CES
COOPERATIVISMO E ECONOMÍA SOCIAL
Núm. 42 (2019-2020), páxs. 25-56
ISSN: 2660-6348

# INTERNATIONAL COOPERATIVE LAW. UTOPIA, REALISTIC UTOPIA OR REALITY?

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Recepción: 6/7/2020 - Aceptación: 9/10/2020

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## ABSTRACT

The article explores the question whether national cooperative law makers are bound by international cooperative law. May states, because of their sovereignty, at all be bound by international law? May recommendations of international organizations in general and in particular the Promotion of Cooperatives Recommendation, 2002, of the ILO (ILO R. 193) create such an obligation? Mainly based on the arguments of the democratic legitimacy of this recommendation and its character as an "auxiliary" instrument to fulfill legally binding obligations as concerns sustainable development, the article concludes that the ILO R. 193 creates such an obligation. Because of the principle of diversity as a source of sustainable development, it is important, however, to limit this obligation to the translation of the universally agreed upon cooperative principles into legal rules, as indicated specifically by Paragraph 10 of the ILO R. 193.



KEYWORDS: International cooperative law; cooperative principles; cooperative law.

*Utopia, a world that will come*
*if we give legal reasons why it must come*

## 1 Introduction

"Currently, the Country of Curaçao is ready to start with the development process of a law on cooperatives",[1] the République Démocratique de Madagascar and the Republic of Tajikistan are revising their cooperative laws. These are three random cases from different parts of the world concerning national cooperative law-makers. May they freely decide or are they legally bound to give their texts a certain content?

These cases are practical examples of the general question whether national law-makers may at all be bound by what we call international law[2] and of the particular question whether they are bound by an international cooperative law.[3]

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[1] Information by the Ministry of Economic development of the Country of Curaçao, 18.6.2020.

[2] The term "international law" stands also for terms like "public international law", "Völkerrecht", "droit (public) international", "derecho (público) internacional" and others. The scopes of these terms might not necessarily be congruent, nor are they used consistently by authors, not even by those belonging to the same legal tradition.

[3] Some regional organizations do also have the power to make cooperative law, for example the Organization for the Harmonization in Africa of Business Law (OHADA), the East African Community (EAC), the African Union (AU), the Mercado Común del Sur (Mercosur) and others. As the relationship between them and international law differs from the one dealt with here, these cases are not included.

This article is to shed light on these questions. I have previously dealt with them.[4] The objective of the article is to demonstrate more rigorously[5] that according to Paragraph 10. (1) of the Promotion of Cooperatives Recommendation, 2002, of the International Labour Organization (ILO R. 193) national legislators have to translate the cooperative principles as enshrined in the ILO R. 193[6] into legal rules regulating the organizational aspects of cooperative enterprises (cooperative law). Paragraph 10. (1) of ILO R. 193 reads: "Member States should adopt specific legislation and regulations on cooperatives, which are guided by the cooperative values and principles set out in Paragraph 3, and revise such legislation and regulations when appropriate."[7]

To many the objective of the article is utopian. Aren't "recommendations", "directives", "resolutions", "declarations", "decisions" and texts with similar names[8] - to cite Politakis and Markov[9] - the "maillon faible du système normatif [the weak element of law]"? Their sharing with international law in general the

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[4] See for example HENRŸ, H., 'Guidelines for Co-operative Legislation', Review of International Co-operation, Vol. 94, no. 2 (2001), pp. 50-105; IDEM, *Guidelines for Cooperative Legislation*, 3rd revised ed., Geneva, International Labour Organization, 2012; IDEM, 'Public International Cooperative Law: The International Labour Organization Promotion of Cooperatives Recommendation, 2002', DANTE CRACOGNA, ANTONIO FICI AND HAGEN HENRŸ (eds.), *International Handbook of Cooperative Law*, Heidelberg, Springer, 2013, pp. 65-88; IDEM, 'The Contribution of the ILO to the Formation of the Public International Cooperative Law', SANDRINE KOTT AND JOËLLE DROUX (eds.), *Globalizing Social Rights. The International Labour Organization and Beyond*, ILO Century Series, Palgrave Macmillan, 2013, pp. 98-114.

[5] I am particularly grateful to Dr. Alejandro Darío Marinello who during the Congreso Continental de Derecho Cooperativo at San José/Costa Rica (20-22 November 2019) pointed to some inconsistencies in my argumentation. See his written contribution to the Congress ("Acerca de la naturaleza del "Derecho Internacional Público Cooperativo" y de su valor jurídico para los ordenamientos internos". Preparatory material of the Congress, 49-65).

[6] Generally, the words "cooperative principles" refer either to the principles laid down in the 1995 Statement of the International Cooperative Alliance on the cooperative identity (ICA Statement) or to all parts of that Statement (definition of cooperatives, cooperative values and cooperative principles). This latter meaning reflects the link which the ICA Statement establishes between its three parts. While the ILO R. 193 integrates most of these three parts of the ICA Statement, it does so with some modifications and it does not mention the link between the three parts of the ICA Statement. These differences between the ICA Statement and the ILO R. 193 will be dealt with in more detail under Point III.

[7] A similar, but less precise formulation of the same "obligation" may be found in Paragraph 6 of the ILO R. 193.

[8] As for the various terms used, see for example CABRA, M., 'Valor jurídico de las resoluciones de las organizaciones internacionales', Derecho Internacional Contemporáneo, pp. 139-159 (142).

[9] POLITAKIS, G. ET MARKOV, K., 'Les recommandations internationales du travail: instruments mal exploités ou maillon faible du système normatif [International recommendations on labour : instruments not made sufficiently use of or weak elements of law]?', Les normes internationales du travail : un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos, Genève, Bureau International du Travail, 2004, pp. 497-525.

lack of a centralized and institutionalized enforcement mechanism does not make them stronger. But what if they are - to cite the other half of the question Politakis and Markov raise - "instruments mal exploités [instruments of which we do not make sufficiently use]? If that can be demonstrated, then the objective of this article could at least qualify as a realistic utopia. The reality of binding international cooperative law in the form of Paragraph 10. (1) of the ILO R. 193 will disclose as we depart from a state-centric notion of law,[10] as we renounce contradicting ourselves by denying effectiveness to a norm of international law on the ground of its lacking a criterion which is inbuilt in international law, namely a missing centralized and institutionalized enforcement mechanism,[11] and as we gradually correct our view of international law merely being a means to prevent conflicts and restore peace. Under the Charter of the United Nations (UN Charter) the member states of the UN have the obligation to work (together) on laying the ground for peace (positive peace).[12]

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[10] For many a fait accompli. See for example ARNAUD, A-J-, *Entre modernité et mondialisation [Between modernity and globaliation],* Paris, Librairie Générale de Droit et de Jurisprudence (LGDJ), 1998; CASSESE, S., *Il diritto globale, Giustizia e democrazia oltre lo stato [Global law. Justice and democracy beyond the State],* Torino, Einaudi, 2009; CATANIA, A., *Metamorfosi del diritto. Decisione e norma nell'età globale [The Metamorphosis of law. Decision and norm in the global era],* Roma-Bari, Laterza, 2008; FARIA, J., *El derecho en la economía globalizada [Law in the global economy],* Madrid, Trotta 1999; FERREIRA DA CUNHA, P., 'Claves del pensamiento jurídico en el siglo XXI: los desafíos [Keys to legal thinking in the 21st century: challenges]', JOSÉ CALVO GONZÁLES, CRISITINA MONEREO ATIENZA (coords.), *Filosofía jurídica y siglo XXI. Ocho panoramas temáticos,* Málaga, Universidad de Málaga, 2004, pp. 43-56 (50 f.); MUTIZ, P., *Globalización del derecho [Globalization of law],* Bogotá, Ibañez, 2010, pp. 32 f.; PASCUAL, C., *Norma mundi. La lucha por el derecho internacional [World law. The struggle for international law]*, Madrid, Trotta 2015, especially on p. 246.

The question is being discussed under the term "legal pluralism" The term has been used prominently in legal anthropology (see for example Griffith) to signify the validity and effectiveness of non-state law alongside the law of the colonial powers imposed on the colonies. But it was not restricted to situations of colonialism. See for example the works of Jean Carbonnier, George Gurvitch and Sinzheimer.

For the recent discussion of "legal pluralism", see MUTIZ, op. cit. See also cotributions in: Cahiers d'Anthropologie du droit (2003): Les pluralismes juridiques, Paris, Karthala.

