THE PLACE OF SOCIO-ECONOMIC RIGHTS IN SOVEREIGN DEBT GOVERNANCE

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DEDICATION

This thesis is proudly dedicated to the following:

My moral pillar and beloved mother, HAJIYA BINTA ABUBAKAR IBRAHIM,

My supportive father, ALHAJI MOHAMMED EL-IDRIS ZANGO,

My compassionate sister, AMINA MOHAMMED IDRIS,

My inspiring brother, BASHIR MOHAMMED and

My ever-present bedrock of support, my dear brother, MUHAMMAD SUNUSI MUHAMMAD

DECLARACTION

I declare that this thesis is the product of my independent research carried out under the guidance of my supervisors. The thesis has not been submitted or presented, either in whole or in part, for the award of any degree in any university or institution of learning. I further declare that all anti-plagiarism rules have been complied with and all sources consulted or referred to have been duly acknowledged as appropriate.

Signed

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TABLE OF CONTENT

Title Page	page	i
Dedication		ii
Declaration		iii
Acknowledgement		iv
Table of Content		vi
Abbreviations		x
Table of Statutes		xiv
Table of Treaties and other International Instruments		xv
Table of Cases		xvii
Abstract		xx
1.0 Chapter One: Introduction	page	1
1.1 General Introduction		1
1.2 Statement of Problem		6
1.3 Research Questions		11
1.4 Aim and Objectives		12
1.5 Justifications		13
1.6 Methodology and Theoretical Framework		16
1.7 Scope & Limitations		26
1.8 Structure of the Research		28
2.0 Chapter Two: Conceptualising Sovereign Debt in International Law		31
2.1 Introduction		31
2.2 Nature and Forms of Sovereign Debt		32
2.2.1 Defining Sovereign Debt		32
2.2.1.1 Sovereign Debt as a Contract		35
2.2.1.2 Classification of Creditors		38
2.2.1.2.1 Official Creditors		38
2.2.1.2.2 Non-Official Creditors		39
2.2.1.3 Sovereign Debt as Investment		42
2.2.2 Validity and Legitimacy of Sovereign Debt: Identifying the 'Sovereign'		35
2.2.2.1 The External Sovereign		43
2.2.2.2 The Internal Sovereign		48
2.3 Sovereign Debt Default and International Responsibility		52
2.3.1 Sovereign Debt Default and Sovereign Debt Restructuring		63
2.3.2 Responsibility arising from events of Sovereign Debt Default and Restructuring		65
2.3.2.1 Nature of International Responsibility		66
2.3.2.2 Sovereign Debt Default and International Financial Obligation		68
2.4 Conceptualising Sovereign Debt Governance		70
2.4.1 Nature of 'Sovereign Debt Governance'		71
2.4.1.1 Global Law: Governance and Justice		72
2.4.1.2 Approaches to Sovereign Debt Governance		77
2.4.1.3 The Sovereign Debt Regime		88
2.5 Conclusion		90
Chapter Three: Socio-Economic Rights and Sovereign Debt Governance		92
3.1 Introduction		92
3.2 Human Rights in Context: Legal and Theoretical Issues		93
3.2.1 Nature of Human Rights		94

3.2.1.1 'Right' and 'Human' 95
3.2.1.2 Conceptions of Human Rights 100
3.2.2 History, Classification and Legal Basis of Human Rights 110
3.2.2.1 Origins 110
3.2.2.2 Sources of Human Rights 111
3.2.2.3. Classification 114
3.3 Socio-Economic Rights in Context 116
3.3.1 Why Socio-Economic Rights? 116
3.3.2 Character and Scope of Socio-Economic Rights 119
3.3.3 The Rights-holders 126
3.3.4 Duty-Bearers and their Obligations 127
3.3.4.1 Sovereigns as Duty-Bearers: Creditors and Debtors 128
3.3.4.1.1 The Traditional Obligations 131
3.3.4.1.2 States' Extraterritorial Socio-economic rights obligations: Maastricht Principles 131
3.3.4.1.2.1 Extraterritoriality Principle: Nature and Extent 133
3.3.4.1.2.2 Sphere of Influence & States' Extraterritorial Obligations for Acts of NSAs 134
3.3.4.1.2.3 International Cooperation as an Extraterritorial Obligation 136
3.3.4.2 Obligations of Other Duty-Bearers 137
3.3.4.2.1 IGOs 137
3.3.4.2.2 NSAs 140
3.3.4.2.2.1The UN & Corporate Human Rights Responsibility (CHRR): A Tug of War? 141
3.3.4.2.2.2 The UN Guiding Principles on Business and Human Rights (GPBHR) 143
3.3.4.2.2.2 Non-official Creditors & the GPBHR 148
3.4 Socio-Economic Rights and Sovereign Debt Governance 149
3.4.1 Socio-Economic Rights and International Finance 151
3.4.2 Socio-Economic Rights and IIL 152
3.4.3 Socio-Economic Rights in Adjudicating Sovereign Debt Claims 154
3.5 Conclusion 155

Chapter Four: Socio-Economic Rights in Sovereign Debt Restructuring 158

4.1 Introduction 158
4.2 Socio-Economic Rights in the History of Sovereign Debt Defaults 162
4.2.1 Pre-1966 SDDs and Socio-Economic Rights 164
4.2.1.1 The Early Periods 165
4.2.1.2 The World Wars 170
4.2.2 Post-1966 SDDs and Socio-Economic Rights 173
4.2.2.1 The Latin American Debt Crisis 174
4.2.2.2 SDDs in 1990s-2000s: African, Asian and Argentine Debt Crises 175
4.2.1.4 The Eurozone SDDs 178
4.2.3 SDDs, Creditor-diktat and Socio-Economic Rights: A Reflection 179
4.3 Socio-Economic Rights in SDR Regimes 182
4.3.1 SDR Regimes 184
4.3.1.1 Socio-Economic Rights in the Regimes for Restructuring Official Loans 184
4.3.1.1.1 The Regime in the First Half of the 20th Century 185
4.3.1.1.2 The Paris Club 185
4.3.1.1.3 Multilateral Debt Reliefs: HIPC and MDR Initiatives 189
4.3.1.2 Regimes for Restructuring Non-official Loans 194
4.3.1.2.1 The London Club 195
4.3.1.2.2 Bondholders 196
4.3.2 Socio-Economic Rights in SDR: Perspectives from General International Law 201
4.3.2.1 Socio-Economic Rights, *Pacta Sunt Servanda* and SDDs 202
4.3.2.1 Socio-Economic Rights, Necessity and SDDs 205
4.3.2.1 Socio-Economic Rights, Global Peace and SDDs 206
4.4 Socio-Economic Rights in SDR: The Roles of the UN and its Agencies 208

4.4.1. UNGA, 'Right' to SDR and Socio-Economic Rights 209
4.4.1.1 Socio-Economic Rights in UNGA's BPSDRP 2015 209
4.4.1.1 Socio-Economic Rights and Sustainable Debt in the SDGs Agenda 2030 211
4.4.2 Socio-Economic Rights in the UNHRC's GPFDHR 213
4.4.5 Socio-Economic Rights in UNCTAD's Evolving SDR Frameworks 216
4.4.1.1 SDR Code of Conduct 1980 216
4.4.1.1 Socio-Economic Rights and SDR under the PRSLB 2012 216
4.4.1.1 Socio-Economic Rights and SDR under the SDWG 2015 218
4.5 Sovereign Debt Obligations, Resource availability & the Progressive Realisation of Socio-Economic Rights 219
4.5 Conclusion 226

Chapter Five: Socio-Economic Rights in Sovereign Debt Adjudication 229

5.1 Introduction 229
5.2 Sovereign Debt Adjudication: Theories, Forms and Scope 233
5.2.1 Theorising Sovereign Debt Adjudication: A Stakeholders' Perspective 234
5.2.2 The Contours of Sovereign Debt Adjudication 248
5.3 Socio-Economic Rights & SDAs by Official Creditors 250
5.3.1 State-State SDAs & Socio-Economic Rights: Espousal of Creditors' Claims 253
5.3.1.1 Russia v Turkey (Russian Indemnities Case) 253
5.3.1.2 Great Britain v Costa Rica (Tinoco Arbitration) 255
5.3.1.3 Belgium v Greece (Belgium Bank Case) 256
5.3.1.4 The French Loan Cases: Serbian, Brazilian & Norwegian Loan Cases 257
5.3.1.5 Guinea v Democratic Republic of Congo (Diallo Case) 259
5.3.1.6 Espousal of Creditors' Claims, SDR and Socio-Economic Rights 261
5.3.2 IFIS & Socio-Economic Rights in SDA 262
5.4 Non-Official Creditors, SDA & Socio-Economic Rights 266
5.4.1 ITA, SDA & Socio-Economic Rights 267
5.4.1.1 ITA: Nature and Jurisdictional Basis 268
5.4.1.2 ITA, Sovereign Debt and Socio-Economic Rights: Case Review 275
5.4.1.2.1 Abaclat & Others v Argentina 275
5.4.1.2.1.1 The Facts and Parties' Positions 275
5.4.1.2.1.2 The Decision & the Dissenting Opinion 278
5.4.1.2.1.3 Socio-Economic Rights & the Abaclat Case 282
5.4.1.2.2The Case of Ambiente Ufficio v Argentine Republic (Ambiente Case) 285
5.4.1.2.2.1 The Facts and Parties' Positions 285
5.4.1.2.2.2 The Decision & Dissenting Opinion 286
5.4.1.2.3 Giovanni Alemanni and Others v Argentine Republic (Alemanni Case) 290
5.4.1.2.3.1 The Facts and Parties' Positions 290
5.4.1.2.3.2 The Decision 293
5.4.1.2.4 The SDC Cases: EDFI v Argentina (EDFI Case), Urbaser v Argentina (Urbaser Case), Impregilo v Argentina (Impregilo Case) & Sempras v Argentina (Sempra Case) 295
5.4.1.2.4.1The EDFI Case 295
5.4.1.2.4.2 The Impregilo Case 304
5.4.1.2.4.2 The Urbaser Case 305
5.4.1.2.4.2. The Sempra Case 311
5.4.1.2.5 Postova Banka AS & Anor v Hellenic Republic (The Postova Banka Case) 313
5.4.1.2.5.1 Facts & Parties' Positions 313
5.4.1.2.5.2 The Decision 314
5.4.1.2.5.3 Socio-Economic Rights in the Postova Banka Case 317
5.4.1.2. 6.Gramercy v Peru (The Gramercy Case) 317
5.4.2 Human Rights-based SDAs 318
5.5 Discerning the Attitudes of the Courts and Arbitral Tribunals 320

5.5.1 Pro-creditor Disposition and other Legitimacy Issues 320
5.5.2 Rising Holdouts and Vulture Funds Arbitrations 321
5.5.3 Norm Conflict & VCLT Principles of Treaty Interpretation 322
5.5.3 Socio-Economic Rights, Defence of Necessity & Counterclaims 323
5.5.4 Creditors' Socio-Economic Rights Responsibilities 325
5.6 Conclusion 326

Chapter Six: Reflections & Conclusions 329

6.1 Introduction 329
6.2 Re-Visiting the Research Thesis 329
6.3 Summary 334
6.4 Prioritising Socio-Economic Rights: The Challenges 337
6.4.1 The Public-Private Divide 337
6.4.2 Conceptual Vacuum 338
6.4.3 State-Centrism 338
6.4.4 Public-Private Divide and Human Rights 339
6.4.5 Disorder in Adjudicatory Jurisprudence & Institutional Illegitimacy 339
6.4.6 The Causality Question 340
6.4.7 Rights-holders as Creditors: The Cases of Pensioners & SWFs 340
6.4.8 Other Hurdles 341
6.5 Recommendations 341
6.5.1 Sovereign Debt Governance as a 'Modified' Global Law 341
6.5.1.1 Statutory Recommendations 342
6.5.1.2 The Incremental Approach for SDR 344
6.5.1.3 The BHR Approach 344
6.5.1.4 The BIT Approach 347
6.5.2 Rethinking Global Economic Governance 347
6.5.3 Reforms through Contracts 348
6.6 Conclusion 348
6.7 Contributions to Knowledge 351
6.8 Questions for Further Research 352
Bibliography 353

ABBREVIATIONS

A
ACHR - American Convention on Human Rights
ACHR - American Convention on Human Rights
ACIL - American Society of International Law
ACrtHPR - African Court on Human and Peoples Rights
ADB - Asian Development Bank
AEEBRD - Agreement Establishing the EBRD
AfDB - African Development Bank
African Charter - African Charter on Human and Peoples Rights
AFRODADD - African Forum and Network on Debt and Development
AIIDB - Asian Infrastructure Investment and Development Bank
AIR – All Indian Report
AJIL - American Journal of International Law
B
BCBS – Basel Committee on Banking Supervision
BHR - Business and human rights
BIS - Bank for International Settlements
BIT - Bilateral Investment Treaties
BPSDRP - Basic Principles on Sovereign Debt Restructuring Processes
BRICS - Brazil, Russia, India and South Africa
C
CAC - Collective Action Clause
CADTM - Committee for the Abolition of Illegitimate Debts
CERD - Convention for the Elimination of Racial Discrimination
CERDS - Charter for Economic Rights and Duties of States
CESCR - Committee on Economic, Social and Cultural Rights
CETA - EU-Canada Comprehensive Economic and Trade Agreement
CHRR - Corporate Human Rights Responsibility
CIL - Customary International Law
CPR - Civil and Political Rights
CRDS - Convention on Rights and Duties of States
CSOs - Civil Society Organisations
CSR - Corporate Social Responsibility
CUP - Cambridge University Press
CRC – Child Rights Convention
D
DRC – Democratic Republic of Congo
DSA - Debt Sustainability Assessments
DSM - Dispute Settlement Mechanism
E
EBRD - European Bank for Reconstruction and Development
EC - European Commission
ECB - European Central Bank
ECB - European Central Bank
ECHR – European Convention on Human Rights
ECJ - European Court of Justice
ECOSOC - Economic and Social Council of the UN
ECPHRFF - European Convention for the Protection of Human Rights and Fundamental Freedoms
EWHC – England and Wales High Court

EWCA - England and Wales Court of Appeal
ECrtHR - European Court of Human Rights
ECSR – European Committee on Social Rights
EJIL – European Journal of International Law
EMEs - Emerging Market Economies
EP - Equator Principle
ESCR – Economic, Social and Cultural Rights
ESG - Environmental, Social and Governance
ESM - European Stability Mechanism
EU - European Union
EURODAD - European Network on Debt and Development

F

FDI - Foreign Direct Investment
FET - Fair and Equitable Treatment
FIAN – Food Information and Action Network
FSB - Financial Stability Board
FTA - Free Trade Agreement

G

G 77 - Group of 77
G20 - Group of Twenty most advanced Economies
G7 - Group of Seven most Advanced Economies
GATT - General Agreement on Tariff and Trade
GC - General Comments issued by CESCR
GCC - Global Citizenship Commission
GDP - Gross Domestic Products
GFC - Global Financial Crises
GPBHR - Guiding Principles on Business and Human Rights

H

HIPC - Heavily Indebted Poor Countries
HRC - Human Rights Committee
HRIA - Human Rights Impact Assessment

I

IACHR - Inter-American Court of Human Rights
IBRD - International Bank for Reconstruction and Development
ICA - International Commercial Arbitration
ICC - International Criminal Court
ICCPR - International Covenant on Civil and Political Rights
ICESCR - International Covenant on Economic, Social and Cultural Rights
ICJ - International Court of Justice
ICMA - International Capital Markets Association
ICSID – International Centre for the Settlement of Investment Disputes
ICSID Convention - Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
IDA - International Development Association
IDB - Inter-American Development Bank
IEL - International Economic Law
IFI - International Financial Institution
IGO - Inter-Governmental Organisation
IHRL International Human Rights Law
IIA - International Investments Agreements
IIC – International Investment Claims
IIF - Institute of International Finance
IIL - International Investment Law
ILA - International Law Association
ILC - International Law Commission

ILM – International Legal Materials
ILO - International Labour Office
IMCC - International Mixed Claim Commissions
IMF – International Monetary Fund
IPA - International Public Authority
ISDS - Investor-State Dispute Settlement
ISO - International Standardisation Organisation
ITA - Investment Treaty Arbitration
ITLOS - International Tribunal for the Law of the Sea

J

JDC - Jubilee Debt Campaign

L

LATINDAD - Latin American Network on Debt and Development
LDC – Less Developed Countries
LP - Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1987

M

MDB - Multilateral Development Banks
MDGs - Millennium Development Goals
MDR - Multilateral Debt Relief
MFN - Most Favoured Nation
MG – Maastricht Guidelines on Extraterritorial Application of Economic, Social and Cultural Rights
MNC - Multinational Corporation

N

NAFTA – North American Free Trade Agreement
NGO – Non-governmental Organisation
NIEO - New International Economic Order
NRTBHR - Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights
NSAs - Non-State Actors
NT - National Treatment

O

OAS - Organisation of American States
OAU - Organisation of African Unity
ODA - Official Development Assistance
ODI - Overseas Development Institute
OECD – Organisation for Economic Cooperation and Development
OHCHR – UN Office of the High Commission on Human Rights
OP - Optional Protocol
OUP - Oxford University Press

P

PCA – Permanent Court of Arbitration
PCG - Principles Consultative Group
PCIJ – Permanent Court of International Justice
PRI - Principles of Responsible Investment
PRSLB - Principles for Responsible Sovereign Lending and Borrowing
PRSP - Poverty Reduction and Strategy Papers

Q

QB – Queen's Bench

R

RDBs - Regional Development Banks
RIAA - Reports of International Arbitral Awards

S

SAPs - Structural Adjustment Programmes

SDA - Sovereign Debt Adjudication
SDC - Sovereign Debt Crisis
SDD - Sovereign Debt Defaults
SDGs - Sustainable Development Goals
SDR - Sovereign Debt Restructuring
SDWG - Sovereign Debt Workout Guide
SERAC - Social and Economic Rights Action Centre
SGSR - Secretary-General's Special Representative on Business and Human Rights

T

TTIP - Transatlantic Trade and Investment Partnership

U

UDHR - Universal Declaration on Human Rights
UK - United Kingdom
UN – United Nations
UNCHR - UN Commission on Human Rights
UNCITRAL - UN Commission on International Trade Law
UNCTAD - UN Conference on Trade and Development
UNCTC - UN Commission on Transnational Corporations
UNDESA - UN Department of Economic & Social Affairs
UNDP - UN Development Programme
UNEP - UN Environment Programme
UNESCO - UN Educational, Scientific and Cultural Organization
UNGA - UN General Assembly
UNGC - UN Global Compact
UNHRC - UN Human Rights Council
UNSC - UN Security Council
UNTS – UN Treaty Series
USA – United States of America

V

VCLT - Vienna Convention on the Law of Treaties 1969

W

WB - World Bank
WCED - World Commission on Environment and Development
WCHR - World Conference on Human Rights
WLR - Weekly Law Report
WHO - World Health Organisation
WTO - World Trade Organisation

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ABSTRACT

Recurring sovereign debt crises across the world have consistently pushed indebted countries into 'obligatory dilemmas', increasingly putting the socio-economic rights of debtors' citizens in jeopardy and creating a doctrinal tension between debtors' contractual and treaty obligations. Even the minimum core obligations of state parties to the International Covenant on Economic, Social and Cultural Rights have been losing their functional significance as a result of the recurring circles of debt crises. Therefore, using doctrinal methodology, this research interrogates the extent to which contractual obligations may be honoured where socio-economic rights of debtor's citizens face clear danger of non-realisation. Unlike previous studies on the subject, this research examines the place of socio-economic rights in all the critical phases of sovereign debt governance using reflexivity of global law as conceived by contemporary transnational legal theorists. It argues that the recurring circles of debt crises are linked to the continuing influence of the dominant private law paradigm in sovereign debt governance. This, the research further argues, could be seen in, first, the creditors' persistent resistance to a statutory framework on restructuring sovereign debt, the rising trend of creditor litigations, the strengthening of the contractual framework by the creditor-controlled law creating and enforcing institutions, the doctrinal wedge between the public and the private realms and state-centrism under which private entities are largely seen as incapable of bearing socio-economic rights obligations. Second, the creeping effects of the investment treaty regime into the sovereign debt regime demonstrates the penetrating influence of creditor-diktat in sovereign debt governance. The research further argues that socio-economic rights can qualify as 'essential interest' to ground debt moratorium under customary international law, treaty law and evolving soft laws on sovereign debt. After reviewing relevant cases, the research observes the growing relevance of socio-economic rights jurisprudence in sovereign debt adjudication. It makes a case for the prioritisation of socio-economic rights considerations in debt contracting, restructuring and adjudication through a more concrete recognition of creditors' socio-economic rights responsibilities. This can be done by recognising the sovereign debt regime as a form of global law which de-emphasises the public-private dichotomy. The research suggests, among others, some statutory reforms to concretely embrace socio-economic rights considerations in contracting and restructuring of sovereign debt and in adjudication of sovereign debt claims by way of a specific treaty, or by taking advantage of both the evolving business and human rights treaty-making process and the incremental soft law development process. In this regard, it suggests a specific recognition of creditors' standstill obligation to respect socio-economic rights of debtors' citizens during debt crisis.

CHAPTER ONE
INTRODUCTION

1.1 GENERAL INTRODUCTION

This research seeks to locate socio-economic rights within the sovereign debt regime. Sovereign debt and socio-economic rights have, over the years, become critical themes in the development discourse.[1] Their interaction is both puzzling and complex. It is puzzling because sovereign debt is a double-edged sword: On the one hand, it can, depending on multiple variables, improve citizens' well-being; and, on the other hand, it can 'impair a government's ability to deliver essential services to its citizens'.[2] The complexity arises from the multiplicity of interests and the multi-level governance spaces within which the regime operates. Complexity also arises from the competing theoretical paradigms undergirding the law and economics of sovereign debt. This has created a 'strained marriage' between public debt and private contracts.[3] The current legal vacuum on sovereign debt restructuring (SDR) is a reflection of the continuing influence of the dominant private law paradigm over other competing paradigms. The former paradigm has advanced and sustained a fictional public-private divide that prioritises debtors' contractual obligations over their other treaty obligations.[4] This, the research will show, is nourished by a formalistic, privity-based, two-sided creditor-debtor matrix which is incompatible with the multiplicity of interests visible in the contracting, restructuring and enforcement of sovereign debts.

Interestingly, at the centre of both socio-economic rights and sovereign debt are the citizens/rights-holders. Despite the competing demands on their limited resources,

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[1] United Nations (UN) Inter-agency Task Force on Financing for Development 2019. *Financing for sustainable development report,* 117-126 https://developmentfinance.un.org/sites/developmentfinance.un.org/files/FSDR2019.pdf (accessed 29 September 2019). See also World Conference on Human Rights 1993. *Vienna Declaration and Programme of Action* (adopted on 25 June 1993):paras 1 & 9-12 (calling 'upon the international community to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the Governments of such countries to attain the full realization of the economic, social and cultural rights of their people').

[2] Cecchetti SG et al 2011. 'The real effects of debt', 3-17 https://www.bis.org/publ/othp16.pdf (accessed 29 September 2017).

[3] Gelpern 2018:28.

[4] An example of this 'creditor priority norm' is Spain's 2011 constitutional amendment which provides that '[l]oans to meet payment on the interest and capital of the state's public debt shall always be deemed to be included in budget expenditure and their payment shall have *absolute priority*'. See Section 135.3. Constitution of the Kingdom of Spain 2011. Following its recent debt crisis, Greece also adopted legislation which mandates 'servicing of the public debt at a *priority*, in order to maintain and strengthen fiscal stability'. See Law 2362/1995, Article 1A, as amended 10 April 2012.

states have obligations to deliver essential services to their citizens. Virtually all prominent theories of the nature and evolution of modern states, from Hobbes' to Habermas', indicate that states' obligations are inextricably linked to the interests of their citizens. In the words of Rasmussen, 'a country is simply an investment vehicle for its citizens … [and the] needs of a state's citizens is (sic) actually part of the reasons why sovereign borrowing is justified in the first place'.[5] This creates a fiduciary relationship between government and its citizens.[6] Therefore, there is constant pressure to fulfil the citizens' socio-economic rights while, simultaneously, performing other governmental commitments. In particular, there is the need to prioritise the fulfilment of certain governmental obligations especially during economic crisis.

In these circumstances, borrowing becomes a viable option. Borrowing stimulates the economy by providing liquidity; it enables a state to invoke its future assets at a given time and helps to level consumption across generations because 'a transfer from future to current generations can raise society's intertemporal welfare'.[7] The assumption is that, with improved technology and more capital, the future generation will be richer than the present generation.[8] Thus, a state may borrow during an economic downturn against the potential prosperity of the future.[9] This invariably raises issues of inter-generational equity in the sovereign debt scheme. In addition, borrowing is not simply an option. It has somehow become an existential necessity for many countries.[10]

Economists have shown the correlation between debt and economic growth.[11] Without borrowing, a country's economy is likely to stagnate; but excessive debt often slows economic growth.[12] It leads to panic and the usual adoption of contractionary policies by governments.[13] According to Cecchetti et al, 'higher nominal debt raises real

[5] Rasmussen RK 2004. 'Integrating a theory of the state into sovereign debt restructuring', 18-19 http://ssrn.com/abstract=558266 (accessed 20 May 2017).
[6] Oyola & Sudreau 2013:213-235.
[7] Cecchetti et al 2011:3.
[8] Cecchetti et al 2011:3.
[9] Rassmussen 2004:19.
[10] Campbell & Wheatcroft 2018. 'The debt of nations: A policy insights', https://www.icaew.com/-/media/corporate/files/about-icaew/what-we-do/policy/public-finances/debt-of-nations.ashx?la=en (accessed 28 September 2019).
[11] Cecchetti et al 2011:3-5.
[12] Rainhart & Rogoff 2010:573–578; IMF 2016. 'Public debt and growth', https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Public-Debt-and-Growth-24080 (accessed 20 August 2018).
[13] Cecchetti et al 2011:3-4.

volatility, increases financial fragility and reduces average growth'.[14] Finding the 'tipping point' is, however, a difficult endeavour partly because of the complex interactions of multiple economic variables.[15]

Importantly, excessive indebtedness is not a recent phenomenon. Over the past couple of centuries, several countries have experienced vicious circles of sovereign debt crises (SDCs) as a result of excessive, unsustainable debts. These often derail the fulfilment of socio-economic rights commitments of such indebted states. In 2010, an International Law Association (ILA) Study Group found that almost all sovereign debtors have defaulted over the past century and that sovereign debt defaults (SDDs) tend to occur at the rate of one to three in every year.[16] A study covering 66 countries also found that between 1350 and 2006, 'virtually all countries have defaulted at least once and many several times on [their] external debt'.[17] Today's wealthy countries were, at a point, serial defaulters. For instance, between 1500 and 1800, Spain defaulted six times while France defaulted eight times and, in the latter case, default episodes were often accompanied by executions of private creditors (ie a crude form of debt restructuring called 'bloodletting') in order to restore equilibrium in the economy.[18] England defaulted in 1340, 1472 and 1594.[19] In addition, between 1800 and 2006 many countries were in default and 'each lull [ie a period of "no default"] has invariably been followed by a new wave of default'.[20] In the periods 1820-1840 and 1930-1950, half of all countries in the world were in debt default.[21] Territories were lost on account of defaults, another crude debt resolution method.[22] Forced receivership and gun-boat diplomacy were the other prominent debt resolution methods employed by creditor nations up to the early part of the 20th century.

[14] Cecchetti et al 2011:3-4.
[15] Caner M et al 2010:63-74.
[16] Sovereign Insolvency Study Group of the International Law Association (ILA) 2010:978-1022, 980. However, Reinhart & Rogoff have shown that, as of 2008, Mauritius had never defaulted on its debts because of high growth rates. See Reinhart CM & Rogoff KS 2008. 'This time is different: A panoramic view of eight centuries of financial crises', 1-123, 15 http://www.nber.org/papers/w13882. (accessed 12 January 2018).
[17] Reinhart & Rogoff 2008:20.
[18] Reinhart & Rogoff 2008:21.
[19] Reinhart & Rogoff 2008:20-21.
[20] Reinhart & Rogoff 2008:3-5.
[21] Reinhart & Rogoff 2008:4.
[22] Reinhart & Rogoff 2008:12.

Following the post-war institutionalisation of international finance, the circles of default reduced. However, this brought further complexities as the number of international creditors increased. The emergence of the International Monetary Fund (IMF), the World Bank (WB) and other multilateral development banks (MDBs) has dramatically changed the sovereign debt landscape. It has also impacted on the realisation of socio-economic rights of debtors' citizens.

In addition, following decades of relative inactivity, bondholders re-entered the debt market in the 1980s. Sovereign wealth funds, banks and the so-called 'vulture funds'[23] all became active in the debt markets, creating a complex debt composition which, invariably, increased the debt management challenges of many sovereign debtors. Informal groupings of creditors began to directly influence the sovereign debt regime especially as it concerned the restructuring processes. The Paris Club, the London Club, the Group of Seven developed countries (G7) and Group of Twenty most advanced economies (G20) are classic examples of players shaping this 'norm-creation' process. In collaboration with international financial institutions (IFIs), creditor nations issued different soft law instruments reflective of the dominant private law paradigm. However, as official and non-official creditors began to cooperate for their common interests, inter-creditor tensions became inevitable. Some official creditors, eg the IMF, began to enjoy a preferred creditor status even without an explicit statutory provision.

Therefore, without a fair statutory restructuring and bankruptcy framework in place, it was not surprising that the pre-Second World War default episodes resurfaced. With fluctuation of commodity prices and rising interest rates, the 1980s-1990s saw another cluster of defaults especially in Africa, Asia and Latin America.[24] Between 1950 and 2010, about 600 cases of SDR were reported.[25] The Russian debt crisis and the

[23] 'Vulture funds' are hedge funds or private equity investors that buy securities in distressed investments such as high yield bonds in or near default or equities that are in or near bankruptcy. They file lawsuits to recover the original amount. Studies have shown that vulture funds generally win their lawsuits. Judgements in 25 of these cases yielded about $1 billion. Since 2004, the number of these cases has doubled, averaging eight cases annually as of 2016. See African Legal Support Facility 2016. 'Vulture funds in the sovereign debt context', https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/ (accessed on 28 June 2018).

[24] Reinhart & Rogoff 2008:24-25.

[25] In fact, combined with past default episodes, some Latin American states spent 40% of their years in a state of debt default as of 2008 while several African countries spent half of their years of existence in the same situation. See Reinhart & Rogoff 2008:28-29.

infamous Argentine debt crisis of the early 2000s were the result of another cluster of defaults. In particular, some of Argentina's private creditors opened a 'Pandora's Box' in sovereign debt adjudication (SDA) by invoking investment arbitration in their efforts to enforce debt claims against Argentina.[26] Unfortunately, while SDA through investor-state dispute settlement (ISDS) mechanism expands creditors' space for the recovery of debt claims, it, however, narrows the debtors' options. Nevertheless, Argentina advanced, among others, a host of socio-economic rights-related defences and counter-claims. This further re-ignited the controversy regarding the legitimacy of ISDS.

Following concerted campaigns for 'debt justice' around the world, creditor nations and multilateral development institutions launched two ambitious debt relief programmes in the form of the Multilateral Debt Relief (MDR) and the Heavily Indebted Poor Countries (HIPC) initiatives. The issue of debt relief also found expression in different United Nations (UN) declarations and resolutions, including the defunct Millennium Development Goals (MDGs) and their successors, the Sustainable Development Goals (SDGs). In addition, human rights friendly standards have emerged over the years as a result of the works of UN in this area.[27] Some of these standards recognise debtors' socio-economic rights obligations and the philosophies underlying these rights.

Despite these developments, especially the positive effects of the MDR and the HIPC initiatives on the finances of sovereign debtors, the debt problem persists. Indeed, following the 2008 global financial crisis (GFC), more waves of default were recorded. The Euro debt crises (2008-2015) exposed the vulnerabilities of developed economies arising from the devastating effects of contagion in a highly integrated currency union. Greece, Ireland, Italy, Portugal and Spain were particularly affected and, consequently, their citizens' socio-economic rights were 'deprioritised'.[28] Like the Argentine debt crisis, the Greek debt crisis also enriched the sovereign debt jurisprudence as thousands of creditors sought to expand the boundaries of SDA

[26] Waibel 2007:711-759.
[27] See for instance, UN General Assembly (UNGA) 2015. *Basic Principles on Sovereign Debt Restructuring Processes* (adopted on 10 September 2015); United Nations Conference on Trade and Development (UNCTAD) 2012. *Principles on Responsible Sovereign Lending and Borrowing* (amended on 10 January 2012); UN Human Rights Council (UNHRC) 2012. *Guiding Principles on Foreign Debt and Human Rights* (adopted on 5 July 2012).
[28] See fn 4 above.

through invocation of the investment arbitration regime. The dominant private law paradigm incentivised this and other forms of international and transnational debt litigations. Interestingly, socio-economic rights found another entry point into the sovereign debt regime through some of these litigations.

Against the above background, this research interrogates the dominant private law paradigm in order to locate socio-economic rights in the critical phases of the sovereign debt regime.

1.2 STATEMENT OF PROBLEM

Ordinarily, the notion of 'sovereign debt governance' suggests the existence of a well-structured, balanced and credible framework designed to fairly respond to or address the diverse and often conflicting concerns, tendencies and interests of primary stakeholders. Contrary to this supposition, however, the current regime for sovereign lending and borrowing is deeply flawed and fragmented, institutionally uncoordinated and skewed in favour of certain interests and, consequently, non-responsive to the interests of some of its primary stakeholders. Indeed, there is a universal consensus that the regime suffers from three major problems: lack of institutional structure that can guarantee legal certainty and adjudicatory coherence in the management of debt crisis; unfair practices which frequently reveal, first, a serious bad faith on the part of stakeholders and, second, an apparent lack of transparency and due process especially in creditor claims (eg vulture litigations) and in the negotiation and restructuring of debts; and the efficiency deficit in SDR otherwise called the 'too little too late' problem which largely arises because of widespread uncertainties, undefined debt resolution mechanism and the fears of contagion and moral hazard.[29] According to UNCTAD, 'the lack of clear, universally applicable rules and principles creates uncertainty and seriously disrupts creditor coordination in sovereign debt restructuring processes'.[30]

Therefore, it is not surprising that parties would seek to use (and shape) this fragmented regime to their respective advantage. Without an international institution for debt resolution, multiple adjudicating bodies (national and supranational institutions) have been turned into sovereign debt crisis management bodies. These

[29] UNCTAD 2015:3-4.
[30] UNCTAD 2015:3-4.

include domestic courts, regional courts, international tribunals, the G7, the IMF, the Paris Club, the London Club and, to a lesser extent, some UN-based institutions like the United Nations Conference on Trade and Development (UNCTAD), the United Nations General Assembly (UNGA) and the United Nations Human Rights Council (UNHRC).

In the light of the above, situating socio-economic rights within this regime would be problematic. Nevertheless, the multiplicity of interests characteristic of sovereign debt plus the growing movement towards sustainable debt for development as contained in numerous multilateral instruments (eg SDGs), provide an important window for cross-regime interactions.[31] Indeed, it is now widely recognised that a sustainable debt management framework is critical for any indebted countries to minimise 'costs for economic and social rights and development'.[32]

In addition, the recurring waves of sovereign debt crises, as indicated above, have brought to the fore the tension between indebted countries' contractual obligations to their creditors and their socio-economic rights obligations to their citizens. This, in the context of a debt crisis, invariably raises fundamental policy issues among which is the status of the socio-economic rights of debtor's citizens. The historical evolution of this tension is striking. Since the adoption of the Universal Declaration on Human Rights (UDHR) in 1948, socio-economic rights have become universal values embedded in, and protected by, various international legal instruments including the ICESCR. These instruments defined and directly imposed legal obligations on states to take steps towards the realisation of these rights. They, however, recognise the centrality of resource availability for this purpose.

Interestingly, it was around the same period that the structural foundations for modern international financial and investment regimes were laid. Nonetheless, since its establishment in the aftermath of the Second World War, the traditional creditor nations have managed to influence the structure of the international financial system in a manner that prioritises building, reinforcing and strengthening the contractual mechanisms for creditor protection. Despite its unsettled character, the investment treaty regime has been controversially invoked to provide additional protections to

[31] See Chapter 4 for an extensive discussion on this.
[32] UNCTAD 2015:6.

certain classes of creditors. The private law paradigm supports these bases of creditor protection thereby empowering creditors while, at the same time, disempowering debtors.

Indeed, in response to the Eurozone debt crisis, the private contractual governance framework had been reformed and strengthened to, supposedly, address the emerging holdout and sovereign debt profiteering cultures.[33] However, as noted earlier, sovereign debt is not an ordinary private debt. As the research will argue subsequently, 'reforming' this fragmented, creditor-driven regime in the shadow of private debt contracts has only deepened the 'doctrinal misalignment' visible in modern sovereign debt governance. Thus, despite the so-called 'reforms', sovereign debt-related problems still persist: rising debt profiles, looming debt crises, debt unsustainability and distress. For instance, in 2018, global debt stocks stood at $244 trillion out of which about $66 trillion were debts owed by sovereigns.[34] The latter figure stood at $37 trillion a decade earlier.[35] Between 2013 and 2018, developing countries' debt grew from 36 per cent of their Gross Domestic Products (GDP) to 51 per cent.[36] This surging debt profile of countries poses significant risks to global financial stability, and could potentially constrain the fiscal capacity and policy space of indebted countries.[37] Indeed, sovereign bond issuances by African countries have been projected to increase in the coming years.[38]

Evidently, therefore, repeated or serial SDDs have become the norm in international finance. In the words of Reinhart and Rogoff there is no such thing as 'This Time is

[33] IMF 2016. *Strengthening the contractual framework to address collective action problems in sovereign debt restructuring.* Washington: IMF; UN Department of Economic & Social Affairs (UNDESA) 2017. 'Technical Study Group Report on sovereign debt restructuring: Further improvements in the market-based approach', 4-18. https://www.un.org/esa/ffd/wp-content/uploads/2017/09/EGM_sovereign-debt_Technical-study-group-report-30Aug2017.pdf (accessed 13 February 2018).
[34] Oguh C & Tanzi A 2019. 'Global debt of $244 trillion nears record despite faster growth', https://www.bloomberg.com/news/articles/2019-01-15/global-debt-of-244-trillion-nears-record-despite-faster-growth (accessed 3 March 2019);
[35] Oguh & Tanzi 2019.
[36] UN Inter-agency Task Force on Financing for Development 2019:118.
[37] UN DESA 2019. 'World economic situation and prospects: Monthly briefing No 124', https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/wesp_mb124.pdf (accessed 17 September 2019).
[38] UN DESA 2019:2-4. As of 2018, eight African countries were in debt distress while 16 were on the verge of distress. See Overseas Development Institute (ODI) 2018. *Africa debt rising conference: Introduction*. London: ODI 2. Mustapha S & Prizzon A 2018. 'Africa's debt rising: How to avoid a new crisis', https://www.odi.org/sites/odi.org.uk/files/resource-documents/12491.pdf (accessed 11 June 2019).

Different'.[39] Unfortunately, this recurring trend had repeatedly derailed efforts towards the full and progressive realisation of socio-economic rights across the world. The recent reform efforts only reinforced 'the strained marriage between public debt and private contracts'.[40] As indicated above, the absence of formal bankruptcy procedures is a manifestation of this misalignment. Of course, economic variables such as fluctuating commodity prices, global capital flows, rising interest rates and domestic political economy are critical contributing factors.[41] Constitutional arrangements of countries might also play a role in the frequency of defaults.[42] However, all these factors may not be unconnected to the private law paradigm.

This paradigm has built a creditor-biased framework that has persistently rejected propositions for a statutory framework, forcing indebted countries into a dilemma of simultaneously satisfying conflicting obligations at a given time. This is the crux of the present research. The dominant paradigm has consistently ignored interests, including those of debtors' citizens, outside the bilateral creditor-debtor matrix built in the shadow of private debt relationship. Consequent upon this narrow relational construct, the dominant private law paradigm leaves a legal vacuum and a governance deficit in the restructuring of sovereign debts, creating deep uncertainties and encouraging unrestrained creditor opportunism and 'cherry-picking' in the enforcement of debt claims by creditors. The UN Commission of Experts on the Reform of the International Monetary and Financial System observes that 'the existing system of protracted, creditor-biased resolution of sovereign debt crises is not in the global public interest and far from the interests of the poor'.[43]

It was partly because of this private law paradigm that creditors' socio-economic rights responsibilities received little attention in the sovereign debt literature despite developments elsewhere, especially in the area of business and human rights (BHR). Indeed, while debtors' socio-economic rights responsibilities have been well established, creditors' responsibilities have continued to generate controversies.

[39] Reinhart & Rogoff 2008:2.
[40] Gelpern 2018:22.
[41] Reinhart & Rogoff 2008:6, 30 & 39; Eberhardt M 2018. '(At least) four theories for sovereign default', https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=CSAE2018&paper_id=1125 (accessed 20 April 2019).
[42] Kohlscheen 2007:713-730.
[43] UNGA 2009. 'Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System', 122. https://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf (accessed 10 February 2019).

Unsurprisingly, many creditors have consistently and fiercely opposed the idea of making clear provisions setting out the socio-economic rights responsibilities of creditors in a concrete legal form. The efforts of the UNHRC have only yielded a soft-law instrument, ie the UN Guiding Principles on Foreign Debt and Human Rights (GPFDHR).

In addition, the recurrence of debt crises raises fundamental concerns about the current creditor-determined debt sustainability framework, the politics of 'debt diplomacy',[44] coordination and other collective action problems visible in contemporary SDR. It also rekindles concerns regarding the important but missing elements of transparency, legitimacy and fairness in the sovereign debt regime. Absence of these critical governance elements incentivised irresponsible lending and borrowing behaviours. Indeed, cases abound in which private speculators profited from a debt crisis while the debtor struggled to satisfy other competing, even more compelling, domestic and international obligations.[45] The presumed beneficiaries of such debts, ie the debtor's citizens, may have little or no voice in the negotiation, contracting, restructuring and repayment of such debts.[46] Inter-creditor relations have similarly suffered as official creditors enjoy a 'preferred creditor status', a position that 'is definitely at severest odds with statutory duties, good governance, and the Rule of

[44] Bilateral creditors, particularly USA and China, have been competing over loans to African countries. See Africa News 2018. 'US warns African nations against Chinese debt, offers 'sustainable alternative', https://www.africanews.com/2018/07/17/us-warns-african-nations-against-chinese-debt-offers-sustainable-alternative// (accessed 11 June 2019). See also *Law Debenture Trust Corp plc v Ukraine* 2017 EWHC 655 (a case involving Russia and Ukraine).

[45] See for instance, *FG Hemisphere v Democratic Republic of Congo* 2011 637 F 3d 373 (claimant got over $200 Million judgement); *Donegal International v Zambia* 2007 *Lloyd Report* 397 (claimant got a $15 million judgement); *Kesington International v Congo Republic* 2008 *Weekly Law Report* 1144 (claimant got $118 million judgement).

[46] The recent case of Mozambique is instructive here. Without the necessary parliamentary approval, the government of Mozambique guaranteed an external loan of $760 million in favour of its state-owned company in 2014. The amount of this 'secret debt' never made it to Mozambique yet $90 million was paid as banks' fees and the lenders sold the debt on the secondary market. Upon default in 2016, the value of the debt fell. Thereafter, the government reached a one-sided debt restructuring agreement with four firms holding 60% of the bonds. This agreement literally allows the bondholders to get about 270% profits despite the illegitimacy or, more appropriately, illegality of the debt. See Jones T 2018. 'Outrageous Mozambique debt deal could make 270% for speculators', https://jubileedebt.org.uk/blog/outrageous-mozambique-debt-deal-could-make-270-profit-for-speculators (accessed 25 August 2019). Undoubtedly, secret debts are not peculiar to Mozambique. Indeed, around the same period, certain sovereign debt obligations were also not reflected in the government debt management systems of the Republic of Congo, Ecuador, Zambia and Togo. See IMF & World Bank 2018. 'G 20 note: Improving public debt recording, monitoring and reporting in low and lower middle income countries', https://www.imf.org/external/np/g20/pdf/2018/072718.pdf (accessed 5 July 2019).

Law'.[47] According to Raffer, these creditors are supposed to grant reliefs before any impending liquidity crisis hit an indebted member country. Had the IFIs been adopting this rather than the 'preferred creditor' approach, they could have 'defused quite a few crises, and saved the poor much misery, and other creditors a lot of money'.[48]

Finally, as the world grappled with the common challenges associated with debt crisis, UN's organs and agencies have become deeply polarised regarding the way forward. Expectedly, official and private creditors have rejected several UN-led reform initiatives. They prefer a soft-law approach. The results include uncoordinated issuance of soft-law instruments. Beside the regulatory confusion arising from the issuance of these instruments, this approach tends to amplify and strengthen the contractual governance framework. Interestingly, some elements of socio-economic rights have been incorporated into some of these soft laws, eg the GPFDHR. Thus, as creditors expand their debt recovery claims to the investment treaty regime, some arbitral tribunals have been confronted with some socio-economic rights related defences and counter claims.[49] Unsurprisingly, the interpretations of these tribunals are far from coherent, raising more questions than answers.

1.3 RESEARCH QUESTIONS

The overarching research question is: What is the place of socio-economic rights in sovereign debt governance? In answering this broad question, the research further raises and examines the following secondary questions:

a. To what extent can debtors' socio-economic rights obligations be prioritised over their contractual obligations to creditors during SDCs?
b. What, if any, are the socio-economic rights responsibilities of international creditors?
c. What is the general attitude of international courts and tribunals towards socio-economic rights of debtors' citizens?

[47] Raffer 2016:249.
[48] Raffer 2016:254.
[49] See the cases reviewed in Chapter 5 especially *Ubaser v Republic of Argentina* 2012 IIC 969.

1.4 AIM AND OBJECTIVES

As noted above, the principal aim of this research is to locate socio-economic rights in all the critical phases of the sovereign debt regime. In other words, it will determine the status of socio-economic rights from the points of conception and negotiation to the points of execution, renegotiation/restructuring and adjudication.

The following are the main objectives of this research:

a. To analyse the status of indebted countries' citizens and their socio-economic rights in contemporary sovereign lending and borrowing under international law.
b. To examine the life-supporting and dignity-enhancing functions of socio-economic rights in the context of the evolving BHR regime in order to provide the basis for creditors' socio-economic rights responsibilities in sovereign debt governance.
c. To trace the historical evolution of the frequent tension between debtors' socio-economic rights obligations and their contractual obligations in order to determine the extent of creditor-bias especially in the current practices for the restructuring of sovereign debt.
d. To critique the extent to which the existing SDR frameworks (including the specific contractual governance reforms designed to strengthen these frameworks) either embraced or dispensed with socio-economic rights or their underlying philosophies.
e. To determine the attitudes of sovereign debt adjudicators towards socio-economic rights and the contributions of these adjudicators towards developing a jurisprudentially coherent sovereign debt regime.
f. To make plausible theoretical propositions and policy recommendations to concretely situate socio-economic rights within a fundamentally redefined sovereign debt regime.

1.5 JUSTIFICATIONS

The first justification for this research was the compelling desire to find a fair, meaningful, sustainable and socio-economic rights-sensitive governance framework to address the recurring circles of debt crises around the world. History has shown the

devastating impacts of debt crises on the realisation of socio-economic rights in indebted countries.[50] Indeed, these rights have, nearly always, been the first targets of debt crisis-induced austerity (ie the reactionary policy of fiscal consolidation and other structural economic reforms including labour market liberalisation and privatisation of public enterprises).[51] The frequent relegation of these rights and the consequent prioritisation of contractual obligations to creditors during debt crisis had triggered policy debates among relevant stakeholders including international institutions such as the IMF, the WB and the UN. As noted earlier, no consensus has, however, emerged on this issue. Thus, the fragmentations and legal uncertainties alluded to above would continue unless inquiries of this nature are undertaken to, among others, offer legal and policy recommendations on the way forward.

The second and perhaps most important justification concerns the literature gaps which the research has attempted to address. The first gap relates to the theoretical underpinnings and the underlying legal paradigm that have been informing, shaping and influencing the relationship between socio-economic rights and the sovereign debt regime. Most scholars in this area tend to build their theoretical analysis upon either the dominant private law paradigm or the public law paradigm thereby ignoring other analytic premises that may offer alternative explanations reflecting the multiplicity of actors and of interests in the negotiation, contracting, execution and restructuring of sovereign debts. Accordingly, some scholars paid more attention to the issues of legality,[52] some paid attention to the issues of debt management,[53] some paid attention to the issues of legitimacy,[54] and some focused almost exclusively on the history, economics and politics of sovereign debts.[55] Regardless of these thematic variations, however, the predominant understandings of the sovereign debt regime mostly reflect the private law paradigm.[56]

Despite the inadequate scholarly attention devoted to the relationship between socio-economic rights and the sovereign debt regime, a few scholars have explored this

[50] Lumina 2014:255-254; Mills 2018:302–322; Wills & Warwick 2016:629-666.
[51] McBride 2019:1; Krajewsky M 2012. 'Human rights and austerity programmes' 1-15, http://ssrn.com/abstract=2199625 (accessed 20 June 2018).
[52] Michalowsky 2007:3-19; Wong 2012:5-27.
[53] Lastra & Bucheit 2014:2-5.
[54] Lienau 2014:3-16.
[55] Greayer 1978:297-318; Hager 2016:1-12; Das et al 2011:357-359; Anderson et al 2011:383-385.
[56] Bianco 2017:3-30.

issue. For instance, the UNHRC's Independent Experts on the effects of foreign debt on human rights, especially Lumina and Bohovlasky, have written extensively in this area.[57] Indeed, Lumina was the chief architect of the GPFDHR.[58] Bohovlasky built upon Lumina's works and, specifically, articulated relevant guiding principles in the areas of human rights impact assessment (HRIA), debt sustainability analysis and debt profiteering behaviours of vulture funds and holdouts in the SDR context.[59] Similarly, Bohovslasky was the chief architect of the Guiding Principles on HRIA 2019.[60]

However, neither Lumina nor Bohoslavsky examined the attitudes of adjudicators towards socio-economic rights in sovereign debt adjudication. In addition, their approach was a state-centric, public law oriented. It is understandable, therefore, that they downplayed the practical relevance and application of creditors' socio-economic rights responsibilities in the context of sovereign debt governance. Indeed, the notion of socio-economic rights responsibilities of creditors has not generated the deserved scholarly attention.[61] The present research avoids the exclusivity of these competing paradigms. Instead, as the next section will elaborate, it opts for a proceduralist, reflexive legal paradigm as advanced by Herbamas.[62] This perhaps underscores the significance of the present research.

The second literature gap which the present research attempted to address was the utility of socio-economic rights as a doctrinal bridge linking the evolving international development, BHR, investment treaty and sovereign debt regimes especially through SDAs. These rights have featured in recent arbitral awards. Unfortunately, most scholars tend to limit their discussions to the relationship between two of these evolving regimes. For instance, some have examined the parallels between BHR and sovereign debt;[63] some have examined the relationship between human rights and the

[57] Lumina 2009:289-292; Bohoslavsky & Goldmann 2016:27-36; See the various Reports of the Independent Experts on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, particularly Economic, Social and Cultural Rights, at www.unhcr.org.
[58] Lumina 2009:289-292.
[59] Bohoslavsky 2015: 5-7.
[60] UNHRC 2011:2-10.
[61] Dowell-Jones & Kinley 2011:183-210; Bilchitz 2016:143-170.
[62] Habermas 1995:771.
[63] Bradlow 2016:201-239; Porzecanski AC 2017. 'Human rights and sovereign debts in the context of property and creditor rights' 1-20, https://ssrn.com/abstract=2961289.

investment regime;[64] some have focused more on the relationship between general human rights and sovereign debt;[65] some have focused on debt sustainability principles in the context of the SDGs, MDGs, BHR and other soft laws;[66] and some have focused more on the relationship between poverty, debt and development.[67] Perhaps only a few have explored the linkage between human rights, investment arbitration and sovereign debt regime.[68] For instance, Bantekas has proposed a human rights-based arbitral tribunal for sovereign debt.[69] The works of the latter scholars did not, however, examine the place of socio-economic rights in all the critical phases of the sovereign debt regime. This regime extends beyond debt restructuring. Therefore, carrying out the present inquiry was important given the developments in the BHR regime and the controversial pronouncements emanating from SDAs in the light of multiple governance instruments adopted in this area.

The final literature gap which justified this research concerns the somewhat fleeting attention given to socio-economic rights considerations in the literature dealing with the 'justice' of the sovereign debt regime. Raffer's idea of inter-creditor fairness which rejects the 'preferred creditor' status as contrary to the 'Rule of law' does not contemplate socio-economic rights' considerations other than debt relief and the MDGs.[70] Barry and Tomitova conceived 'fairness' in sovereign debt as an ethical value shaping conducts of agents as expressed in contractual and legal principles governing the debtor-creditor relationship but they did not specifically discuss the values of socio-economic rights in this regard.[71] Suttle's idea of 'international economic justice' which imposes a shared, cooperative obligation on creditors and debtors in the event of crisis does not go far too.[72] Toolz's conception of 'repayment resource' as unavailable for the purpose of implementing socio-economic rights awkwardly carries the traditional notion of 'ownership' in property rights into sovereign debt.[73] Olivares tried to assemble

[64] Simma 2011:573; Desierto 2012:162-183.
[65] Lumina 2009:289-292.
[66] Raffer 2014:36.
[67] Warwick 2018:1-22.
[68] Allen & Overy, 'Holding investors to account for human rights violations through counterclaims in investment treaty arbitration', http://www.allenovery.com/publications/en-gb/Pages/Holding-investors-to-account-for-human-rights-violations-through-counterclaims-in-investment-treaty-arbitration.aspx (accessed 20 June 2018).
[69] Bantekas 2018:1-19.
[70] Raffer 2014:36.
[71] Barry & Timitova 2006:649-694.
[72] Suttle 2016:799-834.
[73] Tooze 2002:232-250.

principles from decisions handed down by domestic and international tribunals without consideration to the values accorded to socio-economic rights by the tribunals.[74] Finally, Waldron's conception of socio-economic rights as values designed to collectively raise the status of the radically disadvantaged does not contemplate other competing interests within the complex context of the sovereign debt regime. Therefore, this research has attempted to address this literature gap by extending the notion of sovereignty over natural resources to the realm of 'resource availability' for the purpose of implementing socio-economic rights obligations during debt crisis.

