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# Human rights, core labour standards and the search for a legal basis for a trade-labour linkage in the multilateral trade regime of the World Trade Organisation

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## 1 INTRODUCTION

Linking the right to engage in international trade to respect for human rights has emerged as one of the most controversial debates in contemporary international law discourses.<sup>1</sup>

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<sup>1</sup> See Griffin G, Nyland C & O'Rourke A "Trade unions and the social clause: A North-South divide" (1999). Available at [http://council.labor.net.au/labor\\_review/100/updates/1002.html](http://council.labor.net.au/labor_review/100/updates/1002.html) (accessed 10 February 2014).

Opponents of such a linkage point to inequalities in levels of development as a compelling reason for excluding a trade-labour linkage from the legal framework of the World Trade Organisation (WTO).<sup>2</sup> In an era in which countries are vigorously competing for investment by multinational corporations, there is growing fear of a “race to the bottom” given that core labour standards are arguably being lowered to attract investors.<sup>3</sup> While developing countries are being pressured by champions of private sector interests to neglect core labour standards in order to lure investors, democratic societies generally regard substantial compliance with core labour standards<sup>4</sup> as a plausible social policy.<sup>5</sup> This article explores the contemporary debates regarding a need to establish a trade-labour linkage in the WTO on the basis that core labour standards are human rights. This subject has become more prominent and assumed greater urgency given that recent data on governance and human rights protection reveals that developing countries are generally struggling to protect workers’ rights.

The article is divided into five sections. The first section introduces the rationale behind proposals to incorporate a trade-labour linkage clause in the WTO’s legal framework. The immediately following section outlines some of the notable cases that suggest a negative attitude towards the protection of core labour standards in trade based on evidence from some developing countries. The third section then explores the need to protect core labour standards in trade. In this regard, an analysis of the positivist, normative and instrumentalist approaches to protecting core labour standards as human rights is undertaken. That analysis is then followed by an examination of the WTO’s human rights commitments. The last section presents conclusions on strengthening proposals for a trade-labour linkage in the WTO’s legal framework.

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<sup>2</sup> Melendez-Ortiz R, Bellmann C & Rodriguez M “The future and the WTO: Confronting the challenges” (2012). Available at <http://ictsd.org/downloads/2012/07/the-future-and-the-wto-confronting-the-challenges.pdf> (accessed 27 February 2014).

<sup>3</sup> See Trebilcock M J & Howse R *The regulation of international trade* (London: Routledge 2005) at 581.

<sup>4</sup> In the 1998 International Labour Organisation’s (ILO) Declaration on Fundamental Principles and Rights at Work, the Organisation’s Member States agreed to respect, promote and realise core labour standards. These consist of five universally agreed standards which are spelt out in ILO Conventions and are as follows: 1) The elimination of discrimination in respect of employment and occupation (ILO Equal Remuneration Convention 100 of 1951 which entered into force on 29 June 1953 and the ILO Discrimination (Employment and Occupation) Convention 111 of 1958 which entered into force on 15 June 1960); 2) The effective abolition of child labour (ILO Minimum Age Convention 138 of 1930 which entered into force on the 19th of June 1976 and ILO Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention 182 which entered into force on 17 June 1999); 3) The elimination of all forms of forced and compulsory labour (ILO Forced Labour Convention 29 of 1930 which entered into force on 1 May 1932 and the ILO Abolition of Forced Labour Convention 105 of 1957 which entered into force on 17 January 1959); and 4) Freedom of association and the effective recognition of the right to collective bargaining (ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 which entered into force on 4 July 1950 and ILO Right to Organise and Collective Bargaining Convention 98 of 1949 which entered into force on the 18th of July 1951).

<sup>5</sup> See Trebilcock M J *Understanding trade law* (Cheltenham: Edward Elgar 2011) at 172.

## 2 EVIDENCE OF A NEGATIVE ATTITUDE TOWARDS A TRADE-LABOUR LINKAGE

Developments in some developing countries suggest a negative attitude towards protecting core labour standards in trade. On the 15th of August 2011, South Africa's Finance Minister, Pravin Gordhan, suggested that South Africa might have to relax its labour laws in certain cases to ensure growth in employment opportunities.<sup>6</sup> His statements were prompted by threats made by Chinese owners of clothing factories in Newcastle, KwaZulu-Natal Province, to close and relocate to Lesotho, Swaziland or Botswana if they were forced to pay a minimum wage.<sup>7</sup> Minister Gordhan's statements were immediately followed by the recent developments on South Africa's platinum mining belt which illustrates the dangers posed by companies focusing on profits at the expense of workers who are forced to supply cheap labour in flexible labour markets.<sup>8</sup> The South African mining industry has been experiencing increased levels of industrial action, developments which have emerged as a significant risk to the industry and to economic development in the country. Aquarius<sup>9</sup>, the world's fourth largest producer of platinum, retrenched 2000 workers and closed operations at its Everest Mine in early 2012, citing labour unrest as the reason for winding up its operations.<sup>10</sup> Another platinum mining company, Implats,<sup>11</sup> experienced a six week industrial action in February 2012 which sliced 21 per cent off its full-year output and, combined with declining metal prices, led to a sharp cut in its dividend to R1.95 a share from R5.70 in 2011.<sup>12</sup> Three lives were lost during a strike at Implats.<sup>13</sup> The industrial action cost the

<sup>6</sup> Business Day "Change needed in labour dispensation" *Business Day* 15 August 2011. Available at <http://www.bdlive.co.za/articles/2011/08/15/change-needed-in-labour-dispensation---gordhan;jsessionid=E79BCA2382EB67553CE9059DB537BC4D.present2.bdfm> (accessed 20 February 2014).

<sup>7</sup> Business Day (2011).

<sup>8</sup> Howick R N "Marikana massacre exposes weaknesses" *Sunday Times* 20 August 2012. Available at <http://www.timeslive.co.za/ilive/2012/08/20/marikana-massacre-exposes-weaknesses-ilive> (accessed 20 February 2014).

<sup>9</sup> See the Aquarius Platinum website available at <http://aquariusplatinum.com/> (accessed 20 February 2014).

<sup>10</sup> Reuters "Workers to warriors: Union war batters SA mines" (2012). Available at <http://m.engineeringnews.co.za/Article/workers-to-warriors-union-war-batters-sa-mines-2012-08-20> (accessed 22 February 2014).

<sup>11</sup> See the Implats company profile (2012). Available at <http://www.implats.co.za/implats/Company-profile.asp> (accessed 23 January 2014).

<sup>12</sup> See the 24 May 2012 Implats News Release "Implats employees back at work" (2012). Available at [http://www.implats.co.za/implats/downloads/2012/press\\_releases/24%20May%202012%20%20Implats%20employees%20back%20at%20work.pdf](http://www.implats.co.za/implats/downloads/2012/press_releases/24%20May%202012%20%20Implats%20employees%20back%20at%20work.pdf) (accessed 23 February 2014).

<sup>13</sup> "Implats says South Africa labour unrest huge risk" Reuters (2012). Available at <http://www.abndigital.com/page/news/top-business-stories/1369491-Implats-says-South-Africa-labour-unrest-huge-risk> (accessed 23 January 2014).

company, which produces 30 per cent of global platinum, 120 000 ounces in lost production and translated into R2.8 billion in lost revenue.<sup>14</sup>

In August 2012, the London listed Lonmin's Marikana mine experienced an illegal industrial action that resulted in the deaths of a total number of 44 people. Webb has observed: "What no one has dared to say, aside from the miners themselves, is that the mining industry remains dependent on cheap and flexible labour."<sup>15</sup> A Bench Marks Foundation study of platinum mines in the North West Province of South Africa revealed that a number of factors led to the rising discontent of workers.<sup>16</sup> Lonmin was singled out as a mine with high levels of fatalities, very poor conditions for workers and unfulfilled community demands for development.<sup>17</sup> The company also effected a mass dismissal of 9000 workers in May 2011, a development which raises questions as to whether or not there are any gains for developing countries from foreign investors on a long term basis.<sup>18</sup>

Issues, such as the use of child labour in Africa, can also not be simply ignored. Malawi's tobacco industry is dogged by a challenge concerning the use of child labour.<sup>19</sup> While it is acknowledged that child labour is on the decline in Asia and Latin America,

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<sup>14</sup> See Gambarini S "Continued SA labour troubles keep platinum in focus" *Bullionstreet* 23 August 2012. Available at <http://www.bullionstreet.com/news/continued-sa-labour-troubles-keep-platinum-in-focus/2679> (accessed 20 February 2014).