[11] As for enforceability not being a criterion for the validity of international law, see for example HART, H., *The Concept of Law,* Oxford, Oxford University Press 1961.

[12] See Preamble, Article 55 et passim of the UN Charter.

The conception of international law has added several layers to the meaning it had taken as from the Treaty of Westphalia. From being conceived as a means to ensure the peaceful co-existence of states to being a means of cooperation. Some see the need for the constitutionalization of international law. For example FERRAJOLI. L., 'Más allá de la soberanía y la ciudadanía: un constitucionalismo global [Beyond sovereignty and nationality; a global constitutionalism]', Isonomía, Revista de Teoría y Filosofía del Derecho (1998), pp. 173-184; STOLL, P-T., 'Koordination, Kooperation und Konstitutionalisierung im Völkerrecht [Coordination, cooperation and constitutionalization]*',* WERNER HEUN UND FRANK SCHORKOPF (eds.), *Wendepunkte der Rechtswissenschaft,* Göttingen, Wallstein, 2014, pp. 273- 296.

Before concluding (IV) the article will develop arguments which are to demonstrate that under Paragraph 10. (1) of the ILO R. 193 national legislators have the legal obligation to translate the cooperative principles into legal rules (II) and specify the content of this obligation (III).

The article does not claim to make a contribution to the theory of international law.[13] It rather suggests including a missing piece in the debate on the effects of international law on national law-making, namely Paragraph 10. **(1)** of the ILO R. 193.

## 2 Paragraph 10. (1) of the Promotion of Cooperatives Recommendation, 2002, of the International Labour Organization – the legal obligation to translate the cooperative principles into legal rules

This part deals with the question of whether the ILO has the power to set standards on cooperative law-making (1.), whether Paragraph 10. (1) of the ILO R. 193 establishes a legal obligation for national law-makers to translate the cooperative principles into legal rules (2.) and whether this obligation is effective (3.).

### 2.1. The power of the ILO to set standards on cooperative law-making

With reference to Article 1, Section 1., in connection with Recital 2 of the Preamble of its Constitution, the ILO is commonly seen as that specialized organization of the "UN family" that may (only) set standards[14] that regulate the "conditions of labour" (labour standards). The overwhelming practice of the ILO to set labour standards of this kind is held to exhaust its standard setting power. The power of the ILO to set standards on cooperative law-making is given, if cooperative law is part of labour law, if it can be based on an (unopposed) practice of the ILO or if its Constitution does not limit the standard setting powers of the ILO to labour standards.

Rather frequently the relationship between the members and all types of cooperatives is qualified as labour relationship. However, not even in worker

[13] General works on international law abound. See for example Kennedy, David (multiple); KLABBERS, J., *International Law*, Cambridge et al., Cambridge University Press, 2013; Alain Pellet (multiple. See for example ALAIN PELLET, P. DAILLIER AND M. FORTEAU, *Droit international public [International law],* 8th ed., Paris, Librairie de Droit et de Jurisprudence (LGDJ), 2009; SHAW, M., *International Law*, last edition 2017; VERDROSS, ALFRED/BRUNO SIMMA, *Universelles Völkerrecht. Theorie und Praxis [literally: Universal Ius Gentium. Theory and Praxis]*, 3rd ed. Berlin, Duncker & Humblot, 2010. For a critical discussion of latest developments, see for example PASCUAL, op. cit.

[14] In the language of the ILO (Constitution) "standards" signify legal rules.

cooperatives the relationship between the members and the cooperative qualifies as a labour relationship.[15]

As concerns practice, the ILO has only once set such a standard prior to R. 193, namely R. 127, the Co-operatives (Developing Countries) Recommendation, 1966.[16] A singular case, in addition not addressed to all member states, may not qualify as practice.[17] The further question whether (unopposed) practice may be recognized as a sufficient basis for standard setting need henceforth not discussing.

The power to set such standards may however be derived from the ILO Constitution. It is at least noteworthy that during its 2001 and 2002 sessions, which eventually led to the adoption of R. 193, the International Labour Conference did not debate the question of whether the ILO is empowered to adopt standards on cooperative law-making, as the ILO Constitution does not contain an explicit empowerment to this effect. Its Article 12 Section 3. allows the ILO to consult with "… non-governmental organisations … of … cooperators" when creating standards, but it does not empower the ILO to set standards in the sense discussed here. The question is therefore whether cooperative law falls within the general empowerment of the ILO to set standards. Part II (e) of the Declaration concerning the aims and purposes of the International Labour Organisation, annexed to and referred to in Article 1, Section 1. of the Constitution empowers the ILO to "include in its decisions and recommendations any provision which it considers appropriate." Obviously, this wider empowerment allows for measures, which aim to contribute to the overall aim of the ILO which is to achieve "lasting peace [through] social justice" (Recital 1 of the Preamble of the ILO Constitution). Hence, provided cooperative law contributes to social justice, the ILO may set standards on cooperative law-making. The contribution of cooperatives to social justice has been amply recognized. However, a causal effect of cooperative law on social justice may not be established, regardless of whether social justice is

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[15] This is not general opinion. The opposing view is however more often than not an expression of the concern that denying the quality of a labour relationship might entail loss of social protection, which it does in many countries. See for an overview, ILO, *Labour Law and Cooperatives. Experiences from Argentina, Costa Rica, France, Israel, Italy, Peru, Spain and Turkey*, Genève, ILO 1995, and ILO, 'Labour law and cooperatives: General observations', *Labour Law and Cooperatives*, Genève, International Labour Office, 1995, despite these reports being rather old. For a court case, see Corte Suprema de Justicia de Argentina in the case Lago Castro, Andrés Manuel c/Cooperativa Nueva Salvia Limitada y otros and the comment on the decision by Prof. Dante Cracogna. Both texts, in: La Ley (t.2010–A) 290 ff.

[16] See Part III of that recommendation.

[17] This statement is not to disregard the intensive work of the ILO, especially its Office, on cooperative development, including cooperative law, since the inception of its activities in 1920 at Geneva. See for an account of these activities the preparatory report by HENRŸ, H. (manuscript) to ILO, *The Story of the ILO's Promotion of Cooperatives Recommendation, 2002 (No.193). A review of the process of making ILO Recommendation No. 193, its implementation and its impact*, Geneva, ILO, 2015, available at: http://www.ilo.org/empent/units/cooperatives/WCMS_371631/lang--en/index.htm

seen as an inbuilt part of the objective of cooperatives or whether one[18] defends the thesis that the most effective contribution of cooperatives to social justice is their "[meeting the] common economic, social and cultural needs …"[19] of their members. Law is not a mechanical tool, but it is a (potential) means to pursue policy goals.[20]

The unnecessary attempt to qualify cooperative law as labour standard, instead of understanding the width of the standard setting powers of the ILO, is all the more counterproductive as it tends to obstruct the view on the diminishing capacity of those institutions which hitherto have been the most efficient in catering for social justice, namely the labour market partners and the welfare-state. The factors of globalization do not allow them to do so to the same extent in the future.[21] Other actors, foremost enterprises, have to fill the gap.

Having established the power of the ILO under its Constitution to set standards on cooperative law-making, we must now turn toward the question of whether Paragraph 10. (1) of ILO R. 193 establishes a legal obligation of national law-makers to translate the cooperative principles into legal rules.

## 2.2. Paragraph 10. (1) of the ILO R. 193 – the legal obligation to translate the cooperative principles into legal rules

This part must be read bearing in mind the following three points. Firstly, the question of whether Paragraph 10. (1) of the ILO R. 193 establishes the legal obligation to translate the cooperative principles into legal rules must not be confused with the question of whether the ILO R. 193 belongs to the realm of law. Article 19, Section 6. of the ILO Constitution creates certain obligations for the member states of the ILO once a recommendation is adopted. By becoming a member of the ILO, states agree to these obligations. Secondly, this part of the article deals with the legal validity of Paragraph 10. (1) of the ILO R. 193. Legal validity must not be confused with effectiveness in the sense of enforceability. And, as alluded to already, enforceability through a centralized institution is not a condition of the possible legal validity of Paragraph 10. (1) of the ILO R. 193.

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[18] For a thorough foundation of the latter argument, see PICKER, C., *Genossenschaftsidee und Governance [The cooperative idea and governance],* Tübingen, Mohr Siebeck, 2019.