1.6 METHODOLOGY AND THEORETICAL FRAMEWORK

This research uses the Journal of Juridical Science's referencing style.[75] It adopts the modern approach to doctrinal research which views law and legal institutions contextually as part of a normative interaction process, without the traditional assumptions of 'legal exclusivity'. A 'methodology' consists of steps, strategies, processes, techniques and styles adopted to scientifically and systematically address research questions and to arrive at plausible, credible conclusions. 'Doctrinal methodology' is a process of analysing legal norms and institutions; a process of 'arranging, ordering and systematising legal propositions … through legal reasoning or rational deductions'.[76] According to the Council of Australian Law Deans, 'doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'.[77] It is sometimes called 'doctrinalism', 'law-in-books', 'legal formalism', 'black letter law', 'expository positivism' and 'analytical legal research'.[78] This, as will be examined hereunder, is a reflection of the embeddedness of the liberalist paradigm characterised by, among others, philosophies of rationalism, individualism, legal positivism and its attribute of treating law as a formal, objective and neutral phenomenon.[79] The

[74] Olivares 2005:3-8.
[75] This referencing style cites only author's surname, date and page in the footnotes and banishes further details to the bibliography. Electronic sources and primary materials are, however, cited fully in the footnotes. It also avoids using terms such as 'op cit', 'supra' and 'ibid' in reference to previously cited sources. See University of the Free State's Journal for Juridical Science. 'Author guidelines', https://www.ufs.ac.za/docs/librariesprovider57/kovsiejournals/journal-for-juridical-science/jjs-guidelines-for-authors.pdf?sfvrsn=2 (accessed 20 September 2019).
[76] Jain 1982:341-361, 341.
[77] Hutchinson 2015:130-138.
[78] Manderson & Mohr 2002:159-182.
[79] Hutchinson 2015:130-133.

traditional doctrinal method insists on the 'self-containedness' of law, ie addressing a legal problem devoid of external, non-legal influences especially those rooted in morality and politics. Traditional doctrinal researchers are, therefore, concerned with the law as it *is*, not as it *should* or *could* be.

However, this traditional doctrinal approach has been severely criticised as self-limiting, dogmatic, unrealistic, 'un-normative' and non-responsive to the complexities of modern, globalised societies.[80] Indeed, it is out of sync with the inherent dynamism of legal norms and their institutions. For instance, Salter & Mason rightly observe that:

> Law is never simply positive law that is 'just there' to be studied as a certain type of object. Instead, it is a continuing, dynamic and largely institutional process of re-interpretation not only of doctrine but also of procedural requirements, analytical and rhetorical techniques, specialist craft skills and fact-finding.[81]

Indeed, the character and moral values of international human rights law (IHRL) seem to be incompatible with the traditional doctrinal research assumptions.[82] This is more so given the increasing inequality occasioned by economic globalisation and financialisation. In the words of Bottomley & Bronitt, 'the idea of law as an autonomous body of rules is not only enigmatic and inscrutable. It is also potentially an instrument of injustice, with embedded but out-dated values that oppress a later and more enlightened population'.[83]

Therefore, the modern doctrinal, analytical method reflects broad legal evolutions and processes of normative interactions within societies. It is a subjective, analytic, interpretive and argument-based qualitative method of research which, like the traditional approach, is often employed to produce coherent, consistent research outcomes because of the desire for predictability, certainty and stability in legal norms. Unlike traditional doctrinal methodology, however, this approach views law in its social, economic and political contexts. This is moreso in the international arena where legal norms are often imprecise with multiple actors shaping their developments and application. In this regard, law is better seen as a process because its making, application and enforcement are value-laden with juxtaposition between the positivists

[80] Chui 2007:4.
[81] Salter & Mason 2007:112.
[82] Higgins 1994:vi-3.
[83] Bottomley & Bronitt 2006:v.

and the naturalist approaches. This form of legal analysis would invariably cover extensive textual grounds including treaty and customary international law (CIL) rules, doctrines or principles rooted in case law, soft laws and other legal instruments.[84] It is, therefore, an appropriate method for examining the place of socio-economic rights in sovereign debt governance. Accordingly, this research uses relevant international legal sources including CIL, treaties, general principles of law, UN declarations, resolutions and reports, soft law instruments, arbitral awards, judicial decisions, interpretative human rights instruments and academic works.

Therefore, the overarching research paradigm adopted here does not reflect that of the traditional doctrinal methodology. This is because locating socio-economic rights within the sovereign debt regime would require a critical interrogation and deconstruction of the private law paradigm that has largely controlled this regime for centuries. It is, thus, imperative to identify the research paradigm, the theoretical framework adopted in conducting this research and the ontological and epistemological assumptions influencing the choice of such paradigm and framework.

For a start, a 'paradigm' is a set of beliefs, world views and fundamental philosophical assumptions about knowledge and the nature of the world. According to Hutchinson, it consists of 'ways of knowing', a 'taken-for-granted mind set' and a 'shared frame of reference' among researchers in a field which 'could be upset by generational struggles between newer and more established researchers'.[85] It is a background orientation explicitly and implicitly employed to philosophise, theorise and formulate ideas or build an epistemological (ie knowledge-based) theory.[86] It is a 'holistic, totalising and tightly bounded interpretative framework from which it is difficult to escape' because of the widely accepted consensus around it which 'recedes into deep regions of common sense'.[87]

The processes through which this 'epistemological consensus' and 'common sense' emerged fall within the province of ontology (ie the perception and nature of reality).[88]

[84] Salter & Mason 2007:31-49; Hutchinson 2015:130-135.
[85] Hutchinson 2015:132.
[86] Onuf 2012:626-628.
[87] Carspecken 1999:7-29, 10.
[88] Norton 1976:102-115; Sugden 2016:1377-1389.

According to Woodward, a key feature of ontology is the tendency to focus and attempt to answer distinctive questions in distinctive ways often using distinctive terminologies.[89] This, it might be observed, confuses ontology with 'methodology'. As noted earlier, a methodology consists of a set of techniques and guidelines developed, either explicitly or implicitly, 'within a particular paradigm, embodying the philosophical assumptions and principles of the paradigm'.[90] However, a methodology needs not be pinned down to a specific paradigm.[91] In addition, a methodology is often domain/subject-specific. It is, thus, different from 'methods' which are usually influenced or dictated by subjects' peculiarities. The two main methodologies are quantitative and qualitative.[92]

The typologies of research paradigms vary from the positivists (who tend to have a realists' ontology of determining how things are/work) to the constructivists (who postulate that reality is mentally constructed based on one's orientations, knowledge and experience).[93] There are also functionalist, interpretive, emancipatory and post-modern paradigms.[94]

However, others combine some of these paradigms to produce what is often called a 'multi-paradigm'.[95] There are also proponents of 'meta-paradigms'. These scholars use 'one-dominant-paradigm-pluralism' which accepts incompatibility of paradigms as a result of distinct philosophical assumptions that allow for the management of confrontations between paradigms in a manner that '[n]o paradigm is allowed to escape unquestioned'.[96] Carspecken is one of the 'meta-paradigmatists'.[97] He views positivists, constructivists, post-positivists and critical realists as different philosophical orientations within a single paradigm called 'originary scenes'. He defines the latter as 'an underlying holistic view' consisting of 'the barest, broadest and deepest meaning-imparting scenes within a culture or underlying a specific intellectual tradition'.[98] This,

[89] Woodward 2015:3577-3599, 3579-3580. Farrell & Finnemore 2009:58-71.
[90] Zhu 2011:784-798, 785.
[91] Zhu 2011:785.
[92] Zhu 2011:785.
[93] Carspecken 1999:7-10.
[94] Zhu 2011:786.
[95] Carspecken 1999:7-29.
[96] Carspecken 1999:7-29.
[97] Carspecken 1999:7-29.
[98] Carspecken 1999:7-29, 13.

he observes, can be revealed 'through efforts to describe conceptual beginnings and state logical foundations: to philosophise'.[99]

Thus, a research paradigm gives insights into the process of creating meanings and concepts.[100] Importantly, the nature and terminological divisions of research paradigms have found expression in contemporary legal philosophy. Habermas, for instance, sees 'legal paradigms' as implicit 'societal images' guiding the making, application and interpretation of laws.[101] A legal paradigm dictates priorities between legal principles. In the context of adjudication, for instance, indeterminacy of legal norms could be minimised by paradigmatic understandings.[102] It is the 'court's implicit image of society…[providing] the background for an interpretation of a system of basic rights'.[103] Competing paradigms, however, make a consistent paradigmatic understanding problematic.[104] Consequently, Habermas identifies three principal paradigms of law: 1) Liberal/bourgeoisie formalists' paradigm (ie formal law); 2) social-welfare state paradigm (ie materialised law); and 3) proceduralist paradigms (ie 'reflexive law').[105] McCormick considers these as the three 'ways of thinking critically about the law'.[106]

A liberal paradigm goes hand in hand with rational choice theories in economics and can be traced back to the Enlightenment period.[107] In law, this paradigm creates a divide between the private-economic sphere and the public/common-good/state sphere so that the former is, first, left to the 'natural', spontaneous order produced by uncontrolled market forces.[108] Second, it emphasises the protection of individual liberty in order to ensure equality of opportunities and social justice. Only rights can trump these liberties hence interference with their enjoyment on grounds of collective good is prohibited unless it is necessary, proportionate and suitable.[109] In the words

[99] Carspecken 1999:13-14.
[100] Baude & Sachs 2017:1079-1147; Fallon Jr 2015:1235-1308.
[101] Habermas 1995:771.
[102] Alexey 1995:1027 & 1032; Motzkin 1995:1431.
[103] Habermas 1995:771.
[104] Alexey 1995:1032.
[105] Habermas 1995:771.
[106] McCormick 1999:413-428.
[107] Farrell & Finnemore 2009:60.
[108] Hayek is one of the fiercest liberal paradigmatists. He considers the market as a spontaneous, self-generating, endogenous order (cosmos) which could be distorted by any 'interference' (regulation). Interferences 'disrupt the overall order'. See Hayek 1982:36-37 & 128-129.
[109] Alexey 1995:1030-1031.

of Habermas, this paradigm essentially 'confers powers and imposes prohibitions'.[110] This 'image of society' is exemplified by the norms of private law relating to property and contracts all of which are structured on the basis of formal or legal equality in status and opportunities or 'legal ability'.[111] The key feature of this paradigm in the context of liability for business transactions, for instance, is individual/personal liability.

Thus, there are two broad fundamental assumptions underlying the liberal paradigm: economic assumptions of market equilibrium, consumer sovereignty, party autonomy, sanctity, privity and freedom of contract; and sociological assumptions of formal equality of status, distribution and exercise of social powers as defined in the various norms of private law.[112] Understandably, these assumptions have deeply penetrated the sovereign debt regime. The liberal paradigm is referred to, in this research, as the 'dominant private law paradigm'.

However, the strict formalism and individualism of the liberal paradigm were its undoing. It has been accused of encouraging 'a closed, highly formal, vaguely machine-like' approach to legal theorising which reinforces hierarchies and inequality within societies.[113] Hence, the materialised law's social-welfare reformist paradigm emerged using the same normative premises to change this 'image of society'. It emphasises substantive equality, direct government planning and the introduction of new 'basic rights grounding claims to a more just distribution of socially produced wealth and a more effective protection from socially produced dangers'.[114] This second legal paradigm, it should be noted, reflects the changing economic and social conditions of Western societies which became evident in the 19th century. In particular, Marxism was instrumental to the popularisation of this paradigm. It is, thus, a left-leaning legal paradigm most notably employed by scholars of the critical legal studies tradition.[115] Unlike the liberal paradigm, the state has expansive powers under the social-welfare paradigm to provide services. This paradigm also grants individuals a 'material basis for a humanly dignified existence' and guarantees 'the natural bases of

[110] Habermas1995:772.
[111] Habermas1995:773.
[112] Habermas1995:773.
[113] McCormick 1999:413-414.
[114] Habermas 1995:773.
[115] McCormick 1999:413-414.

life'.[116] It is, therefore, the original paradigmatic basis for socio-economic rights. It '*pays for* the agency of the state at the expense of the autonomous status of individual actors'.[117]

Habermas argues that regardless of variations in legal tradition, there has been a gradual 'change from formal to materialized law in all modem societies'.[118] He distinguishes the two competing paradigms in their respective patterns of legal interpretations thus:

> [A]ccording to the liberal market model, society represents the result of spontaneous forces and thus is something like a "second nature" that resists the influence of individual actors. From the vantage point of the regulatory welfare-state, however, society loses precisely this quasi-natural character. As soon as system conditions vary beyond a certain level determined by the "limits of social tolerance", the state is held accountable for crisis conditions perceived to result from its own deficits in planning and intervention.[119]

The key inadequacy of the social-welfare paradigm is its 'susceptibility to legal arbitrariness and vulnerability to naked might', which is likely to impair the enjoyment of those social rights which it seeks to advance and protect.[120]

To circumvent the shortcomings of the above two paradigms, Habermas advanced what he calls the 'proceduralist understanding of law'.[121] Under this, a legal order is measured not only by the protection it affords to private market players but also by the level of social guarantees granted to citizens.[122] Both are, therefore, equally important. Hence, it could be said to represent another version of 'multi-paradigms' because, despite its rejection of the two competing paradigms, it integrates certain features of both. For instance, Habermas has argued that securing private autonomy through either individual liberty (as insisted by the liberal paradigm) or welfare entitlement (as insisted by the social welfare paradigm) ignores 'the internal connection between

[116] Habermas 1995:775.
[117] Habermas 1995:775.
[118] Habermas 1995:774.
[119] Habermas 1995:775.
[120] McCormick 1999:416; Habermas 1995:775.
[121] Habermas 1995:776-780.
[122] Habermas 1995:776-780.

private and political autonomy, and thus lose sight of the democratic meaning of a legal community's self-organization'.[123]

Thus, under this paradigm, 'legal persons are autonomous only insofar as they can understand themselves at the same time as *authors* of the law to which they are subject as addressees'.[124] The private and the public spheres have a mutual, interdependent relationship and are therefore the 'centrepiece of the new image'.[125] Habermas argues thus:

> The vacant places of the economic man or welfare-client are occupied by a public of citizens who participate in political communication in order to articulate their wants and needs, to give voice to their violated interests, and, above all, to clarify and settle the contested standards and criteria according to which equals are treated equally and unequals unequally.[126]

This seems to be a plausible, citizen-centric paradigm. The narrow conceptions of justice under the two competing paradigms have thus been broadened by this unique multi-paradigm. Accordingly, 'the formal' and 'the informal' mutually interact and reinforce each other; and the zero-sum game between the private and the public players is replaced by 'complementary forms of communication found in the private and public spheres of the life world … and in political institutions'.[127] Although critical of the social-welfare paradigm, Habermas seeks to pursue the social-welfare project at a 'higher level' because the 'intention is to tame the capitalist economic system'.[128] Habermas aptly observes thus:

> [A] legal order *is* legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens; at the same time, however, it *owes* its legitimacy to the forms of communication in which civic autonomy alone can express and prove itself. This is the key to a proceduralist understanding of law. [This image] … thematiz[es] the connection between forms of communication that *simultaneously* guarantee private and public autonomy *in the very conditions from which they emerge* (italics in the original).[129]

Therefore, the above three paradigms explain the ontological and epistemological assumptions for the making and application of substantive legal principles, doctrines

[123] Habermas 1995:776.
[124] Habermas 1995:776.
[125] Habermas 1995:777.
[126] Habermas 1995:776.
[127] Habermas 1995:777.
[128] Habermas 1995:777-778.
[129] Habermas 1995:777.

and traditions especially as they relate to the overarching ideal of justice. In particular, however, the proceduralist paradigm recognises the complexities brought by economic globalisation and, consequently, embraces the multi-layered forms of governance at the local, international and transnational levels. Indeed, unlike the formal law and materialised law of the liberal and social-welfare paradigms respectively, it favours a 'reflexive' or 'global' law as advanced by prominent transnational legal theorists such as Teubner and Zambunsen.[130] 'Reflexive law' embraces normative evolutions and sees law as 'a system for the coordination of action within and between semi-autonomous social sub-systems'.[131] Luhman's idea of 'social systems' is at the heart of this coordination.[132] According to Habermas:

> The choice of the respective legal form must in each case remain bound to the original meaning of the system of rights, which is to secure the citizens' private and public autonomy *uno actu:* each legal act should at the same time be understood as a contribution to the politically autonomous elaboration of basic rights, and thus as an element in an ongoing process of constitution making.[133]

Therefore, in the light of the above insights, it is implausible to adopt either of the two competing paradigms in this research. This is because the private contractual governance framework is a child of the liberal paradigm and the social-welfare paradigm emerged in its shadow. Indeed, interrogating the dominant private law paradigm through the same 'societal image' or one directly opposed to it will only produce a predictable outcome. The appropriate approach to interrogate this paradigm is to adopt a multi-paradigmatic approach. Hence, Habermas' proceduralist paradigm fits this description. First, it provides a suitable theoretical premise to bring non-state actors (NSAs)/semi-publics into the legal accountability realm as seen in the adoption

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[130] See, for instance, Teubner 1997:763-788; Teubner G 1996. 'Global Bukowina: Legal pluralism in the world society', https://ssrn.com/abstract=896478 (accessed 14 April 2019); Zumbansen 2008:769-808. In fact, Zumbansen describes transnational legal theory as a 'methodology'. He notes thus:

> [F]rom a methodological perspective, the tensions between national and global, between public and private, and between law and non-law can be understood as constitutive elements of an emerging understanding of the law of world society. These tensions are constitutive and inherent to world society law, because they illustrate the unavoidable ambivalence … of competing and colliding ordering paradigms, alongside of which law seeks to express and assert itself. … Transnational "law" can thus be reconceived as transnational legal pluralism in that it methodologically responds to the fragmented, disembedded evolutionary dynamics of norm-creation in the context of world society.

See Zumbansen 2013:117-138, 132-133.

[131] Teubner 1983:239-286, 242.

[132] Luhmann N 2015. *Social systems.* https://uberty.org/wp-content/uploads/2015/08/Niklas_Luhmann_Social_Systems.pdf (accessed 13 May 2019).

[133] Habermas1995:778.

of the new governance model in the BHR regime.[134] Second, Habermas' proceduralism recognises legal discourse as part of a 'general practical discourse' that aligns with the 'law in context', 'law in society' and 'law as a process' method adopted in conducting this research. Third, the paradigm's legal form is that of 'global law' which embraces the formal and the informal, the hard and the soft, the international and the transnational normative instruments. It accommodates the multi-level governance imperative brought by economic globalisation. Indeed, transnational legal theories evolved within this 'new image'. Admittedly, the research recognises a growing movement towards the so-called 'after-paradigm' which seeks to abandon the pre-set paradigm mentality.[135] Nevertheless, this is only visible in 'operational research' and is yet to yield any impact in contemporary legal scholarship.

Based on this multi-paradigm approach, the research combines social justice-based theoretical premises with the popular rational choice and game theories in order to situate the citizens within the sovereign debt regime. Rational choice theory captures the 'ends-means calculation' by competing agents.[136] Game theory operates in a situation of perfect competition between rational agents which, in the context of SDR negotiation for instance, implies that either the debtor or the creditor would lose.[137] In this circumstance, the research assumes that both agents bear some concrete socio-economic rights responsibilities, hence, prioritising competing obligations (ie to debtor's citizens and to international creditors) becomes necessary.

Finally, theories of social justice are usually sceptical of both liberalism and particularism. They advance analytic, rationally defensible arguments, first, against liberalism's unfettered, spontaneous order of 'market-justice' and, second, in favour of broad-based inclusion of all people.[138] Importantly, they are usually rights-based theories.

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[134] Ruggie 2014:5-17.
[135] Zhu 2011:784-798.
[136] Bohoslavsky & Escriba-Folch 2014:15-32; Towfigh 2016:763-778.
[137] See Don R 2018. 'Game theory', https://plato.stanford.edu/entries/game-theory/ (accessed 11 October 2018).
[138] Parvin P 2017. 'Theories of social justice', https://repository.lboro.ac.uk/articles/Theories_of_social_justice/9469892 (accessed 15 April 2019); Miller 1991:371-391.

1.7 SCOPE AND LIMITATIONS OF THE RESEARCH

Locating the place of socio-economic rights in sovereign debt governance raises a number of broad issues, hence the need to delineate the route followed in conducting this research. First, it is obvious that the research is not about the economics of sovereign debt. Second, the research is not concerned with domestic (sovereign) debts because these are exclusively governed by the sovereign's internal laws which often have a clear legal hierarchy precluding or, at least, minimising the possibility of adjudicatory inconsistencies and norm-conflicts.[139] Indeed, the overbearing powers of the sovereign over the legal system (including its power to print currency) make prioritising competing domestic obligatory demands relatively unproblematic.

Third, the research is not concerned with the enforcement of socio-economic rights in any domestic, regional or global human rights institution or forum. Similarly, it is not concerned with the domestic perspective of sovereign debt governance and socio-economic rights. Socio-economic rights jurisprudence is very vast across jurisdictions. Hence, the usual domestic constitutional mechanisms for the enforcement of these rights are outside the scope of this research. For instance, the research is not concerned with the status of socio-economic rights under the South African constitution. It is equally not concerned with South Africa's sovereign debt management framework. These issues have been covered in the literature.[140] Admittedly, enforcement of socio-economic rights is important and, in functional terms, national constitutional mechanisms make enforcement of these rights feasible. Nevertheless, this will extend the scope of the research beyond the ICESCR, to national constitutions and judicial decisions with potential inconsistencies across legal

[139] De Wet & Vidmar 2013:196-217.

[140] See for instance, Bradlow DD 2018. 'Don't Waste a Serious Crisis: Lessons from South Africa's Debt Crisis' 1-12, <https://ssrn.com/abstract=2901456> (accessed 23 April 2019); Center for Economic and Social Rights Institute for Economic Justice, Submission to the Committee on ESCR on the occasion of the review of South Africa's first period report at the 64th Session, October 2018 <http://section27.org.za/wp-content/uploads/2018/09/CESR-S27-IEJ-submission-to-UN-Commitee-on-Economic-Social-and-Cultural-R.. .pdf (accessed 23 April 2019); Naraidoo H & Suposuane R 2015. 'Debt Sustainability and Financial Crises in South Africa' https://repository.up.ac.za/bitstream/handle/2263/53087/Naraidoo_Debt_2015.pdf?sequence=1&isAllowed=y (accessed 15 June 2019).

traditions. Indeed, the enforcement of socio-economic rights in specific jurisdictions has been well covered in the literature.[141]

Fourth and related to the above, although SDAs cut across domestic and international courts and tribunals, this research is only concerned with specific decisions of international tribunals. This is because the research focuses on the socio-economic rights of debtors' citizens under the ICESCR and not under any national constitution. In addition, the broad principles under examination here have their roots in treaties, customary international law, general principles of law, UN Declarations and resolutions and other soft law instruments. International tribunals are guided by these sources. On the contrary, national judicial decisions have peculiar legal traditions, offering diverse approaches to the application of these legal sources within their respective jurisdictions. Therefore, the cases selected for the purpose of review in this research have their roots in international law, ie without particular constitutional limitations based on hierarchy and principles. Indeed, the dominance of a few creditor states (specifically the United States of America (USA) and the United Kingdom (UK)) as preferred jurisdictions for issuing sovereign debts means that the majority of the domestic cases will come from these jurisdictions. Unfortunately, the USA is yet to ratify the ICESCR which, as the research will show in Chapter Three, is the main source of socio-economic rights in IHRL.

The case selection was made using the following criteria: The actual sovereign debt crisis which usually provides the factual and contextual background for instituting the substantive claim; the actual submission of debt recovery claims by creditors before supranational tribunal; existence of elements of socio-economic rights-related defences or counter-claims by the debtor; the respondent being a sovereign; and the factual basis for legal analysis reflecting one or more features of modern sovereign debts as will be identified in the next chapter. In essence, parties' character, the nature of the substantive claims and defences would be the principal determinants. The specificities of the tribunals and the jurisprudential traditions are immaterial. This is

[141] See generally Langford M (ed) 2008; Eide A et al (eds) 1995; Heyns & Brand 1998:153-167; Sunstein CR 2001. 'Social and economic rights? lessons from South Africa', http://papers.ssrn.com/paper.taf?abstract_id=269657 (accessed 20 October 2016); Nolan A & Langford M 2007. 'The justiciability of social and economic rights: An updated appraisal', http://ssrn.com/abstract=1434944 (accessed 24 January 2017).

because, as noted earlier, there is no international debt claims tribunal; the current regime is fragmented and jurisprudentially incoherent in character. Consequently, creditors have been expanding their debt recovery options beyond the traditional domestic seat identified in the contract documents, to modern investment and human rights tribunals. In other words, there is no institutional constraints limiting creditors' international cause of action.

Fifth, by focusing on international SDAs the research deliberately excludes the institutional and reporting mechanisms under the ICESCR. These are important but they are not adjudicatory institutions whose attitudes can be easily discerned.

Sixth, the research excludes cultural rights as provided under the ICESCR. It is also not concerned with specific socio-economic rights. It only deals with the underlying philosophies of these rights as they feature in the sovereign debt regime. In other words, the focus is on the aspects of the minimum core obligations of these rights and their basic unifying themes of life, human dignity, equality and the underlying philosophy of inclusion and social justice. Hence, the specific constituents of these rights will not be discussed in this research.

Finally, the research was conducted between 2017 and 2019. Therefore, it does not cover developments in this area after September 2019.

1.8 STRUCTURE OF THE RESEARCH

The research is structured into six chapters.
Chapter One introduces the research. It identifies the problems inherent in the relationship between socio-economic rights and sovereign debt. It highlights the impact of the recurring trends of SDCs across the world especially with respect to a debtor's treaty and contractual obligations. The chapter raises the key research questions and then identifies the methodology and theoretical framework adopted in answering these questions.

After this introduction, the next chapter conceptualises sovereign debt in international law showing that, unlike a private debt, sovereign debt is typically unsecured. The sources of sovereign debtor's liability to creditors are multifarious: treaties, CIL, principles of law and multiple contracts. Private, bilateral and multilateral creditors

advance loans to states for a variety of reasons while debtors borrow essentially for development purposes. Consequently, the chapter shows that indebted states are essentially linked to their citizens. Having unpacked the concept of sovereign debt, the research will then examine the nature of SDR and SDD. Importantly, it will conceptualise 'sovereign debt governance' from multiple perspectives and then advance a citizen-focused stakeholder perspective.

Focusing on the third subsidiary research question dealing with creditors' socio-economic rights responsibilities vis-à-vis state obligations under the ICESCR, Chapter Three will invoke the values of life and dignity especially the Habermasian notion of dignity as the normative foundation for socio-economic rights.[142] It will examine the theoretical underpinnings of these rights, their scope and specific juridification under the ICESCR. Thereafter, it will identify the rights-holders and the specific responsibilities of the duty-bearers including IFIs and NSAs. The interconnections between sovereign debt and the evolving BHR regime will be closely looked at with a focus on socio-economic rights responsibilities of private creditors.

Chapter Four will focus on the place of socio-economic rights within the existing SDR regime. It will show that at the time when extra-legal practices of execution of creditors, forced receivership, gun-boat diplomacy and war indemnity were the usual debt recovery norms, socio-economic rights were, *stricto sensu*, non-existent. The underlying values animating these rights were, however, visible. This changed after the Second World War. The rights became concretised and embedded in the consciousness of the global community. Since then, a new set of multilateral and private lenders have emerged in the shadow of the dominant private law paradigm. They have consistently resisted statutory reforms to the SDR regime. Today, the restructuring processes and practices are *ad hoc*, non-statutory processes covering official bilateral debt renegotiations under the auspices of the Paris Club, multilateral debt relief initiatives, renegotiation of private syndicated bank loans through the London Club and sovereign bond restructuring. The chapter will offer a critique of these processes and examine the position of debt moratorium under public international law to see how socio-economic rights-based concerns feature therein. It

[142] Habermas 2010:464-480.

will also identify socio-economic rights under new legal instruments such as the UNGA's Basic Principles on Sovereign Debt Restructuring Processes (BPSDRP), GPFDHR, UNCTAD's Principles for Responsible Sovereign Lending and Borrowing (PRSLB) and Sovereign Debt Workout Guide (SDWG). Finally, the constraint of resource-availability will be examined.

Arising from the 'creditor priority norm' seen in the SDR processes and practices, the place of socio-economic rights in SDA will be the theme of Chapter Five. To do this, the chapter will, first, delineate the contours of SDA in the international and transnational contexts using creditors' action as the key determining factor. Accordingly, the chapter will review selected cases sourced from three distinct adjudication systems: state-state espousal claims; ISDS/investment treaty arbitration (ITA); and human rights-based creditor claims. Using cases from the three forms of SDA, the chapter will identify and examine the emerging trends and adjudicators' attitudes towards socio-economic rights.

In concluding the research, Chapter Six argues that recurring debt crises over the past couple of decades have exposed the fundamental defects of the sovereign debt regime as competing interests struggle to shape its form and substance to their respective advantage. The private law paradigm literally incentivises sovereign debt profiteering thereby undermining socio-economic rights and their underlying philosophies of equality and social justice. During debt crisis, resources are limited, yet, a debtor must satisfy different competing obligations. Prioritisation is, therefore, necessary. However, there are certain hurdles in this regard principally linked to the private law paradigm: Public-private divide, state-centrism, rising invocation of ITA, conceptual and practical challenges. It concludes that global law (and its transformative character in norm creation, application and enforcement) needs to be expounded and more openly embraced by the sovereign debt regime in a manner that recognises the values of socio-economic rights.

CHAPTER TWO

CONCEPTUALISING SOVEREIGN DEBT IN INTERNATIONAL LAW

2.1 INTRODUCTION

The objective of this Chapter is to clarify key concepts and situate sovereign debt within the framework of international law. Sovereign debt crises are no longer domestic problems for individual countries to handle.[1] In fact, the Euro Zone Debt Crisis (2009-2015) has demonstrated the potential cross-border effects of a debt crisis in an increasingly interconnected economic environment.[2] Thus, the claim that sovereigns do not go bankrupt because of unhindered access to tax revenues has been shown to be chimeric.[3] However, the frequency of crises raises fundamental theoretical questions for the present research: What is the nature of 'sovereign debt' in international law? Who is a 'sovereign' for the purpose of sovereign debt liability under international law? What is 'sovereign debt governance'?

This Chapter seeks to answer the above questions. In doing so, it will use the concept of sovereignty to provide a conceptual framework for the subsequent discussions. The chapter examines sovereign borrowing and lending and the capacity of sovereigns to engage in international financial transactions. It argues that sovereign debt is a binding undertaking which often compromises a sovereign's internal and external autonomy. Modern international law prescribes normative and operational contents of sovereignty in relation to states, inter-governmental organisations (IGOs), non-state actors (NSAs) and the international community in general.[4] Indeed, apart from state's financial undertakings, its human rights obligations could also constrain its sovereignty within the international system.[5]

This chapter and the next would argue that sovereignty is a 'conceptual bridge' connecting citizens as rights-holders with the sovereign debt governance regime

[1] Cohen & Valadier 2011:15-44.
[2] The crisis had impacted developed economies as Laryea observed: 'In contrast to previous sovereign debt crisis where the focus had been on emerging markets in Latin America and Asia, or on debt relief to low-income countries, the spotlight is now on highly indebted advanced economies. In varying degrees, the public debt burdens of countries such as Greece, Ireland, Italy, Portugal, Spain, the United Kingdom, the United States, and Japan weigh heavily on the markets and agenda of international policy makers'. See Laryea 2011:139-140, 139.
[3] Rieffel 2003:289.
[4] Tsaugourias 2004:97.
[5] Cassel 2001:60-63; Eleftheriadis 2010:535-569.

especially as international tribunals are continuously being empowered to exercise jurisdictions over sovereigns, including in claims arising from sovereign debt default and restructuring. It will define 'sovereign debt governance' and examine the nature of 'sovereign debt', 'sovereign debt default' and 'sovereign debt restructuring' within the framework of international law. It will also examine the nature and forms of obligation assumed by sovereign debtors, creditors and other NSAs under international law.

Proceeding from the above, the chapter is structured as follows: The next section examines the nature of sovereign debt with particular emphasis on the forms of financial undertakings often assumed by sovereigns under international law. It also addresses issues around who the 'sovereign' is for the purpose of sovereign debt liability and legitimacy. Section three draws the relationship between sovereign debt default and 'sovereign debt restructuring' for the purpose of determining international responsibility. Section four conceptualises 'sovereign debt governance' in the context of this research using theories of global governance. Section five summarises and concludes the chapter.

2.2 NATURE AND FORMS OF SOVEREIGN DEBT

Since the middle ages, borrowing and lending have remained key features of international economic relations.[6] It has been argued that sovereign lending was even more important in the past than it is today.[7] While one may not entirely agree with this conclusion, the nature and forms of 'sovereign debt' certainly reflect the historical evolution of international finance in general: from predominantly government-to-government lending and borrowing to today's multitude of borrowing outlets including institutional and private sector creditors. Obviously, sovereign debt deals with financial undertakings of states. But what exactly is its legal character?

2.2.1 Defining Sovereign Debt

'Sovereign debt'[8] is sometimes called 'public debt', 'national debt', 'international loan', 'external debt' or 'foreign debt' although these terms do not necessarily mean the same thing.[9] Arruda defines 'external debt' simply as 'the sum total of a country's debts

[6] For a detail history of sovereign debt see Tomz 2007; Krasner 1999:3-27; Eduardo & Panizza 2008:5-7; Kolb 2011:3-11; Tammen 1990:239, 241-250.
[7] Krasner 1999:Chapter 5, 3-7.
[8] The research adopts this term because it is commonly used in the literature.
[9] ILA 2010. *State insolvency: Options for the way forward.* The Hague: ILA 9.

resulting from loans and financing contracted with persons resident abroad and guaranteed by its government'.[10] According to the report of the United Nations (UN) Independent Expert on the Impacts of Foreign Debt on Human Rights, 'foreign (or external) debt is debt owed to non-residents and consists of public, publicly guaranteed, and private non-guaranteed long-term debt, short-term debt and use of IMF credit'.[11] Residence, rather than citizenship of the creditors, and creditors' institutional capacity seem to be the main emphasis here. In the same vein, the UN Human Rights Council's (UNHRC) Guiding Principles on Foreign Debt and Human Rights 2012 (GPFDHR) uses the term 'foreign/external debt' and defines it as follows:

> '[A]n obligation (including monetary obligation) created under a contractual agreement and owed by a State to a non-resident lender which may either be an international financial institution, a bilateral or multilateral lender, a private financial institution or a bondholder, or is subject to foreign law. It includes:
>
> (i) Loans, that is, advances of funds to the debtor by the lender on the basis of an undertaking that the borrower will repay the funds at some future point (including deposits, bonds, debentures, commercial loans and buyer's credits); and
> (ii) suppliers' credits, that is, contracts whereby the supplier allows the customer to defer payment until sometime after the date on which the goods are delivered or the services are provided.[12]

While Arruda's definition is too narrow, the GPFDHR's is too broad. Except the fleeting reference in GPFDHR, all three definitions mentioned above ignore the core element of 'external debt' from a conflict of law perspective, that is, the potential application of different laws in the event of dispute resolution. The International Law Association (ILA) avoids this pitfall by describing 'external debt' from the perspective of the potential application of multiple systems of law in resolving disputes pertaining to such debt. According to ILA, 'external debt is expressed in some foreign currency, typically payable abroad, governed by some external law and subject to the jurisdiction of external courts'.[13] In other words, different systems of law are potentially applicable before different courts and these may include the domestic law of the sovereign debtor, law of the lender's country, law of the market, law of a neutral country or 'public international law (or its offshoots)'.[14] This is one of the fundamental features of

[10] He also defines it as 'the foreign money loaned to the government or to companies over several years. It is money loaned with interest'. See Arruda 2000:6 & 140.
[11] UNHRC 2012. *Guiding Principles on Foreign Debt and Human Rights* (adopted on 5 July 2012) (hereafter 'GPFDHR 2012'):para 22.
[12] GPFDHR 2012:sec 1(4).
[13] ILA 2010:9.
[14] Wood 1980:1.

sovereign debt. Indeed, as observed by Wood, 'much of the complexity associated with international finance results from the fact that an international loan agreement or bond issue must inevitably involve the laws of more than one country'.[15] Of course, it can be argued that lender's residence by necessary implication entails potential application of different laws.

However, currency variation is also important. Indeed, Tennekoon views this form of lending from a functional perspective as the 'provision of finance at a financial centre by foreign lenders to foreign borrowers largely in a currency which is not the currency of the financial centre'.[16] The predominant currencies are the USA's Dollar, UK's Pound Sterling and the European Union's Euro. Currency is significant in sovereign borrowing because of the concomitant foreign exchange risks and what is termed 'original sin' which followed the debt crises of the 1980s and 1990s.[17] Generally, a country's economic policies, both monetary and fiscal policies, tend to influence its borrowing in foreign currency.[18]

Sovereign debt could also be considered from the source of the finance or the legal character or position of the lender. In other words, it includes debts owed to supra-national entities, governments or their agencies, commercial banks and bondholders.[19] For this reason, liabilities arising from trade debt, judgment debt or arbitral awards also qualify as sovereign debt.[20]

Importantly, all the above definitions deliberately exclude domestic financial undertakings by either central or sub-national governments and their respective agencies. This explains the use of the term 'foreign/external'. However, domestic debt of national governments is also sovereign debt. The distinguishing features of sovereign's domestic debt are that it is, first, denominated in local currency making it

[15] Wood 1980:3-4.
[16] Tennekoon 1991:2.
[17] Cassard & Folkerts-Landau note that 'several developing countries have experienced the impact of adverse movements in foreign currencies and interest rates in the past 20 years. In the early 1980s, the debt-servicing burdens of countries in Southeast Asia, Latin America, and Africa were severely affected by the steep appreciation of the dollar, the worldwide increase in interest rates, and the sharp decline in commodity prices. The debt crisis resulted in output and employment losses, financial sector crises, and the exclusion of these countries from international financial markets, which was only regained in the early 1990s'. See Cassard & Folkerts-Landau 1989:8-10.
[18] Rosenberg & Tirpak 2008:7-9; Furth 2012:2.
[19] ILA 2010:9.
[20] ILA 2010:9.

not susceptible to foreign exchange fluctuation and, more importantly, it is subject to the exclusive control of the domestic legal system.[21] Thus, domestic debt is not normally subject to the jurisdiction of international tribunals or international investment arbitration. For this reason, it is outside the scope of this research. However, it is worth noting that domestic debt may be susceptible to adverse legislative measures or other actions of government that might affect creditors' interests and consequently disincentivise future external loans.[22] Domestic debt is relatively easier to handle through, for instance, printing of more currency although the government has to contend with inflation which is another disincentive for external creditors to advance loans.[23] However, it is part of overall 'public debt' obligations of a government and, if poorly managed, it could negatively affect a country's economic rating and growth.[24]

2.2.1.1 Sovereign Debt as a Contract

Not surprisingly, all the above definitions conceive sovereign debt as a contract. Parties recognise that respect for contracts is one of the bedrocks of international financial law.[25] The contractual element is undoubtedly one of the core features of sovereign debt, although this has generated debates in some arbitral awards.[26] Indeed, terms such as sovereign debt restructuring, rescheduling and default necessarily imply that their base is agreement. Perhaps, it might help to expound on the juridical character of a 'debt'. The term 'debt' reflects the mutuality of minds inherent in the core philosophy of contract. It is a liability arising from loan contracts. According to Black's Law Dictionary, a 'debt' is 'a liability on a claim; a specific sum of money due by agreement or otherwise; the aggregate of all existing claims against a person, entity or state'.[27] Invariably, a loan is a form of contract; but it is a peculiar contract structured on asymmetrical performance; that is, one party lends and the other subsequently repays over a period of time.[28] In the words of Sommers et al, 'the

[21] ILA 2010:9.
[22] Olivier 2009:2135-2148, 2138.
[23] ILA 2010:3.
[24] Standard & Poor's 2015:26.
[25] Rieffel 2003:45.
[26] See, for instance, *Poštová Banka AS & Istrokapital SE v The Hellenic Republic* 2015 IIC 679 (ICSID) (reference henceforth will be made to the ICSID electronic report) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5752_En&caseId=C2823 (accessed on 23 December 2017) (hereafter 'Postova Banka case'):paras 318-324. Compare with *Fedax NV* v *Republic of Venezuela* 1998 37 ILM 1378.
[27] Garner 1999:410.
[28] Buchheit, for example, notes that 'most lending arrangements involve starkly asymmetrical performance by the parties: the lender's obligations are heavily front-loaded (they lend the money) while

lender performs his part of the bargain at the outset, while the performance of the debtor is stretched over a long period'.[29] This is the nature of asymmetric contracts in terms of expectations of, and performance by, the parties. As a result, there is always a maturity period or a length of time before the contract expires.[30] A debt entitles creditors to receive interest payments before the maturity. Thereafter, the legal effect of performance or non-performance (as the case may be) sets in. Thus, time is of the essence. Aguir notes that 'payments are typically contingent only on time'.[31]

However, sovereign debt is a loan *sui generis* which, as the research will argue in Chapter Four, exposes the limits of contract as a form of governance. First, it is different from normal, private loans because of its multi-jurisdictional element as observed above.[32] The League of Nations' Committee on International Loan Contracts stressed that 'the essential criterion of what is an international loan is the fact of issue in a country or countries other than that of the borrower'.[33] It is worth stating that the Committee was specifically referring to a 'market loan' (like bonds) which is different from inter-governmental, bilateral loan contracts between governments or between government and international organisations. Secondly, sovereign debt largely depends upon the good will and creditworthiness of the debtor. In other words, it is not a secured loan in the sense of requiring collateral security for creditors to fall back onto in the event of default.[34] The International Centre for the Settlement of Investment Disputes (ICSID) arbitration tribunal in the *Postova Banka* case pointedly notes that 'creditors have much more limited legal resources if a sovereign debtor fails to make a contracted payment'.[35]

Third, unlike ordinary loans, a sovereign loan could serve as a monetary policy instrument as it is subject to internal and external sovereign risks and market

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most of the borrower's obligations are performed thereafter (they must pay the money back over time)'. See Buchheit 2007:1-6, 2.

[29] Sommer et al 1956:463.

[30] IMF 2015:9-10.

[31] Aguir 2015:2-3.

[32] Wood 1980:3-4.

[33] League of Nations 1939. 'Report of the Committee for the Study of International Loan Contracts', 6 http://biblio-archive.unog.ch/Dateien/CouncilMSD/C-145-M-93-1939-II-A_EN.pdf (accessed on 11 June 2018).

[34] Borchard famously remarked '[h]e who contracts with the sovereign or the state has nothing but the state's honour and credit as a sanction...[T]he contract is...a gambling contract, depending for its performance entirely on the good faith and capacity of the debtor to pay'. Quoted in Kamlani 2008:20-38.

[35] *Poštová Banka* case:paras 318-324.

volatility.[36] Finally, a sovereign loan is also peculiar in terms of 'the inequality of status between the parties to the contract although this is not of the essence of the loan contract'.[37] Perhaps one exception is inter-governmental, bilateral loans. Even here, it might be observed, there is inequality, at least in terms of financial capacity, structural economic power and geopolitical status of the parties. Generally, a loan tends to bring unequal powers or persons together.[38] As will be examined subsequently, the status and capacity of the parties under international law may even affect the validity of the loan agreement and could incentivise repudiation. Barry has captured both the contractual element and parties' distinct status and capacity when he defines 'sovereign debt' as follows:

> Sovereign debt obtains when agents have lent resources to the national government of sovereign state and these agents have claims to repayment that have at least prima facie legal validity. The claim to repayment, in turn, depends on the existence of a debt contract involving the national government and the lender. On the borrower's side, sovereign debt contracts are entered into by national government (sovereign debtors). On the lender's side, they are entered into by national governments (official/bilateral creditors), International Financial Institutions such as the International Monetary Fund, World Bank or regional development banks (multilateral creditors), or commercial banks and bondholders (private).[39]

Therefore, as the research will examine below, while the position or status of the debtor remains constant (ie sovereign borrower), there is variation in the class of creditors depending on the type and structure of the loan. This too is critical in the context of post-default measures, including resort to adjudication especially at arbitral institutions, as well as in debt relief or forgiveness and further intervention by way of support facility often advanced by the IMF. Based on this, international creditors may be divided into two classes: official and non-official creditors. It is important to examine these briefly to understand their policies or approaches to sovereign debt and the level or extent of influence of each creditor.

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[36] Nelson 2013:2-3. Black notes that excessive and poorly managed sovereign debt could affect the entire economy through 'higher borrowing costs for households, banks and corporations; lower economic growth; financial repression; credit rating downgrades; weakening of banking systems'. See Black L 2012. 'The changing nature of sovereign debt' https://www.tiaa.org/public/pdf/tcam_the_changing_nature_of_sovereign_debt_0.pdf (accessed 23 August 2018).

[37] Schmitthoff 1937:179-196,180.

[38] Kamlani 2008:43-48.

[39] Barry 2015:106-128,107.

2.2.1.2 Classification of Creditors

2.2.1.2.1 Official Creditors

These are either bilateral or multilateral lenders established by laws or multilateral agreements or arrangements. They are governed by their respective charters or articles of agreement and answerable directly or indirectly to a government or group of governments. Their loan to sovereigns is often called an official loan. The prominent multilateral creditors are the IMF, World Bank (WB) and regional development banks (RDBs) such as the African Development Bank (AfDB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IDB) and the Asian Development Bank (ADB).[40] Although each has distinct mandates and lending policies in accordance with its charter or articles of agreement, lending to sovereigns is one of their predominant businesses. They also provide development aid. Their loans may be either concessionary or non-concessionary (ie in terms of the rates).[41] Importantly, the IMF and WB have what is called a 'preferred creditor' status because their loans are accorded priority against other loans.[42]

The IMF principally provides temporary financing to its members having balance of payment difficulties and occasionally lends to low-income countries for poverty reduction.[43] IMF lending normally involves policy prescriptions called 'conditionalities' to enable the borrower to resolve the balance of payment problem and repay the loan on time.[44] This is the core feature of IMF lending. In particular, the policy prescriptions concern borrower's structural and macro-economic fundamentals including '...macroeconomic stabilization, monetary, fiscal and exchange rate policies, including the underlying institutional arrangements and closely related structural measures, and financial system issues related to the functioning of both domestic and international financial markets'.[45] Many have argued that this and other similar policy prescriptions tend to compromise sovereign autonomy of the borrower over its economy.[46]

[40] Borenstein et al 2005:105-107.
[41] Borenstein et al 2005:106.
[42] Rutsel-Silvestre 2015:494.
[43] Emine 2009:6.
[44] Emine 2009:6-7.
[45] Emine 2009:7.
[46] Krasner 1999:Chapters 5 & 6.

Bilateral official lending occurs largely through national development or aid agencies and government-guaranteed loans through export credit agencies.[47] In most cases, these agencies operate in developing countries in dire need of finance for development purpose. The appellation 'creditor nations' is often used to describe developed countries that offer bilateral government-to-government loans or through government-backed agencies' loans and they renegotiate the terms of the loan, if the need arises, through the Paris Club.[48] In essence, both multilateral and bilateral lenders have either direct or indirect governmental support.

Before the establishment of these institutional lenders, the predominant official loan was the direct government-to-government loan. This may arise following defeat in a war, ie as a war indemnity.[49] Non-payment by sovereign debtors could lead to wars or other forms of state intervention.[50] The later included taking direct control of revenue sources of the sovereign borrower by sovereign creditor.[51] However, the gradual withdrawal of governments in international economic and financial matters may explain the upsurge of multilateral and bilateral lenders today. In fact, following complaints of political control and domination of IMF and WB by the USA, the emerging countries led by China, Brazil, Russia, India and South Africa (BRICS) recently formed another multilateral lender called Asian Infrastructure Investment and Development Bank (AIIDB).[52]

2.2.1.2.2 Non-Official Creditors

These are otherwise called private lenders because they are purely business-oriented private or institutional investors and commercial banks having little or no commercial connection with their home government although the latter often offer them some form of 'protection' and, sometimes, provide funds in the form of bail-out in order to rescue systematically important creditors facing imminent collapse. They are, in other words, NSAs in international lending. Furthermore, private lending to sovereigns can be

[47] Emine 2009:7.
[48] Krasner 1999:Electronic pages 5-6 of chapter 5.
[49] This technically negates the notion of *contract* as, often, the 'borrower' lacks the requisite will or power to express its consent. See Mallard 2011:225-247, 227.
[50] Weidemaier 2010:335.
[51] Krasner 1999:Electronic pages 5-15 of chapter 5.
[52] China controls over 30% of shareholding and 26% of the voting rights while India and Russia are the second and third largest shareholders respectively. See BBC 2015. 'China-led AIIB Development Bank holds Signing Ceremony'. https://www.bbc.com/news/world-asia-33307314 (accessed on 12 December 2017).

divided into two classes: bond issue and direct term loan agreement with a bank or banks.[53] Because of the complex issues relating to sovereign bonds especially in sovereign debt adjudication, a detailed overview of bonds is deferred to the next sub-section. For the present purpose, it is sufficient to state that bonds are fixed-income securities by which a holder extends money to an entity for a defined period of time and at certain interest rates.[54] According to Tennekoon, bonds possess the following characteristics:

a. It is a debt instrument in a bearer form which seeks to enable the holder to possess direct legal rights as against the issuer;
b. It contains the promise of the issuer that a sum specified on the face of the bond (the principal amount) will be paid to the 'holder' of the bond on a specified maturity date or at an earlier redemption date;
c. It contains a promise that the issuer will pay interest on the principal to the bondholder;
d. It is transferable on the secondary markets because 'title to the notes passes on delivery'.[55]

In the context of sovereign debt, Waibel defines bonds as a 'country debt instrument acknowledging indebtedness and promising repayment of principal and interest on an earlier advance of money'.[56] With growing internationalisation of capital markets around the world, sovereign bondholders could come from virtually all parts of the world or different countries. This naturally adds to the complexity of sovereign debt especially in the event of default. Nevertheless, capital markets have provided alternative borrowing outlets and sovereigns are taking advantage of this to raise capital.[57]

The other form of private lending to sovereigns is the international loan contract. Before the Mexican debt crisis of the 1980s, the most preferred form of sovereign financing was an international loan constituted by agreement between the sovereign

[53] Wood 1980:177 & 233.
[54] Andritzky 2012:2-5.
[55] Tennekoon 1991:161-162.
[56] Waibel 2007:711-759, 719.
[57] Tanaka notes that '[i]nternational bonds have rapidly replaced syndicated bank lending as the main source of finance for emerging market economies (EMEs). Eurobonds now account for close to 90% of new international debt issuance by EME sovereigns…'. See Tanaka 2006:C149-C171.

borrower and the lending commercial bank or banks through syndication.[58] The latter normally occurs where the loan is so huge that a single bank cannot or, on account of the magnitude of the risk involved, does not wish to provide the entire sum hence a group of banks would form a syndicate (with a lead manager and an agent bank) to provide the entire sum. In such a situation 'each bank commits to contribute a proportion of the loan under the terms of a single loan agreement between the lending syndicate and the borrower'.[59] Syndicated loans have also increased over the years.[60]

Apart from the official character of the loan and the creditors, there are other notable differences between these classes of creditors. The priority accorded to some multilateral creditors as 'preferred creditors' is one. Second, while private creditors are principally driven by profit, the objectives of the official creditors are often dictated by wider, sometimes political, considerations as may be provided by their constitutive documents.[61] With respect to multilateral creditors, for instance, Emine notes that their objectives include 'promoting development and social welfare' although this 'may lead them to lend more in support of development projects, to lend in riskier environments, and to lend more in hard times relative to private lenders'.[62] However, it should be noted that these same wider, development-driven objectives are influenced, both directly and indirectly, by structural economic powers and geopolitical considerations as evidenced, for instance, by the stark variation in the voting powers of IMF member states.[63] Third, non-official creditors have no 'conditionalities' nor bureaucratic red tapes before execution of a loan contract; but these are common features of modern official (especially multilateral) lending which, as noted earlier, could constrain sovereign autonomy of the borrower.

It is also worth pointing out that apart from their non-official status and common objective of profit-making, non-official creditors have little in common. For instance, unlike the official and syndicated bank loans, bondholders have exit options, ie they can sell the bonds on the secondary markets. Consequently, sovereign bonds do not

[58] Rieffel 2003:188-219.
[59] Wood 1980:256.
[60] Gong et al 2018:211-226, 211-212.
[61] The Agreement Establishing the EBRD 1990 (as amended in 2013) (AEEBRD), for instance, stipulates that members should 'be committed to the fundamental principles of multiparty democracy, rule of law, respect for human rights and market economies'. See AEEBRD 2013:art 1.
[62] Emine 2009:109.
[63] Articles of Agreement of the IMF:art XII secs 1,2,3 & 5.

create a direct relationship between the sovereign borrower and the multitude of bondholders who purchase their securities on the secondary markets. On this ground, privity objection might be raised against claims by bondholders especially because of the activities of vulture funds.[64] However, inasmuch as the bondholder has legitimate expectations and rights against the sovereign issuer, it might be difficult to argue that there is no privity between the parties. As noted above, bondholders are mostly institutional investors from different countries. They have a striking resemblance with ordinary shareholders although bonds, by nature, differ from shares. For instance, bonds are transferable, mostly negotiable, and, like shares, their values fluctuate in the course of trading in the international bonds markets.[65] This means that 'a holder in due course acquires the property in the instrument and all rights under it free of any defects in title of a prior holder or defences available to the issuer against a prior holder'.[66] In addition, bondholders are entitled to a return on their investments in the form of interest. However, unlike ordinary shareholders, bondholders have a right to be repaid their principal upon the maturity of the bonds. This clearly makes them 'creditors' although as we shall examine subsequently some scholars and arbitral tribunals continue to hold a contrary view.[67]

2.2.1.3 Sovereign Debt as Investment

It seems quite obvious that a creditor whether official or non-official would consider lending as an investment, after all it is the contract that entitles her to receive interest until maturity. However, in sovereign debt adjudication, especially before arbitral tribunals, this is not as straightforward as it seems, especially with respect to sovereign bonds. This is because only sovereign debt instruments that qualify as 'investment' under the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention) and relevant bilateral investment treaties (BITs) can cloth ICSID tribunals with the necessary jurisdiction to adjudicate.[68]

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[64] *Postova Banka* case:para 338.
[65] Tennekoon 1991:146.
[66] Wood 1980:183. See also *McKenty v Van Horenback* 1911 21 Mn R 360.
[67] For instance, *Abaclat and Others v The Argentine Republic* 2011 IIC 804. See the Dissenting Opinion of Professor Georges Abi-Saab available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (accessed on 12 November 2017) (hereafter '*Abaclat Dissenting Opinion*'):para 269; *Postova Banka* case:paras 336-342.
[68] ICSID 1965. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (adopted 18 March 1965) (hereafter 'ICSID Convention 1965'):art 25.

In other words, a sovereign debt which is the subject of adjudication must not only provide a prior contractual cause of action, it must equally be capable of standing as a treaty obligation to enable invocation of ICSID jurisdiction in claims against the sovereign debtor.[69] Indeed, in *Postova Banka*'s case the ICSID tribunal held that 'loans and bonds are distinct financial products'.[70] Similarly, in his dissenting view in the *Abaclat* case, Abi-Saab argues thus:

> Affirming the jurisdiction of ICSID Tribunals over such instruments, would extend it over a vast new field. It would cover virtually all capital market transactions, ranging from standardized financial instruments, such as shares and bonds to structured and derivative products, such as hedges and credit default swaps. It would thus open the way to converting them from specialized tribunals, dealing with disputes arising out of a special type of investment, into commercial tribunals of general jurisdiction, covering all manners of financial transactions, including the most speculative varieties, which have nothing to do, in fact are light years away from the economic investment for the encouragement of which the ICSID Convention was concluded.[71]

2.2.2 Validity and Legitimacy of Sovereign Debt: Identifying the 'Sovereign'

One of the recurring issues in sovereign debt governance has been the sovereignty-compromising effect of debt and the powerlessness of states to resist it.[72] From the above discussion, it is obvious that sovereign debt is simply a debt incurred by a sovereign. The powers, capacity and identity of the latter and its conceptual basis have generated debates raising questions about the validity and legitimacy of certain

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[69] *Abaclat & Others v The Argentine Republic* 2013 52 ILM 667 (henceforth, reference will be made to the ICSID electronic report available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (accessed on 12 November 2017) (hereafter '*Abaclat* Majority').