<sup>15</sup> Webb C "Echoes of the past: Marikana, cheap labour and the 1946 miners' strike" *The Bullet* 21 August 2012. Available at <https://libcom.org/library/echoes-pastmarikana-cheap-labour-1946-miners-strike> (accessed 21 February 2014). See also Feinstein CH "An economic history of South Africa: Conquest, discrimination and development" (2007) 68(1) *The Historian* 88; and Naicker GM "The African miners strike of 1946" (1976). Available at <http://www.anc.org.za/show.php?id=4727> (accessed 21 February 2014).

<sup>16</sup> Bench Marks Foundation "Communities in the platinum minefields – policy gap 6" (2012). Available at [http://www.bench-marks.org.za/research/rustenburg\\_review\\_policy\\_gap\\_final\\_aug\\_2012.pdf](http://www.bench-marks.org.za/research/rustenburg_review_policy_gap_final_aug_2012.pdf) (accessed 21 February 2014).

<sup>17</sup> The Centre for the Study of Violence and Reconciliation (CSVr) together with the SA Human Rights Commission revealed that Lonmin signed an agreement with the World Bank's International Finance Corporation in 2007 to develop the local community. However, CSVr's director, Delphine Serumaga, has stated that: "[t]t appears that Lonmin has not met its obligations it agreed to with the International Finance Corporation."

<sup>18</sup> The continual retrenchment of workers by the platinum mining companies raises questions as to how labour market flexibility is expected to create more jobs in South Africa. It appears that regulated labour market flexibility is achieving the opposite of job creation by allowing companies to hire and fire as they please. This appears to be defeating the objectives of the 2012 SA National Development Plan 2030 which aims to create more jobs for citizens.

<sup>19</sup> United Nations Committee on the Rights of the Child "Consideration of reports submitted by States parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding observations: Malawi, 27 March 2009, CRC/C/MWI/CO/2" (2009). Available at <http://www.unhcr.org/refworld/docid/49d5f7a10.html> (accessed 27 January 2014). See also United States Department of Labor, 2008 Findings on the worst forms of child labour- Malawi (2008). Available at <http://www.unhcr.org/refworld/docid/4aba3ed232.html> (accessed 26 January 2014).

the African situation appears to be different.<sup>20</sup> Child labour may be physically or mentally harmful, may interfere with schooling, and can undermine educational attainment and future earnings.<sup>21</sup> However, African governments resist the abolition of child labour on the basis that it is a vital component of the economy.

Recent developments in Dhaka, the capital of Bangladesh, in which 1127 workers were killed when an unsafe building in which they were working collapsed, have focused global attention on unsafe conditions in the garment industry in Bangladesh, which is the world's second leading exporter of clothing after China.<sup>22</sup> Bangladesh has more than 5000 garment factories, handling orders for most of the world's top brands and retailers.<sup>23</sup> It has become an export powerhouse largely by delivering lower costs, in part by having the lowest wages in the world for garment workers.<sup>24</sup>

A consideration of the normative function of human rights and the rule of law in providing a legal framework with potential to humanise the global marketplace offers a credible normative legal basis for this article to explore proposals for establishing a trade-labour linkage in the WTO legal framework. However, before a judgement can be made regarding the violation of core labour standards in trade, it must be established whether or not there is any basis at all for protecting core labour standards in trade on the basis of the human rights theory.

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<sup>20</sup> See ILO global report on child labour 2010 (2010). Available at <http://www.ilo.org/ipcinfo/product/viewProduct.do?productId=13853> (accessed 22 January 2014). The new report shows that "Asia-Pacific and Latin America and the Caribbean continue to reduce child labour, while sub-Saharan Africa has witnessed an increase. Africa also has the highest incidence of children working, with one in four children engaged in child labour." See also Wolf J "Child labour declining but rather slowly" (2010). Available at <http://www.indepthnews.net/news/news.php?key1=2010-05-09%2014:54:33&key2=1> (accessed 27 January 2014).

<sup>21</sup> Fiszbein A, Schady N, Ferreira FHG, Grosh M, Kelleher N, Olinto P, & Skoufias E "Conditional cash transfers: Reducing present and future poverty" (2009). Available at <http://go.worldbank.org/4LHXR38HS0> accessed 21 February 2014). See also Miller C & Tsoka M "Cash transfers and children's education and labour among Malawi's Poor" (2012) 30(4) *Development Policy Review* 502.

<sup>22</sup> Yardely J "Report on deadly factory collapse in Bangladesh finds widespread blame" *New York Times* 22 May 2013. Available at [http://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html?\\_r=0](http://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html?_r=0) (accessed 27 January 2014).

<sup>23</sup> See Yardely J "Factory boss 'main culprit' for deaths" (2013). Available at [http://newsstore.fairfax.com.au/apps/viewDocu.ac.jsessionid=9DD968A27318C6C11D4ECFC788928325?sy=afr&pb=all\\_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=16156&clsPage=1&docID=AGE130524DD7117IV6BM](http://newsstore.fairfax.com.au/apps/viewDocu.ac.jsessionid=9DD968A27318C6C11D4ECFC788928325?sy=afr&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=16156&clsPage=1&docID=AGE130524DD7117IV6BM) (accessed 14 January 2014).

<sup>24</sup> See Biraj A "Retailers feel consumer fallout over Bangladesh factory collapse" *The Canadian Press*, 26 April 2013. Available at <http://www.cbc.ca/news/business/retailers-feel-consumer-fallout-over-bangladesh-factory-collapse-1.1319786> (accessed 27 January 2014). Biraj observed that the Bangladesh disaster has underscored the link between cheap clothing chains and international garment workers for many North American consumers.

### 3 SHOULD CORE LABOUR STANDARDS BE PROTECTED IN TRADE?

Regardless of its crucial role in controlling the international trade and investment regime, the WTO does little to protect human rights, especially labour rights.<sup>25</sup> The institution's rules, as they currently stand, make no explicit mention of human rights even though one of its key objectives is to enhance human welfare.<sup>26</sup> Core labour standards are considered to be enabling human rights; they set minimum standards concerning the content and protection of rights, such as freedom of association.<sup>27</sup> Bal<sup>28</sup> has argued that making labour standards compliance a condition for access to product markets constitutes a non-tariff barrier to trade and goes against the policy of the WTO to eradicate barriers to trade.<sup>29</sup> However, it is worth noting that Article XX(a) of the General Agreement on Tariffs and Trade (GATT)<sup>30</sup> provides an exception to the non-discrimination principle with respect to measures that are "necessary to protect public morals".<sup>31</sup> Labour rights are assumed to fall under this exception.<sup>32</sup> This sharp disparity in views explains the current status quo in which the WTO appears unsure, if not disinterested, in protecting core labour standards as human rights within its multilateral regulatory scheme.

In this era of globalisation that promotes the creation of an international environment conducive to the further accumulation of wealth through the expansive tendencies of global capital, there is a need for international cooperation for the creation of a structural environment favourable to the realisation of basic human rights. Businesses are growing around the world, production takes place in countries distant from those in which the outputs are consumed and financial markets have gradually become global. The Uruguay Round of the GATT developed rules that would lead to a

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<sup>25</sup> See Bal S "International free trade agreements and human rights: Reinterpreting Article XX of the GATT" (2001) 10 *Minnesota Journal of Global Trade* 62.

<sup>26</sup> See Bartels L "The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third World Countries" 2008a European Union Parliament November 2008. Bartels states that the WTO system is a system of negative regulation; WTO rules provide little guidance on what government officials can do to promote human rights as they work to expand trade.

<sup>27</sup> See Dessing M "The social clause and sustainable development" (2001) 21(1) *International Centre for Trade and Sustainable Development Resource* 21.

<sup>28</sup> Bal (2001) at 62.

<sup>29</sup> See Article I of General Agreement on Tariffs and Trade (GATT) 1947.

<sup>30</sup> Formed in 1947 and negotiated during the United Nations Conference on Trade and Employment, GATT is the only instrument that attempts to deal with labour matters.

<sup>31</sup> See Article XX(e) of the GATT 1947. Charnovitz S "The moral exception in trade policy" (1998) 38 *Virginia Journal of International Law* 689 at 689; Joseph S *Blame it on the WTO?: A human rights critique* (Oxford: Oxford University Press 2011) at 109; and Hernadez-Truyol BE & Powell SJ *Just trade: A new covenant linking trade and human rights* (New York: New York University Press 2009) at 70.