[19] Citation of part of the definition of cooperatives as enshrined in the ICA Statement and in Paragraph 2 of the ILO R. 193, to which the cooperative principles refer.

[20] See HENRŸ, H., 'Where is law in development? The International Labour Organizaton, cooperative law, sustainable development and Corporate Social Responsibility', *Governance, International Law & Corporate Social Responsibility,* Geneva, International Institute for Labour Studies, 2008, pp. 179-190.

[21] "Factors", namely the technology behind the digitalization. See HENRŸ, H., 'Reflexiones en torno al derecho cooperativo desde una perspectiva global - en homenaje a Dante Cracogna [Reflections on cooperative law from a global perspective - homage to Dante Cracogna]', (forthcoming).

The various theories on the enforceability of international law[22] concern mainly its relationship with national law. Hence they presuppose its legal validity. The question of effectiveness will be discussed further under Point II 3. Thirdly, the arguments presented are limited to what the title of this part indicates, namely to the question of whether Paragraph 10. (1) of the ILO R. 193 contains a legal obligation of national law-makers to translate the cooperative principles into legal rules. Thus, they do not deal with the entire recommendation or with recommendations of the ILO in general, let alone with similar instruments of other international organizations. This limitation builds on a turn in the discussion on the relationship between international law and national law (making). This discussion used to consider national and international law as legal systems or it considered classes of instruments of an international organization and their effects on national law (making). Now it also considers trans-border fields of law with their own ways of creating and implementing (legal) norms (autonomous fields of law)[23] in their relationship with national law (making).[24]

The arguments, which are to demonstrate that Paragraph 10. (1) of the ILO R. 193 establishes indeed the legal obligation to translate the cooperative principles into legal rules, will be presented in four steps. The first one consists in asking whether this Paragraph qualifies as a legal source according to Article 38, Section 1. of the Statute of the International Court of Justice (ICJ) (2.1); the second step discusses whether "recommendations", "decisions", "guidelines" etc. of international organizations may constitute a source of international law in addition to those listed in the Statute of the ICJ (2.2); the third step considers whether the 1995 International Cooperative Alliance Statement on the cooperative identity (ICA Statement)[25] qualifies as a source of international law (2.3); and the fourth step explores whether Paragraph 10. (1) of the ILO R. 193 is a necessary element for the effective materialization of other international legal obligations (2.4).

Proceeding in steps is no more than a didactical tool to represent one "thing". It is to indicate that none of the steps might be conclusive by and of itself and

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[22] The main ones being the dualist and the monist.

[23] Such as trade law, IT law, etc.

[24] In international law this is being discussed under the notion of "fragmentation". For a critical overview of the various aspects of fragmentation of international law, see the doctoral thesis by MARTINEAU, A.-C., *Une analyse critique du débat sur la fragmentation du droit international [A critical analysis of the debate on the fragmentation of international law],* Helsinki, University of Helsinki, 2014. And the ample work of Martti Koskenniemi. For a critique of the concept of fragmentation, see TUORI, K., 'The Law's Farewell to the Nation State?', Finnish Yearbook of International Law, Vol. 19 (2008), pp. 295-327.

[25] International Co-operative Review, Vol. 88, no. 4 (1995), pp. 85 f. Also available at: http://ica.coop/en/whats-co-op/co-operative-identity-values-principles

that any of these steps might be discussed as part of any other one. Overlaps and repetitions are unavoidable. Proceeding by steps applies an idea on the creation of international law according to which a bundle of acts, that individually might not suffice, may densify and constitute a legal obligation.[26]

### *2.2.1. Paragraph 10. (1) of the ILO R. 193 as a source of international cooperative law according to Article 38 of the International Court of Justice*

The sources of international law according to Article 38, Section 1. of the Statute of the International Court of Justice (ICJ) are

a. "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[27]

Of these four sources of international law[28] the first one may be excluded. Given the distinction between "Conventions" and "Recommendations" in Article 19, Section 1 of the ILO Constitution, recommendations of the ILO are not conventions in the sense of treaties.

As concerns the second source, the wording "international custom, as evidence of a general practice accepted as law" allows for two interpretations. "International custom" could refer to a repeated international behavior "as evidence of a general practice". Indeed a repeated commitment by states to translate the cooperative principles into legal may be observed.[29] However, the choice of the legal instruments demonstrating this commitment, especially the choice of a recommendation instead of a convention in the case of the ILO, might be seen - albeit falsely so, as we shall demonstrate - as an explicit expression against the acceptance of such

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[26] I have used this argument in a one of my previously mentioned contributions, namely in 'The Contribution of the ILO to the Formation of the Public International Cooperative Law', op. cit. See also KISCHEL, U., *Rechtsvergleichung [Comparative Law],* München, Beck, 2015, p. 952 with further references.

[27] Any of the mentioned (see footnote 13) general publications on international law deals extensively with the dogmatic aspects of these sources of law.

[28] More precisely: litt. a., b. and c. are sources of international law, lit. d. indicates a way the ICJ may use to determine rules of international law.

[29] I refer to my previously mentioned publications (see footnote 4, especially the *Guidelines for Cooperative Legislation*). To be mentioned especially the adoption in 2001 of the United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives, which contain detailed Paragraphs (9.-16.) on cooperative law.

commitment "as law". The other possible interpretation is that a possible general practice to translate the cooperative principles into legal rules could be seen as evidence of an international custom. A growing number of national and regional cooperative laws do translate the cooperative principles, while others refer at least to the cooperative principles.[30] This is "evidence of a practice". However, it might not qualify as "evidence of a general practice", as in both cases this translation pertains to laws on cooperatives only, but not sufficiently to other areas of law[31] which, together with the law on cooperatives, constitute cooperative law in the wider sense and which continue to be "companized".[32]

Concerning the third source of international law according to Article 38, Section 1. of the Statute of the ICJ – "general principles of law recognized by civilized [33] nations" – the question is whether there is a general principle in the national laws which would support the argument that Paragraph 10. (1) of the ILO R. 193 obliges legislators to translate the cooperative principles into legal rules. Put in this manner, the question must be answered to the negative. However, similar to the argument developed under Point II 2.4 one might consider cooperative law as a means to materialize the general legal principles of "democracy", "equality"

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[30] For examples see the Introductory chapters of the country reports in CRACOGNA, FICI AND HENRŸ (eds.), *International Handbook of Cooperative Law*, op. cit.; the results of the ICA Legal Framework Analyses, at: www.ica.coop and HENRŸ, H., 'Genossenschaftsrecht – international [Cooperative Law - International]', J. BLOME-DREES, N. GÖLER VON RAVENSBURG, A. JUNGMEISTER, I. SCHMALE, F. SCHULZ-NIESWANDT (eds.), *Handbuch Genossenschaftswesen*, Wiesbaden, Springer VS 2020

DOI https://doi.org/10.1007/978-3-658-18639-5_42-1; online ISBN 978-3-658-18639-5

[31] See on "companization" and "convergence", HENRŸ, H., 'Quo Vadis Cooperative Law?', CCIJ Report No. 72 (2014), pp. 50-61 (in Japanese; original in English); IDEM, 'Reflexiones en torno …', op. cit. On "companization", see VILLAFAÑEZ PEREZ, I., 'Algunas reflexiones en torno a la necesidad de integrar la perspectiva cooperativa en el estudio y desarrollo del ordenamiento jurídico [Some reflections on the necessity to integrate the perspective of cooperatives in the study and development of cooperative law]', H. HENRŸ, P. HYTINKOSKI AND T. KLÉN (eds.), *Co-operative Studies in Education Curricula. New Forms of Learning and Teaching,* Mikkeli and Seinäjoki/Finland. University of Helsinki/Ruralia Institute Publications No. 35 (2017), pp. 54-71. Both with ample further references.

[32] For such wide scope of the term "cooperative law", see HENRŸ, H., *Guidelines for Cooperative Legislation*, op. cit., Box 2. This definition of cooperative law reflects hence a wide notion, one which comprises not only the cooperative law proper (law on cooperatives), but also all other legal rules which shape this institution and regulate its operations. The following areas, which are most likely to have this quality in any legal system, need mentioning: labor law, competition law, taxation, (international) accounting/prudential standards, book-keeping rules, audit and bankruptcy rules. This systemic view is also reflected in Chapter III of ILO R. 127. It is to be complemented by considering implementation rules and praxes, for example prudential mechanisms, audit, and registration procedures and mechanisms. It also includes jurisdiction as well as law making procedures and mechanisms.