[70] Tennekoon 1991:147.

[71] *Abaclat* Dissenting Opinion:paras 268-269.

[72] Citing instances of the 19th Century bankruptcies in Greece, Ottoman Empire, Balkan states and Nicaragua, Krasner has argued that 'the autonomy of borrowing states was compromised in two ways. First, rulers in borrowing states signed contracts that included invitations giving lenders some control over domestic fiscal activities including the collection and allocation of tax revenues. ... Secondly, if borrowers defaulted then rulers in creditor nations could intervene using coercion, or in some cases imposition to seize direct control of revenue sources including custom houses…'. With respect to official creditors he argues that 'the terms included in contractual arrangements between borrowing countries and IFIs have often involved detailed specifications of domestic economic behaviour. The IMF, the World Bank and other institutions, have not simply been concerned about getting repaid. One of their central missions has been the restructuring of domestic institutions and policies of borrowing states. In some instances, IFIs officials have occupied offices within the bureaucracies of states that have signed agreements. Some of the missions of IFIs are not so different from the bankers' committees that assumed control of state finances in the Balkan states in the 19th century or the customs receivership in Nicaragua'. See Krasner 1999:Electronic pages 5 & 15 of Chapter 5. See also Waibel 2011:44; Taylor 1997:745, 777 (arguing that economic investment activities dictate state's investment laws and policies and 'each mechanism of transferring capital from one country to another enables the capital provider to impose some constraint on the recipient government's ability to act freely').

sovereign debts.[73] Interestingly, the word 'sovereignty' has always been a trigger for controversy. Likewise, the term 'sovereign' in the context of sovereign debt is not easily amenable to a comprehensive definition.

In this connection, Lienau raises a fundamental question: 'Who, really, is the "sovereign" in sovereign debt?'[74] This is not just an abstract jurisprudential question, it is an important question that is central to this research in particular, and the sovereign debt governance regime in general, because of the following reasons. First, the validity of sovereign debts as well as the legitimacy and moral orientation of such debtors are issues that often feature in sovereign debt adjudication and are therefore part of the complex issues in the evolving sovereign debt governance regime.[75] Second, determining the place of socio-economic rights in sovereign debt governance should logically start with an understanding of the relationship between the 'sovereign' (whoever that may be) and the rights-holders. Third, discussions on sovereign debt tend to ignore the surrounding legitimacy concerns and, as observed by Lienau, this puts the sovereign debt regime in an 'uncomfortable situation of functioning without a clear theory of what it means by "sovereign"'.[76] The famous *Tinoco* case[77] confirms the conceptual difficulty of identifying the sovereign for the purpose of international responsibility. As the research will examine in Chapter Five, the case raised both theoretical and practical questions about recognition of sovereign government and the validity of the financial undertakings of such government under international law.

Fourth, the 'shrinking' economic powers of states in the face of growing internationalisation of institutions and complex regional integration has, to some extent, blurred the traditional relationship between the state and its citizens. The firm control of the Greek financial system by the Euro Group (ie the European Commission and the European Central Bank) and the IMF following the debt default of 2015 even with overwhelming citizens' opposition to such control by way of constitutional referendum, are illustrative of the complex dynamism of this new relationship in the context of sovereign debt governance.[78] Finally, the question is important because of

[73] Lienau 2008:63; Lienau 2016:151 (Lienau 2016a); Raffer 2007:221-247; Buchheit 2007:1237-1245.
[74] Lienau 2008:64.
[75] Lienau 2016a:151; Raffer 2007:221-247.
[76] Lienau 2008:64.
[77] *Tinoco Arbitration Case (Britain v Costa Rica)* 1924 18 *AJIL*147, 150-151 (*Tinoco* case).
[78] Salomon ME & Howse R 2018. 'Odious debt, adverse creditors, and the democratic ideal', 2-27 http://ssrn.com/abstract=3291009 (accessed on 20 June 2019).

the controversy over the so-called 'odious debt' (ie illegitimate, illegal, non-consensual, war or morally reprehensible debts mostly incurred by despotic regimes) which was re-ignited following Iraq's debt incurred during Sadam Hussein's era, or even the debate about the validity of apartheid-era debt on post-apartheid South Africa.[79] In fact, a similar controversy arose with respect to the juridical status of the Democratic Republic of Congo (DRC) for the purpose of sovereign debt liabilities.[80] One must remember that although both 'people' and 'government' are necessary constitutive elements of the juridical state under international law,[81] the two could have distinct (even competing) interests. For these reasons, understanding and locating the 'sovereign' should be one of the starting points of this research.

First, 'sovereignty' and all that it entails are vested in the 'sovereign'. However, defining and identifying the 'sovereign' is a theoretically charged endeavour.[82] According to Rodrigues, since Bodin, scholars have always 'felt that a human being must always be at the disposal or is necessarily a part of something sovereign: the King, the Nation, the People, the State, the Race, the Proletaria'.[83] Scholars have developed several theories to explain and rationalise the concept of sovereignty.[84] Others advocated for its total abandonment in legal theory.[85] For instance, Henkin once remarked that the concept should be relegated to 'the shelf of history as a relic of an earlier era'.[86] It is, therefore, not surprising that the concept has earned several appellations: a 'curse

[79] Hanlon 2006:211-226; Howse 2007. 'The concept of odious debt in public international law'. (UNCTAD (Discussion Paper No. 185) 1-20; Beaulieu et al 2012:709-738; Gray 2007:137-164.
[80] This arose when vulture funds sued the DRC over sovereign debt in the UK and US courts to seize assets belonging to a state-owned company. In *FG Hemisphere v DRC* (2012) the Privy Council held that the government's mining company was not responsible for the government's debt. See Neate 2012. 'Privy Council Blocks "vulture fund" from collecting $100m DRC debt'. www.google.con.ng/amp/s/amp.theguardian.com (accessed on 13 July 2018). In the US, the following suits were also filed and similar issues including sovereign immunity were raised: *Af-Cap Inc v Republic of Congo* 2004 383 f 3d 361 (5th Circuit); *FG Hemisphere Associates v Republique du Congo* 2006 455 f 3d 575 (5th Circuit); and *Kessington International Ltd v Republic of Congo and Ors* 2007 EWCA Civ 1128 (Court of Appeal).
[81] Convention on Rights and Duties of States (CRDS) (adopted on 26 December 1933):art 1 which stipulates that a State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other States.
[82] Kurtulus 2005:67.
[83] Rodrigues 1921-1969:17-21, 18.
[84] See generally Loughlin 2016:57; Grimm 2015; Zagorin 2009:Chapter 3; Eleftheriadis 2010:535; Eleftheriadis P 2013. 'Hart on sovereignty', 2-14 http://ssrn.com/abstract=2321612 (accessed 12th June 2018); Merriam Jr 2000; Wade 1955:172; Lauterpacht 1997:137-150; MacCormick 1993:1-18; Kingsbury 1998:599-625; Janis 1993: 391-400; Krasner 2001:17-42; Sarooshi 2004:1107; Ferreira-Snyman 2006:1; Havercroft 2011:20-35; Turner 2014:101-114; Zick 2005:229.
[85] Eleftheriadis 2010:535-537.
[86] Henkin 1995:9-10.

and source of conceptual confusion',[87] a concept of 'nuisance value',[88] a 'discredited old idea',[89] 'an annoying anachronism',[90] an 'organized hypocrisy',[91] etc. However, it is an important concept that is at the heart of modern international law and is probably here to stay.[92] The debate has mostly been about its actual character and *locus*, not its value or relevance.

For a start, there is no universally accepted definition of 'sovereign' or 'sovereignty'.[93] Nor is there a trace of its exact origin.[94] Indeed, it is conceptualised from various perspectives.[95] This research is, however, concerned with juridical sovereignty, focusing specifically on the legal capacity, status and formal standing of a sovereign in international economic relations and before tribunals.[96] Broadly, Kurtulus defines 'juridical sovereignty' as 'a condition in which an agent - a state or a similar entity - according to law is supreme within a certain territory and independent of agents outside of it'.[97] Werner adopts a similar approach, seeing a sovereign in the image of

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[87] Elshtain 1991:1356.
[88] Rodrigues 1921-1969:17.
[89] Eleftheriadis argues that '[w]hen taken seriously, sovereignty cannot be successfully adjusted and refined to fit our times. Philosophically speaking, sovereignty is and has always been incompatible with the rule of law…'. See Eleftheriadis 2010:538-539.
[90] Rabkin 2005:45.
[91] Krasner 1999:1-10; Krasner 2001:18 & 26.
[92] Kingsbury 1998:599 (calling it 'the normative foundation of international law'); Loughlin 2016:57-59; Werner 2004:125, 126, 133 & 147.
[93] Loughlin draws a distinction between 'sovereign' and 'sovereignty' noting thus:

> The term "sovereign" denotes the office of the ruler, and it signifies the authority of that office … When the expression was first deployed… it was accepted not only that the ruler's "sovereignty" indicated independence from higher authority, but also that sovereignty signified the quality of the legal relationship between ruler and subject … Specifically, the powers of ruler could be divided, but sovereignty - the absolute authority of the ruling power - could not.

See Loughlin 2016:58-59.
[94] For the pre-Bodin history of the concept see Grimm 2015:3-10; Rabkin 2005:45-52.
[95] Cohen 2004:1 & 9 (noting '[t]o say that a state is sovereign means that it decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so to limit its freedom by making commitments to them...It is by virtue of their autonomy, or their capacity to act freely, that citizens are constituted as members of a state and as bearers of rights. It is this capacity of the citizen that gives rise to the sovereignty of the state'.); Cassel 2001:60-61 (arguing that sovereignty is at odds with human rights and defines it as 'the right of a state to rule itself and those who live within its territory; to choose its own constitution, form of government, and economic system; to write and enforce its own laws; to exercise a territorial monopoly on publicly sanctioned use of force through its police and military; to set its own taxes and allocate the spending of government revenues; to exercise police powers to regulate the economy and society; and to enter into agreements with other states. A state that can do all these things, unfettered by outside dictates or interference, enjoys full sovereignty; a state that is not free to exercise these powers is, to that degree, not sovereign... It has the sovereign right to become less sovereign… The exercise by states of their sovereign right to surrender sovereignty has in fact become the most important engine of expansion of international human-rights law').
[96] CRDS 1933:art1.
[97] Kurtulus 2005:84.

an individual with freedom to act and freedom from the actions of others.[98] According to Werner, sovereignty is the independence which, 'on the one hand, gives states a freedom to act and, on the other, protects the freedom of states against the actions of others'.[99] It is a 'claim to authority … institutionalised, defined and redefined within the framework of international law'.[100] Werner uses it in two interrelated ways: as a description of the international status of a political community as a sovereign and 'to endow states with certain fundamental rights, powers and duties'.[101] Oppenheim views sovereignty as an expression of supremacy over territory and supremacy over persons. He famously remarked:

> As supreme authority, an authority which is independent of any other earthly authority… it [ie sovereignty] includes, therefore, independence all round, within and without the borders of the country. As comprising the power of a state to exercise supreme authority over all persons and things within its territory, sovereignty is territorial supremacy. As comprising the powers of a state to exercise supreme authority over its citizens both at home and abroad, sovereignty is a personal supremacy.[102]

While adopting an International Economic Law (IEL) approach, Qureshi & Ziegler define it as 'juridical independence from the authority of other participants in international economic relations … and as constrained and augmented by the principle of equality as between states'.[103] In particular, they define economic sovereignty as 'the totality of the economic powers of a State, as well as its equal status in international economic relations'.[104]

These definitions are by no means adequate. In particular, they failed to disaggregate the constitutive elements of the juridical sovereign and proceeded upon the assumption or premise that 'the state' is simply the sovereign despite the contentious debate about this matter.[105] Therefore, a further contextualisation is important. At least we now know that 'the state' is a possible 'contender' or 'candidate' (for lack of a better term) for the position of the sovereign. However, to identify other possible contenders and properly situate socio-economic rights of citizens within the sovereign debt

[98] Werner 2004:125-126.
[99] Werner 2004:126.
[100] Werner 2004:33.
[101] Werner 2004:155.
[102] Quoted in Kingsbury 1998:599.
[103] Qureshi & Zeigler 2011:49.
[104] Qureshi & Zeigler 2011:48-49.
[105] Sarooshi 2004:1109-1111; Loughlin 2016:59 (noting that the exercise of sovereign powers takes the pattern of 'institutionalization, internal differentiation and corporatization of the office of the sovereign').

scheme, the research will approach the notion of sovereignty from two perspectives: internal and external.[106] These perspectives are not mutually exclusive; they are mutually reinforcing as incidents and manifestations of sovereign powers within and outside a country.[107] In the words of Kurtulus, there is no controversy 'as regards the unitary nature of internal and external state sovereignty, as possession of one form is considered to imply, by definition, possession of the other'.[108] Rodriguez points out that '[s]overeignty is one. … No state can be sovereign externally and not be sovereign internally'.[109] In essence, possession of external sovereignty presupposes the possession of internal sovereignty, but the reverse is not necessarily the case.[110]

The internal and external aspects are only indicative of the extent of territorial limitations of operation, the legal field or environment in which the sovereign functions and manifests its sovereignty. This is important because it would help us to determine the status of the rights-holders and their relationship with the duty bearers on both domestic and international planes. Although external and internal sovereignty are intricately connected, for analytical purposes, it is important to examine them separately.

2.2.2.1 The External Sovereign

A 'sovereign' in the external sense is relatively straightforward: a juridical state is widely considered as the 'sovereign' in international law, although this is increasingly being questioned in the light of the growing influence, powers and rights of IGOs and the explosive growth of NSAs.[111] Nevertheless, 'the state' regardless of its

[106] There are various categorisations of sovereignty in the literature. See, for instance, Rodrigues 1921-1969:19 (arguing that there is only one sovereignty); Kurtulus 2005:81 (calling the internal and external division 'a spatial division of authority); Krasner 2001:21 (describing sovereignty as 'a basket of goods that do not necessarily go together' and classifying it into domestic, interdependent, international, legal and Westphalian sovereignties); Sarooshi 2004:1108-9 (giving a contesting typology: legal versus political sovereignty, external versus internal sovereignty, indivisible versus divisible sovereignty and governmental versus popular sovereignty).

[107] By this approach, the research avoids 'dichotomous questions' as to whether sovereignty is juridical or factual, qualitative or quantitative, divisible or indivisible, etc. Indeed, the various classifications serve different contextual purposes. See Kurtulus 2005:62-63.

[108] Sarooshi 2004:1108 (calling it a 'unity of identity' as it 'is the same whether sovereign powers are being exercised on the domestic or international planes').

[109] Rodrigues 1921-1969:19-20.

[110] This falls under the doctrine of recognition of state and government which could have legal implications for lenders regarding which 'regime is entitled to borrow under the loan agreement…; whether the borrower can be sued in the courts of a country that does not recognize it…; and whether the acts of the borrowing state or its judiciary can be given effect to by non-recognising countries'. See Woods 1980:114

[111] See for example Taylor 1997:750 (suggesting the uncoupling of statehood and sovereignty to recognize that non-states do have powers erstwhile considered sovereign and arguing that 'unfettered

constituents, forms, population, government or constitutional structure is treated as the sovereign just like individuals and other legal persons in the domestic system. Indeed, Grotious compared a sovereign state with an individual under domestic law.[112]

Narrowed down to international financial law, external sovereignty is a juridical state's international economic status and its capacity to engage in international financial transactions and operate externally.[113] A sovereign in the external sense possesses certain legal features: sovereign equality,[114] sovereign immunity,[115] independence and non-interference.[116] Jackson calls the independence and non-interference elements 'negative sovereignty' which constitutes social contracts among states; while the 'positive sovereignty' enables states to provide political goods, formulate and enforce public policy in the interest of their citizens.[117]

In the *Nicaragua* case the International Court of Justice (ICJ) re-affirms that 'the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference'.[118] This is a solid customary international norm.[119]

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economic self-determination is no longer possible for States'); Krasner 2001:18 (noting that compromise of traditional external sovereignty occurs through 'convention, contracting, coercion and imposition' and 'examples of transgressions of autonomy include bondholders' committees that regulated financial activities in some Balkan states and elsewhere in the nineteenth century, International Monetary Fund (IMF) conditionality').

[112] Grotious personified the state and held that 'like persons, sovereign states were not only free agents, but also bound by their agreement, *pacta sunt servanda*…'. Quoted in Janis 1993:398-399; Merriam Jr 2000:47-48.

[113] Qureshi & Ziegler 2011:64.

[114] Kingsbury 1998:603-605.

[115] Rule of *par in parem non habet imperium* ('one equal entity does not have sovereign authority over another such entity'): See *Compania Naveira Vascongada v SS Cristina* 1938 AC 485:490; *Trendtex Trading Corp Ltd v Central Bank of Nigeria* 1977 1 QB 529:552-553; *Kuwait Airways Corp v Iraqi Airways Co* 2001 3 WLR 117; *I Congresso del Partido* 1983 1 AC 244:262; International Law Commission (ILC) 1999. *UN Materials on Jurisdictional Immunities of States and their Property* 1982:annex paras 33, 35 & 84; US's *Foreign Sovereign Immunities Act* 1976; UK's *State Immunity Act* 1978:sec 3 (which exempts 'commercial transactions' of sovereigns from immunity and defines 'commercial transactions' to include 'any loan or other transaction for the provisions of finance and any guarantee or indemnity in respect of such transaction or any other financial obligation').

[116] UN 1945. *UN Charter* (signed on 26 June 1945 and entered into force October 1945):art 2(1); *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) 1986 ICJ Reports 186 (*Nicaragua* case).

[117] Jackson 1990:27-29.

[118] *Nicaragua* case:197.

[119] *Customs Regime Between Germany and Austria* (Advisory Opinion) 1931 PCIJ Reports Series 57; *Aaland Island* case 1920 Report of International Commission of Jurists League of Nations Official Journal Special Supplement No 3:3; *Wimbledon* case 1923 PCIJ Series A No 1:25; *DRC v Belgium* 2002 ICJ Reports; *Island of Palmas* case *(Netherlands v United States)* 1928 2 Reports of International Arbitral Awards 829.

In addition, the UN Charter affirms the 'sovereign equality' of states.[120] This implies equality and equal treatment of all sovereigns under international law.[121] In other words, 'equality' here means, among others, all 'sovereigns' have the same capacity to acquire rights, assume obligations and bring or respond to claims within the framework of international conflict resolution mechanisms.[122] This extends to human rights issues. Qureshi & Zeigler have shown how human rights relate to the doctrine of sovereign equality of states.[123] They observed that the doctrine of sovereign equality is also 'an articulation of the basic human rights of individuals whatever their origins' because 'the state is not a mere artificial construct; it comprises in the end an aggregate of individuals…'.[124]

Notwithstanding the elements of sovereign equality, independence and non-interference, today the new vision of external sovereignty is that of cooperation and interdependence among nations, and between states and NSAs especially in the areas of investment and finance.[125] In fact, today, more than ever before, states are driven into partnerships largely for investments, economic development and cooperation, especially through BITs.[126] Their sovereign status empowers them to do so. Their external sovereignty conditions their participation in the international community's economic and financial spheres of activities. Their financial commitments are part of these activities. This is, however, not a priceless sovereign act. Some even consider it as a dispersal rather than a confirmation of sovereign powers as NSAs have forced themselves into the international economic space. In the words of Taylor '[m]onetary and other policy decisions which affect a country's economic wellbeing are

[120] Art 2(1) & (7) of the UN Charter 1945 provide that '[n]othing contained in the present Charter shall 'authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter…'.
[121] Qureshi & Zeigler 2011:64.
[122] International Law Commission (ILC) 1948-1949. *ILC's Draft Declaration on the Rights and Duties of States*:art 13; CRDS 1933:art 1; Organization of American States 1948. *Charter of the Organization of American States*:arts 10-23; *SS Lotus case* (*France v Turkey*) 1927 PCIJ 10:18; *Island of Palmas* case: 829; *Corfu Channel case (UK of Great Britain and Northern Ireland v Albania) (Assessment of Legality of Compensation)* 1949 ICJ Report 244; *Legality of the Use or Threat of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Report 225.
[123] Qureshi & Zeigler 2011:71.
[124] Qureshi & Zeigler 2011:71-72.
[125] Mattli 2000:149-180.
[126] UNCTAD 2015. 'Recent trends in international investments agreements and investor-state dispute settlement', http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (accessed on 21 December 2017).

no longer the sole province of the sovereign, but are increasingly affected by the direct and indirect demands of external actors'.[127] In addition, part of this new vision of external sovereignty is what Falk calls 'responsible sovereignty', which espouses the responsibility of states to protect their citizens, promote their welfare and adhere to minimum international norms, including those emanating from the UN and its agencies.[128]

Finally, the important point with respect to external sovereignty (for the present purpose) is that the state as sovereign is subject to the rules of international law. The state has the capacity to sue and be brought before an international tribunal over actionable claims. It has capacity to change its internal conditions through its external actions. In particular, its investment treaty and financial obligations are products of the exercise of external sovereignty.[129] However, as far as exercising external sovereignty is concerned, states are no longer the exclusive players with responsibilities under international law. Importantly, the flexibility of the concept of sovereignty enables a 'transfer' of certain elements of external sovereignty to IGOs, NSAs including non-governmental organisations (NGOs), commercial and investment banks, portfolio managers and foreign investment companies.[130] This form of 'transfer' is what Taylor calls the 'exercise elements of sovereignty' which does not affect the status of the sovereign as a state, nor confer statehood on NSAs.[131] However, it enables NSAs to have both rights and responsibilities under international law. This, as it will be argued

[127] Taylor 1997:749.
[128] Falk 2000:582.
[129] Gazzini 2014:15-48, 23.
[130] Taylor 1997:768.
[131] Taylor draws a distinction between 'claim elements of sovereignty' (statehood) and 'exercise elements of sovereignty': the former cannot be transferred and include independence, physical territory, personhood, an identifiable government and population while the latter may be transferred/reallocated to NSAs and include autonomy, impermeability (territorial inviolability) and equality. She defines 'transfer' to include 'all methods by which "exercise" elements change hands' which could be open, intentional transfer to state groupings; de facto transfer to non-state actors (eg money managers like pension funds). She argues that the influence of money managers through investments in sovereign bonds is forcing reallocation of 'sovereign sticks' and that 'whether these actors are positive or negative additions, they are additions … Portfolio managers are now *defacto* in possession of some "sticks" of sovereignty. Recipient States cede some degree of autonomy to these managers. The inability or unwillingness to recognize the power wielded by non-state actors has serious consequences. If their power remains unacknowledged, and hence not accommodated in a legal framework, we may have recurrent economic crises in the world economy…Political and economic realities clearly demonstrate that States are no longer the sole participants in the world financial system'. See Taylor 1997:800-809; Cooley & Spruyt 2009:19.

in the subsequent Chapters, extends to socio-economic rights responsibilities for international creditors.

2.2.2.2 The Internal Sovereign

It is now appropriate to examine the relatively more tendentious aspect of sovereignty to, at least, identify and situate the status of citizens within the discourse. The internal perspective unlike the external one, is replete with jurisprudential controversies, largely because of the criticality of individual rights and liberty and the imperative to recognise citizens' status and to protect them. In addition, locating the *sovereign* has implications for governance structure and the economic and political stability of a state. From the internal perspective, sovereignty could be described as the supreme authority vested in an institution, a person or a body (sovereign) covering the powers to make, change, enforce and alter pre-existing laws in a state and to govern generally within its territorial compass.[132] In other words, it deals with the freedom and autonomy of an entity to organise itself within its territory.

Relying on the Charter for Economic Rights and Duties of States (CERDS) and the Declaration of International Law Concerning Friendly Relations and Cooperation among States in accordance with the United Nations Charter,[133] Qureshi & Ziegler consider the following as the major incidents of internal economic sovereignty of a state: Permanent sovereignty over its natural resources; sovereignty over its non-natural resources, including financial services and human resources; economic self-determination and governance; and non-interference in its economic affairs.[134] It is from these 'resources' that repayment of debts can be made. They observed that internal sovereignty is increasingly being impacted by norms emanating from international economic organisations such as the IMF and the WB.[135] In this regard, it extends to monetary sovereignty by which a state can freely issue currency and determine its monetary and exchange rate policies.[136] However, none of these really tell us who the sovereign is within the state structure or even relate it to the citizens of the state.

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[132] Martin 2003:469.
[133] UN 1970. *Declaration of International Law Concerning Friendly Relations and Cooperation among States in accordance with the United Nations Charter* (adopted on 24 October 1970).
[134] Qureshi & Ziegler 2011:56.
[135] Qureshi & Ziegler 2011:63.
[136] Fink 2014:1054-1070, 1055.

There are three dominant schools of thoughts on this issue: the 'rule of law', the popular and the statist schools. The latter is concerned with the original source of authority as well as the effective control of a state and its government without much consideration given to the legitimacy and moral orientation of such government.[137] The *Tinoco* case seems to favour this approach although Lienau has argued that the award took an 'intermediate, rule of law' position by which a sovereign is 'constituted and constrained by law, rather than "above the law" as presented' by the statists.[138] MacCormick is among the 'above-the-law' statists; he distinguishes between legal sovereignty and political sovereignty.[139] The former is 'the power of law-making unrestricted by any legal limit' while the latter is 'political power unrestrained by higher political power'.[140] Whoever exercises these powers is considered to be the sovereign in the state. MacCormick, however, argues that, *stricto sensu,* nobody has such powers and that 'there is no single sovereign internal to the state, neither a legal nor a political sovereign'.[141] Obviously, several authorities exist in almost all states and each could be sovereign within its domain; but the final and supreme authority from whom all authorities must derive their basis and powers is certainly difficult to identify. This is because, in a sense, it requires an aggregation of factual situations, especially, at least in a positivist sense, the use of brute force to command obedience and acceptance.

It is important to point out that the intellectual ingredients of the statists' conception of sovereignty could be traced to Bodin, Hobbes, Bentham, Grotious and others.[142] For example, Bodin postulated that in every political community there must be a determinate, indivisible sovereign authority whose powers are decisive and recognised as rightful or legitimate basis of authority in such community.[143] He defines it as 'the most high, absolute, and perpetual power over the citizens and subjects in a commonwealth unrestrained by law' and 'as the greatest power to command.'[144] Whether in autocracy, monarchy, democracy or whatever form of government, for

[137] Merriam Jr 2000:44; Nath 2010:107-109.
[138] Lienau 2008:78.
[139] MacCormick 1999:127.
[140] MacCormick 1999:127.
[141] MacCormick 1999:129.
[142] Prokhovnik 2013:Chapters 2 and 3. Bentham famously remarked that 'by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience'. Quoted in Freeman 2001:224, 227.
[143] Beaulac 2004:101-125; Cohen 2004:1-9.
[144] Beaulac 2004:125.

Bodin, sovereignty rests on the 'sovereign prince' with supreme power in the hierarchical organisation of political community.[145] Unlike the Aristotelian position, Bodin maintains that peoples, free or slaves, could be citizens because 'acceptance of a common sovereign is what defines citizens'.[146] He recognised that sovereignty could be limited by natural law.[147] Hobbes, however, claimed that a sovereign is illimitable whatsoever.[148] But he located sovereignty in the Laviathan (the state) and argued that a 'commonwealth without sovereign power is like a word without substance'.[149] Accordingly, the sovereign represents the citizens and his actions represent their will; opposing or questioning him amounts to a contradiction because

> for he that doth anything by authority from another doth therein no injury to him by whose authority he acteth; but by this institution of a commonwealth every particular man is the author of all the sovereign doth; and, consequently, he that complaineth of injury from his sovereign complaineth of that whereof he himself is the author, and therefore ought not to accuse any man but himself.[150]

This means there is unity between the Laviathan and the citizens. Other statists include Kant and Hegel.[151]

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[145] Beaulac lists Bodin's nine marks of sovereignty thus: (a) the power to legislate, (b) to make war and peace, (c) to appoint higher magistrates, (d) to hear final appeals, (e) to grant pardons, (f) to receive homage, (g) to coin money, (h) to regulate weights and measures, and (i) to impose taxes. Bodin was quoted saying thus:

> Majesty or Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth….If such absolute power be given him purely and simply without the name of a magistrate, governor, or lieutenant, or other form of deputation; it is certain that such a one is, and may call himself a Sovereign Monarch. … For if we shall say, that he only had absolute power, which is subject unto no law; there should then be no sovereign prince in the world, seeing that all princes of the earth are subject unto the laws of God, of nature, and of nations. … Let this be the first and chief mark of a sovereign prince, to be of power to give laws to all his subjects in general, and to every one of them in particular, …without consent of any other greater, equal, or lesser than himself'.

See Beaulac 2004:107-115.

[146] Rabkin 2005:56.

[147] Ferreira-Snyman 2006:6.

[148] Zagorin 2009:66-67.

[149] Janis quoted Hobbes arguing that all men need common power for their safety and 'to direct their Common Benefit. …The only way to erect such a Common Power … is to confer all their power and strength upon one man or upon one assembly of men that may reduce all their wills, by plurality of voices unto one Will; which is much to say they appoint one man or assembly of men to bear their Person … The multitude so united in one Person is called a Commonwealth, in latine *Civitas*…that great *Laviathan*. That one man or Assembly of men is called the soveraigne and said to have soveraigne power; and every one besides, his subject'. See Janis 1993:393-394.

[150] Zagorin 2009:68.

[151] Prokhovnik notes that Hegel was 'in general inclined toward an idealization of the State…the individual has reality only as a member of the State; his destiny is to lead a so-called "universal" life, that is, in accordance with the universal will of the whole. … the State must be regarded as an organism, …a personality…or, in the juristic sense, a subject of rights…to the State belongs the attribute of sovereignty….The essence of the sovereignty of the State …is found in the fact that the functions and

For the statists, ultimate authority must rest somewhere. Therefore, for many of the statists, the sovereign is an illimitable, supreme political authority.[152] Following the same line of reasoning, Austin conceives the sovereign as a political superior without limitations, commanding and entitled to obedience from all subjects.[153] Interestingly, Austin located sovereignty ultimately in the people. For him, the sovereign is the foundation of any legal system.[154] However, Austin's failure to envisage a rule of succession of the sovereigns who are entitled to habitual obedience renders his sovereign only a periodic one.[155]

According to Hart, 'habitual obedience' is insufficient; such a sovereign must be 'qualified in a certain way' not merely 'qualified at a particular time' and is only unlimited outside the law.[156] Consequently, Hart replaced Austin's sovereign with 'the rule of recognition'.[157] But this too is not free from criticisms.

For instance, Eleftheriadis argues thus:

> Hart's own rule of recognition is prey to the very same criticisms to which Hart subjected Austin's sovereign. How can the continuity and persistence of the rule of recognition themselves be established? Is the rule of recognition not itself subject - just like sovereignty - to legal limitation and determination? If so, the rule of recognition - just like sovereignty - is not the determinant of law, but its result…. But neither sovereignty nor any ultimate rule of recognition can be 'ultimate' criteria in Hart's sense. Neither can provide the 'foundations' of a legal system, for they are its creations.[158]

For Eleftheriadis, sovereignty is a false concept, the sovereign has neither existence nor location because 'if sovereignty is created by law, it is then just a political office, if it is an ordinary office like any other, then there is no sovereign'.[159] There are only

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powers of the body politic are not exercised for their own sake alone, that is, as governmental rights; nor are they the private property of individuals, but they are rooted in the unity of the State itself. In this sense, the State is the sovereign personality. Popular sovereignty expresses an idea which is true only when one regards the State externally as one among others…'. See Prokhovnik 2013:276-282; Merriam Jr 2000:23.

[152] Lineau 2008:75.

[153] Austin states: 'If a determinate human superior, not in a habit of obedience to a like superior, received habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society is a society political and independent'. See Freeman 2001:242-254.

[154] Freeman 2001:253-258; Merriam 2000:66-81.

[155] Hart 2012:50-55.

[156] Hart 2012:50-58.

[157] Hart 2012:116.

[158] Eleftheriadis 2013:13.

[159] Eleftheriadis aptly notes that 'in Austin's theory we have sovereignty without law, whereas in Hart's version we have law without sovereignty. In both cases, the idea of sovereignty is a distraction' and that 'sovereignty and law are finally incompatible and mutually exclusive'. See Eleftheriadis 2010:547, 562 & 569.

offices and institutions collectively exercising governmental powers under a constitutional framework although 'the people may be politically supreme but their powers are not unlimited'.[160] However, following Hobbes, Eleftheriadis argues that the state or the Leviathan is the sovereign.[161] This appears to contradict his earlier position that there is no sovereignty anywhere.[162]

Using what he calls 'the political domain', Loughlin argues that sovereignty does not even rest in government offices, concluding that '[s]overeignty vests neither in the ruler, nor in the office of government, nor in the people: sovereignty vests in the set of relations that are formed in instituting this political domain'.[163]

In summary, the statists' conception fits into the positivists' theoretical premise.[164] For instance, in positivist international law sovereignty has no moral undertones.[165] It is strictly about *de facto* control of the state and of persons within the state as recognised by other states. The propriety or moral content of the process of assuming such control is immaterial. By extension, the legality, legitimacy or moral propriety of the constitutional order and its internal structures or processes are equally immaterial in constituting and determining the internal sovereign and its powers, contractual obligations, capacity for external relations and commitments. Importantly, international creditors would obviously favour the statists' conception of the sovereign because it ensures sovereign continuity, repayment predictability and relative certainty in their relationship with the state regardless of who the sovereign is.[166] This understanding might give creditors a 'conceptual monopoly' in the sovereign debt scheme.[167] It is noteworthy that except for a few (eg Austin), the statists do not locate sovereignty in the people. This is curious because, logically, without the people, sovereignty (and the sovereign) would be meaningless, perhaps inconceivable. In fact, even Austin's location of the sovereign in the electorates is a theoretical contradiction, as it implies

[160] Eleftheriadis 2010:565.
[161] Eleftheriadis 2010:565.
[162] This appears to be a reflection of the English constitutional system. For instance, in *Baccus v Servicio National del Trigor* 1957 1 QB 438, 466 the court noted that 'in these days the government of a sovereign state is not as a rule reposed in one personal sovereign: it is necessarily carried out through a complicated organization which ordinarily consists of many different ministries and departments'.
[163] Loughlin 2016:59.
[164] Payandeh 2010:967-995; Morgenthau 1940:260-284, 275.
[165] Brownlie 1990:288.
[166] Tideman & Lockwood 1993:251-256.
[167] Lienau 2008:103 & 108.

that the electorates are both the subjects and the sovereigns at the same time.[168] Unfortunately, command and obedience cannot reside in the same place.[169]

Unlike the statists, the popular school adopts a pragmatic approach. It disregards the separation of law and morality and insists that sovereignty goes beyond the factual situations of effective control of government and powers over the people. It is simply about the will or consent of the people, 'a "sovereign people", whose consent provides legitimacy to government and authority for its decisions'.[170] This, obviously, is grounded in the social contract theory as espoused by Rousseau.[171] It is a value-oriented, people-centric conception and, as the research shall argue subsequently, it tends to accommodate human rights, public policy and democratic concerns. It is also more in agreement with external sovereignty as examined above.

Locke, Habermas and Waldron seem to favour popular sovereignty.[172] According to Habermas, '[t]he source of all legitimacy lies in the democratic law-making process, and this in turn calls on the principle of popular sovereignty'.[173] Waldron points out that 'the principle of popular sovereignty - basic to liberal thought - requires that the people should have whatever constitution, whatever form of government they want'.[174] Indeed, there is contemporary evidence supporting this popular conception: the recent instances of street protests toppling democratically elected governments in Europe and Middle East are clear examples.[175] Therefore, the people are uncontestably conceived as the sovereigns according to this approach. In the words of Merriam, 'it is difficult to see how a Government can exist without the people as its basis'.[176] This

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[168] Eleftheriadis 2010:548.
[169] Eleftheriadis 2010:548.
[170] Lienau 2008:76.
[171] Merriam 2000:24-26; Rabkin 2005:66-69.
[172] For instance, after locating sovereignty in legislature Locke argued that 'there remains still in the people a supreme power to remove or alter the Legislative' as 'the people perpetually retains a power of saving themselves... and to rid themselves of those who invade this fundamental, sacred and unalterable law of self-preservation, for which they entered into society'. See Locke 1823:paras 149-150; Habermas 1996:89 cited in Eleftheriadis 2010:537; Waldron 1999:255 cited in Eliftheriadis 2010:537. Eliftheriadis strongly rejects any notion of popular sovereignty arguing that 'the idea of sovereignty in law is either implausible or self-contradictory'. See Eliftheriadis 2010:562.
[173] Quoted in Eleftheriadis 2010:537.
[174] Eleftheriadis 2010:537.
[175] See, for example, The Star 2018. 'Thousands take part in anti-government protest in Albania'. www.thestar.com (accessed 16 July 2018); Reuters 2018. 'Albanian protesters block roads'. www.reuters.com (accessed 16 July 2018); BBC 2018. 'Arab uprisings'. www.bbc.com (accessed on 16 July 2018).
[176] Merriam 2000:50-51.

is also in line with the jurisprudence of the historical and sociological schools. As Savigny argued 'the State originally, and according to nature, arises in a people, through a people, and for a people'.[177] Indeed, in the context of sovereign debt, it has been argued that it is the people who actually pay for such debt.[178] This is because they are the tax payers and they bear the brunt of any non-fulfilment of human rights commitments in the event of sovereign debt crisis. Therefore, their consent is important for the legitimacy of the state. This consent of the people is reflected in their acceptance of a constitutional order. It is this order that guarantees their rights as citizens.

However, the people are not the sovereigns in traditional international law as they cannot conduct international transactions or even borrow in their capacity as such on behalf of, or in the name of their state.[179] A valid question might also be asked: who are the people?[180] In the context of this research, the beneficiaries (or the presumed beneficiaries) of sovereign loan contracts are the people. Viewed from a sustainable development perspective, loans are contracted and debts are forgiven to principally facilitate development. Theoretically, there is no conflict between the people and the state's external sovereignty. While contextualising the logic of sovereign powers within the American constitutional system, Rabkin aptly notes that 'a world in which sovereign states can be intimidated from asserting their own rightful powers is a world where most individuals can be intimidated from claiming their own constitutional rights'.[181] Indeed, both the statists who recognise the state as the sovereign and the populists clearly align with the external aspect of sovereignty as examined above. This is because the people theoretically constitute the state and they empower their government to function externally on their behalf and in their interests. In fact, this approach is reflected in many democratic constitutions around the world. The US

[177] Ibid 51.
[178] Arruda 2000:8-9.
[179] UN 1969. *Vienna Convention on the Law of Treaties* (adopted on 23 May 1969) (VCLT 1969):arts 6 & 26.
[180] According to Loughlin 'since "the people" exist qua people only once institutional arrangements of governing have been established, this type of claim is paradoxical [hence the shift to normative claim based on social contract but]power is not delegated from the people (the multitude) to their governors. Yet it is only through this type of virtual exercise that the juristic construction of the political domain…can be brought into being. Understood as such, sovereignty is a representation of the power and authority created through the formation of that worldview. Sovereignty vests neither in the ruler, nor in the office of government, nor in the people: sovereignty vests in the set of relations that are formed in instituting this political domain'. See Loughlin 2016:59.
[181] Rabkin 2005:69-70.

Constitution, for example, recognises 'We the people' as the basis of constitutional authority.[182] The same obtains under, for example, the Indian, South African and Nigerian constitutions.[183]

It must be admitted that this is by no means the universal position.[184] However, a fictional 'social contract' (the constitution) provides the basis for agency between the state and its citizens in the realm of international relations, including loan contracts with other states or legal actors.[185] It is this fictional arrangement that enables the state to contract legitimately on behalf of its citizens and assume financial obligations as such. In most cases, it is equally the basis for domestic protection of human rights. This conception of the sovereign may not be favoured by international creditors as it creates a cloud of uncertainty in the event of transition of government or succession of state.[186] As noted earlier, creditors prefer sovereign continuity in order to guarantee the repayment of loans or fulfilment of other financial commitments, regardless of the legal basis, legitimacy or moral orientation of the government. In addition, this conception is equally problematic as it can disincentivise repayment or future loan contracts and create a chaotic market for sovereign debt. It is equally not clear the extent to which this conception accommodates public policy, democratic and human rights concerns which the research will examine in Chapter Three.

Finally, Lienau champions the 'rule of law' school in the context of sovereign debt.[187] While interpreting (or reinterpreting) the *Tinoco* case, Lienau advances a new 'rule of

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[182] Preamble to the US Constitution. See also *Alden v Maine* 1999 527 US 706, 714; *United States v Curtiss-Wright Export Corp* 1936 299 US 304, 316-317; *School Exchange v McFadden* 1812 11 US 116, 136; Zik 2005:242 (quoting Madison's statement in Federalist No. 46 that 'the ultimate authority, wherever the derivative may be found, resides in the people alone...'); Rabkin 2005:67-68.

[183] Constitution of India 1948 (as amended):preamble https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf (accessed on 17 July 2018); Constitution of Republic of South Africa 1996:preamble http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf (accessed on 17 July 2018); Constitution of Federal Republic of Nigeria 1999:preamble & sec 14(2)(a) which provides that 'sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority') www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm (accessed on 17 July 2018).

[184] UNGA 1948. *Universal Declaration on Human Rights* (adopted on 10 December 1948) (UDHR 1948):art 21.

[185] Oyola & Sudreau 2013:213-235; Criddle & Fox-Decent 2009:331-249.

[186] For example, following a revolutionary change of government and the new government decides to disregard a prior loan agreement entered into by the previous one. See Wood 1980:14; Sornarajah 2007:83.

[187] Lienau 2008:78.

law' framework on sovereignty for the purpose of sovereign debt.[188] According to her, 'a sovereign government's international action is valid and binding on successor governments only if it has followed its own internal legal requirements for competence or ratification [because] an international contract signed in contravention of a government's own internal laws…[risks] repudiation by a subsequent regime'.[189] Lienau seems to ignore the theoretical implication of this framework: It suggests that international law automatically enforces domestic law whatever the latter's content or basis.[190] This invariably requires a monist approach on the relationship between domestic law and international law.[191] In addition, it appears to assume a minimum regularity and governmental order in all states. Lienau argues that 'the sovereign is not absolute in the sense of being able to break its own laws and is, at least to some degree, *defined* by its law'.[192] She notes that an additional requirement identified in the *Tinoco* case is that 'a sovereign debt contract may not be internationally enforceable unless it intends to serve a legitimate governmental purpose'.[193]

This, however, raises questions about the source of such legality and what exactly 'legitimate governmental purpose' entails. The latter, in particular, is nebulous and can mean anything. Lienau seems to contemplate a sovereign operating under 'international rule of law'.[194] This too is problematic although it appears to have captured the attention of the framers of the UNHRC's GPFDHR.[195] It is submitted, therefore, that this approach fails to locate the sovereign and is not, *stricto sensu,* a 'conception' of sovereignty but a process of validating a sovereign's external relations and financial undertakings. It seems to neatly fit into the notion of external sovereignty. Moreover, Lienau does not identify or locate the sovereign although she seems to suggest that the government, regardless of its character, shape or democratic credentials, is the sovereign so long as it is a government 'both constituted and

[188] Ibid.
[189] Ibid.
[190] Woods made the same point that 'where the loan is made to an instrumentality of an existing government such as a department, in principle one looks to the constitution of the state to determine whether for example, a loan entered into by the ministry of finance of the state is a commitment of the state or a commitment of separate state entity'. See Wood 1980:36
[191] Shaw 2008:131.
[192] Lienau 2008:81 & 108 (Italics in the original).
[193] Lienau 2008:82 (noting Judge Taft's statement that the loan was for personal and not for legitimate government purposes).
[194] Lienau 2008:81-83.
[195] GPFDHR 2012:para 45.

constrained by law'.[196] Finally, the proposition can hardly stand in the absence of the other two conceptions. For, it seems inconceivable to determine compliance with 'internal laws' without recourse to the source, processes and legitimacy or authority of the institutions that actually produced such laws. Not surprisingly, Lienau admitted that this 'rule of law' framework is 'to a large degree an empty standard'.[197] It is even harder to convince scholars who believe 'sovereignty is and has always been incompatible with the rule of law'.[198]

Nonetheless, Lienau's perspective offers a valuable analytical insight. It can be added that, the internal laws enacted by legitimate constitutional authority regardless of its democratic character or credentials should be sufficient to determine the legality of a government's domestic financial undertakings. However, international norms should determine the legality of a sovereign's external financial undertakings. As long as the agency between the people and the state is acknowledged, it seems unnecessary to use domestic laws to judge the validity of external financial undertakings of a state. For, as argued earlier, 'the government' and 'the state' are only conceivable with 'the people' in mind. International law has recognised this imperative especially in the area of human rights.[199]

Finally, it is clear from the above analysis that 'sovereign debt' is not a private debt. In this context, a debt incurred by state owned entities or sub-nationals is not necessarily a sovereign debt. It may, however, qualify as a public debt insofar as citizens' interests are at stake. The government and the citizens constitute the state and, presumably, have a common stake in loans procured in the name of the juridical state. The government serves as an agent of the people.[200] In other words, it is presumed to transact in the name of its people. Whoever heads the government of a state in any particular time is not *the* sovereign, but only represents the citizens (the principal) as a core component of sovereignty. In other words, regardless of where sovereignty

[196] Lienau 2008:78.
[197] Lienau 2008:79 fn 57.
[198] Eleftheriadis 2010:539.
[199] For instance, under the UN Charter and International Bill of Rights and regional instruments. See, for example, UN Charter 1945:preamble and arts 1(3), 55, 56, 63 & 77; UDHR 1948:preamble and arts 1, 2, 6, 8, 28 & 21; UNGA 1966a. *International Covenant on Civil and Political Rights* (adopted on 16 December 1966 and entered into force on 23 March 1976) (ICCPR):preamble; UNGA 1966b. *International Covenant on Economic, Social and Cultural Rights* (adopted on 16 December 1966 and entered into force on 3 January 1976) (ICESCR):preamble. See also Criddle & Fox-Decent 2009:331.
[200] Oyola & Sudreau 2013:213-235.

actually lies, it is difficult to divide the government and the citizens for the purpose of constituting the juridical state in international law.

Importantly, sovereignty, in both internal and external senses, conveys the inherent capacity and freedom of the state to act and transact with other international actors. A sovereign's act of joining international organisations does not derogate from its juridical capacity as such.[201] The state contributes in conferring juridical capacity to such organisations. An illustrative example is the membership of IMF or even ICSID pursuant to the ICSID Convention. But juridical sovereigns are not the exclusive players with powers and rights under international financial law; IGOs and NSAs equally have significant influence, rights and responsibilities under the law.[202] As sovereigns have the powers to engage in international financial transactions and to make claims or respond to claims under international law, so do IGOs and NSAs. Benvenisti notes that 'sovereignty is embedded in a broader, more encompassing global order that serves as a source not only of powers and rights, but also of obligations'.[203] In other words, with sovereign rights come sovereign responsibilities. This extends to fulfilment of financial commitments by way of repaying debts to creditors.[204] The 'rule of law framework' amplifies this notion of sovereignty although as shown above, it is not free from criticisms.

In the context of this research, therefore, the sovereign is the juridical borrower against whom performance is expected and, at the instance of creditors, is legally enforceable at recognised judicial fora. Conversely, it can make claims against creditors. However, such action is not a claim by or against a federating unit or any state-owned entity, governmental agency or institution within the juridical state. According to Buchheit & Gulati, the sovereign is 'an entity that is not subject to external constraints, least of all the tiresome constraint of repaying borrowed money'.[205] Thus, debt qualifies as 'sovereign debt' where the borrower is a sovereign recognised under international law

[201] As claimed by some scholars, for example, Szwedo 2014:17.
[202] Taylor, for example, sees sovereignty as a property, 'a combination of several powers, rights, and obligations, just as property ownership is a "bundle of sticks" that are divisible and transferable between original and subsequent owners'. See Taylor 1997:754.
[203] Benvenisti 2013:295-333, 301.
[204] Eleftheriadis 2010:536.
[205] Buchheit & Gulati 2010:63-92, 65.

and is capable of exercising external sovereignty in the interests of the development and welfare of its people who, for this purpose, qualify as its principal.

2.3 SOVEREIGN DEBT DEFAULT AND INTERNATIONAL RESPONSIBILITY

Having established the capacity of the borrowers and lenders in international financial law, the research will now turn to the international responsibilities arising from sovereign debt crisis, particularly the events of default and restructuring. As observed at the beginning of this Chapter, events in recent decades have shown that it is tenuous to claim that sovereigns do not experience bankruptcy.[206] Cases abound on this.[207] The impacts of sovereign insolvency can be devastating especially for the citizens.[208] It starts with debt default which might lead to outright repudiation or restructuring.[209] Because of the technical confusion in this area, it is important to give a brief clarification and contextualisation of sovereign debt default and sovereign debt restructuring vis-à-vis a debtor's liability under international law.

2.3.1 Sovereign Debt Default and Sovereign Debt Restructuring

In a strict sense, sovereign debt default occurs when a sovereign fails to make payment of either interests or the principal sums as they become due.[210] This means a default could be cured if the missed payment is subsequently effected thereby averting potential crisis. However, default goes beyond missed payments. Indeed, Treadway defines sovereign debt default broadly to mean 'failure to perform a legal obligation specified in a contract or by law'.[211] Wood adopts a more specific approach by categorising events of default into two forms: breach of the loan contract such as failure to pay sums when they become due or non-compliance with contractual undertaking or inaccuracy of warranty; and anticipatory events of default like insolvency.[212] According to ILA the latter occurs 'when a state is unable to pay its external debts as they fall due'.[213] This normally involves foreign currency debts. In

[206] Buckley 2009:1189-1216.
[207] Cohen & Valadier 2010:3-8.
[208] ILA 2010:6.
[209] Trebesch et al 2012:7-8; Tideman & Lockwood 1993:251-256.
[210] Trebesch et al 2012:8.
[211] Treadway 2012:2-3.
[212] Wood 1980:64 &165 (specifying that for sovereign loans, 'events of default will generally be limited to non-payment, non-compliance, breach of warranty, cross-default and, occasionally "a material adverse change"').
[213] ILA 2010:8.

the words of Waibel, there is sovereign debt crisis 'when a country's foreign exchange reserves are insufficient to meet its foreign exchange payment obligations over an extended period of time.'[214] Importantly, inability to pay or honour sovereign debt obligations invariably touches on the terms and credibility of the loan contract, or definitive bonds as the case may be. Naturally, there would be legal implications for such actions. Unlike a breach of private loan contract which is remediable through domestic legal infrastructure, this raises a fundamental public concern. According to Silard, problem arises 'when a basic principle of international law that agreements should be observed comes into conflict with the sovereign debtor's inability to obtain the foreign exchange resources needed to meet the external debt service obligations of the economy subject to its control while simultaneously meeting its other governmental responsibilities'.[215]

It is worth pointing out that contrary to the argument that sovereign debt default is always a matter of choice,[216] the structure of the international economic system seems to be dictating the debtors' choices. Sovereigns are mostly forced into default as a result of both exogenous and endogenous economic problems such as worsening terms of trade, poor macroeconomic fundamentals, increase in borrowing cost, structure of sovereign's debt portfolio, market perceptions, poor sovereign ratings and systemic banking crisis.[217] It could also come as a 'knock-on contagion effect' from other countries especially in a currency union.[218] It can be argued that these are only manifestations of the global economic structure.

A default could be partial (such as not servicing a part of the debt) which is different from a complete halt of all payments, otherwise referred to as debt moratorium.[219] In addition, debt default is different from outright repudiation which entails official announcement of suspension of payments. Repudiation may involve political considerations or even issues of validity and legitimacy as discussed in the previous section.

[214] Waibel 2003:6.
[215] Silard 1989:963-997, 967.
[216] Kolb 2011:3 & 7.
[217] Das et al 2012:6.
[218] ILA 2010:4.
[219] Trebesch et al 2012:8. Some scholars confuse this with *repudiation*. See Herschel et al 1988:1088-1097, 1088.

On the other hand, sovereign debt restructuring follows, in most cases, events of default. It has been defined as 'an exchange of outstanding sovereign debt instruments, such as loans or bonds, for new debt instruments or cash through a legal process'.[220] It has two key components: debt rescheduling which means extension of maturity period or shifting contractual payments to the future as a form of debt relief; and debt reduction which means a reduction in the nominal value of the old debt instrument.[221] Thus, while default is mostly a unilateral action or inaction of the sovereign, restructuring often involves negotiation with creditors. Indeed, the emerging trend today, under the dominant contractual governance framework, is for loan contracts to make provision for a possible debt restructuring.[222]

It is worth mentioning that the 'preferred creditor' status of multilateral creditors and the Paris Club's comparability of treatment for bilateral official creditors are critical principles in modern sovereign debt restructuring.[223] As the research will show in Chapter Four, creditors are organised and divided into three categories for the purpose of restructuring: the Paris Club (a group of creditor nations); the London Club (an *ad hoc* group of commercial banks); and *ad hoc* bondholder committees occasionally formed to pursue the interests of bondholders.[224]

The research will now examine whether sovereign debt default and restructurings could trigger international responsibility.

2.3.2 Responsibility arising from events of Sovereign Debt Default and Restructuring

As observed earlier, sovereign loan contracts recognise sovereign debtors and creditors as subjects of international law. Therefore, it goes without saying that non-performance or non-compliance with any international financial commitment should ordinarily trigger the sovereign's international responsibility.[225] However, this is not as

[220] Trebesch et al 2012:7.
[221] Ibid.
[222] ILA 2010:37.
[223] Rutsel-Silvestre 2015:492. But the Paris Club coordinates the restructuring of most bilateral official debts.
[224] ILA 2010:11.
[225] Waibel 2011:273-297.

straightforward as it may appear. For analytical purposes, it is important to understand what actually amounts to an 'international responsibility' and an 'international financial obligation' in the context of sovereign debt.