<sup>32</sup> See Howse R "The World Trade Organisation and the protection of workers' rights" (1999) 3 *Journal of Small and Emerging Business Law* 131.

liberalised trade regime managed by the WTO which came into existence in 1995.<sup>33</sup> However, the outputs of international trade liberalisation and growth are still not being impartially shared.<sup>34</sup>

It comes as no surprise that one reaction to the lack of improvement in the quality of people's lives is a drive to make observance of core labour standards, as human rights, a conventional feature of globalisation.<sup>35</sup> This approach regards the rule of law as a universal remedy for problems faced by developing countries.<sup>36</sup> It prescribes the rule of law as a means of attaining market led growth and as the best defence against human rights abuses.<sup>37</sup> The rule of law becomes the common ingredient for development and human rights protection. The proposal to make States' membership of the WTO dependent on their respect for human rights thus naturally flows from the need to improve people's lives in the world.<sup>38</sup> Such proposals could encapsulate core labour standards to the extent that these are regarded as human rights. There are three approaches which can be used to determine whether or not core labour standards are human rights. The approaches are discussed below.

### 3. 1 Positivist approach to core labour standards as human rights

The question of whether or not core labour standards are human rights in terms of the positivist approach is not complicated. The positivist approach states that a group of

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<sup>33</sup> The Uruguay Round was the eighth round of multilateral trade negotiations conducted within the framework of GATT, spanning 1986 to 1994 and embracing 123 countries as "contracting parties". The Round transformed the GATT into the WTO.

<sup>34</sup> The fact that several countries are placing little importance on a need to protect labour standards as human rights in trade (in the interest of economic gains) might explain the reluctance to acknowledge a trade-labour linkage in the WTO legal framework. See Trebilcock (2011) at 173 & Lester S, Mercurio B & Davies *A world trade law: Text, materials and commentary* (Oxford: Hart Publishing 2012) at 879.

<sup>35</sup> Lester, Mercurio & Davies (2012) at 879. See also Trebilcock & Howse (2005) at 581. Trebilcock and Howse observe that linking trade to core labour standards (as human rights) will not impose a discriminatory set of conditions on WTO Members' exercise of their trading rights. Instead, compliance with core labour standards as human rights would be something they are already committed to doing in as much as they are Members of the ILO and signatories to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>36</sup> Rajagopal B "Invoking the rule of law in post-conflict rebuilding: A critical examination" (2008) 49(4) *William and Mary Law Review* 1347. See also *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*. Delivered to the Security Council, U.N. Doc. S/2004/616 (23 August 2004) at 2-4; *Report of the Secretary-General: Road map towards the implementation of the United Nations Millennium Declaration*. Delivered to the General Assembly, U.N. Doc. A/56/326 (6 September 2001) at 14-32; and *Report of the Secretary-General: In larger freedom: Towards development, security and human Rights for all*. Delivered to the General Assembly, U.N. Doc. A159/2005 (21 March 2005) at 133-139.

<sup>37</sup> Rajagopal (2008) at 1347. See also Carothers T "The rule of law revival" (1998) 77(2) *Foreign Affairs* 95. The rule of law discourse in developing countries regards it as being a neutral device or mechanism that guarantees formal integrity of politics, governance and economic development.

<sup>38</sup> See Tsogas G *Labour regulation in a global economy* (London: M.E. Sharpe 2001) at 129.

rights are human rights in so far as certain treaties recognise them as such.<sup>39</sup> Accordingly, if core labour standards are incorporated into human rights documents, they must be treated as human rights. The UDHR stands as the formative text of the contemporary human rights system.<sup>40</sup> The UDHR set a framework for the pursuit of human rights globally.<sup>41</sup> It aimed at attaining a world in which the dignity and value of each human being was valued and protected. Several matters affirmed to be human rights in the UDHR are important to the world of work and these include freedom of association,<sup>42</sup> freedom from slavery,<sup>43</sup> discrimination at work and child labour.<sup>44</sup> The functional duty of sustaining human rights was entrusted to United Nations (UN) agencies. It is on that basis that the key duty to account for labour matters was assigned to the ILO.<sup>45</sup> Founded after World War I as part of the League of Nations, the ILO was, and still is, a tripartite organisation with representation from labour, business and governments.<sup>46</sup> In acknowledgment of the principle that “lasting universal peace can be established only if it is based upon social justice,” the ILO embarked on establishing basic standards for all of the world’s workers.<sup>47</sup>

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<sup>39</sup> Mantouvalou V “Servitude and forced labour in the 21st Century: The human rights of domestic workers” (2006) 35(4) *Industrial Law Journal* 395.

<sup>40</sup> The Universal Declaration of Human Rights (UDHR) was adopted on 10 December 1948 and was intended to put in motion legal and cultural forces making it clear that the world community would no longer tolerate the atrocities that occurred in preceding decades and especially in the context of the holocaust. See Adams “From statutory right to human right: The evolution and current status of collective bargaining” (2008) 12 *Just Labour: A Canadian Journal of Work and Society* 49.

<sup>41</sup> Petersmann E “Time for a United Nations ‘global compact’ for integrating human rights into the law of worldwide organisations: Lessons from European integration” (2002) 13(3) *European Journal of International Law* 621. Petersmann, whilst calling for reconsideration of the Washington Consensus and for strengthening human rights in global integration law, observed that:

“Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights (UDHR) can be fully realised. The human rights obligations in the UN Charter and in the UDHR of 1948 were negotiated at the same time as the 1944 Bretton Woods Agreements, the General Agreement on Tariffs and Trade (GATT) of 1947 and the 1948 Havana Charter for an International Trade Organization. All these aimed at protecting liberty, non-discrimination, rule of law, social welfare and other human rights values through a rules-based international order and ‘specialized agencies’ (Article 57 of the UN Charter).”

<sup>42</sup> Art 20 of the UDHR.

<sup>43</sup> Art 4 of the UDHR.

<sup>44</sup> Trebilcock (2011) at 172.

<sup>45</sup> Valticos N “The ILO: A retrospective and future view” (1996) 135(3-4) *International Labour Review* 473. See also De la Cruz HB, Von Potobsky G & Swepston L *The International Labor Organization, the international standards system and basic human rights* (Boulder: Westview Press 1996) at 19.

<sup>46</sup> See Art 7 of the ILO Constitution adopted in 1919. See also ILO “The ILO: What it is. What it does” (2014). Available at [http://www.ilo.org/global/about-the-ilo/WCMS\\_082364/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/WCMS_082364/lang--en/index.htm) (accessed 18 February 2014).

<sup>47</sup> See the ILO Constitution’s Preamble.

The ILO has now outlived both the League of Nations and the disturbances triggered by World War II. Its mission was reaffirmed in the 1944 Declaration of Philadelphia which became part of the organisation's Constitution in 1946.<sup>48</sup> The Declaration focused on a series of key principles to animate the work of the ILO. These include: labour is not a commodity;<sup>49</sup> freedom of expression and of association are essential to sustained progress;<sup>50</sup> poverty anywhere constitutes a danger to prosperity everywhere;<sup>51</sup> the war against want needs to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare;<sup>52</sup> all human beings, irrespective of race, creed or sex, have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;<sup>53</sup> and to achieve these fundamental goals "effective international and national action" is necessary.<sup>54</sup>

The 1998 ILO Declaration on Fundamental Principles and Rights at Work sought to ensure the realisation of the core labour rights by setting standard entitlements or a floor set of rights that all States must conform to, irrespective of their level of development or location in the international economy. The seven fundamental Conventions embraced in the 1998 Declaration, which reiterates the thrust of the 1944 Declaration of Philadelphia and the ILO Constitution, refer to freedom of association and collective bargaining,<sup>55</sup> forced labour,<sup>56</sup> non-discrimination<sup>57</sup> and minimum age,<sup>58</sup> all of which affect specific rights entrenched in the human rights Covenants.

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<sup>48</sup> The Declaration of Philadelphia reaffirmed the traditional purposes of the ILO and then diverged in two innovative ways: the importance of human rights to social policy, and the need for international economic planning. See Duffy NF "Organization growth and goal structure: The case of IGO" in Jordan RS, Archer C, Granger GP & Ordes K (eds) *International organisations: A comparative approach to the management of cooperation* (Westport: Praeger Publishers 2001) at 481. With the end of World War II in sight, the Declaration of Philadelphia sought to adapt the guiding principles of the ILO "to the new realities and to the new aspirations aroused by the hopes for a better world." See Sulkowski J "The competence of the International Labour Organization under the United Nations system" (1951) 45(2) *American Journal of International Law* 287.

<sup>49</sup> ILO Declaration of Philadelphia, Art 1(a).

<sup>50</sup> ILO Declaration of Philadelphia, Art I (b).

<sup>51</sup> ILO Declaration of Philadelphia, Art I (c).

<sup>52</sup> ILO Declaration of Philadelphia, Art I (d).

<sup>53</sup> ILO Declaration of Philadelphia, Art II (a).

<sup>54</sup> ILO Declaration of Philadelphia, Art IV. See also Sulkowski (1951) at 288.