[33] The member states of the UN might consider deleting the prejudice-laden term "civilized".

and "solidarity". They are legal principles in international law[34] and in a great number of national (constitutional) laws.[35] Paragraph 3. (a) of the ILO R. 193 lists them as values. Central to our debate is the legal principle of solidarity. As obligatio in solidum it finds its expression for example in the three-fold objective of cooperatives according to the definition enshrined in Paragraph 2 of the ILO R. 193, in mutual cooperative inter-bank guarantee funds and in the distribution of overhead costs of a cooperative in proportion to the transaction of the individual member with the cooperative and not as a part of the actual costs per member, in the indivisibility of the reserve fund as an expression of inter-generational solidarity etc.[36] Cooperative law that translates the cooperative principles institutionalizes/materializes[37] solidarity.

Finally, concerning "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as a source of international law, there are close to no "teachings" (publications) and only very few court cases, which consider the cooperative principles as legally relevant for cooperative law-making.[38]

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[34] See for example the Preamble of the ILO R. 193 and a great number of UN resolutions, for example UN Res. XXVI on the Rights and Obligations of States. See also BUDE, H., *Solidarität. Die Zukunft einer grossen Idee [Solidarity. The future of a great idea]*, München, Hanser, 2019; RODOTÀ, S., *Solidarietà. Un'utopia necessaria [Solidarity. A necessary utopia],* Roma, GEDI, 2017. In her seminal oeuvre *Les forces imaginantes du droit [The intellectual/imaginative forces of law],* 4 volumes, Paris, Seuil, 2004-2011, MIREILLE DELMAS-MARTY develops the principle in numerous contexts.

[35] To be verified by comparative studies.

[36] Further examples in HENRŸ, H., 'Quo vadis …', op. cit.

[37] Different disciplines understand different things by the word "institution". Douglass North stands for the economists' view. William Barnes and Roger Granger are representative of the lawyers' view. Among the many definitions of "institution" the one by North seems to be the most widely known. He writes: Institutions are "humanly devised constraints that structure political, economic, and social interactions. They consist of both informal constraints (sanctions, taboos, customs, traditions and codes of conduct) and formal rules (conventions, laws, property rights)." See NORTH, D., 'Institutions', Journal of Economic Perspectives (1991), pp. 97 f. I follow the more juridical definition proposed by Granger. He writes: « L'institution peut être définie comme le regroupement de règles de droit, agencées selon un certain esprit, autour d'une idée ou fonction centrale dont elles sont les instruments de réalisation. ». See GRANGER, R., 'Problèmes généraux du mouvement coopératif dans les pays en voie de développement', annales malgaches, 1, série droit (1963), pp. 149 ff. ; IDEM, 'La tradition en tant que limite aux réformes du droit', Revue internationale de droit comparé (1979), pp. 37 ff. (44, 106).

[38] Listed in HENRŸ, H., 'Public International Cooperative Law', op. cit.

### *2.2.2. Paragraph 10. (1) of the ILO R. 193 as a separate source of international law*

The sources of international law according to Article 38, Section 1 of the Statute of the ICJ are not the only sources of international law,[39] nor do they rank higher than other sources. If the list of sources of international law contained in Article 38, Section 1. of the Statute of the ICJ were exhaustive, then the effectiveness of international law rules would depend entirely on the will of states as according to Article 36 of the Statute of the ICJ states may not be subjected to the decisions of the ICJ against their will. The prominent place the sources of international law listed in Article 38, Section 1 of the Statute of the ICJ occupy here as in general in the literature is due to them being undisputed.

Among the possible sources in addition to those listed in Article 38, Section 1 of the ICJ Statute are foremost normative acts set by international organizations empowered to do so by their member states through treaties. Being based on a treaty, the ILO Constitution, recommendations of the ILO could qualify as secondary "treaties", similar to the secondary norms of the European Union (EU), derived from the Treaties of the EU. This view would however be difficult to reconcile with the explicit distinction between Conventions and Recommendations in Article 19, Section 1. of the ILO Constitution.[40]

Not considering these acts as a (possible) source of international law would indeed be contradictory, at least in cases where the organization is empowered by the members states to set law. While there seems to be consensus that normative acts of international organizations need considering, there is a debate on the degree of their binding force.[41] The degree of legal binding force will depend on

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[39] See VIRALLY, M., 'La valeur juridique des recommandations des organisations internationales', Annuaire français de droit international, Vol. II (1956), pp. 66-96 (reprinted, in : Le droit international en devenir, Paris, Presses Universitaires de France, 1990, pp. 169-194). This is not undisputed. Some suggest considering the instruments of international organizations as elements of one of the sources listed in Article 38, Section 1of the Statute of the ICJ.

[40] See for example PELLET, A., 'Le rôle des résolutions des oranisations internationales à la lumière de la jurisprudence de la Cour international de Justice', G. POLITAKIS, T. KOHIYAMA, T. LIEBY (eds.), *Law for Social Justice*, Genève, International Labour Organisation, 2019, pp. 149-160 (154 ff.); G. P. POLITAKIS AND K. MARKOV, op. cit.; VIRALLY, M., op. cit.

[41] For an overview of different opinions, often contradictory in themselves. which are still being discussed, see WHITE, N., *The Law of International Organizations*, 2nd ed., Manchester, Manchester University Press, 2005, especially pp. 168-173. He cites a number of them. For example: 'those acts have to be considered in good faith'; 'they are not designed for the creation of obligations, but are essentially guides for national actions'; 'though formally not binding, … accepted as law by states'; 'they have the potential to shape custom … contributing to an existing source of international law'.

This uncertainty is the reason why the notion of "degree of binding force" is rejected by some, insisting that an act is either legally (and "fully") binding or it is not legally binding. While this view has the advantage of being clear and might be valid in national legal systems, it ignores the reality of international law "making", especially the highly complex "growing" of rules of international law

three circumstances: firstly, on the type of instrument a specific international organization is empowered to adopt and has adopted in a specific case; secondly, on the democratic legitimacy of the decision underlying the instrument; and thirdly, on the extent to which the empowerment or its concrete exercise impacts the sovereignty of the member states of that particular international organization, which in turn will depend on the content of the act in question.[42]

*Concerning the first circumstance*, and as already discussed, the distinction made in Article 19, Section 1. of the ILO Constitution between "Conventions" and "Recommendations" leads to the argument that ILO R. 193 is not legally binding beyond what is specified in Article 19, Section 6. of the ILO Constitution. The question is whether the decision of the International Labour Conference to adopt a recommendation (R. 193), instead of a convention, because it was of the opinion that only a recommendation would "meet circumstances where the subject or an aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention" (Article 19 Section 1. of the ILO Constitution) implies a decision to limit the obligations of the member states ensuing from the adoption of the recommendation to those specified in Article 19, Section 6. of the ILO Constitution. If this were the case, then recommendations of the ILO could never be binding, nor be considered as an element of one of the sources of international law listed in Article 38, Section 1. of the Statute of the ICJ.[43]

The opinion that ILO recommendations are not binding beyond the obligations established in Article 19, Section 6 of the ILO Constitution, frequently reduced to stating that recommendations of the ILO are not legally binding, might stem from misunderstanding that *article. Article 19, Section 1. (d) reads: "*apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them." *Why would member states have to* (in the sense of a legal obligation) report to the ILO if they had no legal obligation to do what is stated in its recommendations, here in Paragraph 10. (1) of ILO R. 193? The difference between Conventions and

with its many actors, its back and forward movements and its as many failures as successes. An early and still frequently cited proponent of a nuanced view was MICHEL VIRALLY, op. cit.

[42] However "weakened" the sovereignty of states might appear in a globalized world, the importance of states must not be undervalued, not the least for the enforcement of law, notwithstanding its changed and constantly changing role otherwise.

[43] See footnote 39.