2.3.2.1 Nature of International Responsibility

Over the years, international law has come to recognise new subjects capable of exercising rights and responsibilities.[226] According to Amador, 'responsibility is a consequence of the breach or non-observance of an international obligation. Its imputability therefore necessarily depends upon who is or are the subject or subjects of that obligation'.[227] Distinguishing between international law and transnational law, Amarensinghe also uses the same approach, extending the application of the principle to all international subjects determined by international law.[228] The principle developed largely from the desire of credit (and capital) exporting nations to protect their nationals and their properties.[229] In the past, this responsibility triggered state's obligation to make reparation only.[230] The wrongful act giving rise to a claim for reparation may be either '(a) acts which affect a State as such, ie, those which injure the interests or rights of the State as a legal entity; or (b) acts which produce damage to the person or property of its nationals'.[231]

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[226] ILC 1956. 'Report of the Special Rapporteur on International Responsibility: State responsibility', http://www.un.org/law/ilc/index.htm (accessed on 20 January 2017).
[227] ILC 1956:paras 35-58.
[228] Using a positivists' approach, Amerasinghe defines 'transnational law' as 'involving dispute settlement by (ad hoc) arbitral tribunals which constitute the dispute settlement mechanism of that system'. He identifies the following as the basic principles of international responsibility: '(1) The international responsibility of an international legal person arises when there has been a violation of international law by such a person. (2) Who or what is an international legal person in a given context is to be determined solely by international law. (3) Whether there has been a violation of international law by an international legal person in a given context is to be determined solely by international law. (4) Whether the violation of international law has been by the relevant international legal person in a given context shall be determined solely by international law. (5) Both the primary and secondary rights and obligations involved in the violation of international law are to be determined solely by international law. (6) While determinations under (2) to (5) above are to be made solely by international legal norms and not by norms of the national legal systems or the transnational legal system, the latter two systems become relevant where international law invokes them for the purpose of making such determinations'. See Amerasinghe 2005:2-6.
[229] Gardiner 2003:436-467. Many have argued that 'dollar diplomacy' or imperialism was the main function of this principle and the aspect of law founded on it (international investment law). See Sornarajah 2007:18 (noting that 'the roots of international law on foreign investment lie in the efforts to extend diplomatic protection to assets of the alien').
[230] *Factory at Chorzow (Claim for Indemnity) (Germany v Poland)* 1928 PCIJ Series A No 17 29 [*Chorzow Factory* case].
[231] ILC 1956:para 41.

Today, however, this principle has, owing to a number of factors, evolved into multiple rules for the protection of foreign investment with the possibility of making different claims beyond reparation and without necessarily involving the home country.[232] In addition, the wrongful acts have been extended to include 'the non-performance by the State - through the agency of any of its organs - of a contract entered into by the State with an alien, in which case the State is responsible for non-performance'.[233] Furthermore, unlike in the past, there are additional bearers of responsibility under international law such as IGOs and NSAs. However, the international responsibility of NSAs especially multi-nationals and other business entities is not that straightforward because of the state-centric, breach-based approach of the traditional principle.[234] Notwithstanding, there are now cases where shared responsibility and shared accountability could work.[235] In addition to responsibilities arising from wrongful acts, human rights obligations are no longer attributed to states only.[236] This underscores the distinction between responsibility and obligation.[237] The research shall revisit this in the next Chapter.

The traditional position has thus been transformed.[238] In other words, the principle of imputing wrongful acts to the state only has now been modified in the light of the reality of modern forms of international intercourse.[239] The idea that only sovereign states are 'law-makers' or 'law-breakers' is only a positivist cloak hiding the fact of co-existence of private and public powers especially in the current international financial system.[240] Apart from being bearers of international obligations, NSAs have now become standard setters.[241] So have IGOs, as they have rights, powers and authority they may ordinarily be held accountable for how they exercise their powers. In other

[232] Sornarajah 2007:37-39.
[233] ILC 1956:para 43; ILC 2001:arts 2-4.
[234] D'Aspremont et al 2015:49-67.
[235] D'Aspremont et al 2015:51.
[236] Global Citizenship Commission 2016:73-77.
[237] Kelsen drew a distinction between responsibility and obligation in that 'legal responsibility for the delict is upon the person against whom the sanction is directed, whereas legal obligation is upon the one who by his own behaviour may commit or refrain from committing the delict, the actual or potential delinquent. Legal obligation and legal responsibility are two different concepts; but the subject of the obligation and the subject of the responsibility may - but not necessarily do - coincide'. See Kelsen 1948:226.
[238] Amerasinghe 2005:3 (paraphrasing the words appearing in the ILC Draft Report on International Responsibility 2001).
[239] ILC 1956:para 60.
[240] Sornarajah 2007:39.
[241] Wheatle 2009:215.

words, the reality of international economic intercourse has placed them in a situation where accountability for their actions would be raised especially in an era that saw the emergence of 'principles for responsible lending'.[242] This will be further examined under the sovereign debt governance regime in the next section.[243]

2.3.2.2 Sovereign Debt Default and International Financial Obligation

Arising from the above discussion, for an event of sovereign debt default or restructuring to trigger either a contractual or treaty cause of action,[244] such an event must qualify as a breach of international financial obligation.[245] An obligation under international law arises primarily from treaty, customary international law (CIL) and general principles of law.[246] To a large extent, bilateral and multilateral loans as well as syndicated loan contracts and bonds issued by sovereigns reflect these normative bases. In addition to these bases of international obligations, however, sovereign financing is increasingly being shaped by contractual documents and 'soft laws' (ie non-binding instruments).[247] In fact, the effectiveness of the latter is, it has been argued, doubtless as their consistent application and compliance by actors in sovereign debt schemes are such that several of them either have birthed, or are in the process of, birthing CIL-like practices or at least paving the way for their emergence.[248] In other words, 'soft-law' instruments could equally shape the behaviours of creditors and debtors thereby paving the way for the crystallisation of procedural and substantive principles on sovereign debt governance.[249]

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[242] UNCTAD 2012. *Principles on Responsible Sovereign Lending and Borrowing* (amended on 10 January 2012) (UNCTAD PRSLB 2012).
[243] Blagescu & Robert 2009:271; Black 2009:242.
[244] Crawford 2008:351-356.
[245] Rutsel-Silvestre 2015:492.
[246] UN 1945. *Statute of the International Court of Justice* (adopted 24 October 1945) (ICJ Statute):art 38. It adds that as subsidiary means for the determination of rules of law reference shall be made to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations'. See ICJ Statute:art 38(1)(c).
[247] Schier 2014:49; Zaring 2015:175, 177-178.
[248] Sudreau & Bohoslavsky 2015:613-634; Bohoslavsky et al 2014:55; Esposito C et al (eds) 2013; Buchheit & Gulati 2010:63-92; Blankenburg & Kozul-Wright 2016:1-7.
[249] The US Restatement (Third) of Foreign Relations Law provides that 'the law of international economic relations in its broadest sense includes all the international law and international agreements governing economic transactions that cross state boundaries or that otherwise have implication for more than one state, such as those involving the movement of . . . funds'. See American Law Institute 1987. *US Restatement (Third) of Foreign Relations Law*:sec 102(2).

In essence, standards have evolved from both formal and informal international law to determine whether a sovereign is liable following events of default and restructuring.[250] There are two schools of thoughts on this point which, for convenience, may be called 'the absolutists' and 'the realists'. The absolutists hold that any event, whether default or restructuring, which detracts from the fundamental principle of *pacta sunt servanda* (respect for contract) amounts to a violation of international law.[251] Accordingly, this will trigger international responsibility against the concerned sovereign debtor. In the words of Schier 'the non-repayment of debt, as a non-performance of a duty created by a contract, constitutes an internationally wrongful act'.[252] This reflects the private law paradigm of sovereign debt governance as will be elaborated below.

On the other hand, the realists hold that short of repudiation, events of default and restructuring would not trigger international responsibility.[253] This is the predominant view. According to O'Connor, CIL supports the position that sovereign debt default *simplicita* does not trigger international responsibility of the debtor arguing that '[n]on-payment in itself is no violation of international law'.[254] Waibel further argues that the absolutists' position that 'sovereign debt default, without more and independent of the debtor country's financial condition or aggravating circumstances in the debtor country's conduct, engenders international liability is deeply problematic … [because] rights to repayment of debt are not property rights: rather, they are contractual entitlements'.[255] Waibel advances a practical reason which is even more forceful in the following words:

> Virtually all states, rich and poor, small and large, have defaulted on their debt at some stage in their economic development. Many states even defaulted repeatedly. A rule equating every sovereign default to an international wrong is neither consonant with the necessities of international life, nor does it appear to be in conformity with state practice.[256]

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[250] Zaring notes that 'six legal principles organize the way that global financial regulation works: 1) a national treatment principle, 2) a most favored nation (MFN) principle, 3) a preference for rule-making over adjudication, 4) a subsidiarity principle of enforcement, 5) a peer review model of enforcement, and 6) a network model of institutionalization'. See Zaring 2012:685-687.
[251] Winkler 1933:9 (noting that the meaning of default is 'an utter and complete deception of a creditor by a debtor.… Regardless of terms and definitions, the practice of disregard for creditors is held in abhorrence everywhere. Government default, irrespective of classifications and erudite definitions is ... a breach of its obligations under domestic and international, and always, moral law'). See Winkler 1933:9.
[252] Schier 2014:50.
[253] Waibel 2011:281.
[254] Quoted in Waibel 2011:280.
[255] Waibel 2011:281.
[256] Waibel 2011:282.

The key determinant, however, is whether a default or restructuring violates the investment law standards of expropriation, most favoured nation (MFN), national treatment and fair and equitable treatment (FET).[257] Because these standards have featured prominently in recent sovereign debt adjudications, the research shall defer their treatment to Chapter 5. For the present purpose, it is sufficient to point out that SDD and SDR have both been subjects of adjudication in both domestic courts and international tribunals. This being the case, the realists' position seems more plausible as, first, it enables a judex to appraise all the circumstances leading to sovereign debt default and restructuring in a given context. This is important because of the growing internationalisation of finance and the expanding roles of actors involved in the determination of ultimate liability.

Second, in practical terms, creditors rarely employ adjudication except as a last resort.[258] Indeed, as the next section will show, the realists' position is in line with the evolving sovereign debt governance regime and has some support in both CIL and soft-law instruments.[259] Importantly, it seems to accommodate the reality of the increasing influence and powers of IGOs and NSAs as well as the impacts of their operations in sovereign debt governance. In the next section, attempt will be made to advance a creditor accountability framework in the sovereign debt governance regime.

2.4 CONCEPTUALISING SOVEREIGN DEBT GOVERNANCE

Until relatively recently, not much attention has been given to the concept of 'sovereign debt governance' in the literature.[260] Scholars tend to focus more on finding a sovereign debt workout framework that is fairly operational.[261] For this reason, the research will conceptualise 'sovereign debt governance' using insights from the theories of global governance and international justice. This is important because of

[257] Waibel 2011:273-297.
[258] *Serbian Loan Cases* 1929 PCIJ Series A No 20-21 142; *Fedax NV v Venezuela* 1998 37 ILM 1378.
[259] For example, *SGS v Republic of Philippines* 2005 ICSID Reports 518:para 161; UNCTAD PRSLB 2012.
[260] Waibel 2011:1-40; Schier 2014:48-50.
[261] Both contractual and statutory proposals have been advanced. See, for example, IMF 2003. 'Proposals for a sovereign debt restructuring mechanism', http://www.imf.org/external/np/exr/facts/sdrm.htm (accessed on 10 November 2016); Krueger & Hagan 2005:203; Schwarcz 2012:95; Macmillan 1995-1996:57; Oechsli 1981:305-341.

the need to situate creditors' socio-economic rights responsibilities within the context of sovereign debt governance.

2.4.1 Nature of 'Sovereign Debt Governance'

Before defining 'sovereign debt governance' it is important to point out some preliminary points. First, it must be emphasised that international institutions and NSAs now have significant influence in shaping the international financial landscape mostly as creditors. Indeed, it is now widely accepted that 'law-making' and 'law-breaking' in the international plane are no longer exclusive to sovereign states. The 'exercise elements' of external sovereignty, to borrow the words of Taylor, enable NSAs to partake in moulding international financial law.[262] Second, it is important to recall the argument advanced earlier on the citizens as beneficiaries (or presumed beneficiaries) of sovereign loans. This is important because sovereign debt governance ultimately affects the citizens thereby raising issues of agency and fiduciary responsibilities.[263] Third, owing to the absence of a multilateral statutory framework in this area, the 'governance' framework must necessarily rely on the disparate public-private mix, especially the secondary normative frameworks that continuously shape and define the international financial obligations undertaken by different actors.[264] In other words, conventional treaty and CIL do not adequately make provisions for the negotiation, contracting and restructuring of sovereign debt. However, they do not prevent actors from developing secondary norms to guide these processes. In fact, 'global law' is full of these supplementary legal instruments outside the conventional or primary normative bases.[265] In this regard, it can be argued that soft law is a child of necessity as it fills the normative vacuum left by conventional law-making processes. Thirdly, it is the contractual element inherent in sovereign debt which supports the dominant private, contractual governance framework. The final crucial point is that our conceptualisation of sovereign debt governance is built around the theories of global governance and the notion of international economic justice.[266] Marrying these with

[262] Taylor 1997:757.
[263] Oyola & Sudreau 2013:213-235.
[264] Zaring 2012:687; Rutsel-Silvestre 2015:10; UNTAD's PRSLB 2012.
[265] Backer 2014:45-48.
[266] Bogdandy & Goldmann 2013:39-70.

the conventional normative bases would help in appreciating the concept of sovereign debt governance within the context of this research.

2.4.1.1 Global Law: Governance and Justice

The disorganised but dynamic structure of the sovereign debt regime is a reflection of the increasing globalisation of finance with its concomitants of intense competition and growing number of players exercising huge influence on the international financial stage. It is partly because of these that the notion of 'global law' emerged.[267] Of course it does not, nor can it, displace conventional international law. However, it reflects the reality of emerging governance standards or frameworks designed to fill the gaps left by realists' international law. Hence it is fluid, polycentric, fractured and permeable.[268] Describing it as 'systematization of anarchy', Backer uses the confusion (and sometimes chaos) that characterises the market as basis for his analysis.[269] He defines it as follows:

> [It is a] dynamic system in which order is dependent on the ability of actors to form and deploy a large number of governance structures simultaneously, where the state continues to assert a substantial power, but in which it can no longer claim pride of place. The foundational premise rests on acceptance of the existence … of a system of non-national, supranational or multi-national principles and rules applicable … to public and private actors, natural and juridical persons. Its constitution is 'form-recognizing' - the elements of this form-recognition include self-constitution, institutional autonomy, regulatory authority, and dispute resolution mechanisms. Its normative element is grounded in the customary expectations of the members of the organization: citizens and residents in states; investors and customers in corporations.[270]

Perhaps 'systematisation of anarchy' best describes the on-going effort to develop a sovereign debt restructuring framework. Both states and NSAs are involved in this endeavour; hence the co-existence of formal (conventional international law-making processes controlled by states) and informal (soft-laws developed by IGOs, NGOs and other NSAs) legal processes.

'Global law' gives legal expression to the evolving global governance regimes. Global governance itself reflects the yearnings for a more suitable analytical framework to address complex governance issues arising out of multiple governance spaces which

[267] Le Goff 2007:119.
[268] Backer 2014:48.
[269] Backer 2014:48.
[270] Backer 2014:49.

have grown outside the traditional structure over the past three decades. It is important to observe that the term 'governance' is an essentially contested concept. The UN Commission on Global Governance defines it thus:

> Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.[271]

According to this broad conception, governance is a process of managing collectivities to align or accommodate conflicting interests. Along similar lines, Ruggie remarks that '[g]overnance at whatever level of social organisation it occurs, refers to the system of authoritative norms, rules, institutions and practices by means of which any collectivity from the local to the global manages its common affairs'.[272]

These two definitions recognise the broader elements of governance in terms of varied constituencies, purposes and procedures. They are, however, descriptive, devoid of much analysis. Thus, from the mainstream governance scholarship, Jessop has offered a more detailed analysis of the concept. He observes that 'governance' can be located in three broad forms of coordination: coordination through exchange characterised by formal rationality designed to ensure efficient allocation of resources (ie anarchy of the markets); imperative coordination characterised by substantive rationality to achieve common organisational or societal goals (ie hierarchy of organisation); and reflexive self-organisation characterised by 'substantive, continuing and reflexive procedures' (ie the heterarchy of negotiated consent to resolve complex problems).[273] The latter form of coordination is what Jessop defines as 'governance'. Accordingly, 'governance' is a reflexive self-organisation involving 'continued negotiation of the relevant goals among the different actors involved and the cooperative mobilisation of different resources controlled by different actors to achieve

[271] Commission on Global Governance 1995:2.
[272] Ruggie 2014:5-17, 5.
[273] Jessop R 2002. 'Governance, governance failure and meta-governance', https://ceses.cuni.cz/CESES-136-version1-3B_Governance_requisite_variety_Jessop_2002.pdf (accessed 20 June 2019).

interdependent goals'.[274] It generally occurs at three levels: informal, interpersonal relations; inter-organisational relations; and inter-systemic relations.[275]

The concept of 'governance' becomes significant today because of the inability of imperative coordination and 'market-mediated anarchy' to manage the complexities of modern economic, social and political life consequent upon the transformative effects of globalisation. Jessop observes that this complexity is rooted partly in the 'dialectic of de-territorialisation and re-territorialisation' and the fact that 'complex systems generally operate in ways that engender opportunity for additional complexity'.[276]

Other familiar concepts have thus failed to provide a suitable theoretical framework to address the myriads of social, economic and political problems because of the epistemological and ontological complexities brought by globalisation. While the self-correcting logic of the markets (ie coordination through exchange) often requires non-market modes of coordination especially during crisis, the top-down, hierarchic, imperative coordination could not handle expansive organisational capacities hence 'both market and imperative coordination[s] are prey to the problems of bounded rationality, opportunism and asset specificity'.[277] In particular, the self-correcting logic or 'invisible hand' of the markets has repeatedly failed to handle the externalities presented by complex interdependence which often leads to sub-optimal outcomes including market failures. Imperative, top-down coordination's excessive demand for centralised interaction of autonomous systems and bureaucratic rule-following often leads to non-realisation of collective goals.[278] Hence, governance (reflexive self-organisation) offers 'a "third way" between the anarchy of the market and top-down planning' because 'it is useful in cases of loose coupling or operational autonomy, complex reciprocal interdependence, complex spatio-temporal horizons, and shared interests or projects'.[279]

Jessop's conception reflects the increasing desire to frame governance discourse around the evolving global governance regimes. He, however, seems to ignore the direct correlation between 'governance' and 'order'. Norm-creation, application and

[274] Jessop 2002:1-3.
[275] Jessop 2002:5-6.
[276] Jessop 2002:7.
[277] Jessop 2002:8.
[278] Jessop 2002:6-9.
[279] Jessop 2002:8.

enforcement are intrinsic to the idea of governance. They establish the legality and legitimacy of any structured order and define the specific roles of the actors driving it. Zumbansen observes that governance 'shares essential elements with ideas such as, for example, justice, sovereignty, or order'.[280] Not surprisingly, contemporary legal theorists generally view 'governance' as a framework for normative ordering, reflecting the concept's intra-disciplinary value and the diversity of actors involved in 'governance'.[281] Zumbansen, for instance, pointedly observes thus:

> In law … references to governance point to the transformational character of existing institutional frameworks of order. For public lawyers, governance has been giving expression to a fundamental shift in the organisation and implementing of public service delivery as well as rule-making. Governance, in this context, carries the burden of being the comprehensive construction site for an encompassing reconsideration of the particularly 'public' nature of legislation, administration and adjudication. Meanwhile, in private law, governance appears to be an attractive concept to illustrate the larger, systematic dimensions of otherwise 'private' conduct. Governance studies in the contexts, for example, of contract and corporate law are thus concerned with the critical analysis of the otherwise unquestioned assumptions that lead to the classification of an activity as either private or public.[282]

'Global governance' is itself a fuzzy term but, in this context, it is about bringing order and regularity to a fragmented regime through a combination of formal and informal processes by both states and NSAs.[283] It is a complex hybridity of private and public elements and actors. According to Wheatley, 'global governance includes both traditional forms of inter-state law making and new forms of international governance by non-state actors'.[284] He notes thus:

> The defining features of an international governance regime are the capacity of non-state actors to consider and formulate responses to social, economic and political problems, to establish relatively precise standards (the doctrine of the rule of law), and the capacity, sometimes delegated to, or assumed by third parties, to interpret and apply those standards in relation to the activities of states, individuals and organisations.[285]

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[280] Zumbansen P 2010. 'The conundrum of order: The concept of governance from an interdisciplinary perspective'. (Osgoodhall Comparative Research in Law & Political Economy Research Paper No 37/2010) 1-19, 9 (noting that '[o]n the one hand, the concept can function to merely identify, describe and capture an existing form and content of order. … On the other hand, however, the concept has a fluid dimension, which can be programmatic in nature or bear critical and investigative character').
[281] Zumbansen 2010:5-12.
[282] Zumbansen 2010:10.
[283] Commission on Global Governance 1995:2.
[284] Wheatley 2009:218 & 220. Goldmann notes that it consists of 'a complex agglomerate of public and private, formal and informal, actors, processes, and instruments'. See Goldman 2018:331-332.
[285] Wheatley 2009:222.

Global governance regimes are shaped by international administrative, constitutional and institutional laws.[286] As will be examined subsequently, the sovereign debt regime is one of these regimes.[287] The key justification for global governance is to effectively deal with collective action problem (ie lack of coordination of different actors).[288] This is also a key problem for some creditors in the sovereign debt regime. Global governance also recognises that both authoritative and non-authoritative acts can affect individuals and their rights.[289] It is, however, not value-neutral.[290]

Finally, there is the overarching objective of fair, balanced treatment in contracting, negotiation or renegotiation of sovereign debt and in resolution of disputes or disagreements arising from the parties' conduct. This raises issues of distributive justice, hence, it might be called the 'justice' of sovereign debt governance.[291] The research would avoid the seemingly endless debate about the idea of 'justice'[292] by simply adopting Thomas's position that 'the requirement of international justice is that peoples 'have sufficient resources as a group not to be subject to collective domination by agents such as states, multinational corporations or international organizations'.[293] In other words, the focus is on the people or citizens and their welfare or entitlements rather than on their state.[294] This conception of justice is tied to the unity of the people with the juridical sovereign as examined above.[295] It also neatly fits into the objectives of both human rights and free market economy which sustains the markets for sovereign debts.[296] Therefore, it makes sense to adopt this conception because it speaks to the theme of the research. In addition, the reality of multiplicity of interests in the sovereign debt regime means that there is likelihood of competing demands

[286] Bogdandy et al 2017:115-145, 119-121.
[287] Global governance's polycentric character fits into international financial law. For instance, while arguing that 'in many ways international financial law should not qualify as law at all', Avgouleas characterises it as a regime based on a diverse 'legal' and organisational universe comprising treaties, state to state contact and co-ordination groups (eg Group of 7) with 'informal', consensus-based (soft law) standards and structures and non-centralised, non-hierarchical and polycentric organisational structure. See Avgouleas 2012:158-159 & 221.
[288] Wheatley 2009:223.
[289] Bogdandi & Goldmann 2013:46.
[290] Bogdandi & Goldmann 2013:43.
[291] Suttle 2016:799-834.
[292] See, for instance, Dworkin 1981:283; Nagel 2005:113; Pavel 2015:1.
[293] Alexander 2015:568-591, 576.
[294] Pavel notes that one of the two strategies for international justice is to focus on what states owe to their citizens and this 'theory is typically derived from a set of moral ideals that reflect the universal moral equality of individuals and their rights and entitlements'. See Pavel 2015:1.
[295] Nagel 2005:114-117; Queiroz 2010:161.
[296] Petersmann 2003:407.

against the debtor thereby raising the imperative for balancing, sorting and prioritisation of interests.[297] This too is a matter of justice.

Finally, 'justice' in international law could be achieved through 'rule following' and 'international agreement'.[298] While the latter accommodates the traditional way of sovereign debt contracting, the former accommodates the evolving soft-law approach with regards to both contracting and dispute settlement.

It is important to state that one of the key objectives of sovereign debt governance is to bring order, regularity and fairness to the sovereign debt regime. This is part of the justice of sovereign debt governance. The efforts especially by the UNGA and IMF to find a workable framework which simultaneously and fairly addresses the concerns of creditors, debtors and other stakeholders in sovereign debt restructuring were largely informed by this objective. The increasing resort to investment arbitration especially by non-official creditors is also partly informed by their quest for justice. Indeed, as the research will elaborate in the next chapter, the idea of socio-economic rights itself is built around the objectives of fairness and welfare, which are key elements of justice as conceptualised above.

2.4.1.2 Approaches to Sovereign Debt Governance

Partly because of the various interests involved in sovereign debt contracting and restructuring, it seems probably natural to expect controversies, diverse (perhaps conflicting) approaches to the concept of sovereign debt governance. For decades, the governance of sovereign debt has remained a critical issue in international development and financial and monetary laws.[299] Although the latter deals with rules and regulations governing international financial relations among states, institutions and other actors, it has, however, arguably failed in the area of sovereign debt.[300] Because of the economic elements inherent in this law, the idea of sovereign debt governance rekindles the debate about the actual utility of regulating markets.[301] It also raises concerns about social justice in a predominantly market-driven, globalised economic system. This, as noted earlier, reflects the variegated, often conflicting,

[297] Suttle 2016:799-834.
[298] Nagel 2005:114-117.
[299] Qureshi & Ziegler 2011:140-147.
[300] Lastra 2014:132.
[301] Panizza et al 2009:651-698; Somma 2012:1571-1578.

interests involved.[302] It also demonstrates the paradigmatic competition alluded to in the previous chapter.

There are two opposing approaches to sovereign debt governance: The private law and the public law approaches.[303] The former is a child of liberalism which emphasises individualism as foundation for all social and political institutions.[304] By this approach, every debt is seen as a property, a contractual right which, in its philosophical origin, precedes any political community and, therefore, the community's laws, rules and regulations must necessarily recognise the liberty of the creditor over such right (debt).[305] In this sense, sovereign debt governance is contract-based governance, ie it is the parties' agreed private-governance and, therefore, its 'justice' is to be located within the contractual instruments which structure, define and govern such relationship from the beginning to the end. This means that creditors and debtors are simply market participants and, naturally, a market adjusts itself without the need for outside interference.[306] As market participants, parties must discipline themselves to respect the 'rule of law' function of the market as mutually agreed in their contract.[307] Thus, this approach emphasises parties' justice or 'market-justice'. It equates 'justice' with 'contract'.[308] A classic example of how this approach influences the shape of sovereign debt governance is the waiver of immunity by sovereign debtors in sovereign borrowing, enabling creditors to enforce debt contracts largely through domestic (ie private law) courts.[309] Hobbes and Lock are believed to be the progenitors of this view.[310]

This approach, however, as the research will show, has been criticised for, first, its failure to accommodate the reality of global governance and the imperative for sovereign debt justice within a complex, multi-layered global setting.[311] Second,

[302] Bogdandy & Goldmann 2013:39; Bohoslavsky & Goldmann 2016:13-42.
[303] Goldman 2018:331-363; Rosenfeld 1985:776-784; Bruner 2008:125-176; Goldmann 2015:1-29; Mills 2009:28-38.
[304] Rosenfeld 1985:787.
[305] Goldmann 2018:331-363.
[306] Hayek 1982:36-37 & 128-129.
[307] Rosenfeld 1985:776-784.
[308] Rosenfeld 1985:771.
[309] The UN Convention seeking to limit state immunity in commercial transactions including sovereign loans is yet to take effect. It is unlikely to see the light of the day because of its sovereignty-constraining effects. See UN 2004. *The Convention on Jurisdictional Immunities of States and their Property* (adopted on 2 December 2004).
[310] Suttle 2016:799-834; Rosenfeld 1985:776-784.
[311] Goldmann 2018:331-363; Bogdandy et al 2017:119-121; Bogdandy & Goldmann 2013:39; Bohoslavsky & Goldmann 2016:13-42.

flowing from the first flaw, this approach ignores the inherent hybridity of private and public elements and actors in sovereign debt contracting and restructurings.[312] Indeed, the complex reality of sovereign debt governance over the years has exposed the artificiality (some would say falsity) of the public-private dichotomy in international law.[313] For instance, the powers being exercised by states as well as the public roles increasingly being played by IGOs and private creditors alike in the sovereign debt regime show that a private law paradigm may not suitably and effectively address issues or grievances arising from the interaction between or among these players. Indeed, thanks to the ingenuity of bondholders and other private creditors, adjudicating sovereign debt claims now extends beyond the province of domestic courts as international tribunals are increasingly assuming jurisdiction over such claims. Third, this approach places too much emphasis on procedural, contractual justice while ignoring the dynamic, substantive issues (eg duress or other forms of unconscionable influences arising from the exercise of structural economic powers by countries) which, often, impair, hinder or frustrate the 'justice of contract'.[314] The private law approach, therefore, faces challenges of relevance and legitimacy today.[315]

The public law approach to sovereign debt governance is, theoretically, republican in origin as it limits private rights in order to protect wider public interests.[316] There are various perspectives here. For instance, while describing the current regime of sovereign debt as a fragmented patchwork of national and international laws, formal and informal rules and actors, Tan conceives sovereign debt governance as 'a set of disciplinary discourses' or 'regulatory conversations' or 'communicative interactions' that is part of governance through development.[317] The current regime, according to Tan, skewed this development perspective by building private law narratives which conditioned behavioural expectations of key actors of the regime.[318] Using the socio-legal and critical legal methodological traditions, Tan rejects the private law approach

[312] Goldmann 2018:331-363; Rosenfeld 1985:769.
[313] Kjaer 2018:13-34; Bogdandi et al 2017:124.
[314] Rosenfeld 1985:776-784.
[315] Bogdandy et al argue that 'there are good reasons to doubt that rules established between private actors can live on their own, whether factually or normatively speaking'. See Bogdandy et al 2017:119-121.
[316] Bogdandy et al argue that private law allows 'actors to act solely in pursuit of their self-interest, whereas public law requires a higher standard, often coined as the pursuit of a common interest'. Bogdandy et al 2017:118 &135.
[317] Tan 2014:249-272, 254 & 268.
[318] Tan 2014:254 & 268.

which influenced the current regime to establish an informal governance architecture based on the fundamental principles of sanctity of contract (in domestic laws) and *pacta sunt servanda* (in international law).[319] This is because these principles effectively shut out the citizens from any sovereign debt governance.[320] It is only by deconstructing these narratives that the citizens can be placed within the development objective of sovereign debt especially with the global acceptance of international financial stability as a public good.[321] According to this perspective, debt relief is a matter of right.[322]

However, despite the deconstruction of the embedded narratives within the existing sovereign debt regime, this critical development perspective is devoid of functionality as it does not actually define the governance structure of the proposed regime. In addition, Tan does not link the ideal of justice to sovereign debt governance. In other words, how does this 'set of disciplinary discourses' connects to the justice of sovereign debt governance?

The most influential public law perspective on sovereign debt governance is the 'international public authority' (IPA) perspective.[323] IPA is defined as 'the law-based capacity of any international institution to legally or factually limit or otherwise affect other persons' or entities' use of their liberty'.[324] IPA is, thus, a consequentialist tool which extends the meaning of 'publicness' by focusing on the consequences of a particular decision or action of an actor or institution on the citizens. Bogdandi & Goldmann use this tool to de-emphasise the informality and discretionary character of the sovereign debt regime while at the same time emphasising issues of institutional legitimacy arising from the impacts of the actions or inactions of decision-making institutions especially on the citizens of sovereign debtors regardless of such institutions' constitutive basis.[325] In other words, the impacts of these institutions' decisions on the 'public' determine the extent of their international authority and, consequently, responsibility. This means that all parties or bodies involved in sovereign debt restructuring (including the IMF, the Paris Club, the London Club and

[319] Tan 2014:254-257; Waibel 2011:281.
[320] Tan 2014:254.
[321] Tan 2013:307-324.
[322] Tan 2013:308.
[323] Bogdandy et al 2017:132; Goldmann 2008:1865; Goldmann 2012:373-378 (describing IPA as 'as an overarching framework for all kinds of governance instruments').
[324] Bogdandy & Goldmann 2013:47.
[325] Ibid 39.

bondholder committees) have IPA because their actions could have direct impacts on citizens of either debtor or creditor nations. The constitutive instruments of these bodies serve the democratic legitimating function of constraining their respective actions. These, of course, include soft law instruments.[326]

Goldmann & Steininger adopt the same IPA perspective.[327] Using public law's constraining function, they show how the interactions between public and private actors within the market place can influence sovereign debt governance.[328] Accordingly, sovereign debt operates within a globalised market setting in which institutions (eg IMF and Paris Club) engage in decision-making processes which could have a strain on human rights and democratic principles thereby raising fundamental legitimacy concerns.[329] Since financial markets are constituted by law, they argue, it makes sense to have a system of judicial review to ensure certainty and predictability because 'legal uncertainty may not only generate transaction costs, but pull the plug entirely'.[330] In the light of the increasing push for legitimacy of SDR and the difficulty of identifying the 'public' within the globalised markets, they proposed the involvement of domestic courts, soft law and transnational cleavages (ie along the entrenched division between neoliberalism and interventionism) to advocate for an SDR that allows for more accountability and citizen participation within the context of the European Union.[331]

Admittedly, this appears to be a plausible perspective. However, it lacks the necessary, practical details on effective sovereign debt governance. Therefore, in an attempt to further refine the IPA perspective, Goldmann argues that IPA recognises the hybridity of private and public elements and that the complex involvement of 'public and private actors, instruments, and rules in sovereign debt restructuring makes the

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[326] Bohoslavsky & Goldmann 2016:13-42.
[327] Goldmann & Steininger 2016:709-734.
[328] Goldmann & Steininger 2016:720.
[329] Goldmann & Steininger 2016:724.
[330] Goldmann & Steininger argue thus:

> Essential hybridity highlights the fact that private financial transactions have an immediate impact upon the public interest because they increase or decrease the quantity of money in the market and, with it, the indebtedness of public or private actors … Without that underlying framework, private law serves the self-interest of strategic market actors, not the public interest. Although this might advance commutative and restorative justice, it is inapt to bring about distributive justice. This requires solidarity, for which an actual - or at least an identifiable - public is necessary'.

See Goldmann & Steininger 2016:730-732.
[331] Goldmann & Steininger 2016:737-746.

public-private distinction inoperable'.[332] Accordingly, the gap between 'market justice' and 'social justice' in sovereign debt cannot be addressed by the market because 'the insistence on the private law character of sovereign debt instruments serves as a tool for entrenching a neoliberal agenda and for discarding important public interests'.[333] He argues that the notion of 'public authority' has to be broadened to include 'an act of authority whose actor reasonably claims to be mandated to act on behalf of a community of which the observer is a member, or a member of such member'.[334]

However, although a plausibly innovative perspective, the IPA is grounded in the positivist's vision of international law which perpetuates the public-private divide. Furthermore, this perspective appears to have fully endorsed the 'justice of contract' paradigm thereby tilting towards the private law approach. It also fails to define sovereign debt governance. Not surprisingly, the perspective does not situate citizens within the pre-SDR phase of the sovereign debt regime and this might affect the legitimacy of the proposed incremental SDR regime built around it.[335] Indeed, it ignores the idea of justice in the sovereign debt regime as part of the legitimacy issues. In addition, the whole proposition ignores the emerging trend in sovereign lending away from the traditional Western dominated lending institutions to other emerging credit-exporting nations like China, Russia and Middle-Eastern countries that often resist the positivists' vision of international law.

Finally, Suttle advances a more citizen-focused, justice-based, public law perspective of sovereign debt governance.[336] Using the Eurozone debt crisis as example, he wonders why citizens of the majority of creditor-nations wanted their governments to, on the one hand, sustain domestic welfare programmes during the crisis but, on the other hand, loathed their countries' bailout support to their crisis-ridden European counterparts.[337] By contrasting the Lockean liberal idea of justice with the Humean liberal idea, he conceives sovereign debt markets as 'the convergence of a plurality of diverse economic and legal institutions' which necessarily depends on international cooperation.[338] Based on what he calls 'Equality in Global Commerce' (ie, international

[332] Goldmann 2018:343.
[333] Goldmann 2018:347.
[334] Goldmann 2018:348.
[335] Blankenburg & Kozul-Wright 2016:2.
[336] Suttle 2016:799-834.
[337] Suttle 2016:799-805.
[338] Suttle 2016:817.

economic justice) as well as the principles of international cooperation, economic advantage and self-determination, he argues that sovereign debtors were normally led to rely on creditors or the debt markets and, because of this, the 'justice' of sovereign debt should impose a cooperative, shared obligation on both creditors and sovereign debtors.[339] Because of the novelty of this perspective, it might help to quote him in *extenso* here:

> [N]o institution, whether national or international, will be just if it undermines self-determination… Clearly, where a state's debts can be serviced only through politically constraining and economically debilitating taxation and austerity over decades, that state's self-determination is substantially impaired. Constraints on economic policies may preclude the state from realizing its domestic conception of economic justice, or from vindicating the basic rights of its citizens, for example, to health care. … No institution that avoidably brings about such consequences can be regarded as just. … It is not because I am poor, but because my debts undermine my self-determination, that I have a claim to default on them. … The corollary is that, in many cases, those economically less advantaged may need to facilitate restructuring by those more advantaged: The poor may have to bail out the rich.[340]

However, despite his innovative, cooperative egalitarianism, Suttle does not define sovereign debt governance. In addition, his notion of 'justice' of sovereign debt is, to say it plainly, too abstract, perhaps completely removed from the functional reality of the behaviours of international financial actors.

From the above approaches to sovereign debt governance, it is clear that the age-long public-private divide in legal theory informs the exclusivity of one of the dominant forms of governance framework by the other despite the peculiar characteristics of norm creation, application and enforcement brought by economic globalisation.[341] This divide is a fictional construction built by liberal theorists and has been shown to be chimeric.[342] The polarisation between public law and private law scholars is unsuitable to frame an evolving regime of global governance with a complex hybridity of norms and a public-private mix operating within multiple layers of governance (national, transnational and international). Global law is not characterised by this divide. Indeed, transnational legal theories have emerged to embrace the complexities and

[339] Suttle 2016:826-829.
[340] Suttle 2016:825-829.
[341] Schwobel 2012:1106-1133; compare Bogdandy et al 2017:115-145.
[342] Kjaer 2018:16-17.

governance challenges brought by economic globalisation.[343] In particular, any form of legal ordering that excludes multiplicity of actors and hybridity of norms cannot adequately capture the key character of sovereign debt contracting, servicing, restructuring and enforcement.

Therefore, guided by the above definitional insights and their respective pitfalls as well as by the preliminary points highlighted at the beginning of this sub-section, this research broadly defines 'sovereign debt governance' as a system of interaction among multiple IGOs, state and non-state actors aimed, first, at bringing order, certainty and regularity to sovereign debt contracting and predictability in resolving any dispute arising from such contracts or bonds and, second addressing the concerns of all stakeholders to achieve the ideal of international economic justice based on equality and well-being of all peoples.

This is a working definition only. Accordingly, it is acknowledged that the definition is far from being comprehensive. However, it is at least sufficient for our analytical purpose here. First, it offers a broader, universal picture of the main players within the current, authority-deficient sovereign debt regime.[344] Unlike in trade and some areas of international law, there is simply no single, regulatory IGO in the sovereign debt regime.[345] The IMF and WB are disqualified because they are interested parties (ie creditors). However, despite this interest, the IMF in particular has established itself as an 'indispensable manager' of this decentralised governance regime even without an explicit mandate in its constitutive instruments.[346] This reveals that the governance of this authority-deficient regime is in the form of interest-driven interaction between or among the players.[347] The interaction may be organised, structured or unstructured, especially because of the inherently decentralised character of the international financial system.[348]

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[343] Teubner G 1996. 'Global Bukowina: Legal pluralism in the world society', https://ssrn.com/abstract=896478 (hereafter 'Teubner Global Bukowina') (accessed 9 July 2019); Zumbansen 2013:117-138.
[344] Tarullo 2001:613-682, 631.
[345] Klabbers, for instance, notes that the field 'is a patchwork of entities, some formal, some less so, addressing various aspects of financial matters. The field is fragmented to a high degree, with some entities assuming some responsibility for financial policy at large'. See Klabbers 2016:241-261.
[346] Buckley 2013:278-290.
[347] Klabbers 2016:241-261.
[348] Gelpern, for instance, argues that up to 2000 the regime was stable, delivering 'a measure of relief for debtors and impressive returns for creditors with no treaty, no statute, and no court in charge. It was flexible enough to adapt to massive shifts in global politics and economics. It was also effective enough,

In essence, the lack of a centralised international financial governance framework means that any meaningful conception should recognise the operational, constitutive basis of all players and their individual roles in driving this decentralised, authority-deficient regime.[349] The first group of players, of course, is the group of sovereign debtors whose principal motives for borrowing are, presumably, to address a gaping budget deficit, build infrastructure and finance the well-being and development of their citizens as may be required by their respective constitutions or other laws or instruments having legal authority.[350] Thus, the consent of the sovereign debtors as states is perhaps the main foundation of the sovereign debt regime.[351] Without it there would be no sovereign debt governance, although its presence does not necessarily legitimise or validate the sovereign debt contract and its execution. The consent may be expressed in the contract documents, definitive bonds or treaty-like instruments depending on who the creditor is. Today, most sovereign debtors belong to the Group of 77 (G 77) countries pushing for a pro-debtor statutory framework for the governance of sovereign debts.

The second group of players is the group of creditors who are united by their shared interest or common objective of maximising profit, although the bilateral and multilateral creditors often have a mixture of motives for lending beyond profit maximisation as they use sovereign financing to pursue additional geopolitical interests covering trade, development, defence and other policy and strategic objectives.[352] Because of the latter, the most geopolitically influential creditors largely dictate the form and substance of this decentralised governance regime often using principles rooted in international law. Although most sovereign debtors are members of the multilateral creditors, the group of creditor nations under the auspices of the Paris Club tends to have a maximum influence on the most influential multilateral creditors, ie, the IMF and the WB. This is because, strictly speaking, sovereign equality

and accepted generally enough - just enough - to pre-empt far-reaching alternatives that periodically sprouted up at the United Nations, at the IMF, and among civil society groups'. See Gelpern 2016:46-47.

[349] Gelpern 2016:57-58; Reigner 2016:145-151.

[350] According to Li & Panizza, countries borrow '(1) to finance investment in physical and human capital; (2) to smooth business cycles; (3) to effect inter-temporal distribution of wealth; (4) and to respond to exceptional events such as war, natural disasters, or financial crises'. See Li & Panizza 2013:17; Panizza et al 2009:664.

[351] Lienau O 2016b:102.

[352] Gelpern 2016:51-53.

in international financial institutions (IFIs) is drastically diluted by the weighted voting system and structural power in international economic relations.[353] Importantly, the creditor nations collaborate through 'exclusionary' (ie non-universalist system of membership), informal bodies such as the Paris Club (now having 20 creditor nations as members), Group of 7, Group of 20, Financial Stability Board and Basel Committee on Banking Supervision, etc.[354] Although non-universal in nature and often lacking constitutive instruments, however, in functional terms, 'these entities exercise authority over the world at large'.[355]

Finally, there are the supporting institutions that are pretty much 'universal', affiliated to neither the group of creditor nations nor the group of debtors, but they nonetheless shape and drive the evolving sovereign debt governance regime. Examples are the UNGA and the UNCTAD. These two institutions have become key advocates of the so-called 'incremental approach' embedded in the IPA approach to sovereign debt governance which continuously recognise public policy and concerns for socio-economic rights.[356]

Second, the above working definition provides an analytical framework to examine the place of socio-economic rights-holders and duty-bearers under a rights-based approach to sovereign debt governance and, consequently, situate creditor accountability in respect of behaviours amounting to 'irresponsible lending'.[357] It incorporates an important element which may provide more legitimacy to this decentralised governance regime, ie, through a stakeholder approach.[358] In particular, by considering the sovereign debtor as a stakeholder the research takes into account the unity between internal and external sovereignty as examined above so that, all

[353] The governance and shareholding structure are arguably skewed. The formula considers a member's weighted average of GDP, international reserve, openness and economic variability. For instance, in 2016, the US had 16.8% of IMF shareholding while Uganda had 0.01. See Article XII, sections 1-5. See also Qureshi & Ziegler 2011:74-80. Klabbers, for instance, argues that 'the equality embedded in the formal decision-making processes of many international organizations has always been mostly of cosmetic or symbolic value … With this in mind, it should not come as a surprise that discussions about debt relief and sovereign default are usually taken in entities where, as a general rule, it remains unclear whether all members are equal, or whether some might be a bit more equal than others'. See Klabbers 2016:246-247; IMF 2013. 'Factsheet: IMF quota', www.imf.org/external/np/exr/facts/quota.htm (accessed 20 May 2018).
[354] Klabbers 2016:244.
[355] Klabbers 2016:244.
[356] Bohoslavsky & Goldmann 2016:13-42.
[357] I thank Dr Annelie de Man for suggesting this phrase.
[358] Lienau 2016b:100-101.

things being equal, the citizens are seen as the ultimate beneficiaries of sovereign debt.[359] This is because the legitimacy of a sovereign debt framework depends upon its acceptability by citizens as critical stakeholders.[360] Without this, there would be no democratic legitimacy and this might affect the validity of a sovereign debt.[361]

By considering creditors as stakeholders, the research takes into account all classes of lenders regardless of their differential features or characters, policies and other peculiarities. A creditor, whether official or non-official, plays a significant role in constituting the loan in the first place and would naturally have interests in how any dispute arising from the loan is resolved. In this regard, courts and arbitral tribunals are also critical stakeholders as, over time, their decisions have shaped (and still continue to shape) the regime.[362] This qualifies as third party involvement and, therefore, requires the universal features of independence, impartiality and neutrality.[363] However, it should be admitted that the authority-deficit further raises legitimacy concerns on sovereign debt adjudication especially regarding lack of predictable, applicable shared norms and the potential inconsistency which adjudicating sovereign debt claims by different courts might lead to.[364] Finally, NGOs and regional institutions and IGOs are also stakeholders having regard to the roles, especially of the latter, in continuously issuing standards on sovereign debt governance, and the former in their campaigns against creditors and submission of briefs in cases of investment arbitration.

This conception of sovereign debt aligns with the notions of global law and governance examined above. The key features are the hybridity of norms, public-private elements and multiplicity of interests. The stakeholders involved are not simply limited to the debtor-creditor matrix. Bantekas notes the multiplicity of interests affected by sovereign debt thus:

> Sovereign debt is not simply a contractual assumption of debt by the state through a loan transaction, but is largely conditioned by other extraneous factors. These

[359] Gelpern, for instance, considers the 'citizens, taxpayers, bank depositors and pensioners' as the 'ultimate stakeholders and therefore the regime ought to be accountable to these stakeholders'. See Gelpern 2016:45-46.
[360] Lienau 2016a:158; Tan 2014:254-257.
[361] Lienau 2016b:103.
[362] Lienau 2016b:107-108.
[363] Lienau 2016b:108-109.
[364] Gelpern 2016:85.

include, among others: The many and varied purchasers of government bonds; *… taxpayers that will be forced to forego some of their bank deposits or pay discriminatory taxes towards reviving the economy, or otherwise forfeit property rights because of their latent inability to keep up with their personal debts … All of these would qualify as third parties to arbitral proceedings, at the very least*.[365]

It may be noticed that the working definition does not give emphasis on the principles and procedures involved in the initial steps of contracting sovereign debts. This is because, contracting is one out of several phases of the regime as the research will now examine.

2.4.1.3 Sovereign Debt Governance Regime

From the above, it is clear that sovereign debt governance is about ensuring order, certainty, regularity and justice for the stakeholders. However, there is still no acceptable multilateral legal framework through which these objectives can be achieved. What obtains today is, at best, a sovereign debt governance regime, rather than a framework. A regime is developed largely to address a particular set of issues. Krasner describes international regimes as 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[366] Thus, regime formation is not exclusive to states.[367]

As indicated above, the sovereign debt regime is a hybrid of public and private elements aimed at addressing problems arising from sovereign borrowing and lending.[368] The first basis of this regime is international law and its formal processes. Actors have always relied on the formal processes of international law, especially agreement as embodied in the core principle of *pacta sunt servanda* to enter into loan contracts and seek enforcement of liabilities arising from such contracts or what Petersmann calls 'contractual justice'.[369] Second, the non-responsiveness of formal law-making processes has led to the emergence of supplementary contractual frameworks by IGOs and NSAs for the renegotiation, rescheduling or restructuring of such sovereign debts or, in some cases, debt relief. However, in general, the regime is arguably more favourable to creditors. Kamlani, for instance, pointedly observed

[365] Bantekas 2014:159, 161-163. Italics for emphasis.
[366] Krasner 1983:1-21; Krasner 1993:139-167.
[367] Kamlani 2008:43.
[368] Kamlani 2008:44; Tan 2014:250-256.
[369] Petersmann 2009:34.

that empirical evidence has shown that creditors dictate the normative substance of the restructuring regime.[370] It is instructive to quote him here:

> Sovereign debt management regimes are better characterized as imposed regimes, since their content is generally not a matter for negotiation between private creditors and sovereign states. In fact, it has customarily been the case that these regimes are established by creditor groups unilaterally […] While sovereign debtors implicitly recognize their authority when engaging them in a restructuring negotiation, they have typically not been a party to the regime's establishment.[371]

This unbalanced power structure in the constitution of the regime will become handy in our discussion on creditor human rights responsibility. This, however, may not affect the validity of the resulting agreement. This is because determining validity is a question of both law and facts. A sovereign debt will be deemed valid once the constituents of the agreement can be established. However, the objective of the loan is key to determining validity. An odious debt, for instance, would not be valid because it is often procured for the personal benefits of government officials rather than to further the interests of the beneficiaries (ie citizens).

As events of default continue unabated stakeholders have been working hard to come up with a more balanced, fair and well-defined rules, principles and procedures for contracting, renegotiating and restructuring of sovereign debts.[372] However, the feasibility of this framework getting a universal acceptance is open to question because maintaining the status quo favours the creditors and, not surprisingly, they

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[370] Kamlani 2008:44.

[371] Kamlani 2008:45. Tan describes this creditor-biased regime thus: 'The sovereign debt regime in this sense is perceived not only as a collection of rules and practices but also a set of common and highly symbolic understandings about, inter alia, the scope and content of sovereign borrowing and lending and the respective entitlements and obligations of debtors and creditors. These historically contingent and socially constituted constructions of economic discipline and order, affirmed and reified through repeated narrations in legal and non-legal domains, can and do shape the expectations and direct the behavior of actors in the sovereign debt regime. Narratives can thus contribute towards the reproduction of existing social, economic and political power by functioning first as 'mechanisms of social control' - instructing actors "about what is expected" and warning "of the consequences of non-conformity" - and second by colonising consciousness by privileging one "configuration of events and characters" over "alternative stories"…'. See Tan 2014:254.

[372] The UNGA has also adopted a resolution for this purpose. See Third World Network 2015. 'UN adopts landmark debt resolution on principles for sovereign debt restructuring', http://cadtm.org/UN-adopts-landmark-debt-resolution (accessed on 15 June 2016). See also UNGA 2015. *Basic Principles on Sovereign Debt Restructuring Processes* (adopted on 10 September 2015) [UN BPSDRP 2015] <http://unctad.org/meetings/en/SessionalDocuments/a69L84_en.pdf>; UNCTAD 2015. *Sovereign Debt Workout: Going Forward, Roadmap and Guide* [UNCTAD SDWG 2015]; UNCTAD 2012.*Principles on Responsible Sovereign Lending and Borrowing* (amended on 10 January 2012) [UNCTAD PRSLB 2012]; UNHRC 2012. *Guiding Principles on Foreign Debt and Human Rights* (adopted on 5 July 2012) [UNHRC GPFDHR 2012].

tend to resist any statutory reform efforts. Unfortunately, the sovereign debt regime 'is fraught with bad incentives and destructive outcomes'.[373] This universal acceptance, as the research will demonstrate in the next Chapter, is something that socio-economic rights have achieved for decades.

2.5 CONCLUSION

This Chapter has contextualised and clarified key concepts and their significance to, and implications on, the sovereign debt scheme within the framework of international law. It defined sovereign debt and outlined its key features. Sovereignty is certainly a central concept that shapes the changing nature of sovereign debt especially with respect to the issues of validity which often confront claimants at the point of adjudication. Having contextualised the sovereign to mean a unity between the citizens and the state for the purpose of valid external financial undertaking, the Chapter showed that the exercise elements of sovereignty could be seen in contemporary international finance with NSAs playing significant role in that regard. The Chapter defined sovereign debt default and restructuring and argued that the events of default and restructuring are not *prima facie* triggers of international responsibility. Thereafter, the Chapter conceptualised sovereign debt governance and situated what it calls the 'justice of sovereign debt governance' within this concept in order to provide an analytical base for the introduction of citizens' socio-economic rights and the corresponding responsibility of creditors in that respect.

In conclusion, there is no doubt that international law sets the contours of sovereign debt relationships. State practices evolved to define the nature and structure of these relationships. However, these relationships are not essentially removed from the control of domestic laws as virtually all non-official sovereign debt contracts and bonds have conflict of laws and jurisdictional clauses empowering domestic courts to determine issues of validity, interpretation, enforcement and liability arising from the parties' conducts under such contracts. This means that, by nature, sovereign debts involve a complex hybridity of private and public elements. Indeed, the nature of sovereign debt demonstrates that the positivists' dichotomy is, arguably, a false contraption developed to serve ideological, economic and political interests. Unfortunately, a number of principles, concepts, theories, ideas, practices and

[373] Gelpern 2013:345-382.

expectations have developed around this interest-based, false dichotomy. Hence, the key players in sovereign debt governance have succeeded in using this device to shut out a (perhaps *the*) critical stakeholder, ie the citizen. The implication, it can be argued, is that the citizens are literally invisible, voiceless, helpless and powerless in sovereign debt governance. This completely ignores the fact that sovereign financing ought, ideally and presumably, to be informed by the citizens' best interests otherwise its legitimacy might be questioned. It might be a consolation that these critical stakeholders have universally recognised rights rooted in citizens' essential humanity. The question of how these rights align with the sovereign debt governance regime to create creditors' socio-economic rights responsibilities will be the theme of the next chapter.

CHAPTER THREE

SOCIO-ECONOMIC RIGHTS AND SOVEREIGN DEBT GOVERNANCE

3.1 INTRODUCTION

This Chapter seeks to contextualise socio-economic rights within the sovereign debt governance regime as examined in the previous Chapter. It will be argued that socio-economic rights are founded on the preeminent values of human life and dignity and that recognising their significance is important for equitable and fair economic relations among international actors. This is because sovereign debt relationships have the potential to impact on the realization of these rights. This argument is supported first, by the conferment of these rights on all peoples regardless of nationality, race, gender, religion and socio-economic status, and second, by the imposition of responsibilities on duty-bearers (most of whom are international actors) to respect these rights. Consequently, a bourgeoning socio-economic rights practice has emerged reflecting this development. Therefore, the main thematic proposition of this Chapter is that all peoples have a legitimate expectation for the recognition and protection of their socio-economic rights within the framework of international law.

In advancing this argument, the Chapter will examine socio-economic rights through the lenses of both International Human Rights Law (IHRL) and International Economic Law (IEL). It is important to recall that apart from examining the nature of sovereign debt, the previous Chapter also highlighted the basis for the responsibility and accountability of international actors. It was observed there that one of the major sovereignty-constraining factors is a sovereign's human rights obligation(s). Conversely, sovereignty is one of the foundational and theoretical premises upon which IHRL stands.[1] Therefore, this Chapter will extend the discussion by focusing on socio-economic rights obligations of critical international actors to serve as pointers to 'creditor socio-economic rights responsibility' which is part of the 'justice' of sovereign debt governance as conceptualised in the previous Chapter. This, clearly, is a thorny adventure because of the general state-centric, territorialised nature of human rights obligations. It is even more complex in the context of the accountability of international financial institutions (IFIs) for the impacts of their programmes or policies on rights-

[1] Cassel 2001: 60-63, 62-63; Scheipers 2013:37-58; Iglesias 1996/1997:382-383; Freeman 1994:491-514, 494.

holders. The same complexity arises with respect to the accountability of institutional investors, vulture funds, banks, extra-territorial bondholders and other NSAs for the impact of their respective actions or inactions on rights-holders especially because of their growing influence as key players in the sovereign debt markets.[2]

To accomplish this task, the Chapter is structured as follows: Section Two will identify the theoretical underpinnings of socio-economic rights within the broader human rights jurisprudence; Section Three will examine the nature of socio-economic rights and the corresponding obligations of duty-bearers; Section Four will identify the connections between socio-economic rights and sovereign debt governance as an aspect of IEL; and Section Five will summarise and conclude the Chapter.