<sup>55</sup> ILO Conventions 87 and 98.

<sup>56</sup> ILO Conventions 29 and 105.

<sup>57</sup> ILO Conventions 100 and 111.

<sup>58</sup> ILO Convention 138.

At the time of the proclamation of the UDHR, the ILO adopted a number of conventions and recommendations related to the issues provided for in the UDHR. For example, concerning human rights issues, such as, freedom of association and collective bargaining, the ILO adopted important instruments, such as, Convention 87 concerning Freedom of Association and Protection of the Right to Organize<sup>59</sup> and Convention 98 concerning the Right to Organize and Collective Bargaining.<sup>60</sup> As a result of its already established procedures, the ILO saw no need to reframe its work in the developing language of the growing international human rights community.<sup>61</sup> This decision is attributed to the fact that the ILO chose to proceed alone rather than get involved in the East-West debate over the separation of human rights into two groups (first generation and second generation rights, as they were categorised at the time). Hence the ILO did not become a major participant in the developing human rights community and debate.<sup>62</sup> The end of the Cold War in the early 1990s, however, saw the UN funding a number of international conferences intended to profile the work of the ILO in the post-cold war period. In 1993 a summit on human rights was held in Vienna from which the Vienna Declaration emerged.<sup>63</sup> In that Declaration, the international community restated its obligation to uphold the universality and indivisibility of human rights.<sup>64</sup> However, the ILO continued using its own ideas and terms and thereby became progressively divorced from the human rights community.<sup>65</sup> Thus, when human rights authorities spoke of the rights of individual people everywhere, the ILO spoke of the duties of States.<sup>66</sup> Also, when the human rights community spoke of the disregard for individual human rights, the ILO spoke of failure to adhere to international standards.<sup>67</sup>

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<sup>59</sup> This is one of the eight ILO fundamental conventions. It affirms the Declaration of Philadelphia and was adopted on 9 July 1948.

<sup>60</sup> This is also one of the eight ILO fundamental Conventions just like the Convention concerning Freedom of Association and Protection of the Right to Organize. It was adopted on 1 July 1949.

<sup>61</sup> Adams (2008) at 50.

<sup>62</sup> Adams (2008) at 50.

<sup>63</sup> The Vienna Declaration and Programme of Action (VDPA) is a human rights Declaration adopted by agreement at the World Conference on Human Rights on 25 June 1993 in Vienna, Austria. The VDPA confirmed the UDHR and the UN Charter.

<sup>64</sup> Part I para 5 of the VDPA provides: "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." The VDPA stresses that all human rights are of equivalent significance, thereby seeking to end the qualitative separation between civil and political rights and economic, social and cultural rights, which was pronounced during the Cold War era.

<sup>65</sup> See Leary VA "The paradox of workers' rights as human rights" in Compa L & Diamond SF (eds) *Human rights, labor rights and international trade* (Philadelphia: University of Pennsylvania Press 1996) at 22.

<sup>66</sup> Adams (2008) at 50.

<sup>67</sup> Adams (2008) at 50.

Whilst the ILO grew divorced from the human rights framework, the UDHR was, by nature and content, too brief<sup>68</sup> and non-binding<sup>69</sup> as a text. Thus, the international community had to create additional broad international instruments to give detail to its contents in order to make it influential.<sup>70</sup> The result was the adoption of two Covenants: the International Covenant on Civil and Political Rights (ICCPR)<sup>71</sup> and the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>72</sup> both of which interestingly made references to labour standards regardless of the fact that the ILO had grown increasingly divorced from human rights. The UDHR and the two fundamental Covenants then became universally recognised as the International Bill of Rights.<sup>73</sup> Upon its adoption in 1966, the ICESCR integrated labour rights which were wholly based more or less on the experience of the ILO.<sup>74</sup> The labour rights integrated in the ICESCR include the right to work,<sup>75</sup> just and favourable conditions of work,<sup>76</sup> trade union rights, including the right to strike,<sup>77</sup> and the right to social security, including social insurance.<sup>78</sup> It also included the rights of the family,<sup>79</sup> and to provision of an

<sup>68</sup> Grayling AC "Rome was not built in a day" *The Guardian* 10 December 2008. Available at [http://www.bt.com.bn/analysis/2008/12/11/rome\\_was\\_not\\_built\\_in\\_a\\_day](http://www.bt.com.bn/analysis/2008/12/11/rome_was_not_built_in_a_day) (accessed 27 January 2014). The UDHR was never designed or intended to be an elaborate one-stop source. Rather, it was intended to be brief and all-inclusive with the objective that future international instruments developed from its principles would explicitly address Member States' concerns. In this regard, even though the UDHR provides some recognition of core labour standards, it cannot be properly regarded as the final source of authority for guidance on the exact content of the nature of core labour standards.

<sup>69</sup> Winkler IT *The human right to water: Significance, legal status and implications for water allocation* (Oxford: Hart Publishing 2012) at 340. The UDHR which was adopted by General Assembly Resolution 217 A (III) in 1948 is not a legally-binding document. It is a non-binding recommendation though in recent years there has been a view that it has assumed the force of customary international law and therefore may be binding. The implication of this understanding is that the provisions of the UDHR may or may not be regarded as customary international law. Accordingly, in order to establish binding trade-labour provisions in international law, one would have to go beyond the UDHR to binding multilateral instruments, such as those of the WTO.

<sup>70</sup> Adams (2008) at 50.

<sup>71</sup> The ICCPR) was adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

<sup>72</sup> The ICESCR was adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

<sup>73</sup> Donnelly J & Howard RE *International handbook of human rights* (Westport: Greenwood Press 1987) at 429. The International Bill of Human Rights is an informal name given to one General Assembly resolution and two international treaties established by the UN. It consists of the UDHR, the ICCPR with its two Optional Protocols and the ICESCR.

<sup>74</sup> ILO "Protecting labour rights as human rights: Present and future of international supervision" (2006) Proceedings of the International Colloquium on the 80th anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations (Geneva: International Labour Office Geneva) at 4.

<sup>75</sup> Art 6 of the ICESCR.

<sup>76</sup> Art 7 of the ICESCR.

<sup>77</sup> Art 8 of the ICESCR.

<sup>78</sup> Art 9 of the ICESCR.

adequate standard of living,<sup>80</sup> health<sup>81</sup> and culture,<sup>82</sup> all of which contribute to the development of people in disadvantaged societies. This effectively meant that all labour standards included in the ICESCR were human rights.<sup>83</sup>

However, it is imperative to appreciate that not all ILO Conventions are covered by human rights Covenants. A number of them relate to domestic labour law matters, and not expressly to human rights circumstances. The difference is significant as with regard to non-human rights issues, States are free to alter their positions in view of future societal developments. This however cannot be the case with human rights standards because once a human right, always a human right.<sup>84</sup> The core labour standards have proven to be the minimum baseline on which labour rights can be regarded as human rights; hence, they are central to the thesis of this article. Therefore, when labour standards are referred to in this article, it must be understood that such reference is to core labour standards amounting to human rights that are universally applicable and also are not subject to the discretion of States in terms of implementation. These core labour standards are not only referred to in the above specified human rights instruments but have also been referred to in the African Charter on Human and Peoples' Rights (ACHPR).<sup>85</sup> Accordingly, core labour standards in terms of the positivist approach are human rights and must be treated as such.

### **3. 2 Instrumentalist perspective on core labour standards as human rights**

The instrumentalist perspective on core labour standards as human rights looks at the consequences of using strategies, such as litigation, to promote core labour standards as human rights.<sup>86</sup> The instrumentalist perspective belongs to the Marxist tradition.<sup>87</sup> In this approach, the imperative to present core labour standards as human rights comes from a desire to utilise the potentially powerful legal methods of securing advantage to pursue their claims.<sup>88</sup> For example, emphasis could be placed on how courts assess

<sup>79</sup> Art 10 of the ICESCR.

<sup>80</sup> Art 11 of the ICESCR.

<sup>81</sup> Art 12 of the ICESCR.

<sup>82</sup> Art 15 of the ICESCR.

<sup>83</sup> Ssenyonjo M "Economic, social and cultural rights: An examination of state obligations" in Joseph S & MacBeth A (eds) *Research handbook on international human rights law* (Melbourne: Edward Elgar Publishing 2010) at 36.

<sup>84</sup> ILO (2006) at 4.

<sup>85</sup> See Article 15 of the African Charter on Human and Peoples' Rights which was adopted on 27 June 1981 and entered into force on 21 October 1986.

<sup>86</sup> Mantouvalou (2006) at 152.

<sup>87</sup> Collins H *Marxism and the Law* (Oxford: Oxford University Press 1982) at 75.