Recommendations is not the first one being legally binding and second one not. The difference is one of content. If the matters to be regulated can be determined and specified, then they may be included in a convention; if, on the other hand and for whatever reason they cannot (yet), then a recommendation is the appropriate instrument. This is the only difference the ILO Constitution makes in Article 19, Section 1. in terms of the requirements for the adoption of Conventions and Recommendations and the ensuing obligations.[44]

*Concerning the second circumstance*, the democratic legitimacy of the decision underlying the adoption of ILO R. 193, it is to be considered first of all that according to Article 19, Section 2. of the ILO Constitution there is no difference between a convention and a recommendation in terms of voting and required majority. In addition, a number of issues attest to the high degree of democratic legitimacy of this recommendation. ILO R. 193 was adopted short of four abstentions from unanimity,[45] surpassing as a unique case in the history of the ILO the requirement of a two thirds majority. Furthermore, the specific nature of the ILO adds to the democratic legitimacy of its instruments. At the International Labour Conference the member states are not only represented by government delegates, but also by delegates representing the employers' organizations and the workers' organizations (Article 3, Section 1. of the ILO Constitution: per member state two government delegates, one delegate for the employers' and one for the workers' organizations). This makes the ILO a tripartite organization with a much wider representation than that of other international organizations. Finally, by integrating the essential[46] parts of the ICA Statement,[47] the ILO R. 193 reflects a wide consensus on the identity of cooperatives, which adds to its democratic legitimacy. As its title indicates the ICA Statement enshrines the elements which according to members of the ICA constitute the identity[48] of cooperatives. This identity has shaped over more than 200 years through practice and it has been the object of systematic theorizing since the foundation of the ICA in 1895.[49] Being

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[44] Jean-Caude Javillier distinguishes between « obligations de résultat » (conventions) and « obligations de moyens » (recommendations). See JAVILLIER, J-C., 'Libres propos sur la « part » du droit dans l'action de l'Organisation intenationale du Travail', *Les normes internationales du travail : un patrimoine pour l'avenir* …, op. cit., pp. 659-685 (677/78). Indeed, a parallel may be drawn to the difference between EU regulations (ILO conventions) and EU directives (ILO recommendations).

[45] See http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-23vote.pdf

[46] Not all parts. See Part III.

[47] The definition of cooperatives into Paragraph 2 of the R. 193, the values into Paragraph 3 and the principles into Paragraph 3 and into the Annex to the R. 193.

[48] "Identity" not to be confused with "essence".

[49] For the history of the ICA Statement see CANO ORTEGA, C., 'Una perspectiva actual del sexto principio cooperativo: Cooperación entre cooperativas [A new perspective on the sixth cooperative principle: Cooperation among cooperatives]', CIRIEC-España. Revista Jurídica, Vol. 27 (2015), pp. 285-331 (288 ff.).

part of the byelaws of the ICA the ICA Statement is binding on the members of the ICA and indirectly on the members of these members. At the time of the adoption of the ILO R. 193 in 2002 these members numbered ca. 700 million; today they number ca. 1.2 billion.[50]

*Concerning the third circumstance,* the impact on the sovereignty of the member states – an institutional and a substantial aspect need mentioning. The institutional aspect relates to the ILO being a transnational organization besides being an international organization. According to Article 4, Section 1. of the ILO Constitution the delegates (representing the governments as well as the employers' and workers' organizations) are "entitled to vote individually" i.e. they are not bound by any order they might have received from the body they represent. This is a potential limitation of the sovereignty of the member states. However, this limitation is voluntarily agreed upon through treaty (the Constitution of the ILO). As concerns the substantial aspect of the limitation of sovereignty, Paragraph 10. (1) of the ILO R. 193 does not imply a complete transfer of sovereignty in matters of cooperative law, as is the case for example of the uniform laws on cooperatives of the OHADA and the EAC.[51] As shall be discussed in Part III the content of the obligation established by Paragraph 10. (1) of the ILO R. 193 affords states with a considerable margin of appreciation when it comes to translating the cooperative principles into legal rules.

### *2.2.3. The 1995 ICA Statement on the cooperative identity as a source of international law[52]*

The ICA Statement can be recognized as a source of international law if it falls into one of the categories of non-state law which are gradually being recognized as a source of international law or if it shows traits which do not justify it being treated otherwise than one of these non-state laws.

The ICA is an association under Belgian law with world-wide membership. The ICA Statement forms part of its bylaws. In a private law dispute these might[53]

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[50] See ICA web-site at https://www.ica.coop/en/about-us/international-cooperative-alliance, visited on 24 June 2020.

[51] 2010 Acte uniforme relatif au droit des sociétés coopératives de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA), at :
http://www.ohada.com/actes-uniformes-revises/939/acte-uniforme-relatif-au-droit-des-societes-cooperatives.html
2014 East African Community Cooperative Societies Bill, at: http://www.eala.org/documents/category/bills/P16

[52] Another approach could be to place cooperative law within enterprise law, which might qualify as an autonomous field of law, not the least because of the organizational integration of enterprises into global value chains.

[53] To the author's knowledge no such case has been decided yet.

be invoked and applied. The question here is however whether they are to be considered by national legislators as a source of international law. The content of the ICA Statement differentiates it from those autonomous fields of law which are (gradually) being recognized as source in international law. While these regulate activities, the ICA Statement deals with organizational matters of an enterprise type, cooperatives. In addition, while the ICA has its own standard setting mechanisms, it has no autonomous enforcement mechanism as have other autonomous fields of law. The specific trait of the ICA Statement which calls however for its being recognized on par with other non-state laws as is its democratic legitimacy. This argument has been used in connection with the democratic legitimacy of ILO R. 193 (see previous Point). It needs further developing. As mentioned, more than one billion people around the world improve their living conditions through membership in a cooperative. With Kelsen[54] one may hold that inferring norms from facts is illogical. But one of the functions of law is to balance facts and legal norms[55] or rather bridge the gap between facts and the autonomy of law[56] without necessarily bringing them into accord. In addition, the situation is not a purely factual one. Where cooperatives are – be it indirectly – affiliated to the ICA, they are bound by the content of the ICA Statement. The factual situation is thus coupled with a legal standard.[57] As mentioned, this legal standard has evolved over more than 125 years. It is constantly being reviewed, reinterpreted and reaffirmed by the ICA membership.[58] Disregarding this circumstance might preserve the presumed independence/autonomy of law from facts, but it cannot but lead to the ineffectiveness of cooperative law inasmuch as cooperatives might have to serve

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[54] KELSEN, H., *Reine Rechtslehre [Pure theory of law],* 2nd ed., Tübingen und Wien, Mohr Siebeck und Verlag Österreich, 2017.

[55] VAN AAKEN, A., 'Funktionale Rechtswissenschaftstheorie für die gesamte Rechtswissenschaft [A functional theroy of legal science for the whole legal science]', MATTHIAS JESTAEDT UND OLIVER LEPSIUS (eds.), Rechtswissenschaftstheorie [The theory of legal science], Tübingen, Mohr Siebeck, 2008, pp. 79-104.

[56] An image LOUIS ASSIER-ANDRIEU uses. See his *Le droit dans les sociétés humaines [Law in human societies]*, Paris, Nathan, 1996, p. 38. See also FÖGEN, M., *Das Lied vom Gesetz [The song of law]*, München, Friedrich Siemens Stiftung, 2007. On p. 89 she writes (citing Luhmann): „Das Gesetz des Rechts ist ein Tertium, das sich weder empirisch noch metaphysisch adäquat beschreiben lässt. Ihm genügt … Geltung [The law of law (right) is a tertium. It cannot be described empirically or metaphysically. It is satisfied with … validity]".

[57] A rule-based social sphere in the sense of GALLIGAN, D.J., *Law in Modern Society*, Oxford, Oxford University Press, 2007, (especially pp. 182 f.).

[58] See for example INTERNATIONAL COOPERATIVE ALLIANCE, *Blueprint for a cooperative decade 2011-2020*, available at:

ica.coop/sites/default/files/media_items/ICA%20Blueprint%20%20Final %20version%20issued%207%20Feb%2013.pdf

IDEM, *Guidance notes to the co-operative principles*, available at: http://ica.coop/sites/default/files/attachments/ Guidance%20Notes%20EN.pdf

Idem, Minutes of general meetings.

two masters, the ICA Statement and a cooperative law which does not translate the cooperative principles into legal rules.[59]

### *2.2.4 Paragraph 10. (1) of the ILO R. 193 as a connex obligation to other legal obligations under international law, especially the nascent international law on sustainable development*

The question debated in this paragraph is whether the legally obligatory nature of Paragraph 10. (1) of the ILO R. 193 may be derived from its being a necessary or at least an efficient means to enable states to comply with other legal obligations they have under international law, hence from its being a connex obligation to other existing obligations.[60] Three of such obligations will be considered here: the obligation to grant freedom of association; the obligation to treat the various enterprise forms equally and the obligation to contribute to sustainable development.