3.2 HUMAN RIGHTS IN CONTEXT: LEGAL AND THEORETICAL ISSUES

Scholars from different fields have tried, without much success one might add, to offer a comprehensive explanation regarding the nature of human rights.[3] This is because the question 'what are human rights?' only raises more questions than answers. Unfortunately for the present research, socio-economic rights are both products and part and parcel of the broader human rights jurisprudence. Therefore, locating these rights within the sovereign debt governance regime would logically involve exploring their roots, that is, understanding the nature and theoretical underpinnings of human rights in general.[4] However, because of the tendentious debates concerning these issues, it is important to lay out some preliminary points here. This will help in framing the discussion going forward. First, on account of the scope of this research, the task here is only to briefly examine the nature, classifications and legal basis of human rights, omitting much of the philosophical argumentations related to these rights.[5]

Second, the research will not devote much attention to the historical accounts of the concept. It is sufficient to briefly explore the place of human dignity and a few other ideas animating socio-economic rights, especially because both the normative framework and philosophical underpinnings are, to a large extent, interconnected in

[2] Cernic 2014:139-160.
[3] Donnelly 2013:7-23; Finnis 2011:2-11; Beitz 2003:36-46; Beitz 2001:269-282; D'Amato 1982:1110-1159; Sarat & Kearns 2009:1-24; Tasioulas 2013:1-25; Nickle 1993:77-86; William 2009:173-201.
[4] Iglesias 1996-1997:361-386.
[5] The details can be found in relevant literature. See fn 3 above.

properly understanding the nature of these rights.[6] Indeed, scholars' characterisations of human rights are often shaped, influenced and justified by their respective constructs and ontological premises.[7] The advantage of this approach is that it will enable the research to frame the discussion around the notion of human dignity in order to rationalise the corresponding responsibilities arising from a particular human rights claim which might also feature in sovereign debt adjudication.

Third, the focus here is not on *constitutional rights* although there is an intrinsic connection between these rights and international human rights, especially in terms of their objectives, substantive content and origin. However, as will be examined later, while the former rights are enforceable through relatively well-developed domestic legal mechanisms especially the judicial system, the latter, even with their primacy and increasing recognition and acceptance across the world, do not enjoy such privileged supporting legal mechanisms. Indeed, like in the sovereign debt governance regime, one of the main obstacles for the effective realisation of these rights is the absence of a comprehensive, unified and legally binding international system of adjudication in the event of their violations.[8] Having mapped out the intended route, it is now appropriate to delve into the discussion proper.

3.2.1 Nature of Human Rights

The idea of 'human rights' has deeply penetrated legal and political philosophy leading to a lot of historical conjectures about its origin and what might be called a conceptual confusion about its meaning.[9] The two terms constituting human rights (ie *right* and

[6] According to Freeman 'rights without reasons are vulnerable to denial and abuse.' See Freeman 1994:493-497. See also Donelly 2013:14.

[7] An illustrative example is the ideological elements that visibly feature in the debates about positive and negative rights and the general classification of human rights into the so-called first generation (civil and political rights), second generation (economic, social and cultural rights) and third generation (collective, solidarity or group rights).

[8] Although there is no structured judicial system in place, there are courts enforcing human rights standards at the supranational level such as the International Criminal Court (ICC), African Court on Human and Peoples Rights (ACrtHPR), Inter-American Court of Human rights (IACrtHR), European Court of Human Rights (ECrtHR) and the International Court of Justice (ICJ). In addition to these adjudicatory institutions, there are UN treaty bodies established to oversee the implementation of certain treaties eg Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Discrimination Against Women.

[9] The literature on this is vast. See, for instance, Roberts 2016:573-608; McCrudden 2008:1-76; Donelly 2013:7-54; Beitz 2013:259-290; Beitz 2003:36-46; Tasioulas 2012:1-30; Tasioulas 2013:1-25; Freeman 1994:491-514; Posner 2008:1758-1801; D'Amato 1982:1110-1159.

human) are both 'foundational' and 'essentially contested' concepts.[10] Notwithstanding this, however, understanding and clearly contextualising the term *right* is necessary for the present purpose especially because of the persistent objection to the recognition of socio-economic rights by some scholars and international actors (notably some class of official creditors).[11] This is partly because of the necessary implications entailed by the strict, technical connotation of or interpretation given to the term 'right'.[12] The research therefore starts by uncoupling the term *human rights*.

3.2.1.1 'Right' and 'Human'

The jurisprudential debate about 'right' precedes the concept of 'human rights'.[13] Thus, 'right' and 'human rights' are conceptually different although they are significantly interconnected.[14] Literally, a 'right' could mean freedom to exercise power or entitlement to something, an interest or a privilege protected by law.[15] It could also mean a moral rectitude in daily human conducts.[16] Technically, however, it holds different meaning for different people depending on various contextual factors such as legal tradition or orientation, political and economic ideologies, culture, moral or philosophical perspectives.[17] For the present purpose, the concern is on what exactly is entailed in a 'right' in both sovereign debt governance and human rights contexts, ie 'what "is" there when there "are" rights'[18] in these contexts?

There are several perspectives on this question.[19] The predominant perspectives are the interest or benefit theory and the choice theory.[20] The former holds that a *right*

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[10] Besson explains an 'essentially contested concept' as follows: '[an] essentially contested concept is a concept that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept itself is .... It is [the concept's] nature not only to be contested, but to be contestable in [its] essence, so that not only [its] applications, but also [its] core elements or criteria are contestable'. Quoted in Sarooshi 2004:1107-1109. According to Freeman, 'foundational concepts' are often 'essentially contested' because 'not only are they constantly challenged, but there is furthermore no logical method for resolving disputes conclusively … Foundational concepts may be culturally "relative". Foundational concepts may also have an inherently unstable meaning'. See Freeman 1994:497.
[11] Alston 2009:1-8; Donelly 2013:45; Stark 1992:79.
[12] See, for instance, Invernizzi-Accetti 2018:215-228; Cranston 1983:1-17; Tasioulas 2010:647-678; Edmundson 2004:119; Singer 1982:975-1006; Hohfeld 1913:16.
[13] Sen 2006:2913-2927, 2914.
[14] Edmundson 2004:194.
[15] Martin 2003:435; Freeman 1994:491-514; Donnelly 2013:7-23; Edmundson 2004:3-14.
[16] For example, doing *right* as opposed to doing *wrong*. See Donelly 2013:7.
[17] Tasioulas 2010:647-678; Edmundson 2004:3-14; Roberts 2017:576; Hansungule 2010:1-30.
[18] Freeman 2001:502.
[19] Edmundson 2004:119-122.
[20] Edmundson 2004:119-122.

exists to protect relevant interests.[21] Without delineating the 'relevant interests', the proponents of this view hold that 'only beings capable of having interests are candidate rights-holders'.[22] Among the founders of this theory is Bentham who, guided by his utilitarian philosophy, simply defined *right* as a beneficial duty and equated it with liberty or freedom to do or not to do self-regarded or self-interested acts which, more importantly, must not go against the wider public interests.[23] The latter is a critical utilitarian ingredient. However, one could argue that this utilitarian approach seems to confuse *right* with *freedom*.[24]

On the other hand, the choice theory focuses on two elements: enforceability and individual autonomy.[25] This theory and its justification have been summarised thus:

> Nothing counts as a right unless it has an assignable right-holder, and no one counts as a right-holder unless she holds the option of enforcing or waiving the duty correlative to the right. Its justificatory aspect can be put this way: The function of rights is to protect and foster individual autonomy.[26]

Following the choice theory, Hart describes the term 'right' as something belonging 'to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules'.[27] In addition, Hart distinguishes between 'special rights' and 'general rights'. The former includes rights arising out of special transactions like contracts and those arising out of other special legal relationships within a political community, while the latter 'are rights which all men capable of choice have in the absence of those special conditions which give rise to special rights'.[28]

The Hartian approach appears to reflect the Hohfeldian conception of *right*. In fact, it may not be an exaggeration to say that the most prominent conception of *right* is the one propounded by Hohfeld.[29] In a Hohfeldian sense, a legal right is of various types

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[21] Edmundson 2004:121.
[22] Edmundson 2004:121.
[23] Singer 1982:984. Bentham was quoted saying '[r]ight, the substantive right, is the child of law; from real laws come real rights; but from imaginary laws, from "law of nature" [can come only] "imaginary rights"…'. Quoted in Sen 2004:315-356, 325. See also Habibi 2007:3-35.
[24] Sen 2004:328-330; Hart 1955:175-191, 175 fn 2; Nussbaum 2011:69-100.
[25] Edmundson 2004:121-122.
[26] Edmundson 2004:122.
[27] Hart 1955:177.
[28] Hart 1955:183 &188.
[29] Williams 2005:16-18; Hohfeld 1913:16.

and each type is characterised, distinguished and determined by its legal correlative.[30] Thus, it could be a *claim* (duty-imposing), a *privilege/liberty* (without duty), a *power* (ability to change legal relations) or an *immunity* (incompatible with liability).[31] Of course, the legal implication of each depends upon context and nature of a relationship. The Hohfeldian correlatives, like their opposites, are also four: *duties*, *no-rights*, *disability* and *liability*.[32] Since a *claim* imposes a correlative *duty* it fittingly qualifies as a *right stricto sensu*. In other words, a *right* in the Hohfeldian sense is a legal entitlement that can be claimed or enforced against others at the instance of the right-holder.[33] Consequently, a right-holder has some general expectations because his *right* imposes duties on others to act towards him in a certain manner.[34]

This approach has, however, been criticised for failing to acknowledge that not every duty implies a correlative *right* and for focusing almost exclusively on private relationships.[35] Freeman also queried whether a right *stricto sensu* in the Hohfeldian sense implies a claim or only 'a right *to* claim' as, according to him, the two are conceptually different.[36]

Donelly offers what, for lack of a better term, might be called a 'Hohfeldian-utilitarian-Dworkian' understanding of *right*.[37] He conceives *right* as an entitlement that creates a triangular 'field of rule-governed interactions centred on, and under the control of, the right-holder', imposing duty on others and conferring benefits on the right-holder.[38] He illustrates this triangular conception thus: 'A has a right to x (with respect to B) specifies a right-holder (A), an object of the right (x), and a duty-bearer(B)'.[39] Donelly, however, cautions that even as 'rights are prima facie trumps', they can also be trumped by 'weighty other considerations'.[40] He did not mention what these weighty considerations could be but argues that rights are not reducible to correlative duties only, nor are they reducible to enjoying a benefit only.[41] The enjoyment of a right and

[30] Singer 1982:975.
[31] Hohfeld 1913:30.
[32] Hohfeld 1913:32.
[33] Singer 1982:986.
[34] Singer 1982:987.
[35] Edmundson 2004:87-102.
[36] Freeman 2001:358.
[37] Donelly 2013:7.
[38] Donelly 2013:8.
[39] Donelly 2013:8.
[40] Donelly 2013:8.
[41] Donelly 2013:8.

triggering of a corresponding obligation could be done through an 'assertive exercise' which would activate 'active respect' and 'objective enjoyment'.[42] He concludes:

> Rights empower, not just benefit, those who hold them. Violations of rights are a particular kind of injustice with a distinctive force and remedial logic. … Objective enjoyment must be the norm. … In an ideal world, rights would remain both out of sight and out of mind. In a world of saints, rights would be widely respected, rarely asserted, and almost never enforced.[43]

The problem of this conception, it might be observed, is that it proceeds upon vacuous assumptions, in the sense that it pays little or no attention to the distinct juridical relationships out of which a *right* may emanate. Nevertheless, this approach appears, in functional terms at least, to offer a more practical understanding than the above abstract approaches.

It can be observed that despite their distinct perspectives, variations and limitations, the above understandings appear to agree on certain key elements: a *right* is a product of either a private or public relationship which may or may not be enforced within a legal system. Thus, the substantive content of a *right* may not necessarily affect its status as a *right*. It is the juridical nature of the relationship that defines and produces *rights*, and it also shows the extent to which these rights can be exercised by a beneficiary. Such relationship needs not be direct in the sense of a conscious, deliberate engagement at the initial stage. However, a *right* is not, solely or exclusively, a claim enforceable against the state or its institutions.[44] That would be overly restrictive. In fact, a *right* in this broad sense, is even more invoked against private or non-public persons than against the state. In other words, violations of a protected *right* are not committed or perpetrated by governments only. This will become clearer in the context of corporate human rights violations to be discussed below.

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[42] '[A]ssertive exercise' means 'the right is exercised (asserted, claimed, pressed), activating the obligations of the duty-bearer, who then either respects the right or violates it (in which case he is liable to enforcement action)'; 'active respect' means 'the duty-bearer takes the right into account in determining how to behave, without the right-holder ever claiming it. The right has been respected and enjoyed, even though it has not been actively exercised'; and 'objective enjoyment' means 'the right - or at least the object of the right - has been enjoyed'. See Donelly 2013:9-10.

[43] Donelly 2013:9-10.

[44] As pointed out by Higgins, 'to define a right by reference to the ability of the party upon whom the obligation lies (the state) to provide it immediately or by the existence of cause of action to bring a legal claim to vindicate it is not the test of existence of rights under international law… Problems about delivery leave [one's] right a right nonetheless… To the international lawyer, the existence of a right is tested by reference to the sources of international law'. See Higgins 1994:99-100.

Sovereign debt relationship offers another example. In this relationship, despite the political and financial imbalance, juridical peculiarities of and disparities between the parties, each party has distinct *rights* arising out of such relationship. However, as pointed out in the previous Chapter, the *sovereign* in the context of sovereign debt relationship is a permanent party thereby narrowing the scope of *rights* in this context. In the same vein, the 'human' in 'human rights' necessarily narrows the scope of *rights* in this regard. In other words, this broad understanding may blur the traditional private-public divide in legal relations. Notwithstanding this counter-argument, it can hardly be disputed that a sovereign debt relationship establishes a juridical connection that consequently creates a bundle of *rights* as understood in the above context. Perhaps, introducing the 'human' element might help here. The research now turns to the term *human*.

While avoiding the philosophical debate about the conceptually contested nature of the term *human* which constitutes the 'demand-side of human rights', it can be safely assumed that the beneficiaries of human rights in general need not be human beings although animals may be excluded.[45] Indeed, it seems fairly settled that the target beneficiaries or possessors of human *rights* (though not socio-economic rights) consist of both human beings and corporate entities depending upon the nature of the *right* claimed.[46] For instance, in *Yokus v Russia*[47] where the petitioner claimed for compensation arising from, among others, a violation of its property rights, the ECrtHR held that a company (not its shareholders) is recognised as a possessor of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF)[48] and is therefore entitled to seek appropriate redress for violation of such rights. Consequently, Russia has a legal duty towards the company as a possessor of human rights.[49]

Admittedly, however, this broad conception of 'human' raises fundamental issues about the philosophical assumptions and justifications undergirding the concept of

[45] Nussbaum 1997:273; Beitz 2009:65-68; Ohlin 2005:209-249.
[46] Donelly 2013:30.
[47] Case of *OAO Neftyanaya Kompaniya Yukos v Russia Application* No 14902/04 (31 July 2014) https://www.italaw.com/sites/default/files/case-documents/italaw7752.pdf (accessed on 20 July 2018) (hereafter '*Yukos v Russia*').
[48] Council of Europe 2010. *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (amended by Protocol No 14 which entered into force on 14 June 2010) (hereafter 'ECPHRFF 1950').
[49] *Yukos v Russia*:paras 18-36.

human rights, especially because corporate entities as claimants of human rights are not really the concern of this research. In addition, the conceptions of *right* and *human* as examined above, did not really tell us the nature of *human rights*. This leads us back to the question raised earlier: What are human rights?[50]

3.2.1.2 Conceptions of Human Rights

Having examined the two terms making up *human rights*, the immediate focus now is to understand what it means. In answering this question (ie what are human rights?), scholars have offered diverse, sometimes competing and conflicting, understandings.[51] For instance, William has identified five distinct categories of conceptions of human rights: (a) Human rights as 'species of evolving legal regimes at national, international, regional, and other levels' consisting of rights embodied in hard laws, *ius cogens* and soft laws; (b) substantive moral theories which insist on universal moral standards applicable across time and space; (c) discourse theories which focus on ethics with multiple argumentation frameworks to support claims for human rights; (d) subaltern perspectives which reflect the global struggles against poverty and injustice; and (e) human rights as Western values or ideology imposed on non-Western societies.[52] However, for convenience and in order to properly trace the link between socio-economic rights and human dignity, the research will divide these diverse conceptions broadly into two categories: naturalists' conceptions and non-naturalists' conceptions of human right.[53]

The non-naturalists are largely influenced by positivism and utilitarianism.[54] Their ideas can fit into William's categories (a) and (b).[55] Their conceptions revolve around the elements of legal prescription, enforceability and institutionalisation of the object

[50] Sen 2006:2914; Sen 2004:317-319; Nussbaum 1997:273-279.
[51] In the words of McDougal & Lung-chu: 'Like the men of fable who observed the elephant differently from different vantage points, scholars who write about human rights commonly, and sometimes most inaccurately, observe mere fragments of a total context'. See McDougal & Lung-chu 1980-1981.337. See also Roberts 2017:581-586; Posner 2008:1758-1801. Beitz notes: '[W]e are in search of an answer to the question, "What are human rights?" The candidate answer under consideration holds that human rights are standards for institutions to which all can agree, where agreement is interpreted as falling within a progressive convergence of world views'. See Beitz 2009:94.
[52] William 2009:174-176. See also Tully 2014:139-140. For a critique of the concept of human rights see Mutua 2016:165-183.
[53] This, of course, is not a water-tight division. Each has a family of distinct conceptions within it but one could draw some similarities between the different categories/conceptions.
[54] Example is Cranston 1983:1-17.
[55] Chong 2010:25-30.

of a right before it properly qualifies as *human rights* within a legal order.[56] They do not recognise any notion of natural rights, because, to them, no rights can realistically exist before the creation or emergence of a state.[57] This means, human rights exist where a state exists, and where such a state not only establishes institutions, but also recognises these rights in a formal sense (ie 'juridification').[58] A striking example would be Kant's treatment of rights as 'artefacts of state' which, typical of Kantian philosophy, has influenced several modern conceptions of human rights.[59]

One of the leading non-naturalists was Bentham who famously remarked that 'natural rights' were 'simple nonsense' and imprescriptible natural rights were 'nonsense upon stilts'.[60] Although *natural rights* and *human rights* are technically not the same, Bentham's rejection of *natural rights* is sometimes considered as a rejection of *human rights* by some scholars.[61] The essential point is that this form of non-naturalists' conception appears to equate human rights with constitutional rights which, as noted at the beginning of this section, are clearly different.[62] This might be explained by positivists' insistence that for any human right to have a concrete meaning, it must derive its relevance and existence from a political or constitutional arrangement.[63] It also partly explains their prioritisation of certain human rights (eg political and civil rights) over others in both theory and practice.

Some non-naturalists, however, distinguish between *human rights* and *constitutional rights*. For instance, while describing human rights as 'politically neutral' values, Rawls recognises the difference between *human rights* and *constitutional rights* as the former are 'a special class of rights designed to play a special role in a reasonable law of peoples for the present age', having 'universal application', and specifying the 'outer boundary of admissible domestic law'.[64] For Rawls, human rights 'express a minimum

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[56] Cranston 1983:13.
[57] Troper was, for example, quoted arguing that '[i]f the expression "human rights" is meant to designate rights that human beings would possess and exercise independently of the state, or even against it, then from a strictly positivist point of view the question is easily resolved: there are no human rights'. Quoted in Invernizzi-Accetti 2018:216.
[58] Fischer & Watson 1980:1-6; Watson 1979:609-614. Compare this strict position with McDougal & Lung-chu 1980-1981:337; D'Amato 1982:1123-1147.
[59] Fox-Decent & Criddle 2009:301-336; Nussbaum 1997:273.
[60] Quoted in Donelly 2013:67; Habibi 2007:3-10.
[61] Example Tasioulas 2013:1-2; Hart 1955:175-177. For the utilitarian approach see Habibi 2007:3-35.
[62] Neuman 2003:1863-1900.
[63] Invernizzi-Accetti 2018:216-217.
[64] Rawls was actually reacting to the universalism and cultural relativism debate. See Rawls 1993:60-71.

standard of well-ordered political institutions for all peoples who belong to a just society of peoples'.[65] Following the non-naturalist approach, he argues that the major distinctive feature of human rights is that they do not actually depend on human nature. It might help to quote his characterisation of human rights in *extenso* here. He says:

> [T]hese rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature, such as, for example, that human beings are moral persons and have equal worth, or that they have certain particular moral or intellectual powers that entitle them to these rights… [A] society's system of law must be such as to impose moral duties and obligations on all its members and be regulated by what judges and other officials reasonably and sincerely believe is a common good conception of justice. For this condition to hold, the law must at least uphold such basic rights as the right to life and security, to personal property, and the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration. These rights we refer to as human rights.[66]

Although the list appears to be open-ended, it can be argued that this Rawlsian conception is too narrow, recognising only a few rights as *human rights*. In the same vein, his division of societies into liberal and hierarchical, applying or adhering to a particular notion of rule of law leaves much to be desired. It is clear that by this approach Rawls justifies external interference in the name of human rights protection. It is no surprise, therefore, that Rawls considers the main functions of human rights to be threefold: (a) serving as necessary conditions for the 'decency and legitimacy' of a regime and its legal order; (b) exclusion of 'justified and forceful intervention by other peoples, say by economic sanctions or military force'; and (c) setting a 'limit on pluralism among peoples'.[67]

In what seems to be an endorsement of the non-naturalist's differentiation of human rights, Edmundson concedes that human rights are inalienable by virtue of their significance and prescriptive recognition although they emerged originally from moral rights.[68] In his words: 'Not all moral rights are inalienable, but some are, particularly those whose special importance has been marked by their recognition as human rights. Some moral rights are forfeitable as well as alienable, but some are neither'.[69]

[65] Rawls 1993:69-70.
[66] Rawls 1993:69-70.
[67] Rawls 1993:69-70.
[68] Edmunson 2004:194.
[69] Edmunson 2004:194.

The naturalists, on the other hand, focus on human nature and the common features and values derived from it.[70] Thus, their conceptions may fit into William's categories (b), (c), (d) and (e). Of course, like the non-naturalists, there are different conceptions within this school. Notwithstanding their differences, however, naturalists are commonly influenced by the natural law tradition.[71] The central feature of this tradition is the 'ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be, the justification for every form of positive law'.[72] In essence, human nature unifies naturalists' conceptions of human rights. It is in this sense that Tasioulas conceives *human rights* as a continuation of *natural rights*, even though the former concept is relatively recent in origin.[73] Therefore, for the naturalists, the idea of *human rights* reflects the inherent moral and ethical core values that characterise humanity. They are rights imbued in or possessed by every human being by virtue of his/her humanity; and any theory or conception of human rights must be justified by elements of human nature such as human worth, needs, capabilities, rational reasoning or sense of morality rather than by reference to any legal instrument or enactment. They are natural, moral rights which predate any subsequent recognition by way of positive legal prescription in documents, ie the act of 'juridification'. The latter act, according to the naturalists, does not give legitimacy or create or confer *human rights*, but it merely confirms what already exists.[74] Thus conceived, human nature is the source of *human rights*.

It is worth noting that the naturalists have a relatively broader, all-inclusive approach to human rights hence, majority of them dispel with the enforceability or 'feasibility' and institutionalisation obstacles to the recognition and realisation of any category of human rights.[75] Consequently, many naturalists include virtually all manner of 'human rights' in their conceptions because they view the rights as transcendental, everlasting and universal.[76] Their existence and relevance derive from a higher source. Nearly all

[70] Donelly 1982:391-405, 392; Pogge 1995:103-120.
[71] Finnis 1980:276; Freeman 2001:140 & 135.
[72] McCoubrey 1987:17.
[73] Tasioulas 2013:1-7; Beitz 2009:71-72.
[74] Sen 2004:345-347.
[75] Sen 2004:345-347.
[76] Pogge for instance argues that 'a human right might be said to have two quite distinct components: juridification and observance. Through its juridification component, a human right to X would entail that every state ought to have a right to X enshrined in its constitution… A human right to X would contain, then, a moral right to effective legal rights to X, which gives every citizen of a state a weighty moral duty to help ensure that an effective and suitably broad legal (or better: constitutional) right to X exists within this state. Through its observance component, a human right to X would give a weighty moral duty to

naturalists' conceptions agree on this although they tend to disagree on the particular moral justification for their respective conceptions of human rights: Some anchored their justification on human dignity; some on human social institutions; some on human needs; some on public reasoning and discourse; and some on human capabilities.[77] A brief illustration of these justificatory variations might help in order to appreciate the connections between human dignity and socio-economic rights.

Tasioulas, for instance, based his conception on public discourse and reasoning because, according to him, human rights are moral rights with distinctive political functions in every established order whether domestic or international.[78] He considers human rights as a continuation of natural rights because both are universal moral rights 'possessed by all human beings, simply in virtue of their humanity' and are 'to be identified by the use of natural reason, principally ordinary, truth-oriented moral reasoning … [as] each human being enjoys a valuable status … characterised by a series of distinctive capacities, including capacities for thought, deliberation and action'.[79] 'Since', he argues, 'all human beings are, in this sense, equally human, this valuable status is possessed by each in equal measure'.[80] He accepts, however, that human rights are not necessarily timeless.[81]

Unlike the time-bound proposition of Tasioulas, a timeless, institutionalist justification has been advanced by Pogge who basically anchored his understanding on global social institutions.[82] Using the naturalist approach, Pogge conceives human rights as purely moral claims on global social institutions which require corresponding collective, global human rights responsibilities towards the poor because the fulfilment of human rights obligations actually depends on both national and global factors.[83] He identifies certain elements that a plausible conception of human rights must recognise: human rights express ultimate moral concerns imposing a moral duty on all persons to respect

each government and its officials to ensure that the right to X - whether it exists as a legal right or not - is observed…'. See Pogge 2000:45-69, 49-53.

[77] Breakey 2015:1198-1215, 1199; Edmundson 2004:119; Posner 2008:1766-1768; Besson 2013:408-431.

[78] Tasioulas 2013:16.

[79] Tasioulas 2013:2-3.

[80] Tasioulas 2013:6.

[81] Tasioulas 2013:2-5.

[82] Pogge 2000:45-69. Another prominent institutionalist is Besson. See Besson 2015:244-268; Besson 2013:408-431.

[83] Pogge argues that 'a human right to X is tantamount to declaring that every society (and comparable social system) ought to be so organized that all its members enjoy secure access to X'. See Pogge 2000:66.

such rights; they express weighty moral concerns which override other normative considerations; these moral concerns are focused on human beings only; all human beings have equal status and similar or indistinguishable human rights; the moral concerns are unrestricted.[84] Thus conceived, Pogge clearly limits beneficiaries of human rights to only natural persons based on his reading of article 28 of the Universal Declaration of Human Rights (UDHR) which, according to him, could be employed using a 'global moral judgement' to impose human rights responsibility on the rich in favour of the poor.[85]

Of course, Pogge's view did not go unchallenged.[86] However, it appears to be in sync with a dignity-based understanding as espoused by Crudden who advocates for a better, judicially inspired practice of human rights based on the notions of human dignity and *personhood*.[87] In a similar fashion, Griffin argues that 'a rich understanding of the dignity, or worth of the human person' is required for any meaningful conception of human rights, asking rhetorically: 'Do not human rights have their own intrinsically valuable purpose: the protection of human dignity? What more point do human rights need than that?'[88]

Indeed, one could safely argue that the dignity-based explanation appears to be more plausible. This is because most naturalists' explanations are arguably parasitic of the dignity explanation. For instance, Crudden's judicially inspired perspective is built around human dignity as he argues that 'the general justifying aim of human rights is the pursuit of human dignity, in the sense that each human person, qua human person, possesses an intrinsic worth that should be respected'.[89] A human rights claim, according to Crudden, can be pursued where some forms of conduct between persons are inconsistent with respect to this intrinsic worth of human beings; and the state must

[84] Pogge 2000:46.
[85] Pogge 2000:62-63 fn 34. Pogge's institutional proposition rationalises that 'any institutional order is to be assessed and reformed principally by reference to its relative impact on the fulfillment of the human rights of those on whom it is imposed... [T]he fulfillment of human rights importantly depends on the structure of our global institutional order and that this global institutional order is to some extent subject to intelligent (re)design by reference to the imperative of human rights fulfillment'. See Pogge 2000:53-56.
[86] Mitchell 2006:113-120.
[87] McCrudden 2014:38-40.
[88] Griffin 2008:341.
[89] McCrudden 2014:27.

recognise this fact since 'the state exists for the individual not vice versa'.[90] In this sense, therefore, human dignity may cut across and even outstrip human rights.[91]

Indeed, even the pragmatists outside the naturalists' tradition acknowledge the centrality of human dignity to a proper conception of human rights.[92] For instance, Donelly argues that human rights provide a powerful mechanism for the realisation of human dignity as they 'specify certain forms of social respect - goods, services, opportunities, and protections owed to each person as a matter of rights - implied by this dignity'.[93] In essence, human dignity is the rational basis for human rights. Specifically, Donelly based his human rights theory upon the idea of human dignity as provided under the UDHR.[94] Using the UDHR as a model, he characterises human rights as equal, inalienable and universal rights.[95] Therefore, as rights, they empower rights-holders to initiate claims challenging institutional actions, traditions, norms or practices and 'to struggle to create a world in which they enjoy (the objects of) their rights'.[96] He says:

> [H]uman rights claims express not merely aspirations, suggestions, requests, or laudable ideas, but rights-based demands for change. … And in contrast to other grounds on which legal rights might be demanded - for example, justice, utility, self-interest, or beneficence - human rights claims rest on a prior moral (and international legal) entitlement. Legal rights ground legal claims to protect already established legal entitlements. Human rights ground "higher", supra-legal claims. … This makes human rights neither stronger nor weaker than other kinds of rights, just different. They are human (rather than legal) rights. If they did not function differently from [municipal] legal rights there would be no need for them.[97]

Finally, both the 'basic needs' and 'capability' approaches could also be said to have derived their inspirations from the broader notion of human dignity. For the basic needs approach, it can hardly be disputed that 'human needs' have an intrinsic connection with human dignity.[98] Indeed, the minimalist understanding of human needs can be equated with the attainment and sustenance of human dignity. These include 'that

[90] McCrudden 2014:27.
[91] McCrudden 2014:40.
[92] Donelly 2013:29.
[93] Donelly 2013:29.
[94] Donelly 2013:26-39.
[95] Donelly 2013:10.
[96] Donelly 2013:12.
[97] Donelly 2013:12-13.
[98] Young 2008: 113-175, 128.

amount of food, clean water, adequate shelter, access to health services, and educational opportunities to which every person is entitled by virtue of being born'.[99]

In the same vein, the 'capabilities approach' advanced by Sen and Nussbaum is also a child of human dignity because its underlying objective is to improve human well-being and development.[100] This approach links human dignity to a broader conception of development.[101] It is reasoned that a life of dignity requires a set of capability functions (ie physical, mental, social and financial characteristics).[102] 'A central feature of well-being', writes Sen, 'is the ability to achieve valuable functioning'.[103] These functionings include good health, adequate nourishment, happiness, self-respect, etc,

[99] Donelly 2013:14 fn 8. The International Labour Organisation (ILO) is widely believed to be the major proponent of this approach. See ILO 1976. *Employment, growth and basic needs: A one world problem*. Geneva: International Labour Office.

[100] The capabilities approach compares human development and quality of life among people and nations. In the words of Nussbaum, 'the most illuminating way of thinking about the capabilities approach is that it is an account of the space within which we make comparisons between individuals and across nations as to how well they are doing'. It is non-utilitarian as it focuses on people 'one by one … insisting on locating empowerment in *this* life and in *that* life, rather than in the nation as a whole'. See Nussbaum 1997:279-288; Nussbaum 2011:69-100. Thus, it moves away from the gross national product and resource-based approaches of development to human capabilities by comparing quality of life and indices of inequality on an individual basis. See Sen 1985:169-221.There are three main strands of the capabilities approach: Sen's flexible emphasis on capabilities as zones of freedoms whose content should improve quality of life; Nussbaum's emphasis on liberal conception of capability rooted in public good, minimal social justice and constitutional law; and Heckman's focus on 'capabilities' as skills. See Nussbaum 2011:193; Nussbaum 1997:275-276; Sen 1992 18-40; Sen 2005:151-166; Prendergast 2004:39-56.

[101] Sen 1999:3-48.

[102] According to this approach the central (though non-exhaustive) human capabilities which make a person's life 'fully human' with powers of choice and reason are: (a) one's ability to have a normal life worthy of living without dying prematurely; (b) one's ability to have bodily health and nourishment; (c) ability to have a choice over one's bodily integrity; (d) ability to use one's senses to think and to have imagination; (e) ability to love and have emotional attachment to others without fear; (f) ability to create and sustain affiliation through interaction and friendship with others and with minimum self-respect and equal dignity; (g) ability to have concern for other species; (h) ability to play and enjoy recreational facilities; and ability to control one's environment politically and materially (eg through gainful employment and by holding properties). See Nussbaum 1997:279-288; Nussbaum 2011:69-100. Distinguishing capability and functioning, Nussbaum argues thus:

> Capability, not functioning, is the political goal. Capability must be the goal because of the great importance the capabilities approach attaches to practical reason, as a good that both suffuses all the other functions, making them human rather than animal … It is perfectly true that functionings, not simply capabilities, are what render a life fully human: If there were no functioning of any kind in a life, we could hardly applaud it, no matter what opportunities it contained. Nonetheless, for political purposes it is appropriate for us to strive for capabilities, and those alone. Citizens must be left free to determine their course after they have the capabilities. The person with plenty of food may always choose to fast, but there is a great difference between fasting and starving, and it is this difference that we wish to capture. Again, the person who has normal opportunities for sexual satisfaction can always choose a life of celibacy, and we say nothing against this.

See Nussbaum 1997:289.

[103] Sen 1985:200.

all of which may qualify as either 'doings' or 'beings'.[104] These are the 'capability set' which entail a person's freedom to have or achieve well-being. Sen argues that human capabilities have 'direct relevance to the well-being and freedom of people'.[105] In this sense, freedom becomes a constituent of a person's well-being which can be achieved without the constraints of 'unfreedoms'.[106] Accordingly, poverty is considered as a manifestation of 'unfreedoms' because it reduces human life options and exposes one to a life without dignity.[107] Hence, expanding freedoms should be seen as both the means and the end of development.[108]

Therefore, this broader conception of freedom under the capabilities approach enables a broader conception of human rights. For instance, while including socio-economic rights within his theory of human rights, Sen conceives human rights as ethical values some of which require neither 'juridification' nor institutionalisation for their realisation.[109] Using a similar approach, Nussbaum also considers human rights as 'an especially urgent and morally justified claim that a person has, simply by virtue of being a human adult, and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group'.[110] Although Nussbaum's focus on adult

[104] Sen 1992:40.
[105] Sen 2009:171. He argues thus: [W]ithout the substantive freedom and capability to do something, a person cannot be responsible for doing it. But actually having the freedom and capability to do something does impose on the person the duty to consider whether to do it or not, and this does involve individual responsibility. In this sense, freedom is both necessary and sufficient for responsibility'. See Sen 2009:158.
[106] Sen divides freedoms into two categories: well-being freedoms and agency freedoms. The former deals with a person's 'capability to have various functioning vectors and to enjoy the corresponding well-being achievements', while the latter is 'what the person is free to do and achieve in pursuit of whatever goals or values he or she regards as important'. See Sen 1985:203-204.
[107] Sen 1999:88.
[108] Ibid 38.
[109] Sen argues that 'the recognition of obligations in relation to the rights and freedoms of all human beings need not, thus, be translated into preposterously demanding commands…The basic general obligation is that one must be willing to consider seriously what one should reasonably do…The recognition of human rights is not an insistence that everyone everywhere rises to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgment that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non-obligational concerns may overwhelm the reason for the particular action in question, but that reason cannot be simply brushed away as being "none of one's business". Loosely specified obligations must not be confused with no obligations at all'. See Sen 2004:340-341; Sen 2006:2914.
[110] Nussbaum 1997:273.

seems restrictive, it is obvious that she acknowledges the centrality of human dignity as critical to the capability approach.[111]

In the final analysis, it can be argued that the above variegated and often competing perspectives are a direct reflection of the increasing importance of the notion of *human rights* built around the expansive but preeminent idea of human dignity. Although a specie of the concept of legal rights, human rights have now surpassed legal rights because of their global moral appeal. Thus, there is a general consensus on their primacy. But human dignity is perhaps the most compelling reason for this unrivalled position attained by human rights. The respect, value or worth of the human person is a language everybody speaks and understands. The practice of human rights across all legal planes (national, regional and international) and in nearly all jurisdictions reflects this. Using the UDHR, Donelly aptly rationalises thus:

> The scientist's human nature says that beyond this we cannot go. The moral nature that grounds human rights says that beneath this we must not permit ourselves to fall. Human rights are 'needed' not for life but for a life of dignity, a life worthy of a human being.[112]

As noted earlier, this research will build its conception of socio-economic rights on human dignity. Admittedly, this is not entirely free from criticisms, nor is it a fool-proof theoretical premise.[113] However, it is arguably a plausible premise because of the compelling consensus around it.[114] Importantly, the focus on human dignity dispels with the reservation harboured by cultural relativists against human rights which, they argue, is an ideological construct designed to push for the imposition of Western

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[111] Nussbaum notes 'if it is true that a society is not minimally just unless it has given people the preconditions of a life worthy of human dignity, then it is incumbent on political actors to figure out what that life requires. If they are to deliver it, they need to know what it is'. See Nussbaum 2011:70-73.

[112] Donelly further notes that '[t]he Universal Declaration, like any list of human rights, specifies minimum conditions for a dignified life, a life worthy of a human being…They say, in effect, "Treat a person like a human being and you'll get a human being". They also, by enumerating a list of human rights, say, in effect, "Here's how you treat someone as a human being". Human rights thus can be seen as a self-fulfilling moral prophecy: "Treat people like human beings…, see attached list and you will get truly human beings". See Donelly 2013:15-18.

[113] Roberts for instance, criticises the natural law assumption upon which this premise is based thus: '[I]f, for instance, a particular value or attribute is one that exists by virtue of one's humanity, arises in nature, or otherwise just is, it is impossible for a dictator or tyrant, or any other mortal, to take it away. They may be violated, they may be protected, they may be enshrined in law, or forgotten about. But as a natural entity, their existence is a constant. There is nothing that can deface, alter, or erase their being. As a premise, this natural form even eliminates the possibility of knowing or understanding its existence beyond the proposition that it just is'. See Roberts 2016:590.

[114] Jayawickrama 2002:19.

values and cultures on the rest of the world.[115] Without delving into the debate, it seems unarguable that the value attached to human dignity is cross-cultural. This means that respect for human dignity is central across cultures, ideologies, belief systems and religions.[116] The research now turns to classifications and legal basis of human rights.

3.2.2 History, Classification and Legal Basis of Human Rights

Since 1945, the number of human rights treaties has been growing.[117] This raises the question where, in actual fact, is the origin of human rights and what is the source of their legal authority? As noted earlier, a detailed overview of the history of human rights is, for reason of scope, unnecessary here. The focus will be on those historical events or issues directly relevant to this research.[118]

3.2.2.1 Origins

There are multiple, sometimes conflicting, historical accounts about the origin of human rights before 1945.[119] Regardless of where the origin is, one thing is clear: the struggle for human dignity (some would say human rights) is as old as the human society itself.[120] Nearly all the historical events that heralded and contributed to the evolution of modern IHRL were triggered by the irresistible desire to preserve and assert human dignity. From the 1215 English Magna Carter to the American Declaration of Independence, the French Declaration of the Rights of Man, abolition of slavery and slave trade, the impacts of the two devastating world wars and ensuing decolonisation, this desire has remained constant thereby becoming a pivotal moral force for the post-war evolution of a global system for the protection of human rights.[121] In essence, the concern for human rights predates the establishment of the modern

[115] The literature on this is vast although the debate appears to be dying down. See, for instance, Hopgood 2013:1-23 &142-165 (arguing that IHRL is no longer 'fit for purpose' as the 'one-size fits all' approach is now outmoded); Nickle 2007:353; Brown 1997:41-65; Oyekan 2012:143-154 (arguing that 'human values are not the exclusive preserve of any race'); Cistelican 2011:1-11; Freeman 1994:493-505.

[116] Morsink 1999:18-54; Martin 1993:75; Beitz 2009:73-93; Hansungule 2010:1-30; Fox-Decent 2017:596-622; Goodhart 2005:353; Roberts 2016:576.

[117] By 2014, there were over 250 human rights-based treaties in the world. See Fomerand 2014:1.

[118] Fox-Decent 2017:596.

[119] Fortunately, this research will not delve into the historical details for obvious reasons thereby avoiding the conflicting historical accounts. But the literature is vast. See, for instance, Roberts 2016:576; Hansungule 2010:1-30; Roger & Zaidi 2008:27-59 & 143-176; Morsink 1999:37-91; Edmunson 2004:3-14; Hopgood 2013:1-23.

[120] Hansungule 2010:1 fn 2.

[121] Morsink 1999:37-91; Roger & Zaidi 2008:43-59.

human rights system. However, it is instructive to note that the predecessor to the UN ie the League of Nations, did not purposely project any human rights agenda apart from its notable concerns in the areas of minorities, slavery and its collaborative works with the ILO on labour related rights.[122] This gap in the legal and institutional mandate of the League of Nations became visible following the horrors perpetrated during the Second World War and was therefore, aimed to be addressed with the establishment of the UN.[123]

Today, the UN and its human rights-based (treaty and non-treaty) institutions, as well as regional organisations and their human rights-based institutions constitute the global drivers of the human rights agenda as seen in their various contributions to the development of human rights standards and in monitoring compliance with such standards.[124] The other contributors include states, international courts and tribunals, IGOs and NGOs.[125] Importantly, multilateral creditors have also become participants in human rights agenda-setting.[126] However, as the research will show in subsequent chapters, the genuineness of their efforts has raised legitimacy questions as they persistently object to being held accountable for human rights violations or even accept human rights responsibility.[127] This will become clearer later as the research now explores both the hard and soft law sources of IHRL.

3.2.2.2 Sources of Human Rights

Needless to state that human rights derive their legal basis from the traditional formal and informal sources of IHRL.[128] Thus, like sovereign debt obligations, human rights responsibilities are provided in these sources. First, with regard to convention, there are over two hundred human rights-related treaties imposing binding obligations primarily on states.[129] Apart from special treaties addressing specific human rights concerns or constituencies, there are general instruments such as the UN Charter, the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESR). The

[122] Roger & Zaidi 2008:54-57.
[123] Morsink 1999:37-91.
[124] Ramcharan 2015:13-37 & 38-54.
[125] Fomerand 2014:3.
[126] Fomerand 2014:5.
[127] Bradlow & Hunter 2010:387-397; Eriksen & De Soysa 2009:485-503.
[128] Fomerand 2014:13.
[129] Jayawickrama 2002:5-7 & 20-21; Ramcharan 2014:9-32.

research will return to the ICESCR in the next section as it is the legal foundation for analysing socio-economic rights. The essential point here is that all the four instruments (UN Charter, UDHR, ICCPR and ICESCR) recognise that human rights are rooted in human dignity and therefore each separately imposes obligations on duty-bearers to ensure the protection and realisation of human rights.[130] Importantly, these treaties are normative in the sense that their beneficiaries are not the signatories (states) themselves.[131]

Second, human rights are also rooted in customary international law (CIL). In fact, partly as a result of the universal moral force of human dignity, certain human rights have today assumed the status of CIL, that is, they have become accepted as state practices binding upon all actors, except a persistent state objector.[132] Although the UDHR is, in itself, a declaration without legal force, it is generally accepted that most (if not all) of its declared or substantive rights have assumed the enviable position of CIL because of its global acceptability.[133] These rights, as will be shown latter, include socio-economic rights. In addition, unlike in the past, it has now been generally accepted that 'in certain cases, the practice of international organisations also contributes to the formation, or expression, of rules of customary international law'.[134] These 'certain cases', as will be argued later, can be extended to the sphere of socio-economic rights responsibilities in sovereign debt governance.

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[130] The rights are provided in the UDHR, UN Charter, ICCPR and ICESCR. They have also been recognised in other treaties. See the UN Charter 1945:arts 55-56; Vienna Convention on the Law of Treaties (VCLT) 1969:arts 2, 26, 42-43. In particular, the ICCPR and ICESCR also have their respective Optional Protocols (OPs) which provide the complaint procedures. See UNGA 1966(c). *OP to the ICCPR* (adopted 19 December 1966 and entered into force 23 March 1976); UNGA 1989. *Second OP to the ICCPR aiming at the Abolition of the Death Penalty* (15 December 1989); UNGA 2009. *OP to the ICESCR* (open for ratification on 24 September 2009).

[131] Bilder et al 1987:157-164,161.

[132] UN 1946. *The Statute of the International Court of Justice* (adopted on 26 June 1945 and came into effect on 24 October 1945) (ICJ Statute):art 38; D'Amato 1982:1128-1145 (noting that treaty law is the major repository of rules of customary international law of human rights'); ILC 2015. *Third Report on Identification of Customary International Law* (UN ILC Draft on CIL 2015):draft arts 2-13.

[133] For example, in a separate opinion, ICJ Vice-President Ammoun held that 'although the affirmations of the Declaration [i.e. UDHR] are not binding qua international convention...they can bind the states on the basis of custom...whether because they constituted a codification of customary law...or because they have acquired the force of custom through a general practice accepted as law'. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution* 276 1971 ICJ Reports 76.

[134] UN ILC Draft on CIL 2015:art 4(2). See also VCLT 1969:arts 3 & 5; *Case Concerning the Interpretation of the Agreement of 25 March 1951 between the World Health Organisation (WHO) and Egypt* (Advisory Opinion) 1980 ICJ Reports (*WHO* Case) 89-90.

It is worth noting again that because of its compelling moral force and significance as a foundation for IHRL, human dignity has prompted the emergence of human rights obligations as *ius cogens* and obligations *erga omnes*.[135] They create obligations *erga omnes* because of the interdependence and indivisibility of all classes of rights.[136] On account of this preeminent status, a third party intervention to protect human rights and claims for reparation by victims of human rights violations can be made at international judicial fora.[137]

Third, the general principles of law applicable in the majority of domestic systems especially minimum rights provided under various national constitutions (constitutional rights) or judicially laid down by domestic courts also provide a source of authority for human rights.[138] Similarly, the authoritative statements and interpretation of provisions of human rights instruments by UN bodies, especially committees established under treaties, constitute another valuable material sources.[139] Examples are the various General Comments issued by the Committee on Economic, Social and Cultural Rights (CESCR).[140]

In addition, decisions of international courts and tribunals as well as works of reputable scholars and experts could serve secondary purposes in supporting a human rights

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[135] *Erga omnes* is an obligation towards all or owed to the international community while *ius cogens* is a peremptory norm 'accepted and recognized by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' so that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. See VCLT 1969:arts 53 & 64; ILC 2001. *Draft Articles on Responsibility of States for Internationally Wrongful Acts* http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 12 February 2016) (hereafter 'UN ILC Draft on State Responsibility 2001'):arts 33, 42 & 48. In the *Barcelona Traction Case* the ICJ held 'such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and discrimination' as *ius cogens*. See the *Barcelona Traction Case (Second Phase)* 1970 ICJ Reports 3:32. See also Criddle & Fox-Decent 2009:331-249.

[136] Ramcharan 2014:11-30.

[137] *East Timor (Portugal v Australia)* 1995 ICJ Report 90:paras 155-159; *Barcelona Traction* case:para 34; *Legal Consequences for the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Report 1360 (hereafter '*Palestinian Territory* case'); *Reservations to the Convention on Genocide* (Advisory Opinion) 1951 ICJ Reports 15; Organisation of African Unity 1982. *African Charter on Human and Peoples Rights* (adopted on 27 June 1981 and entered into force on 21 October 1986) (hereafter 'African Charter 1982'):art 56; Organisation of American States 1969. American Convention on Human Rights (adopted on 22 November 1969 and entered into force on 18 July 1978) (hereafter 'ACHR'):art 44; ECPHRFF 1950:art 36; UN ILC Draft on State Responsibility 2001:arts 33, 42, 48 & 54.

[138] Jayawickrama 2002:3-23.

[139] UN Commission on Human Rights (UNCHR) 2004. *Compilation of General Comments and General Recommendations adopted by human rights treaty bodies*. New York: UN.

[140] *Palestinian Territory* case:136.

proposition.[141] Included among experts are, of course, UN appointed independent experts or special rapporteurs on specific thematic matters including those on sovereign debt.[142]

With regards to the informal sources, there are hundreds of soft laws and declarations re-affirming all classes of human rights.[143] Some of these soft laws which have direct bearing on the theme of this research include: UNGA's *Basic Principles on Sovereign Debt Restructuring Processes*; UNCTAD's *Sovereign Debt Workout Guide*; UNCTAD's *Principles on Responsible Sovereign Lending and Borrowing*; and UNHRC's *Guiding Principles on Foreign Debt and Human Rights*.[144]

3.2.2.3. Classification

Scholars have advanced different classifications of human rights.[145] However, as noted earlier, owing to historical exigencies and ideological factors, human rights are mainly classified into the following categories: civil and political rights (CPRs), economic, social and cultural rights (ESCRs) and group-based rights.[146] While CPRs are rights linked to citizenship status, democracy, political participation, equality and administration of justice as provided for under the UDHR and ICCPR, ESCRs are cultural, social and subsistence or welfare-based rights provided for under the UDHR and ICESCR.[147]

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[141] UN ILC Draft on CIL 2015:arts 13 & 14.
[142] Formerand 2014:8-9.
[143] Jayawickrama 2002:167 & 170.
[144] UNGA 2015. *Basic Principles on Sovereign Debt Restructuring Processes* (19 September 2015); UNCTAD 2015. *Sovereign Debt Workout: Going Forward, Roadmap and Guide* (UNCTAD 2015); UNCTAD 2012.*Principles on Responsible Sovereign Lending and Borrowing* (amended on 10 January 2012) [UNCTAD PRSLB 2012]; UNHRC 2012. *Guiding Principles on Foreign Debt and Human Rights* (adopted on 5 July 2012) [UNHRC GPFDHR 2012].
[145] Koch 2005:81-103; Mutua 2016:143-146; Jaichand 2010:51-71; Ashford 2009:91-112; Hassoun 2012:23-44; Gavison 2003:23-55; Scott 2001:7-38; Formerand 2014:11; Marks 2009:209-243.
[146] Puta-Chekwe & Flood 2001:39-51; Tinta 2007:431-459; Whelan 2010:112-135.
[147] Beitz lists the categories as follows:

1. Personal rights including right to life, liberty, and security of the person; privacy and freedom of movement; ownership of property; freedom of thought, conscience, and religion; and prohibition of slavery, torture, and cruel or degrading punishment.
2. Rights associated with the rule of law which include equality before the law and equal protection of the law; legal remedy for violation of rights; impartial hearing and trial; presumption of innocence; and prohibition of arbitrary arrest.
3. Political rights encompass freedom of expression, assembly, and association; the right to take part in government; and periodic and genuine elections by universal and equal suffrage.
4. Economic and social rights include adequate standard of living; choice of employment; protection against unemployment; 'just and favorable remuneration'; the right to join trade

Although many non-naturalists have prioritised CPRs on account of their feasibility, institutionalisation, enforceability and perceived negative character as opposed to the so-called positive rights which they consider to be lacking these elements, this prioritisation does not, in both functional and theoretical terms, reflect the intrinsic unity of these rights as rights founded on the inherent dignity of all human beings as argued above.[148] Legal developments over the past decades appear to favour non-prioritisation.[149] The UDHR, ICCPR and ICESCR take a uniform position on this and the widely accepted principle of indivisibility and interdependence of all classes of rights further reinforces this claim.[150] In both theory and practice, this prioritisation does not really hold substance.[151] Indeed, the strict negative-positive divide has been shown to be chimeric as both CPRs and ESCRs require duty-bearers' positive actions and negative restraints to be effectively enjoyed.[152] In other words, as far as the conducts of the primary duty bearers (states) are concerned, every right has both negative and positive elements although not in equal measure. Thus, it seems plausible to argue that the 'negativeness' or 'positiveness' of duty-bearers' obligations is only a question of degree. That is why a single conduct may simultaneously amount to violations of different categories of rights. This has been recognised by the ICJ in a 2004 advisory opinion in which it held that Israel's separation wall constituted violations of both freedom of movement and socio-economic rights of the Palestinians in the area.[153]

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unions; 'reasonable limitation of working hours'; free elementary education; social security; and the 'highest attainable standard of physical and mental health'.

5. Rights of communities include self-determination and protection of minority cultures.

See Beitz 2001:271.

[148] See for example UNGA 1989. *Indivisibility and interdependence of economic, social, cultural, civil and political Rights*. New York: UN; and Whelan 2010:9 (calling this 'organic unity').

[149] National and international cases abound on this: *The Prosecutor v Ahmad Alfaqi Al Mahdi* 2016 (ICC No ICC-01/12-01/15); *Bandhua Mukti Morcha v Union of India* 1984 AIR SC 802; *Sunil Batra v Delhi Administration* 1978 SC 1675; *Municipal Council Ratlam v Vardhichand and Others* 1980 AIR SC 1622; *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 20.

[150] UDHR 1948:preamble; ICCPR 1966:preamble & art 1; ICESCR 1966:preamble & art 1; Whelan 2010:9; Morsink 1999:88.

[151] International Commission of Jurists 1987. 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights'. *Review of International Commission of Jurists* 37*:43-55/Human Rights Quarterly* 9:122-126 (hereafter LP 1987):para 6; Mutua 2016:143-146; O'Connell 2011:532-554, 534; Langford 2008:3-4; Sen 2004:345-347. Compare Breakey 2015:1198-1215.

[152] Ashford 2009:92; Pogge 2000:64-65; Langford 2008:30; Stark 1992:79 fn 9; Shue 1996:20; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*1996 (4) SA 744 (CC):para 78. Compare Posner 2008:1764-1765.

[153] *Palestinian Territory* case*:*para 106.

It is also tenuous to argue that only CPRs are human rights.[154] Prioritisation on this account (enforcement and institutionalisation) cannot be sustained especially in the light of developments in national, regional and international human rights practice.[155] It is submitted that even before these developments, prioritisation had neither legal nor logical foundation; it was more of a political rationalisation emerging from the ideological struggle of the Cold War era.[156] Indeed, de-emphasising ESCRs even betrays the positivist insistence on juridification because the rights have been duly provided for under the ICESCR. Not surprisingly, some have argued that de-emphasising or rejecting ESCR is in pursuance of neoliberal policies pushed forward by IFIs and multinational corporations (MNCs), leading to withdrawal of governments from public services by way of increasing deregulation and privatisation of such services.[157]

3.3 SOCIO-ECONOMIC RIGHTS IN CONTEXT

Having examined the legal, historical and theoretical foundations of human rights in general, the research will now narrow the discussion to socio-economic rights.