<sup>88</sup> Fenwick C & Novitz T "Conclusion: Regulating to protect workers' human rights" in Fenwick & Novitz (eds) *Human rights at work: Perspectives on law and regulation* (Oxford: Hart Publishing 2010) 587.

whether or not core labour standards are really promoted under the rubric, or within the framework, of human rights.<sup>89</sup> The character of core labour standards as human rights is endorsed if either State or international institutions, such as courts, are successful in promoting them as such.<sup>90</sup> Accordingly, endorsing or rejecting core labour standards as human rights depends on judicial attitudes towards any claims to have the labour standards recognised as human rights.

Practical examples of this approach can be found in the cases handled by the European Court of Human Rights (ECtHR), with respect to rights enshrined in the European Convention on Human Rights (ECHR).<sup>91</sup> Such rights include the right to freedom of expression,<sup>92</sup> the rights to form and join a trade union,<sup>93</sup> and have a private life,<sup>94</sup> and the prohibition of slavery, servitude, forced and compulsory labour.<sup>95</sup> The case law of the ECtHR has been receptive to arguments of core labour standards being treated as human rights in the course of interpreting certain provisions of the ECHR.<sup>96</sup> In the case of *Sidabras and Dziautas v Lithuania*,<sup>97</sup> the ECtHR recognised that the right to private life “...secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personal capacity.”<sup>98</sup> The ECtHR proceeded to state that lack of access to employment could affect a person’s “...ability to develop relationships with the outside world to a very significant degree, creating serious difficulties...in terms of earning a living, with obvious repercussions on the enjoyment of...private lives.”<sup>99</sup> The ECtHR then held that the right to private life under Article 8 of the ECHR might encompass a right to work.

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<sup>89</sup> Alston P “Labour rights as human rights: The not so happy state of art” in Alston P (ed), *Labour rights as human rights* (Oxford: Oxford University Press 2005) 3.

<sup>90</sup> Macklem P “The right to bargain collectively in international law: Workers’ right, human right, international right?” in Alston (2005) at 61.

<sup>91</sup> The ECHR [formally the Convention for the Protection of Human Rights and Fundamental Freedoms] is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe Member States are party to the Convention.

<sup>92</sup> Art 10 of the ECHR.

<sup>93</sup> Art 11 of the ECHR.

<sup>94</sup> Art 8 of the ECHR.

<sup>95</sup> Art 4 of the ECHR.

<sup>96</sup> Santos A “Three transnational discourses of labour law in domestic reform” (2010) 32 *University of Pennsylvania Journal of International Economic Law* 142.

<sup>97</sup> *Sidabras and Dziautas v Lithuania*, Appeal Nos 55480/00 & 59330/00, Judgement of 27 July 2004.

<sup>98</sup> *Sidabras and Dziautas* case at para 43.

<sup>99</sup> *Sidabras and Dziautas* case at para 48.

In the case of *Siliadin v France*,<sup>100</sup> the ECtHR recognised the right to work in decent conditions. The ECtHR held that conditions of “modern slavery” create a duty to enact legislation criminalising the conduct of the employers. This raises the question as to which legal instruments at the multilateral level might criminalise the conduct of employers in trade. In this regard the WTO treaty instruments may be the only international legal instruments possessing the potential of achieving such an objective.<sup>101</sup> In *Rantsev v Cyprus and Russia*,<sup>102</sup> the ECtHR held that the enactment of legislation on human trafficking for sexual exploitation is not sufficient; the authorities also have a duty to make legislative measures operational. This same reasoning has been extended to the employment sphere.<sup>103</sup> In the case of *Demir and Baykara v Turkey*,<sup>104</sup> the right to collective bargaining was recognised as a component of the rights to form and join a trade union. In this decision human rights were regarded as having established their superiority over economic irrationalism and competitiveness in the battle for the soul of labour law.<sup>105</sup> The decisions of the ECtHR suggest that the judiciary in the European Union is favourably disposed to the protection of core labour standards as human rights. Any rejection of core labour standards as human rights might call for an attitude change on the part of the judiciary especially where such core labour standards are recognised in international law, and in particular at a normative level, as discussed below.

### 3. 3 Normative perspective on core labour standards as human rights

The normative perspective on whether or not core labour standards are human rights examines the issue from the view of moral truth as opposed to the positivist or instrumental perspectives. It is a fundamental aspect of the theoretical and normative school of thought that labour law scholarship and the human rights theory have hardly engaged.<sup>106</sup> However, contemporary scholarship, for example Collins, questions the

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<sup>100</sup> *Siliadin v France*, Appeal No 73316/01, Judgement of 26 July 2005. See also Mantouvalou (2006) at 395.

<sup>101</sup> Lal Das B “Strengthening developing countries in the WTO” (1971). Available at <http://twinside.org.sg/title/td8.htm> (accessed 4 January 2014).

<sup>102</sup> *Rantsev v Cyprus and Russia*, Appeal No 26965/04, Judgement of 7 January 2010.

<sup>103</sup> *Pay v UK*, Appeal No 26965/04, Judgement of 16 September 2008. See also Collins H & Mantouvalou V “Private Life and Dismissal: *Pay v UK*” 38 *Industrial Law Journal* (2009) 133. See further *Vogt v Germany*, Appeal No 17851/91, Judgement of 26 September 1995; *Smith and Grady v UK*, Appeal Nos 33985/96, 33986/96, Judgement of 27 September 1999; *Obst v Germany*, Appeal No 425/03, Judgement of 23 September 2010; *Schuth v Germany*, Appeal No 1620/03; and Sanders A “A right to ‘legal’ representation (in the workplace) during disciplinary proceedings” (2010) 39 *Industrial Law Journal* 166.

<sup>104</sup> *Demir and Baykara v Turkey*, Appeal No 34503/97, Judgement of November 2008.

<sup>105</sup> Ewing K & Hendy J “The dramatic implications of *Demir and Baykara*” (2010) 39(1) *Industrial Law Journal* 47.

<sup>106</sup> Risse M “A right to work? A right to leisure? Labor rights as human rights” (2009) 3(1) *Journal of Law and Ethics of Human Rights* 1. See also Nickel J *Making sense of human rights* (Malden: Blackwell 2007) at 10.

place of core labour standards in the human rights framework.<sup>107</sup> In examining possible justifications for the place of core labour standards in human rights theory, Collins argued that core labour standards do not possess characteristics of human rights consistent with being “universal and imperative, with a special moral weight that normally overrides other considerations.”<sup>108</sup> Therefore, regarding core labour standards as human rights would thus not be an urgent and compelling moral argument, not be universally applicable and would not be a strict enough standard, unlike human rights.<sup>109</sup> Could Collins’ argument be plausible?

It is important to address the arguments raised by Collins. Human rights, by their nature, seek to prohibit moral wrongs.<sup>110</sup> In the context of labour practices, there are certainly acts of employers which render compliance with core labour standards compelling in order to prohibit moral wrongs, such as slavery. There are arguably many cases of modern-day slavery. For instance, treating employees in a degrading and humiliating manner as well as offering them below poverty datum line wages could be conceived of as slavery.<sup>111</sup> A case in point is a 2010 survey undertaken in the United Kingdom to ascertain the living and working conditions of domestic workers. The survey established that 67% of domestic workers worked seven days a week without time off, 56% received a weekly salary of less than GBP 50 or less, 48% worked at least 16 hours a day, and 58% had to be on call 24 hours a day, amongst other things.<sup>112</sup> Could such working conditions not be regarded as compelling? Is this not slavery? The argument here is that the plight of workers can be compelling to such an extent that decisive action must be taken to avoid the future recurrence of such abuse. Recognising workers’ rights as human rights would make it compelling to protect them.

Another example of the significance of core labour standards for the scope of the human rights theory is found in the case of the right to paid holidays. The right to paid holidays is included in the UDHR.<sup>113</sup> Whilst it may not be a human right in the context of core labour standards, it is important to protect the right to paid holidays. For example, for people in developing countries who are living in poverty and working for long hours on very low pay, having holidays with pay might mean no time off at work at all, since

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<sup>107</sup> Collins H “Theories of rights as justifications for labour law” in Davidov G & Langille B (eds), *The idea of labour law* (Oxford: Oxford University Press 2011) at 137.

<sup>108</sup> Collins (2011) at 140.

<sup>109</sup> Collins (2011) at 142. See also Mantouvalou (2006).

<sup>110</sup> Tasioulas J “On the nature of human rights” in Ernst G & Heilinger JC (eds) *The philosophy of human rights* (Oxford: Oxford University Press 2011) at 22.

<sup>111</sup> See Mantouvalou V “The many faces of slavery: The example of domestic work” (2012). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2046039](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046039) (accessed 5 December 2013). See also Article 5 of the UDHR.