The *freedom to associate* is a human right of individuals and entities enshrined in Article 22, Section 1 of the 1966 International Covenant on Civil and Political Rights.[61] Cooperative law which does not translate the cooperative principles into legal rules contravenes this freedom in cases where cooperatives are bound by the ICA Statement and to the extent the cooperative law does not allow cooperatives to reflect the cooperative principles in their byelaws.

The *principle of equal treatment* is a principle of international law; it is enshrined in the same human rights Covenant.[62] The wide-spread "companization" of cooperatives, i.e. the approximation of their legal features with those of capitalistic companies, and "convergence", i.e. measures which tend to streamline the governance structures of all forms of enterprises,[63] infringe upon this principle.

The "companization" and "convergence" measures also disregard the concept of *sustainable development,* which has been recognized by the ICJ since 1997 as

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[59] Independence/autonomy must not mean detachment from sociological facts. See CRACOGNA, D., *Estudios de derecho cooperativo* [*Studies in cooperative law*], Buenos Aires, Intercoop Editora, 1967.

[60] I previously discussed and wrongly rejected this possibility. See especially HENRŸ, H., *Guidelines for Cooperative Legislation*, op. cit., p. 51. For a convincing argumentation to the contrary (concerning the relationship between the Charter of the United Nations and the Universal Declaration of Human Rights, see the reference to the work of Ted Meron in DECAUX, E., *Droit international public* [*International law*], 2nd ed., Paris, Dalloz, 1999, p. 47, where he describes the Universal Declaration as a "second degree treaty".

[61] UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.

[62] Article 26. See also Paragraph 7. (2) of the ILO R. 193.

[63] See supra at footnote 31.

a *concept of international law.*[64] The recognition of sustainable development as a concept of international law signals and requires a number of radical paradigmatic shifts, to which law has yet to adjust to and which justify the opinion that Paragraph 10. (1) of the ILO R. 193 is indeed legally binding. *The first shift* is from partial to holistic approaches in development. It shows in the concept of sustainable development itself. The concept englobes four aspects: economic security, environmental balance, social justice and political stability.[65] Being aspects, they are mutually interdependent and regenerative. This means that failure to act on one or all at the same time puts the concept at risk. *The second shift* is from universality to diversity. It requires shifting from "doing business" on a set of highly standardized criteria, as if that were unconditioned, to focusing on preserving the basis of "doing business". This basis is the principle behind (sustainable) development, namely diversity, in its two interdependent aspects, biological diversity and cultural diversity,[66] including a diversity of enterprise forms. In that sense, "convergence" measures defeat their own rationale, which is to make the economy more resilient. *The third shift* is one from national to local and global. As one of the four aspects of sustainable development relates to nature and is per se global, and given the inter-linkage of all of them, a global approach is required.[67] *The*

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[64] For the history of the concept see BEKHECHI, M. A., 'Quelques notes et réflexions sur le statut du droit international du développement durable [Some notes and reflections on the status of the international law on sustainable development]', MOHAMMED-JALAL ESSAID (sous la dir.), *Variations sur le système international. Mélanges offerts en l'honneur du Professeur Mohamed Lamouri*, Casablanca, Najah Al Jadida, 2010, pp. 107-137; HENRŸ, H., 'Sustainable Development and Cooperative Law: Corporate Social Responsibility or Cooperative Social Responsibility?', International and Comparative Corporate Law Journal Vol.10, Issue. 3 (2013), pp. 58-75.

[65] Names given to these aspects do vary. Often "political stability" is not mentioned. I am inspired by the biosphere idea of Jacques Grinevald. See for example his *La Biosphère de l'Anthropocène. Climat et pétrole, la double menace. Repères transdisciplinaires (1824-2007) [The bioshere of the anthropocene. Climate and oil, the double threat. Transdisciplinary points of reference],* Genève, Georg, 2007.

[66] While the vital importance of the principle of biological diversity (see for example WILLOUGHBY, J. ET AL., 'The reduction of genetic diversity in threatened vertebrates and new recommendations regarding IUCN conservation rankings', Biological Conservation 191 (2015), pp. 495-503) is almost general knowledge, that of cultural diversity is hardly recognized, despite the growing evidence that economies with diverse forms of enterprises seem to be more resilient against market and other shocks. See for example BURGHOF, H-P., 'Vielfältiges Bankensystem besteht die Krise [A diverse banking system resists the crisis]', Wirtschaftsdienst 2010/7, pp. 435 ff.; GROENEVELD, H., 'The Value of European Co-operative Banks for the Future Financial System', JOHANNA HEISKANEN, HAGEN HENRŸ, PEKKA HYTINKOSKI AND TAPANI KÖPPÄ (eds.), *New Opportunities for Co-operatives: New Opportunities for People.* Proceedings of the 2011 ICA Global Research Conference, Mikkeli and Seinäjoki/Finland. University of Helsinki/Ruralia Institute Publications No. 27 (2012), pp. 185-199.

[67] For an overview and critique of epistemological traps, which might hinder us to see this, it might be worthwhile re-reading, not only HANS-GEORG GADAMER, especially his *Wahrheit und Methode [Truth and Method]* and RAYMOND, M., *Le sens de la qualité [The sense of quality],* Boudry-Neuchâtel, La Baconnière, 1948, but also SNOW's *Two Cultures and the Scientific Revolution*

*fourth shift* is one which concerns the morphology of enterprises: hitherto they resembled the classic Greek theatre with its coming together of actors, time and place. With globalization actors disperse, time and place have become irrelevant for the production.[68] Enterprises of all forms integrate ever more intensively into trans-border global value chains, not only operationally but also organizationally. Private and public entities fuse in new type of socio-economic organizations and chains of permanent entities metamorphose into ephemeral global networks of actors, where the positions of producer and consumer fuse. Forms of enterprises de-form.[69] Economic activities have become trans-border phenomena.

In this context cooperative law, understood as the translation of the cooperative principles into legal rules, may serve a double purpose: It may regenerate the principle of diversity and it may provide a mechanism to regenerate social justice as the central aspect of sustainable development.

As mentioned*, diversity*, including a diversity of enterprise forms is vital; it is the source of (sustainable) development. Reducing this diversity through "companization" and "convergence" measures is not an argument for the preservation of the cooperative identity. As with biological diversity, the disappearance of a given species is no proof of diversity being at risk, as new species might appear and do appear. But apart from this being uncertain, hence forcing us into a choice between several actions in a situation of uncertainty, the criteria to make this choice are not the same concerning the two aspects of diversity. Biological diversity seems to be innate in nature, whereas cultural aspects seem to tend toward uniformity. At least they have tended toward uniformity during the past two centuries. And again: The real world of cooperatives must not be disregarded. Effective and efficient organizations build and rebuild on a trias of experience, knowledge/know-how and tradition. The centrality of *social justice* among the four aspects of sustainable development may be demonstrated schematically in the following way: social injustice puts political stability at risk;[70] political instability puts

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[68] As they have for many other (social inter)actions. See contributions in: CALABRÒ, A. (a cura di), *Frontiere*, Milano, Il Sole 24 ORE, 2001.

[69] The reasons Coase gave for enterprises to be established ("firms" in his words) might (have) vanish (ed). See COASE, R., 'The Nature of the Firm', Economica, 4 (16) (1937), pp. 386-405.

This evolution brings additional general challenges for lawyers. Because of their diffusion/dissipation and total anonymization, responsibilities need readjusting; as do labour law, tax law and possibly other areas. It also requires regulating democratic participation in a situation where the five-fold control risk of cooperatives caused by an information and knowledge gap between the members and the general assembly, the members and the surveillance committee, the surveillance committee and the board, the board and the administration and between the administration and the employees worsens through the association of stakeholders and the mixing of private and public entities in new type of cooperative organizations.

[70] In fact paraphrasing the first sentence of the ILO Constitution, JEAN-CLAUDE JAVILLIER ('Libres propos …', op. cit., p. 662) expresses the idea with the following words: « Paix rime nécessairement

economic security at risk;[71] economic insecurity makes people unreceptive for the concerns of the environment. The question is how can social justice be regenerated and by whom. The following very brief answer does not exhaust the complexity of the subject matter. Social justice regenerates most efficiently where the highest possible number of people has the right and the possibility to participate democratically[72] in the decisions on what and how to produce and how to distribute the produced wealth. As the factors of globalization[73] reduce the ability of the welfare-state and of the labour market partners to organize this participation,[74] the pressure to rethink the classical distribution of the social costs of enterprising rises. This pressure results gradually in the consensus on the need to widen the scope of corporate social responsibility (CSR) of enterprises to include societal responsibilities (CSSR), and on the need to juridify the CSSR, implying a necessary shift from share-holder value (capitalistic companies) and member value (cooperatives) to stakeholder value. Enterprise forms with an inbuilt participation mechanism, like cooperatives, might therefore relay the aspect of social justice of the legal concept of sustainable development to practice. In pursuing the mentioned double purpose of cooperative law, regeneration of the principle of diversity and regeneration of social justice as the central aspect of sustainable development lawyers face however the challenge of the mentioned metamorphosis of enterprises.