3.3.1 Why Socio-Economic Rights?

Clearly, the interdependence and indivisibility of all human rights indicates the significance of human dignity as a 'human rights-unifier'. On account of this, the research's exclusive focus on just a sub-category of human rights might be questioned. However, notwithstanding their shared theoretical and historical heritage, the research is only concerned with economic and social rights (socio-economic rights), not CPRs, group rights or cultural rights for the following reasons. First, in most cases, human rights issues arising from sovereign debt default, restructuring and broader sovereign debt governance relate to, and impact more on socio-economic rights.[158] This is not to suggest that CPRs, group rights or cultural rights are insignificant or irrelevant in a broader sovereign debt context. That would be misleading. In fact, events following sovereign debt crises in Argentina, Spain, Italy and especially Greece, for example, show that CPRs can be used as potent

[154] Cranston 1983:13. Compare Higgins 1994:99-100.
[155] See cases referred to in fn 149 above.
[156] Alston & Quinn 1987:156-229, 219-220.
[157] O'Connell 2011:536-537.
[158] Barry 2010:237-271, 237-238.

instruments by citizens to express or ventilate their grievances by way of protests (sometimes leading to change of government), referendum and, sometimes, invoking the judicial process to make certain claims.[159] This, clearly, is a further evidence of the indivisibility of CPRs and ESCRs, because asserting or exercising the latter requires the former and vice versa.[160] However, the exercise and manifestations of CPRs in these instances were, in reality, triggered by underlying socio-economic conditions brought by the various sovereign debt crises in these countries.[161] In other words, CPRs, in and of themselves, are not directly affected by sovereign debt crisis in the sense that socio-economic rights are.[162] Indeed, CPRs can be exercised without much hinderance even during such crisis. They are not the exact triggers but rather instruments employed to express dissatisfaction with socio-economic conditions brought by the crisis, conditions which may directly impact the sustained fulfilment or realisation of guaranteed socio-economic rights.

Second, there could be cases where group and cultural rights may conflate with socio-economic rights, for example, land rights for farming or use of water from a specific, culturally significant river in a particular community.[163] These, however, are mostly not concerned with sovereign debt crisis. Quite rightly they are socio-economic rights as they involve means of livelihood, but their violations normally follow specific activities connected to or arising from, for example, foreign direct investments or development project financing. In addition, while violations of CPRs, cultural and group rights are often quickly determinable or could be easily identified following specific actions of duty-bearers, violations of socio-economic rights are relatively difficult to identify as they mostly follow a chain of actions or inactions, policies or programs from a multitude

[159] Tamamović AI 2015:95-110. See also *Mamatas and Others v Greece* ECtHR (Application Nos 63066/14, 64297/14 and 66106/14) (20 July 2012); The Guardian 2018. 'Argentina agrees to $50bn loan from IMF amid national protests'. https://www.theguardian.com/business/2018/jun/08/argentina-loan-imf-protests-peso (accessed 29 June 2018).

[160] UN World Conference on Human Rights 1993. *Vienna World Conference on Human Rights: Vienna Declaration and Programme of Action*:para 5; UN 1993. *Women World Conference on Human Rights Beijing Declaration: Fourth World Conference on Women* (4 September 1995):para 9.

[161] Tamamović 2015:29.

[162] Studies have shown the support offered by creditors to repressive regimes violating CPRs to remain in power. However, these repressions were not as a result of sovereign debt defaults. In other words, these studies only raised questions of odious debts and not sovereign debt crises. See, for instance, Bohoslavsky & Escriba-Folch 2014:17-32; Sharp 2014:52-59.

[163] *Gabcikovo-Nagymaros Project (Hungary v Czechoslovakia)* 1997 ICJ Report 7 (hereafter '*Gabcikovo* case'); *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ Reports 14 (hereafter '*Pulp Mills* case'); *Methanex v United States of America* 2005 44 ILM 1345; *United Parcel Service of America Inc (UPS) v Canada* 2007 46 ILM 922.

of actors or institutions from either within or outside (but often from both within and outside) the state. The cumulative effects of these on the people could take years to manifest.[164] In essence, sovereign debt crisis as conceived in this research affects mostly socio-economic rights that largely depend on these institutional policies or lack thereof.[165]

The third reason which also relates to the first is that, in the wake of the 2008-2015 global economic crisis, the CESCR had issued guidelines in the form of a letter to state parties recasting and reinterpreting their obligations in situations of economic and financial crises.[166] This indicates the distinctive vulnerability and fluidity of socio-economic rights if posited against CPRs and cultural rights.[167] By such guidelines, compliance with obligations under the ICESCR was relaxed in situations amounting to emergencies such as sovereign debt crisis or broader economic crisis. Arguably, one would have thought that in these situations, monitoring compliance ought to have been toughened rather than relaxed.[168] The essential point is, by their nature, socio-economic rights are quite pliable in a crisis situation while CPRs and cultural rights are comparably not.

Fourth, as will be elaborated below, social and economic rights are more intertwined in both functional and theoretical terms. For instance, lack of education, poverty and

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[164] According to Beitz a 'violation' occurs 'when a protected interest is set back as a result of a government's failure to satisfy [treaty] requirements, whether through lack of capacity or of will. This means that a government might be said to have violated a human right even when there is no intention to do so (e.g. through a lack of capacity or poor policy planning) and when the proximate cause of the deprivation is something other than government action… human rights violations are reason-giving'. See Beitz 2010:3-6. Chapman divides violations into three: '(1) violations resulting from actions and policies on the part of governments; (2) violations related to patterns of discrimination; and (3) violations taking place due to a state's failure to fulfill the minimum core obligations'. See Chapman 1996:23-66, 37.

[165] Warwick 2016:249-265; Bilchitz 2014:710-739 (hereafter Bilchitz 2014(a)); Contiades & Fotiadou 2014:740-746; Bilchitz 2014:747-750 (hereafter 'Bilchitz 2014(b)'); Desiertor 2012:162-185.

[166] See Letter dated 16 May 2012 Addressed by the Chairperson of the CESCR to States Parties to the International Covenant on Economic, Social and Cultural Rights (2012) (UN reference CESCR/48th/SP/MAB/SW). Part of the content of the letter reads: 'Economic and financial crises and a lack of growth impede the progressive realization of economic, social and cultural rights and can lead to regression in the enjoyment of those rights. The Committee realizes that some adjustments in the implementation of some Covenant rights are at times inevitable'.

[167] Saiz 2009:277-293, 279-280.

[168] Before the letter, the standard was 'even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes'. See CESCR 1990. *General Comment No 3: Nature of States Parties Obligations (Art 2 para 1 of the Covenant)* (hereafter CESCR GC 3 1990) para 12. Thus, the letter of 16 May 2012 has been severely criticized. See Warwick 2016:250.

unemployment are directly connected to or can both produce and exacerbate poor living conditions, including ill-health, lack of water and food, social exclusion and discriminatory practices.[169] This partly explains why cultural rights, despite having a similar theoretical foundation and sharing the same legal basis with socio-economic rights, have received separate treatments in both academic literature and interpretative works of the CESCR.[170]

Finally, although all human rights are founded on the preeminent idea of human dignity, in functional terms, however, socio-economic rights are more firmly interlinked with this idea. As the next sub-section will demonstrate, they constitute the basic foundation for a meaningful exercise of other rights.[171] In fact, there is an emerging jurisprudence in some jurisdictions indicating the practical meaninglessness of human life without these rights.[172] Because of this status, socio-economic rights have become central themes in most global initiatives aimed at bridging inequality, ending discrimination and achieving a fair, all-inclusive and just global economic system.[173] Indeed, it has been argued that 'economic and social rights are more central to the international ideological disagreement of the last century and to the international agreement … for this century'.[174]

Having justified focusing on socio-economic rights, it is now appropriate to show their scope, character and the respective obligations of duty-bearers including creditors and debtors.

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[169] Logie & Rowson 1998:82-97.

[170] A UN Special Rapporteur once observed that '[o]f the five major groupings of internationally recognized human rights (civil, political, economic, social and cultural), that of cultural rights receives by far the least amount of serious attention'. See UNHRC 1997. *Final report of Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (reprinted in Leckie & Gallagher 2006:501):para 197; CESCR GC 3 1990:para 10.

[171] According to Shew: '[R]ights are basic if enjoyment of them is essential to the enjoyment of all other rights'. See Shue 1996:19.

[172] The South African and Indian judiciaries have done remarkable work in this area. See for example, the popular *Grootboom* case*; Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) 530; *S v Makwanyane* 1995 (3) SA 391 (CC) 506; *Bandhua Mukti Morcha v Union of India* 1984 AIR SC 802; *Sunil Batra v Delhi Administration* 1978 SC 1675; *Municipal Council Ratlam v Vardhichand* 1980 AIR SC 1622.

[173] The defunct MDGs and the SDGs are examples. See World Conference on Human Rights *Vienna Declaration and Programme of Action* (adopted on 25 June 1993); UN 2002. *Monterrey Consensus of the International Conference on Financing for Development: A Final Text of Agreements and Commitments* (adopted on 22 March 2002); UNGA 2000. *Millennium Declaration* (adopted on 18 September 2000); UNGA 2015. *Transforming our world: The 2030 agenda for Sustainable Development* (adopted on 25 September 2015).

[174] Young 2008:119.

3.3.2 Character and Scope of Socio-Economic Rights

A combination of two main ideas shapes this research's approach to socio-economic rights: human dignity (which entails human value, equality and freedom) and human life (which entails personal security, survival and basic needs).[175] While the latter emphasises the 'material interests or resources required for basic functioning' of human beings, the former goes beyond survival to emphasise human value or worth which defines equality and permeates the entire IHRL as shown above.[176] A combination of these ideas would therefore translate into a broader notion of socio-economic rights which, arguably, reflects the overarching ideal of justice. This could be seen in nearly all human rights instruments.[177] In fact, the notion of indivisibility of human rights is largely anchored on the inseparability of these core ideas.[178]

Using this approach, socio-economic rights may therefore be defined as entitlements of individuals and communities to enjoy or have unhindered access to basic, minimum and dignified conditions necessary for their well-being and survival, as provided under the UDHR and ICESCR and reflected in or reinforced by CIL, general principles, judicial decisions and soft laws.[179] Thus, socio-economic rights essentially express the qualities necessary for a meaningful life and, as argued above, more than any category of human rights, are at the root of human dignity.[180] Their main concern is the availability of the material bases for human well-being; and their 'primary normative function is to secure a basic quality of life for individuals and communities through guaranteeing access to material goods and services such as food, water, shelter, education, health care, and housing'.[181]

The standard is for every person to have 'a minimally adequate level of civic status and standard of living'.[182] This is measured by the following: level of protection of persons from all forms of mistreatments including discrimination; people's level of participation in social institutions; and the level of 'being able to command the basic necessities (food, drink, shelter) necessary to meet elementary needs that all human

[175] Young 2008:128-133.
[176] Young 2008:128.
[177] Ramcharan 2014:9-32; Tinta 2007:431-459.
[178] Tinta 2007:431-459.
[179] Waldron 2010:21-49, 23; Warwick 2016:249 fn 4; Bilchitz 2014(a):719; Alston & Quinn 1987:229.
[180] Valentini 2017:862-885.
[181] Wills & Warwick 2016:631; Barry 2010:237.
[182] Barry 2010:238.

beings have'.[183] While recognising this standard in the context of sovereign debt governance, Barry adopts a broader approach thus:

> [A] person's human rights are *fulfilled* when he/she has access to the natural and social resources that are ordinarily required for persons to achieve a level of civic status and standard of living that are minimally adequate, and when his/her access to these resources is secure. … We can refer to cases in which people fail to command the resources ordinarily required to achieve a minimally adequate level of civic status and standard of living, or where their command over such resources is insecure, as *human rights underfulfilment*.[184]

As indicated earlier, socio-economic rights consist of two broad sub-categories of rights: economic and social. Although the two are inseparable, they are obviously not the same.[185] However, despite the predominant use of the term 'socio-economic rights', other terminologies are often employed to also describe the same rights. These include: social rights, economic rights, anti-poverty rights, subsistence rights and welfare rights.[186] These terminologies could be confusing. Indeed, in some literature socio-economic rights are simply referred to either as social rights or as economic rights despite the possible misconception that such terms could generate.[187] For example, because of the centrality of property rights in IEL especially in the context of foreign investment and the constitutionalisation project in such law, there has been a growing misconception equating 'economic rights' with 'property rights' thereby dissociating social from economic rights while, simultaneously, confusing or distorting the traditional understanding of socio-economic rights and property rights.[188]

This approach, it is submitted, is misleading. Property right is certainly 'economic' in a possessive, wealth-creating and profit-making sense. However, its possessor's assertive exercise, to borrow Donnelly's terminology, is largely activated in the event of interference with his lawful, objective enjoyment. Thus, its enjoyment invariably requires some restraint from others.[189] This means it has predominantly negative elements. Arguably, in a strict IHRL context, property rights is defined and guaranteed

[183] Barry 2010:238.
[184] Barry 2010:238.
[185] Stark 1992:92. See also Daintith 2004:56-90; Lichtenberg 2009:71-91.
[186] Stark 1992:92 fn 58.
[187] See, for instance, Daintith 2004:57; Langford 2008:3 fn 1.
[188] Petersmann 2003:407; Petersmann 2008:769-798.
[189] Alvarez 2018:580-705.

as CPR not as a socio-economic right, hence its predominant presence in international investment law (IIL).[190]

On the other hand, economic rights in IHRL context are both survival and welfare-based, dignity-sustaining and dignity-enhancing human rights that enable self-actualisation through, for instance, employment, income equality, housing, food, water, clothing, access to credit and productive resources especially land, and dignity of labour as provided for under the ICESCR.[191] In the same vein, social rights could be likened to 'social safety nets' offering protection against social deprivations. They normally cover access to social services such as free basic education, sanitation, health care, reproductive health and family planning and social security.[192] Each of these rights could be described as a socio-economic 'gap-filler', not 'gap-enhancer'. This means their targets are persons openly exposed to socio-economic injustice, inequality and deprivations; those deprived of the minimum standards of dignity as a result of either internal or external factors especially government policies and programs or polices of both government and other actors either within or outside the state. In this sense, socio-economic rights might be called 'basic and well-being' rights.[193]

This leads us to the justice component of socio-economic rights. Having established that 'property owners' are not the immediate targets of these rights, the natural question would be: Who are the immediate targets then? Simply put, they are the socially and economically disadvantaged. This is because ensuring equitable and balanced socio-economic coexistence is the underlying objective of these rights.[194] No wonder economic and social rights are considered as anti-poverty rights as their

[190] UDHR 1948:art 17. Property right is neither in ICCPR nor in ICESCR. In fact, during the drafting of the ICESCR this issue led to a major debate. See Whelan 2010:93-96. However, it may be found in regional human rights instruments and national constitutions as a CPR. See for instance, *Protocol to ECPHRFF* 1950:art1; *African Charter* 1982:art14; *American Convention on Human Rights*:art 21; Constitution of the Republic of South Africa 1996:art 25; Constitution of the Federal Republic of Nigeria 1999:secs 43 & 44; Constitution of India:arts 31-31A.

[191] For example, ICESR arts 1 (self-determination and subsistence), 3 (equality), 4 (welfare), 6 (right to work), 7 (just working conditions including safety, fair and equal wages), 8 (trade union) & 11 (adequate standard of living, including adequate food, clothing, and housing).

[192] ICESR arts 9 (social security), 10 (child and maternal health), 12 (right to the highest attainable standard of physical and mental health) 13 (right to education), 14 (free basic education). See also Constitution of the Republic of South Africa1996:arts 10, 23, 26, 27 & 29; Constitution of India 1949 (as amended 2002):arts 21, 21A, 29, 30, 38, 39, 41-43; Constitution of the Federal Republic of Nigeria 1999:sections 16 & 17.

[193] Shue 1996:19; Schefer 2013:3-15.

[194] Bilchitz 2014(a):712. LP 1987:para 14; Schefer 2013 :3-15.

primary aim is to address poverty and its root causes and manifestations.[195] They seek to build an egalitarian system that can effectively check the widening socio-economic inequality across the world. In that sense, they are about justice; they are about fair, balanced social interrelationships.[196] Indeed, justice could be said to be their *raison d'etre*.[197] For instance, while arguing for the emergence of a theory of socio-economic rights from theories of justice, Waldron defines these rights as 'rights calculated to ensure that those in a society who are materially radically disadvantaged are, if possible, raised by collective provision above the level of radical disadvantage'.[198] However, whether Waldron's theory fits into the 'justice' of sovereign debt governance, as advanced in the previous chapter, will become clearer in the subsequent discussions.

It may be countered that justice in the distributive sense might be at odds with socio-economic rights, because achieving justice in this sense requires resources which are, almost always, limited.[199] This argument may be further strengthened by the fact that in most states, resource allocation falls within executive prerogative which, by necessary implication, entails legislative and judicial self-restraint.[200] The doctrine of state sovereignty, as discussed in Chapter2, also limits external interference on matters of internal resource distribution.[201]

However, Waldron's theory answers this counter-argument. With insights from Nozick and Rawls' theories of justice respectively, he offers some theoretical justifications for these rights. He notes that due to resource constraints, socio-economic rights are

[195] Spagnoli calls them the 'right not to be poor'. See Spagnoli 2006:21-34, 21; Deveaux 2015:125-150; Schefer 2013:3-15.
[196] International Commission of Jurists 1998. 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights'. *Human Rights Quarterly* 20:691 [hereafter 'MG 1998']:paras 20-21; Whelan 2010:157-75.
[197] Waldron 2010:21-26; Ramcharan 2015:253.
[198] Waldron 2010:39.
[199] Waldron 2010:39.
[200] *Grootboom* case.
[201] For instance, article 29 of the VCLT 1969 provides that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'. However, as will be discussed in section 3.3.4.1 below, this has limited application in the area of human rights. See Milanovic 2013:67 (arguing that 'state's sovereignty is an entirely fictitious objection to the extraterritoriality of human rights guarantees, be they domestic or international'). It might, therefore, be argued that where violations occur, the involvement of international and regional human rights institutions to which the violating state, voluntarily and in exercise of its sovereign powers, belongs, would not amount to a violation of sovereignty. See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* 2005 ICJ Report 26 (hereafter *DRC v Uganda* case); *Palestinian Territory* case:para 26.

'inherently budgetary' as they consist of rights which 'compete with one another and with other demands for funding' in the society.[202] This means 'there needs to be some sorting, balancing and prioritization among these demands [but it] does not follow that one subset of the demands (socioeconomic rights) must be abandoned in advance as impossible'.[203] Waldron argues thus:

> [Nozick's 'reverse' theory] gives priority to the right not to have one's material situation worsened, whether that situation consists in holding property rights or just in having access of some kind to the resources needed for a decent life. It gives these rights priority in exactly the sense that the 'reverse' theory is supposed to give priority to socioeconomic rights: property entitlements must work round them and no such entitlements are recognized if they are incompatible with these rights.[204]

In addition, this argument ignores the extra-territorial reach of human rights and assumes that socio-economic rights obligations are exclusively positive in nature. This would be a mistake. In addition, the argument is only persuasive in the limited context of an isolated, domestic economic system upon which the state-centric international legal system was built. It is, therefore, submitted that in the context of the current globalised economic system which, paradoxically, simultaneously creates record prosperity for a few and record poverty for the majority, the perceived misalignment between justice and socio-economic rights is superficial.[205] This might become clearer in the context of the extra-territorial effects of socio-economic rights as examined below.

The question whether socio-economic rights are negative or positive rights has been partly addressed above. It is sufficient for the present purpose to emphasise that these rights contain both positive and negative elements although they are widely characterised as positive rights perhaps because, in comparative terms, their positive elements are more visible than the negative ones.[206] However, like in CPRs, negative obligations (to respect and protect) are also critical to the realisation of socio-economic rights. In addition, unlike in the past when the predominant view was that socio-economic rights were programmatic aspirations or goals requiring only positive action, today there is a near universal consensus that they are not mere aspirations but

[202] Waldron 2010:46.
[203] Waldron 2010:28.
[204] Waldron 2010:31.
[205] Iglesias 1996-1997:375-377; ILO 2004. *The report of the World Commission on the Social Dimension of Globalization*. Geneva: ILO paras 20-45.
[206] Bilchitz 2014(a):714.

enforceable rights.[207] Apart from the supporting legal architecture covering these rights at national, regional and international levels, there are institutional frameworks to monitor compliance and, in several cases, judicial interpretations at these levels have further cemented their status as full-blown rights binding on duty-bearers.[208] Indeed, an area of legal practice known as socio-economic rights litigation has emerged as a result.[209]

However, recurring sovereign debt and financial crises have raised fundamental concerns about the practicality of realising socio-economic rights. In addition, although human dignity and security of life undergird these rights, the above analysis does not tell us which, as between rights dependent on survival or basic needs and those dependent on human welfare or development, are the 'essential core' of socio-economic rights, especially for the purpose of prioritisation in situation of economic crises.[210] As important as these points might be, they however, do not affect the normative content nor the character of such rights as socio-economic rights. In addition, Waldron's socio-economic rights theory already provides a prioritisation framework. Consequently, prioritisation within this subcategory of human rights is immaterial. It is sufficient if, as observed by CESCR, the minimum levels 'of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education' are factored into duty-bearers' policies, programs and actions for the purpose of discharging their obligations under ICESCR.[211]

As the research will show subsequently, this minimum core threshold is the basic obligation under ICESCR. In this context, it performs three major functions. First, it integrates or unites socio-economic rights thereby avoiding the competing demands for resources to satisfy or fulfil some or all of these rights (ie inter-rights' prioritisation). To be sure, the minimum core runs through specific socio-economic rights such as rights to food, water and health. Second, it offers assistance to those deserving of

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[207] Ashford 2009:112; Hassoun 2012:23-44; Gavison 2002:23-55. Compare Hartley 2014:xv.
[208] Protocol to ESCR 2009. See the cases in footnotes 149 & 172 above and the popular case of *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria* (African Commission on Human and Peoples Right Communication No. 155/96, 27 May 2002):paras 44-47.
[209] Jaichand 2010:51-56; Equal Rights Trust 2014. 'Economic and social rights in the court room: A litigator's guide to using equality and non-discrimination strategies to advance economic and social rights', https://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf (accessed 24 June 2018); Langford 2008:3; Mellish 2006:171-343; Langford 2009:91-111.
[210] Young 2008:126.
[211] CESCR GC 1990:para 10.

assistance and, thus, seeks to narrow the inequality gap. The theoretic support for this could be found in Rawl's difference principle which has been interpreted to mean 'when we are designing or (more likely) evaluating and reforming the network of rules and procedures that constitute the institutional structure of an economy, we should do so in a way that is oriented towards the advantage of the worst-off group'.[212] Rawl's second principle of justice is that 'social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantage and (b) attached to positions opened to all under conditions of equality of opportunity'.[213]

Third, the minimum threshold prioritises these rights above other competing, non-rights demands for resources in a deserving situation. A person at or below 'the level of radical disadvantage' loses her dignity and, arguably, her 'real person'. This could be relevant to the sorting, balancing and prioritisation of the multiple interests during sovereign debt crisis.

Having defined the character and scope of socio-economic rights, it is now appropriate to examine the rights-holders and the respective obligations of the duty-bearers under ICESCR.

3.3.3 The Rights-holders

Needless to point out that the rights-holders are the citizens of respective state-parties. Indeed, as part of their international commitments, many state-parties have

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[212] Waldron 2010:29. Indeed, Rawl's general conception of justice is that 'all social values – liberty and opportunity, income and wealth, and the basis of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage'. See Rawls 1999:52-56. This also raises question of moral responsibility. In the words of Waldron:

> Many of those who would benefit if socioeconomic rights were recognized are destitute and in need of the assistance that these rights afford through no fault of their own. Others, however, are destitute because of bad choices they have made. Some are in need because of sheer bad luck that has nothing to do with choices they made; others are in need because they chose to take (and hoped to benefit from) a risk that had penury as one of its possible outcomes. Again, some are in need of the help that such rights require because neither they nor their parents nor their grandparents ever had access to anything remotely like a fair share of their society's (or the world's) wealth or a fair opportunity to make a decent and self-sufficient life for themselves; but this is not true of everyone, for some may have squandered a fair share and need assistance now on account of their own lack of prudence.

See Waldron 2010:39-40.

[213] Rawls 1999: 206-207. Interestingly, Rawls' theory provides two rules of priority: the priority of liberty (ie liberty can only be restricted for the sake of liberty) and priority of justice over efficiency and welfare (ie justice is prior to efficiency, fair opportunity is prior to the difference principle so that 'an inequality of opportunity must enhance the opportunities of those with lesser opportunity'). See Rawls 1999:206-207.

constitutionalised socio-economic rights.[214] However, the degree of entitlements of socio-economic rights-holders is further defined by socio-economic factors and circumstances such as poverty and emergency situations that can impoverish a community or make individuals to desperately require social and welfare supports.[215] They are those radically disadvantaged. Consequently, only natural persons are beneficiaries. In addition, the ICESR has recognises situations where non-citizens could also be entitled to claim these rights in the spirit of non-discrimination.[216]

Therefore, upon fulfilling conditions for admissibility, rights holders may enforce their socio-economic rights at the appropriate institution.[217] Thus, right-holders may claim socio-economic rights at national, regional and international levels depending on the legal instrument and the prescribed procedures. In other words, as rights-holders, they qualify as claimants against international actors bearing responsibility for the fulfilment of socio-economic rights. However, in practice, socio-economic rights claims at the supranational level are largely filed by NGOs on behalf of the rights-holders. Indeed, besides filing claims in specialised human rights courts, NGOs can now file *amicus curie* submissions especially before investment arbitration tribunals.[218]

3.3.4 Duty-Bearers and their Obligations

From the brief historical account above, it is clear that the ICESCR was conceived as part of the universal legal response to the horrors, dehumanisation and undignified treatments meted out to individuals by states during the Second World War.[219] In addition, the indignity of poverty was a major concern for the framers of the post-war socio-economic rights framework.[220] Understandably, therefore, ICESCR and other human rights-based treaties were designed to primarily address the propensity of states to indulge in similar practices violating the rights of their citizens, hence the

[214] See references to national constitutions in fn 192 above.
[215] Jaichand 2010:56.
[216] ICESCR:art 2(2) and 2(3).
[217] See, for instance, UNGA 2006. *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.* New York: UN.
[218] ICSID Convention 1965:art 44; ICSID 2006. *ICSID Arbitration Rules (amended rules and regulations)* of 10 April 2006:rule 37(2) https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf (accessed on 20 March 2019).
[219] Morsink 1999:88-91.
[220] Morsink 1999:36-38.

primary duty-bearers are the states.[221] This reflects the prevailing state-centric character of international law. However, developments in the past couple of decades have shown that states are no longer the exclusive violators of socio-economic rights hence the gradual recognition of additional duty-bearers as evidenced by a number of global initiatives, such as the GPBHR and GPFDHR, combined with a progressive reading of ICESCR.[222] In other words, the focus is now shifting away from the violator to the violation.[223] The research will now examine the specific obligations of states and other duty-bearers.

3.3.4.1 Sovereigns as Duty-Bearers: Creditors and Debtors

In the context of sovereign debt governance, both sovereign lenders and borrowers who are signatories to the ICESCR are bound by its provisions. Bilateral official creditors clearly fit into the compass of duty-bearers under the ICESCR as the research will now show. Because socio-economic rights obligations are essentially not jurisdictionally circumscribed (ie territorially delimited) under the ICESCR, the research will divide these obligations broadly into the traditional (ie, territorialised) and extra-territorial obligations.[224] In substance, these obligations are the same; the

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[221] Besson 2015:244-268; Nickel 1993:77-86; Weiss et al 2001:144.

[222] Equal Rights Trust 2014:84; Muchlinski 2001:31-47.

[223] Bilchitz 2016:143-170,156.

[224] On the extraterritoriality of human rights see, for instance, *DRC v Uganda* case:26; *Palestinian Territory* case. In the latter case, the ICJ aptly states the legal position thus:

> [W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this… The *travaux preparatoires* of the Covenant confirm the Committee's interpretation… These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.

See *Palestinian Territory* case:136. Furthermore, in 2008, the ICJ held in respect of the non-discrimination obligation under the Convention for the Elimination of Racial Discrimination (CERD) thus: '[T]here is no restriction of a general nature in CERD relating to its territorial application…in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation…These provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a state party when it acts beyond its territory'. See *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* 2008 ICJ Report 353. However, there are cases of the Inter-American Commission on Human Rights which refer to jurisdictional delimitations in the application of the regional human right treaty. See *Victor Saldano v Argentina* 1999 IACHR Report 20-21; *Coard et al v US* 1999 IACHR Report 37. In general though, socio-economic rights under the ICESCR are not delimited territorially. In the words of Shutter et al '[t]he preservation of human rights is in the interest of all states, even in the absence of any specific link between the state and the situation where human rights are

distinction is that the extra-territorial obligations are shared obligations which reflect the increasing interdependence brought by globalisation and the imperative for international cooperation in the realm of socio-economic rights.[225] A clear example of this are the Millennium Development Goals and the subsequent Sustainable Development Goals (even though both frameworks aimed at addressing socio-economic needs rather than rights *per se*).

3.3.4.1.1 The Traditional Obligations

Implementation of the commitments under the ICESCR involves taking legal and policy measures by a state party within its territory. Upon accession to ICESCR, a sovereign debtor or creditor, as the case may be, shall:

> take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the covenant by all appropriate means including adoption of legislative measures.[226]

The CESCR has officially interpreted this provision identifying a number of obligations for states parties.[227] Accordingly, every state party shall take steps towards progressively realising socio-economic rights provided for under the ICESCR. *Taking steps* is an immediate, absolute obligation but *progressive realisation* entails a gradual, resource-determined implementation without adopting regressive measures which could hamper the implementation process designed to fully realise these rights.[228] The achievement of the minimum core obligation discussed above is also an immediate obligation.

In particular, state-parties assume three forms of obligations: *to respect*, *to protect* and *to fulfil* socio-economic rights of their citizens (the 'triple obligations').[229] An obligation

violated: they are owed *erga omnes*. Thus, while the beneficiaries of human rights obligations are the rights-holders who are under a state's authority and control, the legal obligations to ensure the rights in question are owed to the international community as a whole'. See Shutter OD et al 2012:1084-1166, 1092.

[225] Shutter et al observe that 'the territorial and extraterritorial obligations of a state are separate. Irrespective of whether economic, social, and cultural rights have been fully realized for persons located in its own territory, a state could still be said to have positive obligations to fulfill the human rights of people outside its borders on the basis of an objective determination as to what constitutes the "adequate and reasonable" use of its available resources towards the realization of rights'. See Shutter et al 2012:1098-1103 & 1150.

[226] ICESCR:art 2(1).

[227] CESCR GC 1990:paras 1-14; LP 1987:paras16-34.

[228] CESCR GC 1990:para 9.

[229] Shue couched them as duties 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'. See Shue 1996:160. Also in *SERAC v Nigeria* where the African Commission held that 'both

could be either positive or negative: *to protect* and *to respect* are negative while *to fulfil* is positive.[230] For instance, a state's obligation *to protect* socio-economic rights entails ensuring non-interference with an individual's enjoyment of, say, her already possessed (or accessed) food, water, healthcare and housing by the state or by any third party.[231] In the same vein, the negative obligation *to respect* is unconditional so that individuals' means of livelihood must, at all times, be free from interference. The negative obligations are essentially restraining and *preventive* in nature.[232] They are obligations rooted in CIL corresponding, in most cases, to states' municipal norms and are, therefore, considered as fundamentals of IHRL.[233] Thus, negative obligations are universal, in the sense that they can be extended to subjects other than states without much difficulty. The focus is on the violation. On the other hand, the positive obligation *to fulfil* is owed more directly to socially and economically disadvantaged persons who, without their fault and despite all efforts, have no access to these basic necessities.[234] It consists of three obligations: to facilitate, to promote and to provide.[235] These too depend on the contexts and circumstances. For instance, in situations of emergency, the right-holders would be entitled to even direct food hand-outs.[236]

It is worth noting that the margin of discretion implied by 'to the maximum of available resources' has been constrained by the requirement of satisfying a 'minimum core obligation'.[237] As noted above, this is a minimum legal baseline designed to ensure the taking of 'deliberate, concrete and targeted steps' towards progressive realisation, and to measure possible retrogression from such mandatory measures or steps.[238] In addition, by using the conjunctive word 'and' after 'individually' in the above-quoted provision, it can be argued that the minimum core obligation does not anticipate a sole performance of responsibility by a state as it requires 'international cooperation'.[239] A

civil and political rights and social and economic [rights] generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights'. See *SERAC v Nigeria*:44; Jayawickrama 2002:57-59; Koch 2009:14-16; Eide 1989:35-51.

[230] Bilchitz 2014(a):714.
[231] Bilchitz 2014(a):714.
[232] Ramcharam 2015:234-235; Weiss & Hubert 2001:147.
[233] Ramcharan 2014:17 & 100-121.
[234] LP 1987:para 14.
[235] OHCHR, Facts Sheet No 34:para 18; UNHCR 2001:9; UNHCR 2008:15.
[236] CESCR General Comment No 12 (Article 11) (adopted on 12 May 1999):para 13 https://www.refworld.org/pdfid/4538838c11.pdf (accessed 7 August 2019).
[237] CESCR GC 3 1990:paras 10-12; LP 1987:paras 25–28; MG 1998:paras 9-10.
[238] CESCR GC 3 1990 para 9.
[239] LP 1987:paras 29-34; CESCR GC 3 1990:paras 13-14.

sovereign debt relationship could thus, qualify as a form of this cooperation. Indeed, a sovereign's decision to borrow may be influenced by a compelling desire to satisfy its socio-economic rights obligations under the ICESCR or its national constitution or both.[240] Similarly, activities of IMF, WB and Regional Development Banks (RDBs) could form part of this 'international cooperation'.[241]

A violation of socio-economic rights could be both direct and indirect depending upon whether the obligation is negative or positive. In this sense, any action or inaction that practically renders the socio-economic rights commitments of a state empty would constitute a violation.[242] This appears strict although it is a reason-giving standard.[243] Under the *Maastricht Guideline for the Violations of ESCRs* (MG 1998) a state would be in violation where it fails to satisfy its minimum core obligation or it fails to protect, respect and fulfil its citizens' socio-economic rights, or where it indulges in discriminatory practices which entrench inequality.[244] Importantly, by MG 1998's interpretation, 'entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations' without regard to obligations under ICESCR would also constitute a violation.[245] This seems to prioritise socio-economic rights obligations above other potential economic benefits derivable, say, from foreign investments and issuance of sovereign debt instruments. It, however, does not seem like a realistic balance especially given the unequal financial strengths of state-parties and the potential contributions of investments in enhancing the capacity of poor states to fully realise these rights. In addition, this is a two-way street in the sense that both parties to a sovereign loan contract must consider the potential impacts of such contract on socio-economic rights before executing the contract. It is not only the debtor's duty to do so.

3.3.4.1.2 States' Extra-territorial Socio-Economic Rights Obligations: The Maastricht Principles

In addition to the above, both creditor and debtor states have extra-territorial obligations to respect, protect and fulfil socio-economic rights. In 2011, the *Maastricht*

[240] Kaplan & Thomson 2014:1-5.
[241] LP 1987:paras 94-96 & 100-103. This is not as straight forward as it might seem as will be examined in Chapter 5.
[242] LP 1987:paras 71-72; VCLT 1969:art 60(3).
[243] Beitz 2010:3-6.
[244] MG 1998:paras 6-15.
[245] MG 1998:para 15(j).

Principles on the Extraterritorial Obligations of States in the area of ESC Rights (Maastricht Principles 2011) were adopted by UN experts and human rights specialists across the world to elaborate on these obligations.[246] Building on the Limburg Principles 1987 and Maastricht Principles 1998, these principles were adopted largely to give further clarity to the nature of states' obligations because of the realisation that rights-holders' socio-economic rights now depend, to a large extent, upon the extraterritorial acts and omissions of both states and NSAs.[247] In other words, because of the impacts of globalisation especially the impacts of the activities of MNCs on the realisation of socio-economic rights, states' socio-economic rights obligations are now said to have an extraterritorial reach.[248] This is an exception to the territorialised nature of human rights obligations.[249] It means that a state having effective control of persons outside its territory has socio-economic rights obligations arising from violations committed by such persons (extraterritoriality).[250] Thus, extraterritoriality would apply 'where people residing in another country are within the jurisdiction of a foreign state as a result of such a state's extraterritorial acts or omissions'.[251]

The Maastricht Principles consists of 44 main principles defining and elaborating on the nature and extent of these extra-territorial obligations.[252] It reiterates the cardinal principles of IHRL concerning the pre-eminence of human dignity, equality, indivisibility, participation, transparency and accountability as provided for under the general and specific human rights treaties and declarations.[253]

There are three main principles directly relevant to this research: the extent of the extraterritoriality principle; states' sphere of influence and responsibility to hold NSAs

[246] FIAN 2013. *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights* (adopted on 28 September 2011) (hereafter 'Maastricht Principles 2011').
[247] Maastricht Principles 2011:preamble.
[248] Milanovic 2013:67; CESCR 1998:para 515(3); McCorquodale & Simons 2007:598-625.
[249] Even though the US is not a party to the ICESCR, it also recognises the extraterritoriality principle. For instance, the *Restatement (Third) of the Foreign Relations Law of the US* provides that 'a state has jurisdiction to prescribe law with respect to…the activities, interests, status, or relations of its nationals outside as well as within its territory'. See *Restatement (Third) of the Foreign Relations Law of the United States* 1987:sec 402(2).
[250] See Maastricht Principles 2011:principle 8.
[251] Altwicker 2018:581-606; Coomans 2011:1-35, 5. However, the extent to which this obligation might be borne by the home states of non-official creditors is arguable and will therefore be examined subsequently. In the spirit of this principle, it seems plausible to suggest that the activities of extraterritorial non-official creditors could implicate their home states.
[252] Maastricht Principles 2011.
[253] Maastricht Principles 2011:1-7.

accountable for human rights violations; and international cooperation as an extra-territorial obligation.[254]

3.3.4.1.2.1 Extraterritoriality Principle: Nature and Extent

While emphasising the territorial obligations under ICESCR, the Maastricht Principles provides that states have extra-territorial obligations to respect, protect and fulfil, among others, socio-economic rights of rights-holders.[255] The extra-territorial obligations consist of:

> a) Obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
> b) Obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.[256]

Thus, unlike the separate, individualistic character of the traditional, territorial obligations, these are joint and shared obligations in view of the increasing internationalisation of economic and financial activities around the world.[257] Both, however, operate concurrently, ie they are not mutually exclusive. In particular, the extra-territorial reach of a state's triple obligations is determined by the tests of effective control of persons and the foreseeability of the effects of its actions or omissions on persons outside its territory. In this regard, the Maastricht Principles 2011 provides thus:

> A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
> a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
> b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
> c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social, and cultural rights extraterritorially, in accordance with international law.[258]

[254] Maastricht Principles 2011:principles 8, 9, 12 & 28.
[255] Maastricht Principles 2011:principle 4.
[256] Maastricht Principles 2011:principle 8.
[257] Shutter et al 2012:1097.
[258] Maastricht Principles 2011:principle 9.

The implication of the above is that acts or omissions amounting to violations of socio-economic rights might generate the needed causality capable of implicating a state party under ICESCR.[259] The causal link could be an act or omission by the official of the state which took (or is taking) place outside the state, or arising from the effects of a state's policies which are reasonably (not remotely) foreseeable.[260] This appears to cover lending policies or practices of creditor nations or those of their agencies (eg aid agencies) responsible for debt reliefs or their *alta egos* (eg the Paris Club) responsible for debt restructuring. It would also, arguably, include creditor nations' act of selling or assigning their rights under a sovereign debt contract to vulture funds at a discount with knowledge of the vulture's intention to recover the full, original value of such debt using both conventional and unconventional means.[261] Directly impairing the capacity of a sovereign debtor to fulfil its obligations under ICESCR will also engage a creditor nation's extra-territorial obligations.[262] In addition, the extraterritoriality principle might implicate a creditor state indirectly through the irresponsible lending behaviours of its non-official creditor nationals, especially on the strength of tax or other reasonable connections as the research will now examine.[263]

3.3.4.1.2.2 Sphere of Influence & States' Extra-territorial Obligations for acts of NSAs

As part of the obligation to protect, a state party to ICESCR has an obligation to regulate businesses, including, one might add, bank creditors, bondholders and vulture funds.[264] This becomes necessary where such a state is the origin of a private creditor's act which violated (or is violating) socio-economic rights.[265] It may also arise from a legal connection, for instance, on the basis of citizenship/nationality or place of

[259] Shutter et al 2012:1106-1108.
[260] In respect of CPRs, the Human Rights Committee notes that 'a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time'. See UN Human Rights Committee *Munaf v Romania* Communication No. 1539/2006 (adopted 30 July 2009):para 14.
[261] *Donegal International v Zambia* 2007 1 Lloyd's Report 397 (claimant got a 15 million dollars judgement) [hereafter '*Donegal* case']; *Allied Bank International v Banco Credito Agricola de Cartago* 1985 757 F2d 516 (2nd Circuit). See also Laryea 2010:193-200; Samples 2014:49-86; Schumacher et al 2015:585-623.
[262] Maastricht Principles 2011:principles 20-21.
[263] Lone 2014:233-249.
[264] Maastricht Principles 2011:principles 23-24.
[265] Maastricht Principles 2011:principle 12.

registration, domicile, centre of main interest or business operation or any 'reasonable link' between the state and such creditor.[266] Importantly, in view of the increasing cooperation between states and NSAs (including businesses), the Maastricht Principles 2011 provides that the socio-economic rights responsibility of a state party to ICESCR extends to the following situations:

> (a) acts and omissions of non-State actors acting on the instructions or under the direction or control of the State; and
> (b) acts and omissions of persons or entities which are not organs of the State, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental authority, provided those persons or entities are acting in that capacity in the particular instance.[267]

Although the Maastricht Principles 2011 is not meant to apply to businesses, the above recognises the increasing complicity between businesses and states which, sometimes, might impact negatively on the citizens' enjoyment of socio-economic rights.[268] Indeed, sovereign creditor/sovereign debtor-private creditor complicity is already visible in the area of sovereign financing.[269] It seems in such a situation attributing socio-economic rights responsibility would be less complicated. This is supported by the public international law principles on state responsibility.[270] It is not clear whether this responsibility depends upon the foreseeability of the risks arising from such loan contracts. However, in view of the evolving standard of human rights impact assessment (HRIA) in sovereign debt governance, it seems the foreseeability test would apply here too.[271] HRIA is a due diligence standard linked to the

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[266] Maastricht Principles 2011:principle 25. This has basis in CIL. For instance, in *SS Lotus (France v Turkey)* it was held that 'far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules;…as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable'. See *SS Lotus (France v Turkey)* 1928 PCIJ No 10 (hereafter '*SS Lotus* case'):18-19.

[267] Maastricht Principles 2011:principle 12.

[268] Maastricht Principles 2011:principle 43.

[269] Bohoslavsky & Escriba-Folch 2014:15-32; Bohoslavsky & Cernic 2014:1-11; Cernic 2014:139-160; Leader 2014:199-211; Lone 2014:233-249.

[270] *Nicaragua* case:115; UN ILC Draft Principles on State Responsibility 2001:arts 5 & 8.

[271] The Maastricht Principles 2011 provides thus:

> [S]tates must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.

See Maastricht Principles 2011:principle 14. See also UNHRC 2011. *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements* (adopted on 19 December 2011).

precautionary principle under environmental law.[272] Indeed, the Guiding Principles on HRIA 2019 (HRIA 2019), for instance, provides thus:

> Private creditors have to ensure that the terms of their transactions respect human rights, and do not compel debtor States to compromise on their human rights obligations directly or indirectly. They have an obligation to assess the impact of activities financed by loans when significant adverse human rights impacts are expected.[273]

3.3.4.1.2.3 International Cooperation as an Extra-territorial Obligation

International cooperation ordinarily entails efforts from two or more states.[274] In accordance with the UN Charter, states have an obligation to coordinate and internationally cooperate in order to jointly fulfil their socio-economic rights obligations both within and outside their territories and to hold NSAs violating socio-economic rights accountable for their actions.[275] Importantly, this implies that states must cooperate to establish an enabling international environment in the areas of finance, development, trade and investment conducive to the realisation of socio-economic rights. This is because measures or policies of individual states could undermine this objective extraterritorially.[276] The Maastricht Principles 2011 also requires that each state contributes to the fulfilment of socio-economic rights extraterritorially, but commensurate with its economic capacity, resources and international influence.[277] According to Shutter et al, this means there could be apportioning of responsibility for past problems taking into account 'historical responsibility or causation, which take a compensatory approach based on some determination of liability for contributing to a problem that undermines the fulfilment of economic, social, and cultural rights extraterritorially'.[278] A state has a 'good faith' obligation to give and request for international assistance to fulfil its socio-economic rights obligations.[279] In discharging

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[272] In the *Corfu Channel* case the ICJ held that 'due diligence obligations 'are based […] on certain general and well-recognized principles, namely […] every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. See *Corfu Channel Case (UK v Albania)* 1949 ICJ Report 4:22 [*Corfu Channel* case]; *Pulp Mills* case:204.

[273] UNHRC 2019. *Guiding Principles on Human Rights Impact Assessments for Economic Reform Policies* (adopted on 21 March 2019) (hereafter 'HRIA 2019'):principle 5.

[274] Shutter et al notes that 'in circumstances where more than one state is responsible for the same wrongful act, each state is separately responsible for its own conduct … the existence of collective legal obligations is recognized while relying on an individualized regime of legal responsibility in the event of a breach of those obligations'. See Shutter et al 2012:1152.

[275] Maastricht Principles 2011:principles 27-30. See also UN Charter 1945:arts 55 & 56.

[276] Maastricht Principles 2011:principle 29.

[277] Maastricht Principles 2011:principle 31.

[278] Shutter et al 2012:1153.

[279] Maastricht Principles 2011:principle 33-35.

the obligation for international cooperation, states have a duty to prioritise the rights of disadvantaged persons and the fulfilment of essential minimum core obligations under ICESCR.[280]

However, it is obvious that the Maastricht Principles 2011 focuses almost exclusively on states' obligations and, in its objectives and substance, it was deeply influenced by the state-centric approach. Although it can be argued that the extraterritoriality principle might have the effect of imputing responsibility to the home states of non-official creditors (especially vulture funds), it indirectly shields creditor nations from some responsibility in this respect. Admittedly, it requires home states of creditors to toughen regulation, but the challenge would be with respect to extra-territorial bondholders who, often registered in tax havens, might be difficult to pin down to a particular state for the purpose of regulation and accountability.

3.3.4.2 Obligations of other Duty-Bearers

As noted above, in the light of the primacy of socio-economic rights and the growing trend of violation of these rights by NSAs, it is now widely accepted that human rights responsibilities can be extended to other legal entities other than the states.[281] However, this only operates in the shadow of the state-centric model of circuitously imputing human rights responsibility. Nevertheless, there is a growing consensus that the responsibility for human rights protection rests on 'everyone'.[282] Therefore, it can be argued that the controversy is not really about the propriety of holding these entities accountable for violating (or complicity in violating) socio-economic rights, but on the means of doing so and on the extent of their responsibility in that respect. An examination of the obligations of these actors is important here.

3.3.4.2.1 IGOs

Like their member states, IGOs are active international subjects and there is little doubt that they, at least, bear the negative obligation *to respect* socio-economic rights of rights-holders.[283] Obviously, in the context of socio-economic rights in sovereign debt

[280] Maastricht Principles 2011:principle 32.
[281] Global Citizenship Commission (GCC) 2016:73-78.
[282] Besson 2013:408-430; Weiss & Hubert 2001:149; Annan K 1999. 'Secretary General's annual report to the United Nations General Assembly*',* www.un.org/press/en/1999/19990920.sgsm7136.html (accessed 14 April 2019). See also VCLT 1969:arts 3 & 5.
[283] *WHO* case:89-90; *Case Concerning Reparation for Injuries suffered in the Service of the UN* 1949 ICJ Report 174 (hereafter '*Reparation for Injuries* case').

governance the relevant IGOs are mainly IFIs. Arguably, their socio-economic rights responsibilities flow from CIL, general principles of law, soft laws and their constitutive documents or internal operational policies.[284] The European Court of Justice has held that the European Commission cannot escape human rights responsibilities arising from sovereign debt crisis.[285] They have a peculiar responsibility of cooperation as well.[286] The CESR may make recommendation regarding technical assistance to the UN or its specialised agencies including the IMF and the WB.[287] In particular IFIs play a critical role before, during and after debt crisis and are the principal purveyors of structural adjustment programmes (SAPs) designed to align indebted countries' economies with the ideals of market fundamentalism. However, as will be examined subsequently, these adjustment measures to address debt burdens must be socio-economic rights sensitive.[288] This appears to be a gradual shift away from the market-based approach.

Generally, in the context of IGOs, the IFIs could be seen both as standard setters and as duty-bearers. First, as standard-setters, their practices have contributed in shaping socio-economic rights jurisprudence.[289] The effects of their SAPs on socio-economic rights were among the major triggers for the adoption of the GPFDHR. However, as the research will show in the next Chapter, in the sovereign debt regime, IFIs generally support the contractual governance framework.[290] Second, they could support CESCR in monitoring compliance as required by the ICESCR.[291] In fact, in practice, IFIs normally prescribe human rights-based conditionalities before advancing a loan facility, additional financial support or intervention to a state.[292] As noted earlier, they could be part of the 'international cooperation' envisaged by ICESCR to support the

[284] International Bank for Reconstruction and Development Articles of Agreement (27 December 1944):art VII, section 2; IMF Articles of Agreement (22 July 1944):art IX, sec 2. See also Cernic 2010:243.
[285] Joined Cases C-8 P to C-10/15 P, *Ledra Advertising Ltd. v Commission* 57, ECLI/EU/C/2016/701 http://curia.europa.eu/juris/document/document.jsf?text=&docid=183548&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=884615. (accesses 2 October 2018).
[286] CESCR GC 3 1990:paras 13-14.
[287] ICESCR:art 22.
[288] CESCR *International Technical Assistance Measure (Article 22) General Comment 2* (adopted 2 February 1990):paras 2 & 9
[289] UN ILC Draft on CIL:art 4(2).
[290] IMF 2014. 'Strengthening the contractual framework to address collective action problems in sovereign debt restructuring', https://www.imf.org/external/np/pp/eng/2014/090214.pdf (accessed 2 May 2019) (hereafter 'IMF Strengthening Contractual Governance')
[291] CESCR GC 3 1990:paras 13-14.
[292] Barry 2010:242-251.

full realisation of socio-economic rights.[293] Moreover, they are required to 'place appropriate emphasis upon economic, social and cultural rights as rights and should contribute to efforts to respond to violations of these rights'.[294]

The problem, however, is that they could (and perhaps often do) violate or hinder the realisation of socio-economic rights. Thus, as 'violators', IFIs role may come by way of irresponsible lending, complicity with creditor states or by influencing debtor states to adopt policies that could amount to retrogressive measures. It may also be by a combination of two or all of the above mentioned.[295] In these situations, IFIs could thus undermine the realisation of socio-economic rights.[296] In addition, undermining socio-economic rights may come by way of non-human rights conditionalities prescribing cuts to funding of welfare and social programmes aimed primarily at progressively realising socio-economic rights under ICESCR.[297] It is curious that IFIs would prescribe human rights-based conditionalities knowing the potential of their non-human rights-based conditionalities to undermine socio-economic rights. Arguably, this appears like another way of prioritisation of CPRs. Indeed, the MG 1998 expressly recognises that IFIs often mount pressure on resource-constrained states in the latter's decision making. This, it observes, often affects socio-economic rights and it recommends that IFIs should 'correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights'.[298]

Despite this acknowledgement, however, the MG 1998 adopts the traditional state-centric approach to international responsibility by imputing to members of IFIs and other IGOs the responsibility to ensure compliance with ICESCR. In other words, notwithstanding the extraterritoriality principle, a violation is imputed to the state in whose jurisdiction it occurred.[299] However, the MG 1998 recognises the impacts of IFIs operations on socio-economic rights especially in situations where violations occur as a result of their policies or through complicity with primary duty-bearers.[300] Therefore, as bodies of states established to, among others, support international

[293] ICESCR:art 2(1).
[294] MG 1998:para 32.
[295] Barry 2010:254.
[296] Radavoi 2018:1-22, 2.
[297] Barry 2010:241.
[298] MG 1998:para 19.
[299] MG 1998:para 16.
[300] GCC 2016:74.

cooperation for development, they have a bounden responsibility not to undermine the realisation of socio-economic rights.[301] In connection to this, the Tilburg Guiding Principles on World Bank, IMF and Human Rights 2002 expressly provides that 'as international legal persons, the World Bank and the IMF have international legal obligations to take full responsibility for human rights respect in situations where the institutions' own projects, policies or programmes negatively impact or undermine the enjoyment of human rights'.[302]

Unsurprisingly, the Maastricht Principles 2011 attempts to fill the vacuum in the MG 1998 by explicitly recognising the human rights responsibility of IGOs.[303] However, it can be argued that soft laws alone can hardly fill the human rights accountability gap with respect to IFIs' operations and policies.[304] Unfortunately, IFIs are yet to become signatories to the ICESCR.

3.3.4.2.2 NSAs

Like IGOs, NSAs also have become key players in the sovereign debt scheme and it can hardly be contested that they, at least, bear some negative socio-economic rights obligations.[305] Indeed, some scholars have argued that NSAs also have obligations to protect and fulfil socio-economic rights.[306] In the context of this research, NSAs are private creditors especially banks, finance companies and vulture funds or similar purchasers of sovereign bonds on the secondary markets. In the area of human rights in general, businesses are now being gradually treated as duty-bearers following a somewhat tendentious soft law development process.[307] Apart from this, businesses

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[301] UN Charter:arts 55 & 56; CESCR GC 3 1990:paras 13 & 14; Formerand 2014:5-6.
[302] Tilburg University 2003. *Tilburg Guiding Principles on World Bank, IMF and Human Rights* (adopted in April 2002):principle 5.
[303] Maastricht Principles 2011:princple 16.
[304] Bianco & Fontanelli 2014:213-232.
[305] CESCR 2017. *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*; CESCR 2017. *Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights* (hereafter 'CESCR Corporate Sector 2011'):para 1; UNHRC 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (adopted 21 March 2011) (hereafter 'GPBHR 2011'). http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 14 August 2018).
[306] Cernic 2014:154-155.
[307] UN Economic and Social Council's Sub-Commission on the Promotion and Protection of Human Rights 2003. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (adopted 26 August 2003). https://www.refworld.org/pdfid/403f46ec4.pdf. (accessed on 20 April 2019).

are increasingly becoming violators of socio-economic rights, sometimes in complicity with the state and could, therefore, be held accountable especially using the domestic legal system.[308] At the regional and international levels, there has been some form of resistance.[309] This is because by the positivists' state-centric vision of IHRL, NSAs are only indirectly responsible under IHRL as they are seen as secondary bearers of responsibility. For instance, although it recognises the expanding influence of NSAs, MG 1998 only holds the states accountable for lack of due diligence or for their failure to extract accountability from NSAs guilty of violating socio-economic rights.[310]

Like in the case of IGOs, this circuitous imputability approach has been severely criticised.[311] This is because it creates an accountability gap. However, the negative effects of globalisation have been increasingly generating consensus about the need to close this gap. Therefore, the UN has taken up the task. Unfortunately, the task has, so far, proven to be extremely challenging as, for decades, the UN has been struggling to 'bring businesses to human rights' without much success. Since non-official creditors are businesses, it is important to now examine how the various UN initiatives add to or, going forward, might influence or shape their socio-economic rights responsibilities.