<sup>112</sup> Lalani M *Ending the abuse: Policies that work to protect migrant domestic workers* (London: Kalayaan 2011) at 10. See UDHR, Article 4.

<sup>113</sup> Art 24 of the UDHR.

the workers would not be able to afford rest time.<sup>114</sup> Being unable to rest is unhealthy; hence leisure is essential for the worker. Denying workers such a right would indeed be a direct and serious affront to human dignity, which is reminiscent of the oppressive features of 19<sup>th</sup> century unregulated capitalism.<sup>115</sup> Therefore, every human being's core labour standards related rights should be protected, as soon as he or she becomes a worker. It is in that sense that core labour standards can be seen as universal human rights.

Arguing that the content of core labour standards, such as a right to a minimum wage, differs from one country to another, and therefore is not a strict entitlement of an absolute minimum wage that all countries ought to respect since it is dependent on what each society can afford, is debatable. Should this argument be correct, it would imply that other social rights, like the right to housing, are not human rights because their precise content may vary depending on a country's resources. Human rights are normative standards. The fact that a particular society at a given point in time is incapable of complying with a right, such as the right to housing, because of resource constraints, does not mean that the right is not stringent. There is therefore a stringent normative standard towards which any society ought to strive to protect core labour standards. Thus, the positivist, instrumentalist and normative approaches to core labour standards as human rights point to an absolute necessity to protect worker rights in trade.

#### 4 THE WTO'S HUMAN RIGHTS COMMITMENTS

Since the WTO is a global organisation with an almost worldwide membership,<sup>116</sup> it is necessary to look at existing human rights instruments and obligations at a universal level to determine the relevant substantive human rights standard for WTO accountability.<sup>117</sup> A number of substantive human rights are enshrined in the UDHR. The substantive rights included in the UDHR were codified and vested with a monitoring mechanism in the ICCPR and the ICESCR, instruments which give substance to the human rights provisions in the UN Charter.<sup>118</sup>

Regardless of the separation of the list of human rights in two Covenants, a holistic human rights notion exists today, where the universality, indivisibility, interdependence and interrelatedness of all human rights are recognised in

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<sup>114</sup> Mantouvalou (2006).

<sup>115</sup> Donnelly J *Universal human rights in theory and practice* (Ithaca, New York & London: Cornell University Press 2003) at 71.

<sup>116</sup> The WTO has an estimated more than 153 members and with 29 States involved in accession negotiations.

<sup>117</sup> Art 1 (3), Art 55 (c) and Art 56 of the UN Charter oblige all UN Member States to cooperate internationally to promote respect for and observance of human rights.

<sup>118</sup> Tomuschat C *Human rights: Between idealism and realism* (New York: Oxford University Press 2003) at 81.

international law,<sup>119</sup> and implementing obligations are regarded as principally the same for all UN Member States.<sup>120</sup> The substantive rights protected by the UDHR and the two UN Covenants are barely disputed by any State. However, apart from the prospect of making reservations<sup>121</sup> and suspending human rights in a state of emergency,<sup>122</sup> most human rights<sup>123</sup> are subject to limitations. Limitation clauses, which are contained in all human rights instruments,<sup>124</sup> are intended to allow the limiting of an individual's rights, where this is necessary for the protection of certain plainly identified public policy interests or for the protection of the rights of other individuals.<sup>125</sup> Limitation clauses allow States to impose restrictions, if the unlimited enjoyment of a right would lead to absurd results or if rights would clash with each other or other interests of the State.<sup>126</sup>

In spite of all the potential to limit human rights, there is, however, a set of minimum core responsibilities protected by each substantive human right that States must respect and protect under any conditions.<sup>127</sup> This minimum benchmark, which cannot be eliminated, derogated from or otherwise limited, must be guaranteed regardless of the flexibilities that are provided for in the human rights concept as such.<sup>128</sup> The essence of the right must not be jeopardised; otherwise the covenant

<sup>119</sup> UN General Assembly, UDHR, Art 2 (1); UN General Assembly, Declaration on the Right to Development, Arts 1 (1) and 6; International Conference on Human Rights, Proclamation of Teheran, at para. 2; UN General Assembly, UN Declaration on Social Progress and Development at para 2 (b); UVDPA at paras I.1, I.5 and I.10; International Commission of Jurists, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights at para 1 and Tomuschat (2003) at 81.

<sup>120</sup> Tomuschat (2003) at 81. Chapter II.B.

<sup>121</sup> See ICCPR General Comment No. 24, which outlines a number of reservations that would be null and void, as they contradict the object and purpose of the covenant.

<sup>122</sup> See Article 4 of the ICCPR. However, there are a number of non-derogable rights, such as in Article 4(1) of the ICCPR, and the ICESCR General Comment No. 15 at para 40 as well as General Comment No. 14 at para 47.

<sup>123</sup> Exceptions are a few absolute human rights, such as the prohibition of torture Art 7 of the ICCPR and the freedom of thought and consciousness Art 18 of the ICCPR.

<sup>124</sup> See Arts 4, 5, 12 (3), 14 (1), 18 (3), 19 (3), 21, 22 (2), and 25 of the ICCPR; and Arts 4, 8, 29 and 30 of the UDHR.

<sup>125</sup> Alston P & Quinn G "The nature and scope of state parties' obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9(2) *Human Rights Quarterly* 194.

<sup>126</sup> See Art 5 of the ICCPR, Art 5 of the ICESCR and Art 30 of the UDHR. For example, freedom of association can be restricted to protect national security; freedom of speech is limited by the right to privacy and personal integrity of another person, the criterion for balancing the scope of both rights being the principle of proportionality.

<sup>127</sup> See ICESCR General Comment No. 3, at para 10 and ICCPR General Comment No. 31 at para 6. See also International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, at para 9 and International Commission of Jurists, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights at para 47.

<sup>128</sup> See Art 2 (1) of the ICESCR; see also ICESCR General Comment No. 3, at para 10. The available resources that allow for flexible implementation of economic, social and cultural rights are no excuse for not enabling those rights.

would be largely deprived of its *raison d'être*.<sup>129</sup> In any case, ignoring the minimum core obligations results in the infringement of human rights.<sup>130</sup>

To establish whether substantive human rights standards are relevant in a WTO framework, it is essential to establish to what degree the WTO and its Members are bound by international human rights law.<sup>131</sup> Most WTO Members have ratified at least either of the two UN Covenants<sup>132</sup> or one of the specialised UN human rights treaties,<sup>133</sup> and are thus bound by those treaty obligations when acting in the WTO. Core labour standards have become a major issue in international trade.<sup>134</sup> There is no dispute as to what these standards are. Also, as identified in the introduction of this article, core labour standards cannot be confused with basic conditions of employment, such as hours of work, which vary from one country to another. Critics of a trade-labour linkage in the multilateral trade system have argued that, “labour standards have no place in the WTO because it is an organisation that exists primarily to promote mutually beneficial, non-coercive trade through reciprocal and mutually advantageous arrangements aimed at reducing barriers to trade.”<sup>135</sup> Such views might on the whole not be plausible as they fail to recognise that the WTO Agreement makes reference to “sustainable development” as one of its objectives which must be balanced against the institution’s other economic objectives.<sup>136</sup> The WTO’s reluctance to recognise a trade-labour linkage

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<sup>129</sup> See the UDHR Art 30. This limit is also contained in Art 4 of the ICESCR, which requires all restrictions to be “compatible with the nature of the right.”

<sup>130</sup> See International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights at para 8.

<sup>131</sup> See UN Charter, Arts 1 (3) and 55. Most WTO Members are bound to observe human rights by international treaty obligations and all WTO members, except the European Community, Hong Kong and Chinese Taipei, are UN Member States as well, and thus recognise the UDHR and are bound by the general obligation to promote respect for and protection of human rights.

<sup>132</sup> The only WTO Members which have not signed or ratified either of the two covenants are: Antigua and Barbuda, Brunei Darussalam, Cuba, Fiji, Malaysia, Myanmar, Oman, Qatar, Papua New Guinea, St. Kitts and Nevis, St Lucia, Saudi Arabia, Singapore, and the United Arab Emirates.

<sup>133</sup> The Convention on the Rights of the Child (CRC) 1577 UNTS 3 of 20 November 1989 is ratified by all WTO Members except the US, while the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1249 UNTS 13 of 18 December 1979 is ratified by all WTO Members save for Qatar, Tanzania and the US.

<sup>134</sup> Salem S & Rozental F “Labour standards and trade: A review of recent empirical evidence” (2012) 4(2) *Journal of International Commerce and Economics* 63. See also Chartes RL & Mercurio BC “A call for an agreement on trade-related aspects of labour: Why and how the WTO should play a role in upholding core labour standards” (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 665.