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avec justice sociale [Peace rimes necessarily with social justice] ».

[71] An idea which Montesquieu already developed. See his *De l'esprit des lois [The spirit of the laws*], for example Chapter XX, 1 and 2.

[72] "Democratically" to be understood in the sense of a right to participate, conditioned solely by the fact of being a human being, regardless of social, economic or other status or standing.

This approach to "participation" does not depreciate other approaches. Those divide, grosso modo, into two schools, one which emphasizes the importance of effective access to basic goods (representatives: Amartya Sen and Martha Nussbaum) and one which emphasizes a fairer, more equitable distribution of goods (representative: John Rawls). See also RENAUT, A., *Un monde juste est-il possible [A just world. Is it possible]?,* Paris, Stock, 2013.

[73] Building on Immanuel Kant's concepts of time and space as conditions of life, "globalization" is understood here as a condition of life, which allows us to interact, produce, consume without regard to the conditions of time and space.

[74] See HENRŸ, H., 'Quo vadis …', op. cit, footnote 102; IDEM, 'Who Makes the Law? Parliaments, Governments, Courts or Others? Social Justice through Cooperatives at Stake', CHIARA ANTONIA D'ALESSANDRO AND CLAUDIA MARCHESE (eds.), *Ius Dicere in a Globalized World. A Comparative Overview,* Volume One, Studies in Law and Social Sciences 3, Roma, Roma Tre Press, 2018, pp. 251-260.

## 2.3. The effectiveness of the obligation under Paragraph 10. (1) of the ILO R. 193

This part deals with some theoretical and with some practical aspects of the effectiveness of the obligation under Paragraph 10. (1) of the ILO R. 193.

*Theoretical aspects*: Frequently the term "effectiveness" is used in the context discussed here as an equivalent of or a condition of the legal validity of an act and/or as an equivalent of its enforceability through a centralized institution. These equations are not convincing. The legal validity of an obligation under international law may not depend on its being abided by. In that it does not differ from an obligation under national law. This would be contrary to its being a norm. Contrary to national law, this could also lead to a split of the validity. The norm would be valid where abided by and not valid where this is not the case. As concerns enforceability through a centralized institution, indeed a lacking element of international law rules, claiming it to be a condition of the legal validity of the rule amounts to denying the existence of international law, unless one agrees to open national enforcement mechanisms to international law rules by obliging national states to integrate these into their legal systems. Not only would this not solve the problem, because in turn such obligation would not be enforceable. It would also not be congruent with the sovereignty of states in the sense of them being absolved of the obligation to fulfill any obligation to which they have not agreed to. However, absolute sovereignty and international law exclude each other and yet they depend on each other. The sovereignty of states may be based on the UN Charter (Article 2 et passim), but it does not have its origin therein. And again, how can this Article of the UN Charter be enforced? State sovereignty has never been and cannot be now an absolute. As a right it must come with an obligation, which justifies it.[75] As a minimum, the obligation requires refraining from activities which disable other states to exercise their sovereignty effectively and efficiently. The factors of globalization make state territories irrelevant[76] and disable their national law as that means par excellence to effectively solve problems, independently of legal actions by other states. These same factors make it possible to perceive the world as one global world and to perceive the double dependency of states:[77] they depend on the state of the nature and on the willingness

[75] For the correspondence of "rights" and obligations see HOHFELD, W., 'Some fundamental legal conceptions as applied in judicial reasoning', Yale Law Journal, 23 (1) (1913), pp. 16–59.

[76] See for example LÓPEZ AYOLLÓN, S., 'Globalización, estado nacional y derecho [Globalization, national state and law]', Isonomía, Revista de Teoría y Filosofía del Derecho (1999), pp. 7-21 (15). As for the effects on state law, see for example RAMÍREZ, A., *Procesos de globalización. Estado-nación y redes no estatales [Globalization processes. Nation-state and non-state networks],* Bogotá, Uniandes, 2012.

[77] See HENRŸ, H., 'Vom Entwicklungsrecht zum Menschenrecht auf Entwicklung - vielfältige Einheit anstelle von Einheitlichkeit [From the Development Law to the Human Right to Development – Diverse

of their peers to work on the common interest of preserving it in its diversity, instead of "only" coordinating their individual interests.[78] This perception needs turning into accepting obligationes in solidum.[79] There is no legal basis for this. The endless search for a Grundnorm (Kelsen) is senseless, as it would also require enforcing. It needs replacing with arguments that help us find that point where we decide that the fact of being mutually dependent requires common legal action.[80] The debate on international law has yet to fully accept this radical change of the situation as compared with what states might have faced when they agreed on respecting mutually their sovereignties. This acceptance is the substratum of solidarity, without which sustainable development cannot be had.

*Practical aspects:* A legal rule may effectuate through other means than through institutionalized enforcement. First of all, contrary the general debate which creates the impression that states were most of the time in denial of their international obligations "[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[81] Furthermore, ever more content of national laws is of regional or international origin.[82] As mentioned, an increasing number of national cooperative laws integrate the cooperative principles or refer to them. Many national legislators have collaborated voluntarily over the past decades with the ILO, the ICA and other national, regional and international governmental and non-governmental organizations on cooperative legislation projects, knowing that these would base their contribution on the ICA Statement and/or the ILO R. 193. As far as the ILO is concerned its Office is bound to do so (Article 10, Section 2. of the ILO Constitution).[83] To what extent these collaborations have indeed led to a translation of the cooperative principles into legal rules cannot be established with certainty; the factors to be considered are too numerous. But one may assert that the question of effectiveness may not be reduced to that of centralized and

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Unity Instead of Uniformity]', Zeitschrift für Rechtsvergleichung (1994), pp. 3-29.

[78] See for example, GEIGER, T., *Vorstudien zu einer Soziologie des Rechts [Pre-studies for a legal sociology],* Berlin, Duncker & Humblot, 1987, p. 185.

[79] "Solidum" in the sense of the "whole".

[80] One of the main points of reflection in the oeuvre of Jean Carbonnier. See also CAMUS, A., *L'homme révolté*, Paris, Gallimard, 1951, especially pp. 15-38.

[81] HENKIN, L., *How Nations Behave*, 2nd ed., New York, Columbia University Press, 1979, p. 47. Similar GEIGER, op. cit., pp. 184/185.

[82] See HENRŸ, H., 'Genossenschaftsrecht – international', op. cit.

[83] See for example ILO, *General Survey concerning employment instruments in the light of the 2008 ILO Declaration on Social Justice for a Fair Globalization*, Geneva, ILO, 2010; ILO, *The Story of the ILO's Promotion of Cooperatives Recommendation …,* op. cit.

I have myself participated in some 65 of these projects over the past decades and made the cooperative principles as defined here the basis of my participation.

institutionalized enforcement.[84] In fact, this requirement is a reflex of conceiving law as state and inter-state law. This tenet contradicts anthropological,[85] sociological and the findings of legal science and of legal practice.

A rule of the kind discussed here will be/come effective when legal arguments can be and are being used in legal circumstances/contexts claiming its legally obligatory nature.

Having - hopefully - developed arguments to justify the opinion that national law-makers are legally bound by Paragraph 10. (1) of the ILO R. 193, we need to establish now the contents of this obligation.

## 3 The Content of Paragraph 10. (1) of the ILO R. 193

This part of the article intends to clarify the content of Paragraph 10. (1) of the ILO R. 193 and to reiterate the importance of understanding that it is not suggesting a unified world law on cooperatives, but that legislators have an obligation to contribute to diversity by not allowing for the uniformity of their cooperative laws.