3.3.4.2.2.1 The UN & Corporate Human Rights Responsibility (CHRR): A Tug of War?

As noted above, the Maastricht Principles 2011 attempted to address some of the governance and accountability gaps in IHRL with respect to the responsibilities of states vis-à-vis the activities of NSAs in general. In addition, there are several soft-law instruments that reiterate the human rights responsibilities of businesses.[312] Indeed,

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[308] Backer 2017:417.
[309] Kinley & Tadaki 2004:931,933-935.
[310] CESCR Corporate Sector 2011:paras 5 & 7; MG 1998:para 18.
[311] Bilchitz 2016:143-170.
[312] See, for instance, UN Global Compact 1999. *The Ten Principles of the Global Compact* (31 January 1999), https://www.unglobalcompact.org/what-is-gc/mission/principles (accessed on 12 February 2018); OECD *Guidelines for Multinational Enterprises* (adopted 25 May 2011), http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed on 12 February 2018); International Standardisation Organisation 26000 *Guidance to Social Responsibility* (1 November 2010), https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en (accessed on 12 February 2018). Of course, there are some hard laws which, to some extent, seek to close the CHRR gap. See for instance UN 2005. *Convention against Corruption* (entered into force 14 December 2005); UN 1976. *International Convention on the Suppression and Punishment of the Crime of Apartheid* (entered into force 18 July 1976).

the palpable tension between business and human rights has led to the emergence of a separate field of study called Business and Human Rights (BHR).[313] In particular, the UN has been the major driver (or perhaps the agenda-setter) of this new field. Generally, however, bringing businesses within the accountability parameters of IHRL has always faced stiff resistance from two main fronts: political resistance by the MNCs through their home states, and, as highlighted above, the positivists' theoretical resistance on ground of state-centrism and the persistent divide between law and ethics.[314] The 'pull and push' is becoming a routine. However, these forms of resistance have, arguably, deepened the CHRR governance and accountability vacuum. Unsurprisingly, since the 1970s, the UN has been struggling to fill this vacuum.[315]

The first attempt, initiated by the UN Economic and Social Council (ECOSOC), only produced a draft Code of Conducts for MNCs which, unsurprisingly, faded into oblivion.[316] It was, however, not a totally failed initiative as it led to the establishment of the UN Commission on Transnational Corporations (UNCTC) in 1974.[317] A second attempt to fill this accountability gap, initiated by the UN Secretary-General, produced the UN Global Compact (UNGC).[318] With over 10, 000 companies across 145 countries as participants, the UNGC has been applauded as the most inclusive global corporate social responsibility (CSR) initiative in history.[319] It focuses on entrenching a human rights culture by corporations through adoption of ten core principles relating to anti-corruption and respect for human rights, labour and environmental standards.[320] However, the UNGC has woefully failed to address the gapping accountability vacuum. Indeed, its inclusiveness and increasing acceptance by the business community has been criticised as evidence of its credibility-deficit which,

[313] BHR seeks to hold businesses accountable for both direct and indirect violations of human rights. See Santoro MA 2015. 'Business and human rights in historical perspective', 1-7 http://ssrn.com/abstract=2631107 (accessed on 12 February 2018).
[314] Bilchitz 2016:143-170.
[315] The literature is vast. See, for instance, Backer 2011:37-80; Backer et al 2015:254-287; Cernic 2015:193-218; Cernic 2014:139-160; Addo 2014:133-147; Ruggie 2007:819-840; Feeney 2009:161-175; Bilchitz 2016:143-170; Jacob 2015: 152-167.
[316] Feeney 2009:162.
[317] Jacob 2015:152.
[318] Rasche 2009:511-537, 517-520; The UNGC 'The UNGC Strategy 2014-2016', https://www.unglobalcompact.org/about (accessed 8 August 2019).
[319] Deva 2006:107-151.
[320] Rasche 2009:517-520.

ineluctably, widens the human rights accountability gap.[321] In particular, human rights activists have rejected the UNGC as it belittles the essential humanising agenda propelling their movements.[322] Thus, instead of 'bringing businesses to human rights', it literally brings 'human rights to businesses'. This, it has been argued, could legitimise the corporate capture of the UN as the latter avoids confronting state-centrism, adhering, instead, to inflexible traditional doctrines that have become non-responsive to the realities of systematic corporate human rights violations.[323] Furthermore, from a conceptual point of view, the UNGC appears to have confused CSR with CHRR.[324]

In the wake of the credibility-deficit confronting the voluntary, pro-business UNGC, the UN Sub-Commission on the Promotion and Protection of Human Rights launched a new initiative under the rubric *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights* (NRTBHR) in 2003.[325] By taking a direct responsibility approach, the NRTBHR sought to address the CHRR accountability gap through public international law, ie by imposing three broad legal responsibilities on businesses, viz: duty to implement human rights, duty to refuse benefits arising from human rights violation and duty to use their influence to protect human rights.[326] In a repeated scenario, playing like a tug of war, the human rights community hailed the NRTBHR while the MNCs, the business community and their home states vehemently rejected it.[327] The latter group won the war as the NRTBHR died unceremoniously.[328] In fact, the creditor nations felt that the NRTBHR directly 'threatened both sovereignty and current international law'.[329] The war was far from over though.

3.3.4.2.2.2 The UN Guiding Principles on Business and Human Rights (GPBHR)

In 2005, following a request by the UN Commission on Human Rights, the UN revived its resolve to fill the CHRR governance gap by appointing one of the major critics of

[321] Nolan 2005:445, 460-466; Deva 2006:144-149.
[322] Jacob 2015:152-155.
[323] Jacob 2015:155.
[324] Santoro 2015:9.
[325] ECOSOC Sub-Commission on the Promotion and Protection of Human Rights 2003. *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (26 August 2003) (hereafter 'NRTBHR Commentary 2003'):para 3.
[326] NRTBHR Commentary 2003:paras 5-12.
[327] Jacob 2015:152-155.
[328] Jacob 2015:152-155.
[329] Backer 2011:45-46.

the NRTBHR but, not surprisingly, one of the major architects of the UNGC (John Ruggie) as the Secretary-General's Special Representative on Business and Human Rights (SGSR).[330] The SGSR recognised that MNCs have 'global reach and capacity […] of acting at a pace and scale that neither governments nor international agencies can match'.[331] In the light of the failed efforts of the past, the SGSR opted for a 'principled pragmatism' in order to generate better consensus, avoid legalism and integrate principles from both hard and soft laws to produce a multi-layered, polycentric framework along the line of global governance.[332] This, according to the SGSR, is because states and businesses occupy distinct regulatory spaces which makes a uniform approach to CHRR and accountability impossible.[333] The SGSR distinguishes between CHRR and corporate human rights accountability in that the former consists of legal, social and moral obligations while the latter includes mechanisms designed to hold companies to these variegated forms of obligations.[334] Unfortunately, as argued below, this approach focuses on the actors and not their actions. Nevertheless, through this approach, the SGSR was able to bring BHR into the realm of global governance.[335]

After a series of consultations and reports, the SGSR produced the famous 'Three-Pillars Framework' of Protect-Respect-Remedy (fondly called the 'Ruggie Framework') in 2008.[336] The Ruggie Framework was then operationalised and

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[330] Backer 2011:45. In fact, at the commencement of his task, Ruggie rejected the NRTBHR thus: '[I]f the Norms [NRTBHR] merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so'. See UNHRC 2006. *Interim Report of the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.* New York: UNHRC (hereafter 'SGSR Interim Report 2006'):para 60.

[331] SGSR Interim Report 2006:paras 14-16.

[332] SGSR Interim Report 2006:para 70. Backer supports the methodology arguing that 'if there is no one silver bullet for the governance of the human rights obligations of business, then it will be necessary to produce a polycentric (multi-layered and intertwined) system of governance'. See Backer 2011:57.

[333] SGSR Interim Report 2006:paras 5-30.

[334] UNHRC 2007. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Mapping international standards of responsibility and accountability for corporate act.* New York: UNHRC para 6; UNHRC 2010. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Protect, Respect and Remedy: A framework for business and human rights.* New York: UNHRC (hereafter 'SGSR Report 2010').

[335] Ruggie 2014:5-17, 5.

[336] UNHRC 2008. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Protect, Respect and Remedy.* New York: UNHRC.

adopted by the UNHRC in 2011 as the GPBHR.[337] A working group was then established to 'promote the effective and comprehensive dissemination and implementation of the Guiding Principles'.[338] Furthermore, the UNHRC, following the GPBHR, has initiated a process for the adoption of a binding legal instrument on BHR.[339]

Reflecting the Ruggie Framework's Three-Pillars, the GPBHR embodies three cardinal principles: the state's duty to protect, businesses' responsibility to respect and the obligation of both states and businesses to ensure accessible and effective remedies for victims of human rights violations.[340] First, the duty to protect is relatively straightforward as it is rooted in IHRL. Accordingly, it consists of preventing violation within a state especially by businesses and 'taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.[341] For instance, in the context of socio-economic rights, it extends to the traditional triple duties examined above, ie states' obligations to protect, respect and fulfil socio-economic rights of their citizens. This implies taking appropriate legislative and policy steps within the maximum available resources to progressively realise these rights.[342] It also implies preventing violation by a third party or, in the event of such violation, providing or enabling a victim to have prompt, accessible remedies. However, the GPBHR is unclear about extraterritoriality of this duty although the SGSR recognises that 'there is a good policy reason' for that.[343]

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[337] GPBHR 2011.

[338] UNHRC 2011. *Resolution A/HRC/RES/17/4 of 6 July 2011*; UNGA 2015. 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: Measuring the Guiding Principles on Business and Human Rights', https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/216 (accessed on 2 July 2019); UNHRC 2017. 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Access to effective remedies under Guiding Principles on Business and Human Rights', https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement (accessed on 2 July 2019).

[339] UNHRC 2014. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.* New York: UNHRC (hereafter 'UNHRC Elaboration 2014'). The resolution was adopted by 20 votes in favour, 13 abstentions and 14 against.

[340] GPBHR 2011:principles 1-13; SGSR Report 2010:para 19.

[341] GPBHR 2011:principle 1.

[342] GPBHR 2011:principles 8-15.

[343] Backer 2011:45-60; OHCHR 2012. 'An interpretative guide to corporate responsibility to respect human rights', para 2 http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (accessed on 21 July 2018).

Second, the corporate responsibility to respect is the baseline responsibility of 'doing no harm' in addition to compliance with national laws.[344] It supplements state's duty to protect although it is independent of the latter.[345] Under this responsibility, companies have a responsibility to carry out a HRIA as part of their due diligence obligation to 'take reasonable steps' to ensure that they are 'aware of, prevent and address' adverse human rights impacts of their operations.[346] A company must avoid potential and actual adverse impacts of its operation on human rights[347] The elements of 'adverse impacts' and 'reasonable steps' circumscribe the due diligence obligation as alternatives to element of 'sphere of influence' which would require some level of impact, proximity and control.[348] Thus, the GPBHR gives expression to the notion of sphere of influence as examined earlier.

In addition, responsibility to respect extends to avoiding both direct and indirect involvement or complicity in human rights abuse.[349] However, using the term 'responsibility' instead of 'duty' indicates

> that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility.[350]

Finally, both states and businesses share the responsibility to provide effective remedies to victims of human rights violation.[351] These remedies may be state-based, non-state-based, judicial, non-judicial, financial or non-financial compensation, restitution, rehabilitation or even apology.[352] Although each of the protect-respect-remedy principles are separate, they are to be pursued or implemented together.[353]

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[344] Backer 2011:59.
[345] Backer 2011:45-60.
[346] GPBHR 2011:principles 11-12.
[347] UNHRC 2008. 'SGSR Report: Clarifying the concepts of '"sphere of influence" and "complicity"', para 25 https://www.refworld.org/docid/484d1fe12.html (hereafter 'SGSR Report Sphere of Influence').
[348] SGSR Report Sphere of Influence:paras 5-25
[349] SGSR Report Sphere of Influence:para 30.
[350] SRSG Report 2010:para 55; SRSG Report 2008:paras 46-48.
[351] GPBHR 2011:principles 25-31.
[352] SGSR Report 2010.
[353] SGSR Report 2010:para 2.

The Ruggie Framework has been widely hailed as an innovative milestone.[354] It has been incorporated into other BHR soft law instruments.[355] For the present research, it is significant because of the multi-layered governance approach it adopted which seems to be the preferred approach for the evolving global governance regimes.

However, the tug of war continues as activists rejected the GPBHR because it fails to close the CHRR accountability gap.[356] This is not surprising because, by its nature, the GPBHR does not create legally binding obligations for private companies and, arguably, only reiterates the state-centric position of not holding businesses directly accountable for human rights violations except by way of 'circuitous imputability' to the state or what Bilchitz calls the 'indirect duty model'.[357] Furthermore, monitoring compliance or implementation is already proving difficult. Unfortunately, it only focuses on the actors and not their actions. Arguably, focusing on the violator rather than the violation would, invariably, miss 'the violated' (ie the individual citizens).

Thus, advancing CHRR through soft law is now the norm. In fact, the proposed binding legal instrument on BHR might not even materialise in view of the economic powers and interests of MNCs as well as the dominance of the state-centric narrative.[358] In addition, the GPBHR's alternative to 'sphere of influence' (ie taking reasonable steps to prevent adverse impacts) although quite plausible, is a departure from the 'principled pragmatism' which animated the GPBHR as it seems highly theoretical. The elements of 'influence', 'control', 'proximity' and 'complicity' seem, arguably, more pragmatic and could ensure better adherence to businesses' responsibility to respect

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[354] Backer 2011:50 & 68; Sanders 2015:293 (arguing that 'where the 'Norms' [NRTBHR] created division and controversy, Ruggie managed to achieve consensus and support').

[355] Backer et al 2015:258.

[356] Bilchitz 2010:199; Okoloise 2017:209 (arguing that 'all the talk about corporate responsibility to respect is contrived to transpose CSR into the BHR debate at the international level'); Deva 2013:91; Weissbrodt 2008:373.

[357] Bilchitz argues thus:

> What is unclear is why we should follow an indirect route at all for recognizing that all agents are bound by fundamental rights. If the goal of rights-protection is to ensure the realization of rights, and multiple actors can impact upon such rights, why then not simply recognize that all actors who have the capacity to affect their realization are under direct obligations in this regard? The indirect-duty approach places the state between the individual and other actors, but it is simply unclear why this is necessary, efficient, or desirable… [I]f protecting the fundamental interests of individuals is the goal of rights-protection, then that would seem adequate to justify placing direct obligations on corporations and other non-state actors. The doctrinal commitment to states as the sole subjects of international law appears rigid, unjustified, and unconnected to the very normative underpinnings of fundamental rights'.

See Bilchitz 2016:152.

[358] Mc Connel 2017:143-180; Bilchitz 2014(c):3-10; Schutter 2015:41.

human rights, linking the actor and the victim through a chain of causation. Indeed, the GPBHR's standard does not properly handle the negative activities of extra-territorial investors like vulture funds registered in tax havens. As the research will show in the next chapter, the activities of these investors have direct effects on states' responsibilities to protect, respect and fulfil the socio-economic rights of their citizens under the ICESCR.[359]

It should be admitted, however, that the robust debate the GPBHR generated before, during and after its adoption, has contributed in moving the CHRR governance agenda forward. As noted above, it was as a result of this that an inter-governmental working group was established to come up with a draft treaty on BHR although the feasibility of this endeavour seems doubtful.[360] In addition, in the context of sovereign financing, it is now widely accepted that CHRR might arise where a creditor contributes to an excessively unsustainable debt.[361] The latter would, arguably, amount to an irresponsible lending practice.[362]

3.3.4.2.2.2 Non-official Creditors & the GPBHR

The GPBHR clearly applies to non-official creditors as businesses. However, it is not peculiar to any industry or sector. This perhaps limits its reach as there are industry peculiarities which might require a special approach. Ruggie himself recognises this fact.[363] The UNHRC also recognises this fact by its adoption of the GPFDHR in the same year as the GPBHR.[364] However, it is important to draw the connection between the two here. The Independent Expert who drafted the GPDHR sees it as a 'complement' to GPBHR.[365] This means that the GPBHR provides a general framework covering all businesses while the GPDHR is specific to sovereign financing. There appears to be no hierarchy though as both have the same legal status. In fact, since they are 'complementary', it seems there would be little or no room for conflict.

[359] Rossi 2016:185-196.
[360] UNHRC Elaboration 2014. See also McConnel 2017:143-180; Bernaz & Pietropaoli 2017:287-311.
[361] Jagers 2014:188-198.
[362] Lone 2014:233-249.
[363] SRSG Report 2006:29.
[364] A comparison of the substantive provisions seems unnecessary since they are declared to be 'complementary' and their undergirding philosophy appears to be the same. However, this point will be revisited after examining the substance of the GPFDHR in the next chapter.
[365] UNHCR 2011:para 17.

Unarguably, in the unlikely event of conflict between the two, the GPFDHR will prevail because it is specific to sovereign financing.

Importantly, however, there are additional industry frameworks developed by, among others, the non-official creditors themselves. Prominent among these is the Equator Principle (EP).[366] It is a financial industry-based self-regulatory standard built around the dominant state-centric narrative of IHRL. Unfortunately, it goes far below the Ruggie Framework of protect-respect-remedy. Therefore, it has inherent credibility and legitimacy deficits. Although the EP predates the GPBHR, it seems to have recognised some of the principles provided in the latter.[367] However, being a self-regulatory industry-inspired standard with credibility-deficit, this research will not examine it. In fact, it has been observed that despite the EP, the 'political weight of the financial sector has managed to block the entrance of a minimum set of standards, which have already been accepted for other corporations'.[368]

In addition, as the research will show in the next chapter, the Institute of International Finance (IIF) adopted the *Principles for Stable Capital Flows & Fair Debt Restructuring in Emerging Markets* (Principles for Capital Flow) and the *Voluntary Principles for Debt Transparency* 2019 to, among others, address debt secrecy.[369] Finally, the UNEP-initiated Principles of Responsible Investment (PRI) aimed at incorporating environmental, social and governance (ESG) issues into private investment and risk management decisions.[370] Like the EP, these soft laws completely suits the interests of private creditors without consideration to socio-economic rights concerns as candidates for responsible investments.

It is now appropriate to draw the link between sovereign debt governance and socio-economic rights as a prelude to the analysis in the next Chapter.

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[366] The Equator Principles Association 2006. *The Equator Principle III 2017*, http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf (hereafter 'EP 2017') (accessed 10 May 2019).
[367] EP 2017:preamble & principle 2.
[368] Bohoslavsky & Cernic 2014:4.
[369] IIF 2019. *Voluntary Principles on Debt Transparency,* https://www.iif.com/Portals/0/Files/Principles%20for%20Debt%20Transparency.pdf (accessed 9 July 2019).
[370] United Nations Environment Programme (UNEP) 2006. *Principles for Responsible Investment* (PRI), http://www.unpri.org/about-pri/the-six-principles.html (accessed 20 April 2019). Another standard has been issued recently. See UNEP 2019. *PRI*: *Spotlight on responsible investment in private debt*, www.unpri.org/private-debt//spotlight-on-responsible-investment-in-private-debt/4048.article (accessed 10 May 2019).

3.4 SOCIO-ECONOMIC RIGHTS AND SOVEREGN DEBT GOVERNANCE

It is important to recall that the research's stakeholder approach to sovereign debt governance places the socio-economic rights-holders at the centre of the sovereign debt discourse. On the basis of the above discussions, this section will now cement the linkage by identifying the major areas of intersection between socio-economic rights and the broader sovereign debt governance regime which is frequently being shaped or influenced by the dynamics of international economic relations. It is instructive to note that IEL has for long been a critical enabler for the prosperity and economic development of states and their peoples. Out of the different aspects of IEL, laws relating to trade, international finance and investment present more opportunities for economic growth and development of states.[371] Until recently, however, socio-economic rights do not feature much in these aspects of IEL. Interestingly, the absence of a comprehensive legal framework for sovereign insolvency has forced creditors to resort to these aspects of IEL to protect their interests. Sovereign debtors would naturally respond to creditors' claims and strategies, sometimes by relying on human rights-based defences. Thus, typical of an authority-deficient regime, dispute resolution in sovereign debt governance as presently constituted is an amalgamation of these areas of law covering distinct spaces of governance (ie national, transnational and international).

Therefore, the areas of intersection between sovereign debt governance and socio-economic rights may be identified as follows: Effects of debt servicing on the realisation of socio-economic rights including conditionalities imposed by official creditors; commonalities between IHRL and some aspects of IEL especially IIL; and socio-economic rights as components of a necessity defence in sovereign debt claims by non-official creditors at arbitral tribunals.[372] These will be elaborated and critically examined in the subsequent chapters but, for the present purpose, it is important to briefly examine these intersections to guide subsequent discussions.

[371] Marceau 2013:41-47; Cottier 2013:48-65; Mercurio 2013:66-78; Haberli 2013:79-106; Buckley 2013:278-290; Tan 2013:307-334; Krajewski 2013:189-210; Gass 2013:137-143; Dimpsey 2013:159-176; Crespo 2013:225-240; Schnitzer 2002:41-46; Thirkell-White 2013:250-277; Ellis 2013:291-306.
[372] Reinisch & Binder 2014:115-128; Hill 2007:547-567; Backer 2006:1-20; Sachs 1989:255-296; Edwards 1989:249-262; Konings 2008:35-61; Konzelman 2014:701-741.

3.4.1 Socio-Economic Rights and International Finance

A lot of the previous works in this area recognise some form of human rights responsibilities for IFIs, but not those of other creditors especially banks and institutional investors like vulture funds.[373] While the responsibilities of the former are relatively clear, those of non-official creditors especially those having extra-territorial character are not. Indeed, the application of the evolving principles and justifications of CHRR on non-official creditors especially extra-territorial bondholders would seem awkward because they have no physical presence in the debtor country.[374] In the same vein, determining the impacts of their activities or policies on the realisation of socio-economic rights would be daunting.[375]

Notwithstanding this complexity, however, evidence abound on the negative impacts of the activities of especially multilateral creditors on the realisation of socio-economic rights in different countries, specifically by way of prioritising debt servicing over socio-economic rights commitments presumably to enable the indebted state regain access to the international debt markets.[376] With the evolution of BHR principles as examined above, it can, thus, be argued that non-official creditors who are beneficiaries of such debt servicing can hardly be extricated from complicity regarding the effects of this action on the realisation of socio-economic rights.[377] Another relevant issue of interest is the effects of conditionalities on socio-economic rights.[378] Using the 'legitimate expectation' principle, it can be argued that creditors, whether official or non-official, must have regard to the potential impacts of their loans on citizens' socio-economic rights for their interests to qualify as truly 'legitimate' and, therefore, recoverable.[379]

[373] Meckled-Garcia 2009:245-271.
[374] UN OHCHR 2003:paras 5-15; Francioni 2009:78-79.
[375] The research will return to this in Chapter 5.
[376] UNHCR 2010:paras 17, 18 & 48; Buckley 2013:278-290; Tan 2013:307-334.
[377] Lone 2014:233-248; Jagers 2014:179-197.
[378] Details of these will be discussed in Chapter 5.
[379] Dupuy 2009:45 & 55. The principle of legitimate expectation originally developed from English administrative law in order to grant legal protection arising from a harm occasioned by the action of a formal or informal decision-making institution. The principle has now been firmly established in IIL to meet the expectations of actors in the investment treaty regime based upon two main justifications/theories. First, a party's failure to execute or carry out an act may dash the expectations of those relying upon the fulfillment or execution of such act (reliance theory). Second, a party is entitled to expect certainty of results in legal relations, ie as part of the rule of law principles of legitimacy, certainty and predictability in contracts (rule of law theory). See Potestà 2013: 88-122; *Suez et al v Argentina*, 2010 IIC 443 (ICSID):para 203.

This will be clearer in the context of the principles of responsible sovereign lending and borrowing to be examined in the next chapter.

3.4.2 **Socio-Economic Rights and IIL**

The intersection between socio-economic rights and IIL could be viewed from three angles. First, as noted earlier, non-official creditors have now been channelling their claims through investment treaty arbitration (ITA) using the ICSID tribunals to reclaim the full value of their principal and interests. This reflects the dynamic character of IIL. State-state dispute settlement in the area of investment is now out of fashion. The predominant recourse mechanism now is the ISDS, thanks to the ICSID Convention. However, as the research will show in Chapter 5, apart from the legitimacy crisis surrounding ITA, submitting sovereign debt claims to investment arbitration raises fundamental conflict of interest concerns.[380] A successful claim also has the potential to subdue socio-economic rights obligations despite the imperative to prioritise the latter as discussed above.[381] Added to this is the possibility of attaching sovereign debtor's assets abroad in the enforcement of the resulting award in the face of increasing waiver of sovereign immunity.

Second, in both socio-economic rights and IIL, the law seeks to protect the individual (presumed to be the weaker party) against the propensity of the state, the Leviathan (presumably the stronger party), to arbitrarily abuse its extensive (some would say limitless) powers. As observed earlier, property right is one of the major constitutional principles of IEL. Indeed, IIL emerged largely to provide international protection to private properties of foreigners outside their home countries. That is why nearly all the principles or standards for the protection of foreign investments are rooted in this overarching imperative.[382] In essence, both investor rights and human rights have substantial similarities as they seek to address the propensity of states to abuse their powers.[383] As far back as 1956, Amador had argued that the principles for the

[380] This will be further discussed in Chapter 5. For now, it is sufficient to point out that ICSID was originally designed as part of the architecture of the Bretton Words institutions.
[381] For instance, vulture fund litigation l and judgement enforcement measures have been shown to frustrate functioning of government activities including implementation of welfare programmes. See UNHRC 2010:para 33. An empirical study has found that sovereign debt 'litigation has negative spillover effects on (i) government access to international credit markets, (ii) international trade, and (iii) delays in crisis resolution'. See Schumpeter et al 2013:1-51.
[382] Inger 2018:33-58.
[383] Dupuy 2009:45-62, 49-53.

protection of properties of aliens (national treatment and standard of justice) be subsumed under IHRL.[384] However, whether these standards have any bearing on the realisation of socio-economic rights would depend on relevant facts and contexts.

What is obvious, however, is that, in-flow of foreign investments into a state could have a positive correlation with the realisation of socio-economic rights.[385] This is because, with the right policies and measures in place, effective protection of property rights could spur efforts towards full realisation of socio-economic rights. Although bilateral investment agreements (which are often the jurisdictional life-wire of investment arbitration) are generally perceived as critical preconditions for safeguarding investors' interests, their underlying objective is to encourage in-flow of investments for economic growth and development of the states concerned.[386] According to Radi, for instance, investment agreements have dual objectives: protection of investors and economic development of the host state which necessarily includes improved welfare and protection of human rights.[387] Unarguably, therefore, both socio-economic rights and IIL share this developmental objective. Historically, both emerged to protect the individual; both were part of the post-war global reform efforts; and both form part of the same framework of international law despite increasing claims of fragmentation of this law.[388]

Importantly, laws relating to international finance and development also enable a sovereign borrower to bring in resources through loan contracts and bonds. The purpose of procuring such resources may vary. However, the legitimacy and legality of such loans might be questioned once they are not linked directly or indirectly to the well-being of the citizens. As argued in the previous chapter, rights-holders are the principals of the government officials hence their interests are paramount in the legitimacy of sovereign debt.

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[384] Amador 1956:para 156.
[385] Dimpsey 2013:159-176; Radi 2013:7; UN OHCHR 2003:paras 10-25.
[386] Dimpsey 2013:161-165.
[387] Radi 2013:7.
[388] As argued by Dupuy: '[T]he development of human rights law and international investments law should not be deemed as substantiating the thesis of the "fragmentation of international law". …These two sets of legal regimes belong to the same legal order, namely the international one. If one considers their respective origins and content, there are indeed substantive points of contact between the two. One can furthermore argue that given the growing importance of human rights within the international legal order, arbitrators with jurisdiction over international investment disputes will undoubtedly be increasingly confronted with such rights - be they invoked by the investor or by the host state'. See Dupuy 2009:61.

Finally, by its dynamic economic nature, IEL (and by extension sovereign debt governance regime) is an aspect of international law that cannot avoid socio-economic rights concerns. Indeed, through its 'humanistic' and individualistic elements, IHRL could penetrate any aspect of the law in which the well-being of the individual may be at stake.[389] Thus, the plain reality is that socio-economic rights' main objective of ensuring security and well-being of individuals easily connects with laws relating to international finance and investments as key aspects of Global Law. This could, arguably be a confirmation of their primacy in the international legal system.[390] Interestingly, IEL's main focus is on the prosperity of the state and, by necessary implication, its citizens.

3.4.3 Socio-Economic Rights in Adjudicating Sovereign Debt Claims

An important but often ignored area of intersection is in the adjudication of sovereign debt claims before courts and international tribunals. The Permanent Court of International Justice (PCIJ), ICSID and various International Mixed Claim Commissions have all exercised jurisdictions over sovereign debt disputes over the years.[391] In fact, even the ECrtHR had assumed jurisdiction on matters related to sovereign debt default.[392] Importantly, these dispute settlement fora ordinarily adjudicate in conformity with the principles of justice and international law including 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[393] In essence, recourse to human rights treaties is part of the ideal of justice in international law.[394] Since, as argued above, the idea of justice cannot be separated from socio-economic rights, it stands to reason that the principle of justice envisaged here may justifiably limit investor or creditor interests.[395] The notion of justice is meant

[389] Using Sen's capabilities approach, Schefer draws the link by showing the 'complex interactions of human need, socio-economic possibilities, institutional mediation of norms, and governance'. She argues that the general debate about IEL-human rights should move to the specifics because '[t]he combination of difficulties facing those living without the means to support themselves and their neighbours surpasses the effects of hunger, thirst, and ignorance. Instability, unforeseeable risks and prejudice - interestingly, all targets of IEL rules when experienced by market participants - are also results of being poor'. See Schefer 2013(a):13-14. See also Schefer 2013(b):432; Picker 2013:16-35.
[390] Schefer 2013(b):432; Shue 1996:19; Golding 1984:124.
[391] Waibel 2011:5-20.
[392] *Mamatas and Others v Greece* 2012 ECtHR Application Nos 63066/14, 64297/14 and 66106/14 (20 July 2012).
[393] VCLT 1969:preamble and art 31.3.c. See also Petersmann 2009:31-32.
[394] *Awas Tingni v Nicaragua* 2001 IACHR 9; *SERAC v Nigeria* supra; Francioni 2009:71-74.
[395] Petersmann 2009:34. According to Petersmann, apart from the function of constraining state powers, human rights serve the following functions: human rights as sources of democratic legitimacy; human rights as decentralised dispute settlement and enforcement mechanisms; human rights as

to serve both the citizens and actors in the international economic system. It is on account of this that Petersmann describes citizens as the 'democratic owners' of international law.[396] Although this is not free from contestations, it could, arguably, enable recognition of socio-economic rights in disputes arising from sovereign debt default or restructuring.[397] The primacy of these rights requires nothing less. Indeed, as argued in the previous chapter, the justice of sovereign debt governance recognises the interests of socio-economic rights-holders (citizens) in constituting, suspending and resolving a sovereign debt relationship.[398] However, whether the attitudes and respective jurisprudence of these adjudicating fora reflect this imperative would be a question for further inquiry in the subsequent chapters.

Finally, as ICSID has been unofficially turned into a dispute resolution institution in the current sovereign debt governance regime, it seems that sovereign debtor respondents could employ the provisions of article 42 of the ICSID Convention to introduce defences founded on socio-economic rights.[399] Arguably, this could enable peoples' rights embodied in the respondent state's constitution to be considered by ICSID tribunals. The growing employment of the *amicus curie* submissions in investment arbitration might also help in this respect.[400] In the words of Petersmann: '[T]he more IEL and its judicial protection respect and protect human rights, the better are the chances for transforming international rule of law among states into a cosmopolitan legal system protecting also rule of law among free citizens across frontiers'.[401]

3.5 CONCLUSION

This chapter attempted to draw a link between socio-economic rights and the sovereign debt governance regime. In doing this, it laid a theoretical foundation for socio-economic rights obligations of creditors by examining the nature, sources, origin,

countervailing powers and decentralised remedies against 'market failures'; human rights as conflict-prevention mechanisms; human rights as incentives for mutually beneficial division of labor; human rights as instruments for reducing the problem of limited knowledge. See Petersmann 2003:440-445.

[396] Petersmann 2009:36.

[397] *Siemens AG v Argentina* 2007 IIC 227:para 81; *SGS Societe Generale de Surveillance S.A. v the Philippines* 2005 ICSID Rep 518:para 116.

[398] Suttle 2016:799-834.

[399] Article 42 of the ICSID Convention provides that in the absence of an agreement of the parties on the applicable law, 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.

[400] Harrison 2009:396.

[401] Petersmann 2009:42.

classifications and philosophical underpinnings of human rights and then located socio-economic rights within the broader IHRL framework. Thereafter, the chapter drew the scope and character of socio-economic rights and the responsibilities of the duty-bearers including debtors, official and non-official creditors. It characterised socio-economic rights as dignity-based rights which seek to uplift the socially and economically disadvantaged to achieve a fair, equitable and just societies. Because of this, the ICESCR imposes obligations on the duty-bearers to protect, respect and fulfil these rights through, for instance, the adoption of progressive legal and policy measures.

The chapter equally examined the socio-economic rights responsibilities of IGOs and non-official creditors. It highlighted the deeply state-centric narrative that permeates IHRL. This, the chapter showed, has created a CHRR governance and accountability gap which the UN has been struggling to fill. Although the debate about the extent of the CHRR is still raging, there is a general consensus that non-official creditors have a minimum, 'baseline' responsibility to respect socio-economic rights of rights-holders. Finally, the chapter indicated the interface between socio-economic rights and sovereign debt governance. It demonstrated key areas in which this interface is visible, viz: the correlation between socio-economic rights and international financial law and IIL, the substantive focus on the individual and the human rights issues increasingly being raised in sovereign debt adjudication and investment arbitration.

In concluding the chapter, shifting focus from the violator to the violation, from the actor to the action is arguably in tandem with both the primacy of socio-economic rights and the reality of economic globalisation. It is worth emphasising that the primacy of socio-economic rights derives from the values of human dignity and the security of life. This has been reflected in treaties, CIL, general principles, judicial pronouncements, scholarly works, UN declarations, resolutions and other soft law instruments. Arguably, the doubts over their legal status have vanished. The obligations of duty-bearers must not be constrained by other areas of international law without inviting deprecation across the world, hence any interface that overlooks their primacy must be measured to ensure prioritisation. This is because they are rights rooted in human life, dignity and they aim at addressing socio-economic inequality to guarantee the well-being of rights-holders. It is therefore important to carry out this measurement in the context of the evolving sovereign debt governance regime.

However, it must be admitted that despite the recognition of creditors' obligations under IHRL, there are still fundamental hurdles connected to the dominant state-centric narrative which is constantly being advanced by positivists in rejecting any form of direct corporate accountability for businesses. One of the manifestations of this challenge is the absence of enforcement mechanisms to bring businesses violating human rights to book. Indeed, even the existing non-judicial enforcement mechanisms against states are very weak. The most effective so far have been the regional human rights courts and commissions. At the level of the UN, the OP on the ICESCR was just recently adopted. A second challenge relates to the establishment of actual violations of socio-economic rights obligations especially with respect to reasonability and sufficiency of the causal connection between the act causing the harm on the victim and the violator. In addition, even in the case of indirect corporate accountability, the link between the corporate violator and the state might be difficult to establish in view of the ambiguity of the doctrine of 'sphere of influence'.

Notwithstanding the above challenges, there is a growing consensus about the significance of socio-economic rights as dignity-enhancing rights binding on all classes of creditors. In fact, it can be safely argued that socio-economic rights have assumed a *jus cogens* and *erga omnes* status in IHRL. Thus, focusing on the primacy of these rights is arguably part of a collective obligation to address global inequality within and between nations. It is about justice. Focusing on the character of the act violating these rights rather than on the character of the violator is the best way to entrench justice and accountability. Unarguably, IHRL (perhaps international law in general) must embrace the transformative character of economic globalisation. Creditor accountability is necessary for justice and for the realisation of socio-economic rights. Thus, allowing any duty-bearer to exploit the inadequacies or accountability gaps visible in the existing IHRL betrays the collective obligation towards the realisation of these rights.

Unfortunately, state-centrism has left a vacuum which, arguably, undermines the full realisation of socio-economic rights of rights-holders under IHRL, thereby belittling the essential humanity of the individual. It seems positivists' vision of international law continues to undermine the individual. However, the plain reality is that it is unwittingly undermining the progressive development of international law. This is because there is a general consensus that international law needs to keep pace with the increasing

challenges presented by economic globalisation. One of these challenges is how parties to a sovereign debt contract can fairly restructure the debt in the face of an imminent default without compromising the socio-economic rights of debtor's citizens. Does the positivists' narrative find a space in sovereign debt restructuring? This will be the subject of the next chapter.

CHAPTER FOUR

SOCIO-ECONOMIC RIGHTS IN SOVEREIGN DEBTRESTRUCTURING

4.1 INTRODUCTION

Having established the primacy of socio-economic rights as dignity-based, 'inherently humanistic' rights aimed, primarily, at addressing socio-economic inequality within countries and across the world, it is now intended to examine the effects of recurring sovereign debt defaults (SDDs) on the realisation of these rights under international law. As argued in the previous chapter, in the determination of claims founded on property rights, socio-economic rights' considerations cannot simply be shelved aside. Therefore, with the aid of history and principles of general international law, this chapter demonstrates the implications of the persistent resistance of creditors towards the development of a fairly balanced statutory sovereign debt restructuring (SDR) framework on the realisation of socio-economic rights.

Interestingly, over the years, there has been a growing consensus on the criticality of mainstreaming socio-economic rights into sovereign financing. For instance, following the recent waves of sovereign debt crises (1980-2015) across the world, many scholars and supranational institutions have advocated for the adoption of a debt sustainability framework in order to avert, or at least, minimise, the incidents of sovereign debt crises and, thus, support a sustained implementation of socio-economic rights especially in developing countries.[1] Consequently, several measures and proposals had been advanced for this purpose. The most prominent and far-reaching of these measures include: UNGA's BPSDRP, UNHRC's GPFDHR, UNCTAD's PRSLB and Sovereign Debt Workout Guide (SDWG).[2] In addition,

[1] See, for instance, World Conference on Human Rights 1993. *Vienna Declaration and Programme of Action* (adopted on 25 June 1993):paras 1,9,10, 12 (calling 'upon the international community to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the Governments of such countries to attain the full realization of the economic, social and cultural rights of their people'); UN 2003. *Monterrey Consensus of the International Conference on Financing for Development: A Final Text of Agreements and Commitments* (adopted 22 March 2002):paras 47, 51 & 60 (calling for 'innovative mechanisms to comprehensively address debt problems of developing countries …[and] consideration by all relevant stakeholders of an international debt workout mechanism, in the appropriate forums, that will engage debtors and creditors to restructure unsustainable debts in a timely and efficient manner'); UNGA 2000.*Millennium Declaration* (adopted on 18 September 2000):paras 4,6,13, 15,16 & 28; Beddies et al 2009:93-115; Domeland & Kharas 2009:117-140.

[2] UNGA 2015. *Basic Principles on Sovereign Debt Restructuring Processes* (adopted on 10 September 2015) https://www.undocs.org/A/RES/69/319 (accessed 20 May 2018) (hereafter 'UN BPSDR 2015'); UNCTAD 2015. *Sovereign Debt Workout: Going Forward, Roadmap and Guide* (hereafter 'UNCTAD SDWG 2015); UNCTAD 2012. *Principles on Responsible Sovereign Lending and Borrowing*

following sustained campaigns by civil society organisations (CSOs), debt reliefs were granted to poor countries largely by official creditors under the HIPC and the MDR Initiatives in order, ostensibly, to reduce excessive debt burdens of eligible sovereign debtors, ensure debt sustainability and support global development initiatives.[3] Indeed, debt sustainability was among the targets of the defunct MDG on global partnership for development which has now been rolled over to the SDGs.[4]

Although these initiatives indicate some form of international cooperation, this Chapter will argue that they are inadequate as their general normative character reflects the overwhelming influence of international creditors (ie, what the research calls 'creditor-diktat') in the general sovereign debt regime.[5] Accordingly, the Chapter will

(amended on 10 January 2012) (hereafter 'UNCTAD PRSLB 2012'); UNHRC 2012. *Guiding Principles on Foreign Debt and Human Rights* (adopted on 5 July 2012) https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-23_en.pdf (hereafter 'UNHRC GPFDHR 2012').

[3] IMF 2016. *Multilateral Debt Relief Initiative: Fact Sheet* https://www.imf.org/external/np/exr/facts/pdf/mdri.pdf (accessed 13 April 2018). Prominent among the CSOs include: Jubilee Debt Campaign (JDC) a CSO campaigning for debt justice across the world especially in the UK and US,<https://jubileedebt.org.uk/> (accessed 10 October 2018); African Forum and Network on Debt and Development (AFRODADD) consisting of CSOs from many African countries,<http://www.afrodad.org/> (accessed 10 October 2018); European Network on Debt and Development (EURODAD) consisting of 47 CSOs from 20 European countries, <https://eurodad.org/> (accessed 10 October 2018); Latin American Network on Debt and Development (LATINDAD) consisting of CSOs from 13 Latin American countries <http://www.latindadd.org/> (accessed 10 October 2018); Committee for the Abolition of Illegitimate Debts (CADTM) <http://www.cadtm.org/English> (accessed 10 October 2018).

[4] UNGA 2015. *Transforming our world: The 2030 agenda for Sustainable Development* (adopted on 25 September 2015) (hereafter 'UNGA SDG 2015'); Domeland & Kharas 2009:117-140; Raffer 2014:101; Sudreau & Bohoslavsky 2015:613-634; UNEP & Institute of Human Rights and Business 2016. *Human rights and sustainable finance: Exploring the relationship* (UNEP Inquiry Working Paper 16/1) 25-28.

[5] The research borrows the term 'creditor-diktat' from Raffer. See Raffer 2015:243-263. However, Raffer uses it in a restrictive sense, ie, in the context of his proposal for a statutory SDR framework, while this research conceives it broadly to include creditors' conscious resistance to the emergence of such a framework using real and subtle economic and geopolitical powers. Thus, creditor-diktat and resistance to a fair statutory SDR framework are treated as two sides of the same coin in this research. Creditor-diktat ensures dominance of creditor-interests thereby rendering the existing SDR regimes to lack the necessary elements of fairness and legitimacy (ie, impartiality or neutrality and independence). The best way to maintain this is to resist reform initiatives. The principle of sanctity of contractual obligations is often cited as justification. The US's long-held position, for instance, is that 'rules [ie bodies or regimes of law] other than human rights law are most relevant to the contractual arrangement between states and lenders'. Quoted in Lumina 2014:258. This narrative is thus a child of neoclassical economic rationalisation of market primacy which rejects human rights and public policy issues as political matters. While calling it the 'debt continuity norm', Lienau summarises the implications thus: 'sovereign borrowers must repay, regardless of the circumstances of the initial debt contract, the actual use of loan proceeds, or the exigencies of any potential default…If repayment is expected even in such extreme circumstances, then debtors should certainly bear the burden....By policing the boundaries of the sovereign debt regime - and ensuring that such issues remain marginal - this rule keeps the core flow of capital safe and relatively free of controversy'. See Lienau 2014:1-3. Based on this narrative, most explanations for recurring debt crises across the world tend to focus on debtor's behaviour (eg financial imprudence and confrontational behavior or lack of good faith in SDR negotiations) regardless of exogenous factors such as market contagion, currency crisis and creditors' behaviours. Fisch & Gentile

demonstrate the pattern of creditors' control of the sovereign debt governance regime as seen over many centuries. Thus, the existing SDR regimes still remain essentially creditor-determined and, consequently, biased against sovereign debtors and their citizens. This, the Chapter will show, simultaneously frustrates international cooperation and efforts by individual sovereign debtors to progressively realise the socio-economic rights of their citizens. In fact, despite their individual and collective responsibilities under IHRL as shown in the previous Chapter, international creditors show little (or no) concern for the socio-economic rights of the debtors' citizens. In essence, notwithstanding their laudable objectives and potentials, the above-mentioned measures and initiatives fall far short of the requisite international cooperation envisaged by the UN Charter, the ICESCR and the UDHR.[6]

To substantiate this claim, the Chapter will adopt a historical, narrative methodology with some insights from game and rational choice theoretical perspectives.[7] This is

2004:1043, 1052-1053 (justifying the creditor's neoclassical narrative on the basis of debtor moral hazard as a result of the possibility of 'opportunistic default' by sovereign debtors); Wautelet 2011:2-56. (calling the objection to vulture funds' litigation a 'war on creditors'). However, this narrative subjects the rights of debtors' citizens to an unrestrained market fundamentalism, prioritising creditor interests thereby disempowering the debtors' citizens. In addition, the dominance of creditor-interests makes neither legal nor economic sense. In the words of Raffer, 'economic efficiency prohibits deciding in one's own cause'. See Raffer 2015: 243-263; Lienau 2014:15-17; Tan 2014:249-272, 255.

[6] UN Charter 1945:arts 1(3) & 56; ICESCR 1966:arts 2(1), 22 & 23; UDHR 1948:art 28; UN 1989. *Convention on the Rights of the Child* (adopted in 1989 and entered into force 2 September 1990):art 4; UN 2006. *Convention on Rights of Persons with Disabilities* (adopted on 13 December 2006 and entered into force 3 May 2008):arts 4(2) & 32. See also CESCR 1990. *General Comment 2: Article 22: International Technical Assistant Measures*:paras 4-10.

[7] First, 'game theory' works in a situation of imperfect competition, a contest between rational agents in which each tries to outdo the other in order to derive optimal outcome. It focuses on 'the ways in which interacting choices of economic agents produce outcomes with respect to the preferences (utilities) of those agents, where the outcomes in question might have been intended by none of the agent'. A rational agent in such a contest selects outcomes, calculate paths to the outcome and select action from sets of alternatives. See Don R 2018. 'Game theory', https://plato.stanford.edu/entries/game-theory/ (accessed 11 October 2018); Pitchford & Wright 2013:649-667, 658-662. The peculiarity of sovereign debt means that in SDR negotiation, either the debtor or the creditor would lose. See Kamlani: 22-35. Unlike creditors, however, debtors engage in 'a complex cost-benefit calculus involving political and social considerations, not just economic and financial ones'. See Nishizawa 2014:2. It will then mean, using the unity of sovereignty advanced in Chapter Two, a loss to the debtor is a loss to its citizens. Thus, if a loss is inevitable and both parties have socio-economic rights responsibilities under ICESCR, then a prioritisation would be necessary. It means, creditor loss would be justified on account of the primacy of socio-economic rights. This is because, debt servicing during good times outweigh the cost of SDD. See Sturzenegger & Zettelmeyer 2007:343-351. Second, rational choice theory's '…underlying assumption is that individuals engage in purposive, means-ends calculation in order to attain their goals - that is, they select actions so as to maximize their utility…Nevertheless, the theory of rational choice, and the notion of rationality more generally, has both a normative and a positive dimension. Rationality is a normative concept insofar as "it points to what we should do in order to attain a given end or objective". Its positive application comes when it is used to describe, explain, and predict human behaviour'. See Thompson 2002:285-306; Hathaway 2005:469-536, 482-483; Bohoslavsky & Escriba-Folch 2014:15-32. Third, a historical narrative is a qualitative method that uses past events to draw behavioural patterns. It includes 'temporal ordering of events', to make something out of such

because the structural imbalance in the relationship between creditors and sovereign debtors in the existing SDR frameworks involves using both real and soft powers (mostly by creditors to protect their interests), hence the unfairness of the restructuring frameworks on debtors and their citizens.[8] Therefore, using game theory will enable the research to situate the bearer of potential loss arising from a fair SDR system which recognises the primacy of socio-economic rights of debtor's citizens; the rational choice theory will help in understanding the underlying assumptions upon which the creditor-diktat is built in order to interrogate the continuing influence of creditors over the SDR regimes; and the historical narrative will indicate the pattern of such influence over a couple of centuries.[9] Using this approach and guided by the imperative for a sustained implementation of socio-economic rights under ICESCR, the Chapter will explore whether a sovereign debtor has any 'right' to a fair SDR under international law in the light of the above initiatives and the recent developments in this area.[10]

The remainder of the Chapter is organised as follows: Section two will give a brief historical account of SDDs vis-à-vis socio-economic rights; Section three will examine the place of socio-economic rights in the existing SDR regimes and will show that, despite the collective obligation of states to ensure international cooperation for the realisation of socio-economic rights under the ICESCR, the existing SDR regimes, in functional terms, undermine the realisation of these rights; Section four will examine the utility of the principles provided under, for instance, UNGA's BPSDRP, UNHRC's GPFDHR and UNCTAD's PRSLB, and then determine both the 'right' to SDR and the

events in a coherent and plausible manner. It 'reveals and suggests solutions for analytic problems' by linking 'elements of the past, present and future'. See Sandelowski 1991:161-162. Therefore, since SDR had been a problem in the past, is a problem for the present and (it seems highly likely to be a problem) in the future, it makes logical sense to adopt this approach focusing on the creditors only.

[8] Kamlani, for instance, argues that 'structural and compulsory power help [sic] to drive the formation and bargaining outcomes of sovereign debt restructuring regimes'. See Kamlani 2008:269. Lienau conceives power in the sovereign debt context as something existing 'through shared ideological structures or discourses - ways of thinking and talking about things in a particular community (such as the international financial community). If a given set of norms seems reasonable, plausible, and normal, then any actions that resonate with these expectations will meet with little resistance or comment'. See Lienau 2014:17; Konings 2008:35-61.

[9] Using game theory, Kamlani aptly rationalises that 'it is not generally the case that two parties to a debt negotiation can jointly improve their outcomes through cooperation. In fact, any improvement to the outcome of one party will most likely result in an injury to the second. That is because once the decision is taken to negotiate, each party knows that any concession on his part translates into a gain for the opposing side. Also, sovereign debt management is always and everywhere a political phenomenon. This is not only because one party to the negotiation is by definition a state; it is also because creditor country governments have often inserted themselves into the process'. See Kamlani 2008:22; Lienau 2014:15-17.

[10] Paliouras 2017:115-136.

place of socio-economic rights in each of them; Section five offers a critique of the creditor priority norm and argues for a prioritisation of socio-economic rights in SDR; Section six summarises and concludes the Chapter.

4.2 SOCIO-ECONOMIC RIGHTS IN THE HISTORY OF SOVEREIGN DEBT DEFAULTS

In both theory and practice, SDD and financial crisis are deeply intertwined: SDD often leads to financial crisis, and the reverse is equally true, ie financial crisis compromises the payment system and reduces economic activities thereby affecting debt servicing obligations which, often, translates into default.[11] Importantly, the increasing internationalisation of sovereign debt markets means that there is always the potential for contagion (ie, market shocks in one jurisdiction spreading to another).[12] According to ILA, 'contagion is the ricocheting of perceived default risk beyond the initial defaulting country'.[13] Illustrative cases would be the Latin American Debt Crisis in the 1980s, the Mexican Debt Crisis in the early 1990s (fondly called 'the Tequila Crisis') and the Asian Financial Crisis in the late 1990s.[14] There is evidence showing that contagion often impacts the implementation of socio-economic rights-based programmes by the affected states.[15]

[11] A financial crisis has three interrelated, mutually interactive components called the 'triple crises': sovereign debt crisis, banking crisis and currency crisis. Sovereign debt crisis occurs when there is a default (ie, SDD). SDDs are frequent where debts are denominated in foreign currencies and the frequency increases in a severe financial crisis. See Reinhart & Rogoff 2008:1-123. Currency and banking crises (called the 'twin crisis') often precede SDD. Banking crisis occurs when there is a financial distress which erodes capital within the financial system, compromises the payment system and, consequently, creates panic or systemic runs on bank deposits. Currency crisis is '[a] forced change in parity [or] abandonment of a pegged exchange rate'. Thus, currency crisis is sometimes called exchange rate crisis. See Franklin & Gale 2007:9-11; Pepino 2013:28; Ureche-Rangau & Burietz 2013:35-44. However, SDD often occurs simultaneously with twin crisis as the last global financial crisis has shown. See Kolb 2011:369; De Paoli et al 2011:23-31, 27-28 (noting that empirical studies show that 'sovereign defaults rarely occur in isolation. …In practice, most EME [emerging market economies] sovereign crises over the past 25 years have been associated with a banking or a currency crisis. Sovereign defaults appear to have the biggest impact on domestic output when there is a triple (sovereign, banking, and currency) crisis. In some cases, such as following the Latin American crisis in the early 1980s and the Russian crisis in the late 1990s, sovereign defaults have precipitated broader instability in the global financial system'). Over the past two centuries, SDD episodes were usually preceded by a lending boom mostly caused by deterioration of terms of trade, recession in the capital/credit nations, raising cost of borrowing arising from higher interest rates in credit exporting nations and a crisis in a major sovereign debtor which could have a contagious effect. See Sturzenegger & Zettelmeyer 2007:6.

[12] Phylaktis & Xia 2011:6-24.

[13] ILA 2010:4.

[14] Ocampo 2016:189-205.

[15] Tamamovic 2015:42-93.

It is worth noting, however, that while SDD is not a recent phenomenon, contagion is a symbolic manifestation of the increasing globalisation of sovereign debt (and, of course, other financial products) markets.[16] Indeed, SDD has become a recurring phenomenon which is evident across centuries.[17] However, its recurrence appears not to have disincentivised creditors from advancing further loans to sovereigns, sometimes even to perpetual defaulters.[18] Thus, a circle of defaults has, somehow,

[16] Phylaktis & Xia 2011:378. Contagion could occur on account of factors connected to external trade, interbank markets, the financial markets and payment systems. See Franklin & Gale 2007:23; Blundell-Wignall 2012:201-224.

[17] For a detailed history see Todd 1989:1; Tomz 2007: Chapters 1-3; Krasner 1999: Chapter 5; Oosterlinck 2013:697-714; The Applied History Research Group 1997. 'The end of Europe's Middle Ages: Banking in the Middle Ages', http://www.faculty.umb.edu/gary_zabel/Courses/Phil%20281b/Philosophy%20of%20Magic/Dante.%20etc/Philosophers/End/bluedot/banking.html (accessed 23 October 2018).