<sup>135</sup> Lester, Mercurio & Davies (2012) at 873.

<sup>136</sup> Lester, Mercurio & Davies (2012) at 873. Lester *et al* point out that critics of a trade-labour linkage ignore that, “The General Agreement on Tariffs and Trade (GATT) and WTO, as well as human rights treaties and organisations were created for the purpose of increasing human welfare, and for the considerable evolution of the aims, objectives and roles of the international trading regime, starting from the establishment of the GATT in 1947.” Stressing the importance of linking trade to issues of global welfare is not intended to dismiss as myopic those who pursue economic gains in trade over human welfare. Instead, such an approach seeks to draw the attention of such parties to the need to create a

in its legal framework marks a significant point of departure from the position adopted by the failed International Trade Organisation (ITO) which explicitly embraced development as a key objective of its agenda and sought to protect workers' rights in trade.<sup>137</sup> However, while the concept of a trade-labour linkage may seem straightforward, its interpretation and translation into enforceable measures remain hotly disputed and often generate counter-arguments of protectionism.<sup>138</sup> Trade liberalisation and human rights protection are based on two fundamentally different philosophies, the one of the free market and the other of state intervention, at least in relation to economic and social rights.<sup>139</sup> Not surprisingly, the two concepts have been difficult to align and each of the concepts has taken a rather different path and pace in development. The re-union of the two is a more recent event, and it has hardly been a harmonious one. Not surprisingly, the violation of core labour standards in trade practices persists with no solution in sight. This is compounded by the fact that Article 33 of the ILO Constitution permits the preferring of sanctions against Member States which violate core labour standards in trade, a provision which may be consistent with the public morals clause in GATT Article XX(a).<sup>140</sup> However, preferring sanctions in the form of trade restrictions on another Member in pursuance of the public morality clause poses a legal challenge as doing so would constitute discrimination against that Member's products.<sup>141</sup>

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balance between economic gains and development, an arrangement which could possibly lead to greater economic returns in the future.

<sup>137</sup> See Art 7 of the Havana Charter. The Article titled "Fair Labour Standards" provided that, "Unfair labour conditions, particularly in production for exports, create difficulties in international trade...and each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory."

<sup>138</sup> See Tsogas G "Labour standards in international trade agreements: An assessment of the arguments" (1999) 10(2) *The International Journal of Human Resource Management* 354.

<sup>139</sup> Economic, social and cultural rights are socio-economic human rights, such as the right to education, the right to housing, and the right to health. Economic, social and cultural rights are recognised and protected in international and regional human rights instruments. Member States have a legal obligation to respect, protect and fulfil economic, social and cultural rights and are expected to take progressive action towards their fulfilment. The UDHR is one of the most important sources of economic, social and cultural rights. It recognizes the right to social security in Art 22, the right to work in Art 23, the right to rest and leisure in Art 24, the right to an adequate standard of living in Art 25, the right to education in Art 26, and the right to benefits of science and culture in Art 27. The ICESCR is the primary international legal source of economic, social and cultural rights.

<sup>140</sup> Art 33 of the ILO Constitution provides that: "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."

<sup>141</sup> See GATT Art III: 4 and Art 2.1, 2.2 and 2.3 of the Agreement on Technical Barriers to Trade 1868, U.N.T.S. 120. See also Warikandwa TV & Osode PC "Managing the trade-public health linkage in defence of trade liberalisation and national sovereignty: An appraisal of *United States Measures Affecting the Production and Sale of Clove Cigarettes*" 2014 17(4) *Potchefstroom Electronic Law Journal* 1263; Simo RY "Public morals exception clause and WTO dispute settlement: Balancing between regulatory autonomy and the fear of opening the floodgates" (April 15, 2014), Bocconi Legal Studies Research Paper No. 2433720. Available at <http://ssrn.com/abstract=2433720> (accessed 02 October 2014); Mangin EA

The differences in opinion do not however dispel the genuine concerns that in order to be relevant for the remaining WTO Members and the WTO as an international organisation, human rights must form part of general international law in that they must constitute customary international law or general principles of law.<sup>142</sup> To determine the customary international law nature of human rights, it is essential to ascertain whether there is supporting State practice and *opinio iuris*.<sup>143</sup> In practice, both elements are not always given equal weight when establishing whether a rule forms part of customary international law.<sup>144</sup>

It is difficult in most instances to differentiate between State practice and *opinio iuris*,<sup>145</sup> since judgments or unilateral declarations do not only amount to state practice, but also amount to *opinio iuris* to a certain extent. Valid State practice that also articulates an *opinio iuris* would be national constitutions and laws recognising human rights, national court judgments, unilateral declarations of politicians and other State

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“Market access in China-publications and audiovisual materials: A moral victory with a silver lining” (2010) 25 *Berkeley Technology Law Journal* 279; Pauwelyn J “Squaring free trade in culture with Chinese censorship: The WTO Appellate Body Report on ‘China-Audiovisuals’” (2010) 11 *Melbourne Journal of International Law* 119; Wright C “Censoring the censors in the WTO: Reconciling the communitarian and human rights theories of international law” (2010-2011) 3 *Journal of International Media and Entertainment Law* 17; Zhang L & Hu X “Liberalization of trade and domestic control on cultural products: The application of public morals exception in China-audiovisual services” (2011) 45 *Revue Juridique Themis* 403; and Amirehsani K “EU seal case adds new protectionism to WTO” *Global Risk Insight* 8 June 2014. Available at <http://globalriskinsights.com/2014/06/eu-seal-case-adds-new-protectionism-to-wto/> (accessed 27 January 2014). The use of the public morals clause is fraught with challenges. It raises risks of protectionist tendencies amongst Member States of the WTO and is capable of multiple interpretations which may not serve the best interests of a trade-labour linkage. Also, it raises questions as to whose morals should be considered. However, there is no dispute as to what core labour standards are and, as such a trade-labour linkage clause should not raise similar debates and concerns.

<sup>142</sup> Many scholars state that the rights enshrined in the UDHR, or at least parts of it, constitute customary international law, without providing detailed evidence for this statement. This is supported by a number of authors, although many of them do not make the effort to examine the statement in detail. See for example Warikandwa TV & Osode PC “Legal theoretical perspectives and their potential ramifications for proposals to incorporate a trade-labour linkage clause into the World Trade Organisation’s legal framework” *Speculum Juris* (forthcoming 2014); Warikandwa TV “Linking trade to core labour standards to limit labour unrest: A South African perspective” (2013) 19(1) *Transformer* 31; Salcedo JC “Human rights, universal declaration” in Bernhardt R (ed) (1948) 2 *Encyclopaedia of public international law* 925; Eide A *The Universal Declaration of Human Rights: A commentary* (Oxford: Oxford University Press 1992) at 6; Hannum H “The status of the Universal Declaration of Human Rights in national and international Law” (1995) 25 *Georgia Journal of International and Comparative Law* 289 as well as Sands P & Klein P *Bowett’s law of international institutions* (London: Sweet & Maxwell 2001) at 16.

<sup>143</sup> See Art 38 (1) (b) of the Statute of the International Court of Justice 26 June 1945. See also *North Sea Continental Shelf case, Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands* 1969 ICJ Reports 3, at para 71.

<sup>144</sup> See the ICJ 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua case, Nicaragua v United States of America* 1986 ICJ Reports 14, at para 183. In this case, the ICJ established that the prohibition of the use of force is customary international law. The court basically ignored state practice, and based its conclusions merely on the examination of *opinio iuris*.

<sup>145</sup> Simma B & Alston P “The sources of human rights law: Custom, *Ius Cogens* and general principles” (1992) 12 *Australian Yearbook of International Law* 88.

agents,<sup>146</sup> or demonstrations against human rights abuses happening in other countries, and acts of State practice that provide ample evidence that States consider themselves to be bound by substantive human rights principles. Also, the UDHR is acknowledged by UN Member States that are not parties to any UN human rights conventions as the basis for determining human rights abuses in the human rights monitoring procedures founded on Economic and Social Council (ECOSOC) Resolutions 1503 and 1235.<sup>147</sup> Subsequent to the approach of the International Court of Justice (ICJ) in the *Nicaragua* case, in which the ICJ acknowledged that soft law instruments, such as, the Friendly Relations Declaration,<sup>148</sup> or the Commission on Security and Cooperation in Europe (CSCE) Helsinki Declaration<sup>149</sup> create a manifestation of *opinio iuris* that is adequate to found the prevention of the use of force as customary international law,<sup>150</sup> a sizeable number of soft law instruments, together with the UDHR, the Vienna Declaration and the UN Millennium Declaration,<sup>151</sup> that have been accepted by the majority of States, must be recognised as expression of the *opinio iuris* of States concerning the acknowledgement of substantive human rights.