Concerning the content of Paragraph 10. (1) of the ILO R. 193, its text appears to be clear, but it raises complex questions.[86] This complexity is not the least due to the ILO R. 193 being somewhat ambiguous. This ambiguity is the result of textual incoherencies;[87] of changes to the ICA Declaration which, at first sight, the R. 193 seems to integrate;[88] of incoherencies between the terminologies used

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[84] Similar MAUPAIN, F., 'Persuasion et contrainte aux fins de la mise en oeuvre des normes et objectifs de l'OIT [Persuasion and force to implement the IlO standards and objectives]', *Les normes internationales du travail : un patrimoine pour l'avenir…*, op. cit., pp. 687-709 (708).

[85] See for example EBERHARD, C., *Le droit au miroir des cultures. Pour une autre mondialisation [Law in the mirror of cultures. A plea for another globalisation],* Paris, Librairie Générale de Droit et de Jurisprudence (LGDJ), 2010.

[86] A number of other paragraphs of ILO R. 193 relate to cooperative law as well. For example Paragraphs 6, 7 and 18. They are not relevant for this context. For more details see HENRŸ, H., 'The Relevance of ILO Recommendation No. 193 Concerning the Promotion of Cooperatives for Cooperative Legislation', Analele Stiintifice ale Universitatii Cooperatist-Comerciale din Moldova, vol. 11 (2012), pp. 19-28.

[87] Compare Paragraphs 6 and 10; 7, 8, 9 and 18 of the ILO R. 193.

[88] But that is not the case. For example
- the definition of cooperatives in Paragraph 2 of the ILO R. 193 contextualizes this definition in international law by formulating "For the purposes of this Recommendation …"
- the ICA Statement distinguishes between "values" and "ethical values" (of the members). The ILO R. 193 does not do so (see Paragraph 3)
- Paragraph 3 of the ILO R. 193 mentions as author of the principles "the international cooperative movement", without further specification. The clarification appears in the Annex to the R. 193.

in the R. 193, by philosophy and by legal sciences;[89] of it being unclear who the author of the cooperative principles is (the ICA, the ILO or an unspecified author (Paragraph 3. (b) of the R. 193: "the international cooperative movement")?); and of not establishing a hierarchy between the cooperative values and the cooperative principles, as does the ICA Declaration.[90]

The interpretation of the cooperative principles, hence their translation into legal rules depends on the clarification of this ambiguity. Interpretation according to the criteria of international law or according to those of the ICA? ICA's criteria at the time when the ILO adopted R. 193 (2002) or the ICA's current criteria?[91] What happens should the ICA change its principles?

Paragraph 10. (1) of the ILO R. 193 is also undetermined as to how the cooperative principles should be translated into legal rules. The variety of ways found in cooperative laws attests to the problem. These ways – considering the cooperative principles, including them or making reference to them – may be classified as follows: texts which do not mention the cooperative principles, but which do translate them into legal rules; texts which refer to the cooperative principles; texts which list the titles of these principles as contained in the ICA Declaration and in the R. 193, at times introducing changes to the terminology; texts which list the titles and the explanations which come with them in the ICA Statement and in the ILO R. 193, at times with terminological changes; texts with an incomplete list of the cooperative principles, with more than seven principles or a mix of principles of the ICA and the ILO and additional ones; texts which mention the author of the principles; texts which do not mention the author of the cooperative principles, at least not unequivocally; and texts which qualify the principles as guides for the interpretation of the law.

The consequences of these different modes are of three types: i.) if the author of the principles is not mentioned, then their interpretation will follow national criteria; ii.) the same applies in cases where the principles have been changed (less than seven/more than seven and/or terminological changes; and iii.) by qualifying the principles as "guides" for the interpretation of the law, the principles change their very nature.[92]

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[89] According to the ICA Statement "democracy", "equality" and "solidarity" are values; in legal science these are also legal principles.

[90] By formulating "The co-operative principles are guidelines by which co-operatives put their values into practice."

[91] *See INTERNATIONAL CO-OPERATIVE ALLIANCE, Guidance* notes …, op. cit.

[92] Independently of the mode of integration of the principles into the national cooperative law, the question is whether this integration transforms the cooperative principles into legal principles of the national legal system. If that is so, then the principles are to be interpreted according to national criteria, increasing the risk of infringing upon international law. If not, then the principles maintain a special status, the respect of which will again depend on the attitude towards international law.

These inconsistencies and their consequences leave us with an imbroglio of general values and principles, of ICA values and principles, of ILO values and principles and of legal principles. A way to untangle this imbroglio is to let the cooperative principles enter law through the same door which social norms and general values use, namely legal principles. Legal principles give a reason for a variety of decisions, whereas legal rules specify one decision.[93] This is all the more plausible as some of the values stated in the ICA Declaration and in the ILO R. 193 are also legal principles, such as democracy, equality and solidarity. Legal principles allow for a variety of legal rules,[94] a contribution to diversity.

## 4 Conclusion

The objective of this article was to answer the question of whether national cooperative legislators may freely decide or whether they are legally bound to give their texts a certain content. The answer is: they are not free; they have to translate the cooperative principles into legal rules. Reinforced by a bundle of other reasons, the main reason for this obligation is the democratic legitimacy of ILO R. 193. It fits with the way law in is "produced" in the global world and with the way the common interest[95] of states to contribute to sustainable development may be met. Law appears as something national, an utterance of a public authority. But even when formally issued by a public authority, applicable on the national territory and in general enforced in last instance by a national authority, its origin and the ways it is produced are not.[96] These ways coalesce national, regional and international streams, bring public and private actors together.[97] The ILO embodies these ways. Its tripartism allows private actors (employers' and workers' organizations) to participate in (public) standard setting; its transnational character expresses a voluntary limitation by states of their (absolute) sovereignty. The cooperative law demonstrates the argument. For example: Besides national

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[93] See HELLER, H., 'La justificación del Estado [The justification of the State]', Cruz y Raya, 1993 (9). Reprint by the Universidad Nacional Autónoma de México, Estudios Jurídicos No. 6, 2002, 11. See also Alexy's and and Dworkin's theories.

[94] This is the approach of the Study Group on European Cooperative Law. See GEMMA FAJARDO, ANTONIO FICI, HAGEN HENRŸ, DAVID HIEZ, DEOLINDA MEIRA, HANS-H. MÜNKNER AND IAN SNAITH (eds.), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge et al. intersentia, 2017.

[95] On the common interest of states see D'ASPREMONT, J., 'The Foundation of the International Legal Order', Finnish Yearbook of International Law (2007), pp. 219- 255.

[96] For more detail see HENRŸ, H., '*Genossenschaftsrecht – international'*, op. cit.

[97] The phenomenon is not a recent one. See already JESSUP, P., *Transnational Law*, New Haven, Yale University Press, 1956. But it is becoming "normal". It is being discussed under terms like "law and globalization", "globalization of law" and near-equivalents in other languages. Whether this will lead to what might be called "global law" is an open question.

laws we have regional laws applicable at the national level;[98] we have national accounting standards elaborated by international private entities, albeit at times applicable with national modifications;[99] we have regional and international regulators who set standards for cooperatives, especially in the financial sector.[100] Individually, states are not able any more to meet their own interests in sustainable development, let alone to deal with threats and risks like global pandemics, trans-border crime and terrorism, cyber-attacks, the misuse of power behind so-called Big Data.[101] The state is not superfluous; its role as enforcer of law (of whatever origin) is undisputed. But its role is changing. We might have to remind ourselves that we allowed the "ubi societas, ibi ius" to slide towards "ubi State[102], ibi ius". Instead of the idea of a Weltstaat [world-state], which some continue to cherish, we might rather conceptualize that of Weltgesellschaften [world-societies] with states. The cooperative idea applied to Althusius?

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[98] For example, the mentioned OHADA and EAC uniform cooperative acts; the EU Council Regulation on the Statute of the European Cooperative Society (SCE), 1435/2003.

[99] For example the standard-setting by the International Accounting Standards Board (IASB), the Financial Reporting Standards Board (FRSB) and the Basel Committee on Banking Supervision.

[100] For example the regulations issued by the European Banking Authority EBA).

[101] Similar LUIGI FERRAJOLI in an interview in El País, 28.3.2020, 24: "La UE debería haberse hecho cargo de la crisis desde el principio [The EU should have taken the crisis as its responsibility from the start]", reflecting, of course his works on international constitutionalism (for example his *Constitucioinalismo más allá del Estado [Constitutionalism beyond the State]*, Madrid, Trotta, 2018. See also at footnote 12.

[102] There is no word in Latin for "state". The term "res publica" covers more possibilities.

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