Criticism is levelled at the customary international law nature of human rights on the basis that a number of genuine human rights abuses that undermine the reality of regular State practice exist. Remarkably, the customary international law nature of the prohibition of the use of force, as well as the rules of the law of war as codified in the

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<sup>146</sup> See the Nuclear Tests Cases, *Australia v France, New Zealand v France* 1974 ICJ Reports 252 and 456.

<sup>147</sup> Tomuschat (2003) at 117.

<sup>148</sup> On 24 October 1970, the UN General Assembly adopted a Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Res. 2625 (XXV)), setting out, and expanding upon, seven principles in Sect. 1: (1) "The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (2) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (3) The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter'; (4) The duty of States to co-operate with one another in accordance with the Charter; (5) The principle of equal rights and self-determination of peoples; (6) The principle of sovereign equality of States; (7) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter."

<sup>149</sup> The Helsinki Final Act, Helsinki Accords or Helsinki Declaration was the final act of the Conference on Security and Co-operation in Europe held in Helsinki, Finland, during July and August 1975. Thirty-five states, including the USA, Canada, and all European states except Albania and Andorra, signed the Declaration in an attempt to improve relations between the Communist bloc and the West. The Act's "Declaration on principles guiding relations between participating states" (also known as "The Decalogue") enumerated the following 10 points: I. Sovereign equality, respect for the rights inherent in sovereignty; II. Refraining from the threat or use of force; III. Inviolability of frontiers; IV. Territorial integrity of States; V. Peaceful settlement of disputes; VI. Non-intervention in internal affairs; VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; VIII. Equal rights and self-determination of peoples; IX. Co-operation among States; and X. Fulfilment in good faith of obligations under international law.

<sup>150</sup> *Nicaragua v United States of America* case at para 188.

<sup>151</sup> See the UN Millennium Declaration (UN General Assembly Resolution 55/2 of 18 September 2000).

1949 Geneva Conventions, are never disputed, although there is as much contradictory State practice through factual breaches, as in the field of human rights. An argument against this construction is that in nearly all cases of human rights abuses there are efforts by the responsible State to either rationalise the conduct, which demonstrates that there is consciousness of prevailing human rights responsibilities, or to obscure the conduct, being conscious of its unlawfulness.<sup>152</sup> Such explanatory justifications by the perpetrators mean that there is *opinio iuris* that the actual behaviour is a breach of existing human rights obligations. One may argue that the WTO as a “persistent objector”<sup>153</sup> is not bound by international human rights law. However, the WTO does not deny the reality or binding nature of human rights, or their applicability to its activities, but it simply either contends that human rights are not appropriate to the WTO framework or denies that its purpose is to protect human rights.<sup>154</sup>

## 5 CONCLUSION

This article has advanced a case for the protection of core labour standards in trade on the basis that they are human rights. Along with providing justice in the workplace, core labour standards empower people to exercise rights in the broader community.<sup>155</sup> The positivist, instrumentalist and normative approaches to core labour standards were used as schools of thought which evidently support proposals for incorporating core labour standards into the legal framework of the multilateral trade regime administered by the WTO. The pitfalls of resisting a trade-labour linkage for both developing countries and the WTO were highlighted. For developing countries, challenges such as persistent labour unrest, in the case of South Africa<sup>156</sup> cost the country and investors the loss of substantial revenue which could have been directed towards economic growth and human capital investment.

However, it must be acknowledged that there are challenges to the human rights theory as it is regarded by developing countries as a neo-liberal approach to establishing a trade-labour linkage which has the potential to undermine their competitive advantage derived from lower levels of compliance with core labour standards. However, if a lower compliance with core labour standards in developing

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<sup>152</sup> Tomuscat (2003) at 34.

<sup>153</sup> See the Fisheries Case; *United Kingdom v Norway* [1951] ICJ Rep 116 at 131.

<sup>154</sup> Baek BS “Economic sanctions against human rights violations” Paper 11, March 2008 Cornell Law School Inter-University Graduate Student Conference Papers. Available at [http://scholarship.law.cornell.edu/lps\\_clacp/11](http://scholarship.law.cornell.edu/lps_clacp/11) (accessed 27 February 2014).

<sup>155</sup> Solidarity Center “Rule of law” (2014). Available at [http://www.solidaritycenter.org/6EF437B9-569E-4723-91AD-774522E48D72/FinalDownload/DownloadId-3EC8B1C1152BAB3FEE0B4B96CECE83A3/6EF437B9-569E-4723-91AD-774522E48D72/files/pubs\\_ruleoflaw\\_en.pdf](http://www.solidaritycenter.org/6EF437B9-569E-4723-91AD-774522E48D72/FinalDownload/DownloadId-3EC8B1C1152BAB3FEE0B4B96CECE83A3/6EF437B9-569E-4723-91AD-774522E48D72/files/pubs_ruleoflaw_en.pdf) (accessed 3 January 2014).

<sup>156</sup> Smith D “South African gold miners strike over ‘slave wages in White man’s economy’” (2013). Available <http://www.theguardian.com/world/2013/sep/03/south-africa-gold-miners-strike> (accessed 6 February 2014).

countries would lead to development, it must be questioned why economic growth and human development is minimal. Why are developing countries yet to industrialise when there is abundant cheap labour? The solution to the development crisis in developing countries might rest in human capital development. Interestingly, most developing countries, as evidenced by data obtained from current indices on compliance with the rule of law,<sup>157</sup> governance<sup>158</sup> and human rights protection,<sup>159</sup> are not doing well. This suggests that the resistance to a trade-labour linkage in the WTO legal framework might just be a result of developing countries' negative attitude towards observing the rule of law and human rights protection on which a culture of observing the rule of law and human rights protection must be built.

Democratic institutions clearly observe the rule of law and protect human rights. A balance needs to be struck between economic growth and the development of human beings. However, achieving this goal is not the exclusive duty of developing countries. The WTO must be aligned to the protection of human rights, in particular core labour standards, to ensure economic growth and poverty alleviation in developing countries. Core labour standards are a fundamental element of customary international law.<sup>160</sup> That core labour standards are human rights is uncontroversial.<sup>161</sup> If core labour standards are human rights then there is a need to protect them by way of incorporation into the legal framework of the WTO.<sup>162</sup> The WTO has the obligation to protect human rights, as do all UN institutions and international monetary institutions. It must also create the appropriate environment to ensure that its Member States observe the rule of law in a progressive manner. Concerns of the developing countries must be given due regard to ensure that they do not end up reneging on their international human rights obligations. Failure to recognise a need to protect core labour standards in trade might lead to a loss of legitimacy on the part of the WTO, as the article has established. There is clearly a need to come up with comprehensive package deals including solitary responses to market failures to achieve redistributive justice by aligning the WTO with human rights protection.<sup>163</sup> Liberal trade rules must be

<sup>157</sup> See World Justice Project "Rule of law index scores and rankings" (2014). Available at <http://worldjusticeproject.org/rule-of-law-index-data> (accessed 6 February 2014).

<sup>158</sup> See the World Bank "Worldwide governance indicators" (2014). Available at <http://data.worldbank.org/data-catalog/worldwide-governance-indicators> (accessed 6 February 2014).

<sup>159</sup> See Escola de Cultura de Pau "Human rights index" (2014). Available at [http://escolapau.uab.cat/index.php?option=com\\_content&id=77&Itemid=97&lang=en](http://escolapau.uab.cat/index.php?option=com_content&id=77&Itemid=97&lang=en) (accessed 6 February 2014).

<sup>160</sup> Core labour standards were outlined in the 1998 ILO Declaration of Fundamental Principles and Rights at Work as well as the UDHR and the ICCPR and ICESCR. They are as follows: 1) freedom of association and the right to engage in collective bargaining; 2) the elimination of forced labour; 3) the elimination of child labour; and 4) the elimination of discrimination in employment.

<sup>161</sup> Lester, Mercurio & Davies (2012) at 878. See also *Mantouvalou V "Are labour rights human rights"* (2012) 3 *European Labour Law Journal* 151.

<sup>162</sup> Petersmann (2002) at 621.

<sup>163</sup> Lester, Mercurio & Davies (2012) at 883.

supplemented by competition and social rules promoting fair opportunities and the equitable distribution of gains from trade.<sup>164</sup> Global trade integration law must now be seen to pursue democratic legitimacy and social justice as defined by human rights, and not only economic efficiency.<sup>165</sup>

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<sup>164</sup> Lester, Mercurio & Davies (2012) at 883.

<sup>165</sup> Lester, Mercurio & Davies (2012) at 883.