[18] The economic logic of lending to sovereigns (ie, why creditors lend to serial defaulters) and of repayment by sovereigns (ie, why sovereigns repay loans despite absence of a sovereign insolvency framework) has generated discussions in the literature. While there is general consensus on the former (ie, creditors lend for the purpose of profit-maximisation and for protection of geo-political interest especially for the official creditors), scholars are divided into four groups on the latter: Retribution theorists, reputation theorists, sanction theorists and power theorists. First, the retributionists argue that creditors punish defaulting debtors by denying new loans or charging higher interests hence it is better for debtors to avoid default. Second, the reputationists argue that sovereign debtors repay because default would tarnish their image/creditworthiness in the debt market and, thus, limit their future access to the debt markets. See Eaton & Gersovitz 1981:289-309; Asonuma 2016:1-45, 7-10. Third, the sanctionists argue that the fear of military or trade sanctions prompt repayment and not reputation as, without the possibility of creditors all over the world uniting and acting collectively to deny the defaulting debtor further loans, re-accessing the market is not a problem for even a serial defaulter. Sanction theory is divided into two sub-categories: debt-military linkage/gun-boat diplomacy (ie, fear of using military force to extract repayment from the defaulting sovereign) and debt-trade linkage (ie, fear of embargo or trade sanctions by way of seizure of goods or withholding short-term import/export credit). According to Tomz (a reputationist), borrowers repay on schedule in order to protect and enhance their access to future capital. He rejects the sanction and retribution theories as they suffer from collective action problem and, in particular, retribution theory does not even enjoy historical support as creditors always supply capital regardless of default which shows that creditors always 'ignore history'. He categorises borrowers into three classes based on repayment or default preferences: stalwarts (ie, those who repay in both good and bad times), fair-weathers (ie, those who default in bad times only) and lemons (ie, those who default in both good and bad times). He argues that in general 'governments honor commitments when benefits of compliance outweigh the costs of reneging'. See Tomz 2007:14-17. However, the reputation theory has also been questioned because history shows that debtors' reputation is not a determinant of access to the credit market as, in the words of De Paoli et al, empirical studies show that '…in the aftermath of EME [emerging market economies] debt crises a decade ago, EMEs were often able to re-access international capital markets quite quickly'. See De Paoli et al 2011:27-28. Fourth, Kamlani advances a power-based theory combining both reputation and sanction theories, arguing that, since the two are not mutually exclusive but 'involving distinct causal mechanisms that can be simultaneously operative…we consider sanctions to be a form of compulsory power, and reputation (or access to funding) to be a form of structural power'. See Kamlani 2008:30-35. Therefore, while each of these explanations may be plausible, the power model seems more plausible and realistic within the thematic context of this research. Indeed, history shows that there is a mixture of both economic and political power at play in sovereign debt relationships. This is because official creditors literally dictate what happens in the international financial system. In particular, bilateral creditors possess both structural power (ie, they may influence access to funding as seen in the role the US played during the 2001-2005 crisis in Argentina) and compulsory power (ie, they may rally other creditors to deny further funding to debtors, also seen in the 2001-2005 crisis in Argentina). In addition, the US is also the majority shareholder of the IMF. For non-official creditors, Kamlani argues, their

become ‘the normal’. Like contagion, this normalised trend, history shows, has implication for the sustained implementation of socio-economic rights-based programmes within states.[19]

Since concerns for socio-economic rights predate the actual juridification of IHRL, it is important to briefly explore how these concerns were expressed in the period before the development of a human rights framework within the context of sovereign debt governance. This is because history has revealed that, up to the early 20th century, creditors and their respective home states had almost an unrestrained freedom over the finances of their sovereign debtors even though some of these debts were patently odious or illegitimate (perhaps illegal), and can hardly stand the test of modern international law.[20] To explore this historical trend, the research divides the history of SDDs vis-à-vis socio-economic rights into two periods, using the adoption of ICESCR as a benchmark: pre-1966 and post -1966.

4.2.1 Pre-1966 SDDs and Socio-Economic Rights

History shows that, under international law, there were little concerns for human welfare or the plights of the poor and the socially, economically disadvantaged persons before the 19th century.[21] This is because subjectivation of individuals under international law was only recognised at a later stage.[22] In other words, individuals were considered as subjects of states, not subjects of international law, and this partly explains the frequency of forced receivership and military intervention by home states of private creditors to forcefully enforce claims against sovereign debtors in the past.[23] Notwithstanding this, in the late 18th and early 19th centuries, anti-slavery campaigns and concerns for improved labour standards in the wake of industrialisation across Western Europe began to alter the situation.[24] Subsequently, international

‘structural and compulsory powers’ drive the formation of SDR regimes’. This may partly explain creditor resistance to a statutory SDR framework as the research explores. See Kamlani 2008:269; Krasner 1999:3-6; Eaton & Gersovitz 1981:289-309; Asonuma 2016:1-14; Pitchford & Wright 2013:658-662.

[19] Tamamovic 2015:42-93.

[20] Tomz 2007:6-9; Feinerman 2007:193-220, 202-210.

[21] Quigley 1996-1997:73-103.

[22] Portmann 2010:126-172.

[23] Weidemaier 2010:335, 339.

[24] Weston 1984:. ‘Human Rights’. *Human Rights Quarterly* 6(3):257-283, 257-260.

humanitarian law, human rights and alien protection laws cemented the international status of individuals in more concrete legal terms.[25]

Nevertheless, the values of human life and dignity which animated socio-economic rights were recognised in many states and empires even before the 19th century, thanks to the influence of the church.[26] However, as will be shown below, the impacts of war-induced debt defaults on these rights were visible in some states as gun-boat diplomacy (military intervention) and excessive economic sanctions were part of the debt collection norm up to the 19th and early 20th centuries.[27] A key debt recovery strategy during this period was the usual control of sovereign debtors' sources of revenue by creditor nations.

4.2.1.1 The Early Periods

SDD is as old as the system of international borrowing and lending itself.[28] As noted in Chapter One, instances abound on the debt defaults of sovereigns or quasi-sovereigns dating back several millennia.[29] The first recorded SDDs in history were those of the Greek city states in the 4th century BC when ten out of 13 Greek

[25] Gordon 2011:43-78.

[26] The poor's protection was ingrained into the law through the influence of the church. See Frank 2000:288; Backer 1995:871-1041, 1032-1040. Quigley notes (footnotes omitted) that since the Statute of Laborers of 1349-1350 in England, 'work and poverty journeyed hand in hand. …Under feudalism there could, at least in theory, be no uncared-for-distress. The people who would today be in the most economic danger were, in the Middle Ages, presumably protected by their masters from the most acute suffering… had coverage against disaster. Insurance against unemployment, sickness, old age was theirs in the protection of the liege lords. ...In Anglo-Saxon times, the administration of poor relief was almost entirely under the control of the church…'. See Quigley1996-1997:73-76.

[27] Despite the different economic theories noted in fn 18 above, most historians of sovereign debt have shown that through much of history creditors use their military powers to force sovereign debtors to repay through invasion, blockade and bombardment, and this militarised debt collection was a 'well-accepted norm of international law as creditors wrote the rules'. See Mitchener & Weidenmeir 2011:155-167; Tomz 2007:Chapter 6.

[28] Historically, modern sovereign lending started from money-changers extending loans to merchants in medieval Europe. However, a major obstacle for them was the church's prohibition of usury, the charging of interest on loans. This was later relaxed and by 13thcentury there were over 80 banking houses in Europe with Italy's Florence being the European banking hub. The Bardi and Peruzzi banking families established branches in England. The financial success of Florence led others to break the monopoly. However, 'the greatest danger to Medieval banking was in granting loans to European monarchs to finance wars. The use of mercenary armies and field artillery increased the costs of mounting military operations. To finance these activities, rulers were often willing to repay loans at extremely high rates of interest sometimes as high as 45 to 60 percent. Yet if they were unable to repay the loans, they simply did not. Most of the bank failures of the late Middle Ages and Renaissance were the result of large loans to rulers who refused to pay their debts. The Bardi and Peruzzi banks suffered greatly when England's monarchs refused to pay for loans acquired to finance the Hundred Years' War'. See the Applied History Research Group 1997:1; Lu 2005:1-7; Sturzenegger & Zettelmeyer 2007:3-23.

[29] According to Nishizawa, during antiquity, European states addressed their debt crises through 'inflations or devaluation'. See Nishizawa 2014:2.

municipalities defaulted on debts owed to Delos Temple.[30] However, during this period, the notions of social welfare and human dignity were, perhaps, unimaginable because different dehumanising and discriminatory treatments such as slavery were common and, indeed, legitimate practices in different empires.[31]

Between the 12th and 14th centuries, rulers of Spain, South Germany and Italy borrowed substantially from private bankers and wealthy families who obtained guarantees for repayment (ie, collaterals) in the form of positive assignment of public revenues.[32] These, however, proved to be terrible guarantees as evident in the continued collapse of private banking houses upon defaults by their respective sovereign debtors.[33] For instance, in 1339 Britain, under the reign of King Edward III, defaulted on its debts leading to both the failure of the creditor (the Baldi banking house of Italy) and, perhaps, the first recorded financial crisis in Europe.[34] Similarly, France defaulted on its debts in 1598.[35] Notwithstanding these defaults, welfare and socio-economic rights' concerns especially for the poor and the weak were encouraged by the church.[36] These were well-cherished Christian values.

However, during the Renaissance, secular, liberal ideals began to penetrate into European polities.[37] Consequently, the above-mentioned religious values were dramatically de-emphasised while sovereign borrowing was, at the same time, used in financing empire expansion.[38] Indeed, sovereign borrowing became even more exigent after the wars-induced reorganisation of the international society expressed in the Treaty of Westphalia, which is widely considered to be the root of the modern system of sovereign states.[39] The new sovereigns were financed through both internal

[30] Sturzenegger & Zettelmeyer 2007:3; Kotz'ea 2015:6; Kopf 2013:149-180; Arkolakis 2014:8; Stasavage 2007:489-525.
[31] Kotz'ea 2015:3-5.
[32] Kotz'ea 2015:6-7.
[33] Kotz'ea 2015:7.
[34] Krasner 1999:Chapter 5.
[35] Reinhart & Rogoff 2008:2-8.
[36] Quigley 1996-1997:73-76.
[37] During the Renaissance, the emphasis was on free will, individualism, liberty within independent states and their separate churches. See Freeman 2001:107-110; Edward 2001:283-355. Although the church developed 'poor relief' up to the 14th century, 'the Economic behaviour and the monastic ideal of poverty were in disastrous contradiction under the stress of economic development at the turn of the fifteenth century'. See Scholl 1980:236-256, 236-238.
[38] Conklin 1998:483-513; Staasavage 2007:489–525; Rasler & Thompson 1983:489-516.
[39] Krasner 1999:3.

and external sources.[40] Internally, it was through 'revenue for rights', ie rulers extracted taxes from their propertied subjects in return for some measure of individual rights.[41] Political rights were, in particular, tied to taxation; but welfare and social concerns for the poor were relegated to the domain of the church whose influence was drastically weakened following the reorganisation of the sovereign states under the Westphalian Treaty.[42] In essence, taxation provided the link between states and their subjects. Although critical, taxation was, however, an insufficient source of public financing especially for the defence of the sovereign's territories and its subjects. Added to this was the fact that domestic borrowing was insufficient and, upon default, enforcement against the rulers was simply impracticable, perhaps inconceivable.[43]

In essence, rulers must either borrow to finance their security and expansionist's interests or risk paying war indemnity to their conqueror.[44] Owing to these real threats, external borrowing became a viable (sometimes, necessary) option. Importantly, the development of international capital markets in Amsterdam in the 16th century added impetus to sovereign borrowing as it enabled sovereigns to obtain long-term loans at lower interest rates.[45] Following the new 'Dutch-finance' (ie long-term borrowing) system, Britain, for instance, issued annuities with low borrowing costs in 1688.[46] Unfortunately, this enabled merchant creditors to have some control over fiscal policies through the parliament.[47] This was because the enforcement conundrum was still a challenge for private creditors unless they could secure some measure of political control over the sovereign debtor.[48] This was perhaps the origin of the creditor-diktat as state institutions were biased in favour of creditors. In the words of Tracey,

[40] In 16th century Spain, for instance, the Crown's revenues came principally from four sources: Ordinary rents consisting of 'excise taxes, customs duties, revenues from royal monopolies, pasturage fees'; extraordinary rents consisting of monies requiring permission from 'the Church or the Cortes de Castilla, the representative assembly of the third estate'; revenues from the American colonies; and 'extraordinary expedients' consisting of revenues from 'the seizure of merchants' silver, the sale of offices, and the sale or resale of lands on which the Crown may have had a claim'. See Conklin 1998:486.
[41] Barzel & Kiser 2002:473-507.
[42] Krasner 1999:3.
[43] Krasner 1999:1-3.
[44] Conklin 1998:483-513.
[45] Staasavage D 2015. 'What we can learn from the early history of sovereign debt', 30 https://conferences.wcfia.harvard.edu/files/peif/files/2_stasavage.pdf (accessed 24 August 2019).
[46] Staasavage 2015:31.
[47] Staasavage 2015:33.
[48] Staasavage 2015:30-36.

‘equitable or not, control of fiscal policy by men who themselves had heavy investments in state debts, was the genius of the Netherland’s system of borrowing’.[49]

Therefore, many creditors became parliamentarians and, in 1693, King Williams of Britain was empowered by an act of parliament to borrow for the purpose of financing the Anglo-Franco war.[50] The loan proved to be vital because it contributed to the victory over France; hence, this was said to be the beginning of ‘democratic’ parliamentary control over sovereign debts in Western Europe.[51] The logic, however, was that creditors succeeded in using governmental institutions to minimise their risks.[52]

However, as sovereign borrowing increased, so did SDD. Indeed, it became normal behaviour for many rulers to simply default and, sometimes, repudiate their debts.[53] Without parliamentary control in other states, creditors had little options in cases of defaults and repudiations. For instance, Spain’s King Phillip II was notorious for this and, as a result, he has been described as the ‘most spectacular defaulter’ of the late 16th and early 17th centuries as he pushed Spain’s finances into perpetual indebtedness.[54] This was because he ‘fought wars throughout his reign and borrowed extensively to finance fluctuations in military expenditures’.[55]

Defaults by sovereign debtors continued through the 18th and 19th centuries. For instance, France suspended repayment of some loans and repudiated others in 1797.[56] Furthermore, wars were forcing sovereigns to be either creditors or debtors with little or no concern for the well-being of their poor subjects.[57] The Franco-Prussian war of 1870-1871 is a classic example of indebtedness following defeat at war. As a

[49] Tracey 1985:216 quoted in Staasavage 2015:26. While showing the consequence of the lack of representation of creditor interests in French government in 1552, Staasavage quoted Cauwes (1895:456) saying ‘[i]f the affairs of the king are so desperate, he could make use of half of the rents constituted on both the cities and communities of the kingdom, he could tax the financiers who have lent to him, or he could sell off church lands’. See Staasavage 2011:142.
[50] Murphy 2006:200-217.
[51] Sastavage 2015:2-3.
[52] Sastavage 2015:30-36.
[53] Krasner 1999:3-7.
[54] Conklin 1998:483-513.
[55] Conklin 1998:484.
[56] Krasner 1999:3-7.
[57] Lu 2005:7.

result of this war, France was forced to pay huge indemnity despite Germany being the culpable aggressor as it had no moral justification for the war in the first place.[58]

There was some relative stability after the Napoleonic wars.[59] The stability meant fewer sovereign debts.[60] In addition, industrialisation and dominance over the evolving international trading system brought economic prosperity to Western Europe.[61] However, it also created a global financial power asymmetry among states as, for instance, the successor states to the Ottoman, Spanish and Portuguese empires became dependent on foreign loans from Western European states and private creditors in order to finance their operations.[62] Indeed, private creditors from Western Europe, especially Britain, were readily extending loans to these emerging states because it was profitable. Therefore, to guarantee enforcement of the loans, private creditors developed an intimate relationship with their home states' governments and, through this, 'lending was tied to a larger strategic and political objective such as cementing international alliances'.[63] Kamlani aptly describes the logic of private creditor-protection during the 19th century thus:

> [A]dherence to the terms of a debt contract was seen as the moral undertaking of a civilized nation. Sovereign default was therefore regarded as an immoral and uncivilized act, a characterisation which allowed for a good deal of interference by creditor governments in the affairs of financially distressed sovereigns. Oftentimes this interference coincided conveniently with the larger geo-strategic objectives of Britain relative to a particular defaulting state or region.[64]

In the Americas, the situation was not entirely different as the US and the new Latin American states became independent sovereign entities determined to build infrastructure and finance their developments.[65] For instance, several US sub-national governments defaulted in the 1800s.[66] Furthermore, between 1830 and 1860 more

[58] The term 'indemnity' refers to material goods or resources exacted by the victor against defeated parties in war. Paying indemnities was the cost of making war and losing, but did not necessarily signify any moral judgement of the losers. See Lu 2005:7. See also Michael et al 2005:3-6.
[59] Krasner 1999:4.
[60] Krasner 1999:4. White 2001:337-365.
[61] Engerman & O'Brein 2004:451-464.
[62] Krasner 1999:127-151.
[63] Krasner 1999:5; Enrique 2010:233-235; Weidenmier 2010:339. Some scholars questioned the logic of gun-boat enforcement. For example, Tomz argued that 'detailed historical analysis shows that the apparent relationship between default and militarized action is mostly spurious' although he accepts that 'prior to world war 1 countries that defaulted became targets of military action at a higher rate than countries that paid'. See Tomz 2007:127-133.
[64] Kamlani 2008:265.
[65] Loubert 2012:442-455.
[66] Arkolakis 2014:10.

than 40% of sovereign debtors, mostly from Latin America, defaulted on their debts.[67] The classic case of a contagious, regional SDD was the Baring Crisis of 1890 which started in Argentina.[68] Argentina held about 60% of all defaulted sovereign debts in the 1890s.[69] However, the contagious effect of the crisis spread to other countries in the region; and creditors (mostly finance houses) collapsed, forcing, for example, the Bank of England to rescue the House of Baring which held the bulk of the Argentine debts.[70]

The above SDD episodes affected operations of the concerned states and consequently the states' implementation of welfare-based or anti-poverty laws which, essentially, were not framed in the language of 'rights'.[71] However, in the 18th century the struggles for independence in the US were primarily anchored on the ideals of dignity, equality and justice, thus, influencing the constitutionalisation of concerns for the welfare of the weak and the socially and economically disadvantaged, especially at sub-national levels.[72] Along with the French Declaration of the Rights of Man, this laid the foundation for the international juridification of socio-economic rights.[73]

In short, between 1500 and 1900 there were over 46 SDD episodes in Europe alone most of which leading to (or resulting from) conflicts and war indemnities.[74] The devastating consequences of these conflicts on the well-being of subjects of the states involved were atrocious.[75] The influence of private creditors also increased through control of state institutions thereby creating, for lack of a better term, a 'creditors-government romance'.

4.2.1.2 The World Wars

The first half of the 1900s was marked by two devastating world wars in which SDDs were part of the political dynamics.[76] As indicated above, war financing and destructions invariably have human costs and could plunge the warring parties into

[67] Kotz´ea 2015:7.
[68] Mitchener & Weidemier 2011:269-275; Vizcarra 2009:358-387; Weidemier 2010:335-355.
[69] Mitchener & Weidemier 2011:271.
[70] Mitchener & Weidemier 2011:271.
[71] Quigley 1996-1997:733.
[72] Deale 2000:281-342, 284 fn 16. See also Forbath 2001:1821-1891.
[73] Deale 2000:284-287.
[74] Arkolakis 2014:10.
[75] Senga 2018:1-18.
[76] Lu 2005:7.

excessive debts.[77] In the words of Waldenstr & Frey, 'wars put extraordinary pressures on countries' fiscal balances and may even provoke governments to repudiate their sovereign debt'.[78] For instance, the US's war-financing and guarantees to allied powers forced many of them into excessive indebtedness after the First World War.[79] It was puzzling, therefore, that even the US, the ultimate financier and guarantor, also defaulted on its debts in the 1930s.[80] The great economic depression (1929-1933) saw almost 50% defaults by sovereigns.[81] Interestingly, the sanctity of debt contracts and, consequently, gun-boat diplomacy and forced receivership were relaxed during this period.[82] SDD was no longer seen as an 'immoral,' 'uncivilised' breach as creditors themselves turned into debtors. In the words of Kamlani, 'suddenly, default became less of a moral failing and more the rational policy choice of a government looking to protect the economic well-being of its citizenry'.[83] It was, however, not a complete relaxation as Britain and US continued to support private creditors by diplomatic representation (ie, not to grant loans to sovereigns who defaulted on British and US creditors) and trade sanctions.[84]

Therefore, the 'debt-politics' could not provide an international restructuring mechanism. The task was left to the League of Nations which made efforts to

[77] Gibbs A 2015. 'Who still owes what for the two World Wars?' https://www.cnbc.com/2015/03/18/who-still-owes-what-for-the-two-world-wars.html (accessed 24 September 2019).
[78] Waldenstr & Frey 2011:279-286, 279-280; Shea 2014:771-795.
[79] Sturzenegger & Zettelmeyer 2007:21-22; Enrique 2010:234-235; Oosterlinck notes that 'the costs of the First World War resulted in a huge inter-allied debt, largely developing the practice of loans from one government to the other. The system devised after the Second World War paved the way for more government lending and radically changed the sovereign debt market. Indeed, for the three decades following the Second World War, most lending to developing countries came from either governments or international institutions such as the World Bank or the International Monetary Fund. As a result, defaults were rare and settlements usually occurred without drawing much attention'. See Oosterlinck 2013:699; Wormell recounted the British experience and the pressure to borrow thus: 'There was little disagreement, or even negotiation, about the terms for the advances, which were to provide such fertile soil for misunderstanding and acrimony when it came to the terms for their funding: winning the war was uppermost in the British mind, the need was too pressing and the terms and amounts were obviously superior to anything available in the private markets. Instead, strains in the relationship centred on the use of the advances for three purposes: the maintenance of the sterling exchange rate; the repayment of British debts to the American private sector incurred before 1 April; and their use for expenditure outside the USA'. See Wormell 2002:243.
[80] Koetze 2015:8
[81] Tomz 2007:2. Eichengreen & Portes 1986:599-640; Eichengreen & Portes 1990:69-94; Almunia et al 2010:219-265.
[82] Enrique 2010:234.
[83] Kamlani 2008:265.
[84] Sturzenegger & Zettelmeyer 2007:20.

institutionally address global debt problems.[85] Although the League of Nations' efforts were laudable, they, however, could not prevent the outbreak of another war.[86]

In fact, SDDs were among the multiple causes of the Second World War as Germany repudiated all its sovereign debts in 1933.[87] The Second World War was, compared to the first, even more costly in financial terms and it was more devastating in terms of human costs.[88] About 78 million people, mostly civilians, were killed while many survivors sustained long-term impacts in terms of unemployment and lack of access to food, healthcare and education.[89] These consequences of the war, however, influenced the laying of the foundation of modern sovereign financing. A notable example was the establishment of multilateral official creditors (ie IFIs) and, subsequently, the ICSID which, gradually but unofficially, has become creditors' chosen dispute settlement forum for adjudicating claims against sovereign debtors in the event of either SDD or rejection of proposed SDR. It also saw the establishment of a more comprehensive, rule-based international trading system under the General Agreement on Trade and Tariff (GATT) and its successor, the World Trade Organisation (WTO).[90] The essential point is that, the aftermath of the war saw increased official lending and institution building based on a positivists' vision of international law.[91] The entrance of the IFIs into the sovereign debt scheme completely

[85] League of Nations 1939. 'Report of the Committee for the Study of International Loan Contracts', 6 http://biblio-archive.unog.ch/Dateien/CouncilMSD/C-145-M-93-1939-II-A_EN.pdf (accessed 20 August 2018).
[86] Enrique notes that after the war the focus was on the question 'at what point was it more appropriate for the well-being of the international community to write off the debts rather than collect them? And how much breathing space did the debtors need before resuming total, partial, or any payments at all?'. See Enrique 2010:234.
[87] Goldmann 2012:153-175, 153-175; Staasavage 2007:489-525; Rasler & Thompson 1983:489-516, 491-507; Kelly 2011:63-64 (noting that the US lent over $2 billion to the Triple Entente and over $27 million to the Triple Alliance); Lu 2005:5 (noting 'the demand for reparations after World War I is commonly thought to have contributed to unleashing a more devastating world war only twenty years later. Revisionist history after the Second World War blamed the architects of Versailles for pursuing "victor's justice" and "vengeance" rather than a "peace of justice"'); Rathborne R 1925. 'Making war loans to the Allies', 3 https://www.foreignaffairs.com/articles/united-states/1925-04-01/making-war-loans-allies (accessed 21 September 2019).
[88] Lu 2005:5; Franklin & Gale 2007:6-24.
[89] In a study covering 15 European countries, it was found that over 39 million people, mostly civilians, were killed and that 'many individuals were forced to abandon or give up their property without compensation and move to new lands. Periods of hunger became more common even in relatively prosperous Western Europe. Families were separated for long periods of time, and many children lost their fathers. Many, including young children, personally witnessed the horrors of war as battles and bombing took place in the very areas where they lived. Horrendous crimes against humanity were committed. Due to the war, political and economic systems in many countries were permanently altered'. See Kesternich I et al 2014:103-118, 104-106.
[90] Bossche 2005:78-86.
[91] Oosterlinck 2013:699.

changed the dynamics of borrowing and lending but without actually addressing the underlying problem of the past centuries as discussed in the introductory Chapter: a vacuum in the SDR framework.[92]

Finally, as noted in the previous chapter, the impacts of the Second World War were instrumental to the adoption of the ICESCR in 1966 as the world rediscovered the intrinsic human values earlier advocated and practiced by the church when it held sway before the Treaty of Westphalia. However, in addition to the ICESCR, the post war institutionalisation had succeeded in establishing a positivist international legal system which creditors have been invoking to evade responsibility for the realisation of socio-economic rights using the public-private divide, 'contractual justice', the principle of *pacta sunt servanda* and the fragmentation argument.[93] Admittedly, the institutionalisation may have eased (or perhaps ended) the pre-war forced receivership and gun-boat diplomacy for sanctioning SDD and the circle of conflict on account of sovereign debt. However, the enforcement conundrum still remained partly because of the positivists' thesis and the pre-Second World War deployment of arbitration was disrupted.[94]

4.2.2 Post-1966 SDDs and Socio-Economic Rights

As indicated in the previous chapter, following the adoption of ICESCR in 1966, state parties committed themselves to the full realisation of socio-economic rights through progressive implementation of programmes and policies.[95] The juridification was significant in placing socio-economic rights on the global economic and political agendas. Regrettably, however, international actors have done little to garner the desired international cooperation necessary for the formulation and operationalisation of a fairly balanced SDR system. This has negative implications for the realisation of these rights as can be seen from the increasing SDDs and the drastic cuts to socio-economic rights-based programmes since the adoption of the ICESCR, even in advanced economies.[96] Indeed, as the research will now show, the costs and impacts

[92] Raffer 2016:254; Lienau 2016:153; Lienau 2014:194. Ritschl 2012:943-964.
[93] Tan 2014:249-272, 256.
[94] Raffer 2016:249-250.
[95] ICESCR 1966:art 2(1).
[96] See, for example, Mills 2018: 302–322; Wills & Warwick 2016:629-664; Salomon 2015:521-545, 521-523; Bear 2015:1-35; Konzelman 2014:701-741 (arguing that austerity could be traced back 300 years); Tamamović 2015:95-110; Themelidou 2018: 8-15; Graham 2016:124-157; Swaminatham 1998-1999: 161-214. However, some scholars rather questioned the 'freezing, non-

of SDDs between 1966 and 2015 significantly surpassed those of the preceding centuries combined, at least, since recorded history began.[97]

4.2.2.1 The Latin American Debt Crisis

Since the adoption of the ICESCR, there was no major SDD episode until the late 1970s when the Latin American debt crisis began to manifest following unprecedented lending by US commercial banks as a result of the excess liquidity brought by the oil boom.[98] The underlying private law paradigm incentivised the lenders. Raising of US interest rates in 1981, higher oil prices and falling commodity prices for export, all combined to push sovereign debtors' interests on loans payable to these banks higher.[99] By 1983, the combined sovereign debts of Latin American countries stood at $380 billion.[100] Already, in 1982, Mexico had defaulted on its $90 billion debt owed mostly to US banks.[101] This had a contagious effect as Argentina, Bolivia, Brazil and Venezuela immediately followed suit.[102]

Notwithstanding the widespread SDDs, the banks responded by rescheduling principal payments and extending further loans (called 'bridge loans') to enable sovereign debtors to continue servicing the interest components of the loans.[103] The real logic was to enable the banks to, first, avoid insolvency and, second, avoid reporting non-performing loans on their balance sheets.[104] Still, the logic failed and so

responsiveness' of IHRL to the global reality of austerity. See, for instance, Dowell-Jones 2015:193-223.

[97] Trebesch C & Zabel M 2016. 'The output costs of hard and soft sovereign default', 2-5 https://www.econstor.eu/bitstream/10419/147397/1/cesifo1_wp6143.pdf (accessed 21 January 2019); Samples 2012-2013:51; Kotz´ea 2015:6-8.

[98] Power 1996:2701-2772, 2707.

[99] Power 1996:2708.

[100] Power 1996:2707.

[101] Power 1996:2707 fn 17.

[102] Power 1996:2708. Buckley rationalisesthe behavioural pattern that prompted the crisis:

> [T]he creditors were prepared to keep extending credit, far beyond reasonable levels, because the absence of a bankruptcy mechanism meant they expected to be repaid by the debtor nations increasing taxes and reducing social services to their people…The debtors were prepared to keep borrowing, far beyond reasonable levels, because of the short time frames of politicians and the need at all costs to avert a recession to be able to win the next election, as well as the effect, in many cases, of bribes paid by creditors to individual politicians and technocrats…The creditor nation governments encouraged this excessive extension of credit because it served their short-term interest in avoiding a recession'.

See Buckley 2009:1189-1216, 1193.

[103] Power 1996:2710.

[104] Power 1996:2710-2711.

did several other interventionist policies.[105] It was the Brady Bonds (bond issues named after the then US Treasury Secretary, Nicholas Brady), which exchanged these bank debts to bonds tradable on secondary markets, that eventually resolved this crisis.[106] However, this initiative opened a Pandora's box as, instead of the few bank creditors, thousands of bondholders now became creditors, thereby raising three major problems as will be examined below: Collective action problem, litigations by both hold-out creditors (recalcitrant creditors claiming the original, pre-restructuring values of the debts) and vulture funds (creditors who purchased debts at a give-away price, yet they are claiming the original, pre-restructuring values of the purchased debts).[107]

For socio-economic rights, these contagious SDD episodes brought the question of trade-off (ie between continued debt servicing on the one hand, and SDD on the other) to the fore. Indeed, a combination of bridge loans, raising interest rates on loans and low commodity prices for exports, meant huge accumulation of debts which had devastating social and political impacts on the sovereign debtors and their citizens.[108] In addition, the Brady Bonds were conditioned upon IMF conditionalities.[109] This literally chained the sovereign debtors to IMF and the creditors. In the words of Powers,

> [A]ll parties were thus dependent upon one another: the banks deemed it essential that the debtor countries implement austerity programs; the debtor countries would not implement austerity programs unless the IMF extended loans; the IMF would not make loans unless the commercial banks extended bridge loans.[110]

Indeed, it was a full circle but, in plain reality, it was a circle for debt accumulation.

4.2.2.2 SDDs in 1990s-2000s: African, Asian and Argentine Debt Crises

From the 1980s through 1990s, SDDs continued across the world unabated, thereby decelerating the implementation of socio-economic rights-based programmes especially in the developing countries.[111] In Africa, for instance, balance of payment

[105] Sturzenegger & Zettelmeyer 2007:17.
[106] Since the Brady Bonds, SDR involves a 'mixture of interest reduction, principal reduction, and maturity extension'. See Sturzenegger & Zettelmeyer 2007:17-18.
[107] Pitchford & Wright 2012:812-837; Fisch & Gentile 2004:1043-1114, 1052-1053.
[108] Power 1996:2708-2712.
[109] Sturzenegger & Zettelmeyer 2007:17-18.
[110] Power 1996:2712.
[111] Baloro 1990:139-161; Okeke 2001:1489-1505; Carty 1986:401-419, 402-404.

difficulties linked to years of unfair trading relationships dating back to colonialism as well as the drying up of sovereign financing from official creditors, forced many countries to borrow from Western commercial banks which had more than enough liquid petrodollars in need of recycling as a result of the oil boom.[112] Between 1970 and 1987 alone, the external debt stock of African countries increased from a total of $8 billion to $174 billion.[113] By 1990, with increased debt servicing but reduced investment flows into Africa, the total debt burden of African countries was estimated to be around $220 billion.[114] By 2000, the debt stock stood at $330 billion.[115] This led to widespread SDDs causing 'general hardship for the weakest section of the population' and the adoption of IMF-induced austerity measures.[116] Naturally, these measures meant drastic cuts to social, health and education programmes leading to instability and massive protests in, for instance, Nigeria, Ghana, Sudan and Tunisia.[117] Despite some odious elements (eg bribery and corruption) in some of these loans, successive African governments did not resort to repudiation, preferring, instead, to pursue rescheduling with bridge loans extended to continue debt servicing.[118] The result was accumulation of more debts.

However, the SDD episodes during this period were not confined to Africa. The disintegration of the Soviet Union into 15 sovereign states between 1989 and 1991 raised odious debt concerns and led to multiple SDDs.[119] Russia, as the successor to the Soviet Union, had to negotiate a debt rescheduling of $60 billion in 1997.[120] In July of the same year, the Asian financial crisis erupted and its contagious effects were devastating especially in Indonesia and Thailand.[121] Needless to point out that both

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[112] Baloro 1990:141-143.
[113] Green JE & Khan MS 1990. 'The African debt crisis', 1-5 https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/12010/88201.pdf?sequence=1 (accessed 19 July 2019).
[114] Balaro 1990:142.
[115] AFRODAD 2003. 'Africa's external debt: An analysis of the African countries', 5-6 https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/1688/AFRODAD-248538.pdf?sequence=1&isAllowed=y (accessed 19 July 2019).
[116] Baloro 1990:141.
[117] Baloro 1990:141-143.
[118] Ghana repudiated in 1972 but it was forced to 'repudiate' the repudiation and continued its debt servicing. See Balaro 1990:143-144.
[119] Koetze 2015:7.
[120] Koetze 2015:7.
[121] Sturzenegger & Zettelmeyer 2007:10. The peculiarity of the Asian Crisis was that it started as a corporate debt crisis and spread to constrain government finances across the region and, in 1999, it extended to Argentina. Buckley identifies the following factors responsible for the crisis: '(i) fixed exchange rates tied to an appreciating U.S. dollar when the currency of the countries' principal competitor, Japan, was depreciating; (ii) weaknesses in the local financial sectors and their prudential

crises constrained the financial capacities of the concerned states, leading to massive unemployment and tremendous impacts on health, education and welfare programmes.[122] Over 10 million people dropped below the poverty line in just two years.[123] Unsurprisingly, the IMF intervention and its structural economic reform benchmarks, the SAPs, were widely condemned in the light of these negative consequences.[124] Moreover, SAPs were based on IMF's creditor-focused debt sustainability assessments (DSA).[125]

Because of contagion, the Asian crisis increased the borrowing costs for many countries.[126] Consequently, at the turn of the millennium, Argentina, faced with limited options, defaulted on its $93 billion debt.[127] Drastic government measures, including bank deposit freeze and expropriation-like measures in the public utilities' sector, were imposed.[128] These forced the population into mass demonstrations and unrest leading to loss of lives and properties and resignation of four successive Presidents within a few months.[129] Following protracted negotiations, IMF-induced austerity measures were adopted.[130] Unemployment soared, and social security and pension benefits were negatively affected leading to nationalisation of private pension funds.[131] Besides the impacts of these measures on the implementation of socio-economic rights, the Argentine SDD opened another Pandora's box: the resort by non-official creditors to the ISDS mechanism as will be examined in the next chapter. It also led to various litigations before domestic courts.[132] These litigations were fuelled by the hold-out and

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regulation so that local banks were able to borrow heavily abroad and re-lend the proceeds domestically without hedging the foreign exchange risks (i.e. relying utterly on the peg of the local currency to the Dollar to hold); (iii) crony capitalism which further eroded the effectiveness of prudential regulation; (iv) excessive capital inflows facilitated by premature liberalization of local financial sectors; and (v) a region-wide loss of confidence'. See Buckley 2009:1194.

[122] Buckley 2009:1194.

[123] Buckley 2009:1194.

[124] UNCTAD SDWG 2015:40.

[125] UNCTAD SDWG 2015:26 & 40.

[126] Buckley 2009:1195.

[127] Gelpern 2005:1-10; Mario et al 2010:179-230; Mario M et al 2005. 'Lessons from the Argentine case of debt accumulation, crisis and default', 1-52, 1-7 https://vi.unctad.org/debt/debt/m3/documents/Country%20Case%20Argentina%20%5B1%5D.PDF (accessed 14 June 2018).

[128] Mario et al 2005:2-18.

[129] Gelpern 2005:9.

[130] Gelpern 2005:8.

[131] Datz 2012:101-126, 110-117.

[132] See, for instance, *NML Capital Ltd v Republic of Argentina* 2012 699 F3d 246, 253-254 (2nd Circuit) and the appeal to the US Supreme Court in *Republic of Argentina v NML Capital Ltd* 2014 189 L Ed 2nd 234 (SC); *EM Ltd v Republic of Argentina* 2007 473 F3d 463, 481 (2nd Circuit); *Aurelius Capital Partners LP v Republic of Argentina* 2009 584 F3d 120 (2nd Circuit). In Germany, some cases were also

vulture funds phenomena. The latter have become the main obstacles to orderly restructuring. In the litigations involving Argentina, as the next Chapter will show, the costs of these actions were very high. The litigations added further demands upon a completely bankrupt treasury. The implication was that they simultaneously constrained Argentina's financial capacity, increased its debt burden and undermined socio-economic rights obligations.[133] Indeed, up to June 2018, Argentina was battling with the effects of this sovereign debt crisis.[134]

4.2.1.4 The Eurozone SDDs

The recent Eurozone debt crisis was perhaps the costliest in history as a result of the effects of contagion in the highly integrated currency union.[135] The financial crisis which started in the US enveloped the world and deeply penetrated the European financial markets leading to increased market volatility, uncertainty and, consequently, more sovereign risks.[136] In 2010, Greece announced a default, and Ireland, Italy, Portugal and Spain followed suit.[137] Despite efforts by the *Troika* (European Central Bank, European Commission and IMF), Greece defaulted again on its $138 billion debt in 2012.[138]

The impacts of the crisis on the population of these countries were immense.[139] For instance, in Greece, unemployment jumped from 8% in 2008 to 25% in 2012.[140] In addition, health care and social security for the elderly were neglected as a result of austerity.[141] The people were forced to turn 'to the family and charities to cover basic

filed. See the Joined Case Nos. 2 BvM 1-5/03 & 2 BvM 1-2/06, 2007 360, 2610 (Germany's Federal Constitutional Court) http://www.bundesverfassungsgericht.de> (accessed 9 June 2017).

[133] Gelpern 2005:9.

[134] The Guardian 2018. 'Argentina agrees to $50bn loan from IMF amid national protests', https://www.theguardian.com/business/2018/jun/08/argentina-loan-imf-protests-peso> (accessed 29 June 2018).

[135] Acharya et al 2018:2855-2896; Miklaszewicz 2016:357-373.

[136] Koetze 2015:8.

[137] Koetze 2015:16-19. However, some studies showed that the Greek debt crisis started much earlier in 2009. See Kauretas GP 2015. 'The Greek debt crisis: Origins and implications', 1-12 https://blogs.sl.pt/cloud/file/21d38da7521f27cbd70ea0ecf7a4093a/balcaodacantina/2015/Kouretas.pdf (accessed 20 February 2018).

[138] Koetze 2015:8.

[139] Tamamović 2015:95-110.

[140] Dellas &Tavlas 2013:491-520, 492.

[141] Thomson et al 2017:13-35; Kentikelenis & Thomas 2017:13; Stubbs TH & Kentikelis AE 2018. 'Conditionality and sovereign debt:. An overview of human rights Implications', 1-32 http://www.kentikelenis.net/uploads/3/1/8/9/31894609/stubbskentikelenis2018-conditionality_and_sovereign_debt.pdf (accessed 14 August 2018).

survival needs - food, shelter and health services'.[142] Indeed, there is empirical evidence showing a correlation between the remarkable increase in suicide rates and the sovereign debt crisis in Greece.[143] Moreover, the fiscal austerity affected the health care system, reduced fertility rates, increased alcoholism and increased divorce rates.[144] There was also a backlash leading to protests, change of government and referendum on further austerity which the people rejected.[145]

4.2.3 SDDs, Creditor-diktat and Socio-Economic Rights: A Reflection

It is important to now contextualise the above historical exploration of episodes of SDD vis-à-vis the implementation of socio-economic rights programmes. First, creditor-diktat started through 'creditors-government romance' supported by the underlying private, contractual paradigm based on the public-private divide. Second, the historical trend shows that the implementation of socio-economic rights, as required by the ICESCR, has been reduced to 'a fluctuating obligation' subjected to the vagaries of creditors (eg, bridge loans) and the volatility of the markets all of which led to further accumulation of unsustainable sovereign debts. Unarguably, this is unhealthy for the realisation of socio-economic rights. The positivist, creditor-focused fragmentationists may argue that SDD and socio-economic rights belong to different regimes of international law.[146] Consequently, like oil and water, the market and socio-economic rights should not meet. This argument is, however, hollow because the drafters of the

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[142] Thomson TM et al 2017:13-15.

[143] Harrison P 2015. 'Greek debt crisis: Tragic spike in suicide', 2 https://www.medscape.com/viewarticle/846904 (accessed 25 July 2018); Antonakakis & Collins 2014:39-50.

[144] Antonakakis & Collins 2014:40. The situation was the same in other countries. for instance, with respect to Spain, Vargas et al 2016:3-4 (noting that 'the economic distress has seriously lowered welfare aids, repudiating the state's ability to recognize human rights, specifically: the right to work; to health, to social security, housing, poverty and inequality in favor of creditor rights of full repayment of their investment. This represents a clear violation of the humanitarian principles as represented in the UN Charter, the Universal Declaration of Human Rights, the European Charter of Fundamental Rights and international covenant on economic, social and cultural rights'). Vargas et al 2016:3-33, 3-4. See also Lopez-Valcarsel BG & Barber P. 'Economic crisis, austerity policies, health and fairness. Lessons learned in Spain'. https://accedacris.ulpgc.es/bitstream/10553/19093/3/0728811_00000_0000.pdf (accessed 13 June 2019).

[145] Tamamović 2015:95-110.

[146] As consistently maintained by the US. See fn 5 above. However, the ILC maintains that: 'no legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside it*'. See ILC 2006. *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission Finalised by Martti Koskenniemi.* New York: UNGA para 193, http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (accessed 13 June 2018).

ICESCR understood the potential consequences of unregulated market behaviours (which often trigger contagion) on the universal humanism expressed by socio-economic rights.[147] In other words, the drafters of the ICESCR were not unaware of the volatility of the sovereign debt markets at the inception of the Covenant, given what transpired before 1966.[148] In addition, the fragmentation argument lacks historical support and has been shown to be chimeric.[149]

Third, sovereign debt cannot be divorced from the ICESCR because of the positive correlation between responsible borrowing and meaningful implementation of socio-economic rights.[150] Indeed, the above history shows that external debt is primarily aimed at addressing deficits arising from the insufficient domestic revenues from tax, internal borrowing and other income-generating investments.[151] However, the above history has also shown that it was the age-long financial power imbalance and the post-war institutionalisation which led to the establishment of a 'non-system' that supports creditor interests, backed up by the international political and trading systems.[152] To date, questions remain about the fairness of the latter system as countries struggle to deal with balance of payment problems which, invariably, compound their debt burdens.[153] In other words, unfair trade practices contribute to trade imbalance and, consequently, increased external borrowing to deal with budget deficits.[154] Unarguably, this can hardly support a sustained implementation of programmes for the realisation of socio-economic rights.[155]

Fourth, it is equally worth noting that concerns for the poor and socially, economically disadvantaged was not the priority of private creditors during the early history of sovereign debt. However, welfare and anti-poverty concerns for the poor became part of the state laws and policies in medieval Europe because of the overwhelming influence of the church.[156] There was no recognition of any socio-economic rights in the strict sense of the term, but there was a fair understanding of the anti-poverty idea.

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147 Alston & Quinn 1987:156-229.
148 Alston & Quinn 1987:219-220; LP 1987:paras16-34.
149 Dupuy 2009:45-62.
150 Li & Panizza 2013:17-20.
151 Li & Panizza 2013:17.
152 Lienau 2014:15-17.
153 UNHCR 2010; UNHCR 2011; Melaku & Hirsch 2012:127-170 (noting at 129 that 'Africa has become increasingly marginalized in world trade'); Stiglitz & Carlton 2005:11; Rodrik 2007:184; Mosoti 2003:1.
154 Schier 2014:58.
155 Backer 1995:1040.
156 Quigley 1996:73-76.

Unfortunately, when the Westphalia system was introduced during the Renaissance the focus shifted to political rights which were tied to taxation of property owners, although this did not prevent states from making anti-poverty legislation.[157]

Fifth, sovereign borrowing and SDDs increased because of frequent wars up to the time the multilateral official creditors were established. However, some debts were merely imposed as war indemnities which, at the time, were deemed as an appropriate price for the vanquished to pay. In addition, private creditors enjoyed significant support from their home-states because of the enforcement problem.[158] Thus, if states, on the basis of their connections with their citizens deemed it necessary to intervene on behalf of their private creditors using gun-boat diplomacy and forced receivership as methods of debt collection, then, it would seem plausible to argue for the reverse situation in modern international law, ie, home states of extra-territorial, non-official creditors should shoulder responsibility for the latter's direct or indirect violation of socio-economic rights especially because of a stronger tax-connection today.[159]

Finally, although there is evidence of SDDs across centuries affecting both developed and developing countries, there is also evidence suggesting that creditors' governments do not generally support a statutory legal framework to resolve claims arising from SDDs preferring, instead, to use extra-legal means (political power and economic sanctions) to enforce debts upon default.[160] This, it will be shown in the next section, has remained a major obstacle to the development of a fair SDR regime which is counter-productive to a sustained fulfillment of socio-economic rights obligations under the ICESCR. In a sense, this indicates a lack of international cooperation,

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[157] Quigley 1996:73-83.

[158] Enrique 2010:231-233 (noting the invasion and bombing of the Mexican harbor of Veracruz by gunboats of Great Britain, France, and Spain on 31 October 1861, following the Mexican government's suspension of foreign debt service payments on 17 July 1861).

[159] Enrique notes that:

> [D]uring the nineteenth and early twentieth centuries, ad hoc associations of private holders of foreign government bonds customarily formed themselves for negotiating with debtor governments when payment difficulties arose. Occasionally the bondholders' governments assisted, even employing "gunboat diplomacy" to enforce compliance with contractual obligations. The doctrine on which governments acted on behalf of private creditors in collecting payments on foreign sovereign debt was called "diplomatic protection", the idea behind which is that governments might come to the aid of their citizens at their request, when they had not, or not fully, been paid. The ultimate remedy was dispatching gunboats to collect on the debt, as by capturing and operating the debtor's customs house.

See Enrique 2010:232.

[160] Michener & Weidenmeir 2011:155.

hence, the recurring SDDs. Indeed, international cooperation is critical in this regard especially because of the contagious effects of SDDs which, as shown above, might lead to a forceful, extra-constitutional change of government.[161] Like war, instability in a polity, almost always, derails the implementation of programmes designed for the realisation of socio-economic rights. This is because socio-economic rights are not just any public goods, they are sensitive public goods which form part of the state's essential interests.[162] Unfortunately, creditors have been tenaciously resisting any cooperation for a legal framework, partly using the positivists' fragmentation, sanctity of contracts and debtor moral hazard arguments as justifications.[163] The research elaborates on this in the next section.

4.3 SOCIO-ECONOMIC RIGHTS IN SDR REGIMES

The above history of SDDs shows that defaults are often forced upon sovereign debtors by exogenous factors, hence, a timely, fair, efficient and effective restructuring might avert SDD and its potentially contagious effects.[164] It is worth recalling that, because of the juridical character of the parties and the purpose of the relationship, sovereign debt creates rights and duties under two regimes: treaty and contract.[165] Thus, SDD may amount to a violation of treaty or contractual obligations.[166] The above

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[161] Krasner 1999:13.

[162] Goldmann 2014:98-99; Tamamović 2015:122.

[163] Tan notes that this narrative '…localises the problem of sovereign indebtedness and legitimises the image of the debtor state as an inefficient, if not irresponsible, trustee of domestic resources, thereby sanctioning the rehabilitative interventions of the international community. Debtor states are required to demonstrate prudence in the use of the aforementioned public funds through reductions in fiscal expenditure and deflationary monetary policies in attempts to reduce debt ceilings and continue servicing external debt'. See Tan 2014:255-256.

[164] Enrique recounts the 1980s debt crises in this exogenous sense thus:

> [T]he crisis was triggered by the following developments: first, the precipitous rise in interest rates to unprecedented levels after 1979 and the associated swings in exchange rates, as developed countries sought to roll back inflation; second, the sharp slackening of import demand in developed countries resulting from the steep and then prolonged recession that started in 1980; third, the collapse of primary commodity prices, including oil, beginning in 1980; fourth, the rapid increase in the relative prices of imported manufactured goods, which together with the fall in export prices entailed a deterioration of developing countries' terms of trade; and last but not least, the growing wave of protectionism that characterized foreign economic policy in the 1980s in developed market economy countries.

See Enrique 2010:244.

[165] Waibel 2007:711-759, 733; Sandrock 2012:507; Norton 2012:302-306; Gallagher 2012:362; Thrasher & Gallagher 2016:2-6; Ostransky 2015:27-58.

[166] *Geovanni Alemanni v Republic of Argentina* 2014 IIC 666 (ICSID) (reference here is to the ICSID electronic report):para 320. It was held that it is not open to the claimants to use '[this] arbitration as a means for vindicating their contractual rights as "bondholders", but only such rights (and the associated remedies) as they can properly lay claim to as "investors" under the BIT'.

history, however, shows that the enforcement of creditor rights upon default has always been a problem and, often, being politicised. Indeed, the erstwhile gun-boat diplomacy and forced receivership methods of enforcement cannot work in a relatively more 'civilised' post-war international system. Notwithstanding these challenges, and as already mentioned, creditors have generally not been supportive of a fair statutory framework on SDR. It suggests that creditors prefer and rely on a 'non-system' to protect their interests.

In essence, to date, there is no legal framework on SDR setting out principles and procedures for sovereign bankruptcy thereby leaving creditors and debtors to sort themselves out, sometimes through self-help.[167] Without a bankruptcy mechanism, economic incentives come into play. These often influence the parties' respective courses of action. Naturally, a debtor would prefer a debt moratorium, a debt relief or cancellation, or even repudiation (ie as far as the so-called 'rogue debtors' are concerned) while creditors would struggle to avoid loss. However, the diversity of creditors means coordination problems are highly likely to arise in the restructuring processes. Holding out of such processes is also highly likely. In other words, the absence of a bankruptcy mechanism creates a vacuum with its attendant disorder and conflicting interests. This section will argue that the logic behind this is simply to ensure continuous creditor-diktat using the contractual philosophy. However, this, as noted earlier, is evidence of a lack of international cooperation. In this atmosphere of chaos (and under this strict notion of contractual philosophy), debtors (and perhaps their citizens) have little solace.

Therefore, sovereign debtors might be left with the following options where SDD becomes imminent: Public bail-out plus IMF-induced austerity especially in a currency union; 'mutually' acceptable restructuring with IMF-induced austerity; unilateral take-it-or-leave-it restructuring; unilateral repudiation; or a continuing debt service on creditors' terms.[168] Although mutually acceptable restructuring appears to be the responsible thing to do (ie in order to re-build confidence and quickly regain access to

[167] In 1986, the UNCTAD noted that 'the lack of a well-articulated, impartial framework for resolving international debt problems creates a considerable danger…that international debtors will suffer the worst of both possible worlds…being judged de facto bankrupt…largely without the benefits of receiving the financial relief and financial reorganization that would accompany a de jure bankruptcy'. See UNCTAD 1986:141; Wright 2012:158.
[168] UNCTAD SDWG 2015:40-48.

the debt market), the negatives of austerity on socio-economic rights, the power imbalance and questions about the fairness and legitimacy of such an option literally leave debtors in a dilemma.[169] In addition, international law remains unclear about this with much of the regimes founded on voluntary practices and non-binding standards tightly controlled by creditors. The question then, for the present purpose, is: What should a sovereign debtor do to ensure a sustained implementation of programmes designed to progressively realise socio-economic rights of its citizens especially in a contagious SDD situation? In addressing this question, the research will examine the existing regimes for 'mutual' restructuring and determine the place of socio-economic rights therein.

4.3.1 SDR Regimes

Today, SDR regimes reflect the nature of the loans and types of creditors (ie official creditors or non-official bank creditors or bondholders, as the case may be).[170] The restructuring frameworks are, thus, not uniform. Each consists of disparate, ad-hoc institutional processes designed to re-negotiate the terms of the loan in the event of imminent or actual default.[171] In addition, they are voluntary. However, it will be shown that there is a common thread running through all of these regimes which is the creditor-diktat. In other words, they are all controlled, driven and determined by creditor interests which, as argued earlier, suitably fits into the game and rational choice theoretical premises.[172] Fundamentally, all these restructuring regimes are rooted in, and reinforce, the private, contractual governance framework as the dominant paradigm for the sovereign debt regime.

4.3.1.1 Socio-Economic Rights in the Regimes for Restructuring Official Loans

The research will adopt a historical approach here to demonstrate the pattern of creditor influence over the sovereign debt regime using the private, contractual governance framework.

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[169] UNCTAD SDWG 2015:3-4.
[170] Enrique 2010:233; UNCTAD SDWG 2015:40-48.
[171] UNCTAD SDWG 2015:3-4. Ocampo & Stiglitz note that 'all these mechanisms…have the problem that they offer dissimilar treatments to different debtors and different creditors'. See Ocampo & Stiglitz 2010:vi Herman describes SDR regimes as the 'informal imperfect coordination of the debtor and its creditors, usually by the IMF under the guidance of the Group of 7 major industrialized countries'. See Herman 2010:389-424.
[172] Thompson 2002:S285.

4.3.1.1.1 *The Regime in the First Half of the 20th Century*

In the first half of the 20th century, the SDR process took the form of bilateral agreements between debtors and creditor states.[173] After the First World War, the ensuing economic depression (1929-1933) raised fundamental questions about the capacity of Germany to pay war reparation as well as the capacity of the allied powers to repay the inter-Allied war debts owed to the US.[174] For instance, Britain renegotiated its debts owed to the US as the latter accepted a repayment plan extending up to 62 years.[175] Indeed, after the Second World War, SDR agreements took into account 'the debtor government's perspective and *its ability to repay debt and still maintain economic growth*'.[176] For instance, the Anglo-American Financial Agreement of 1946 allowed Britain the 'options to postpone payments in response to given conditions'.[177] Thus, sovereign debtors enjoyed some reasonable concession during this period as restructuring agreements usually assumed the form of a treaty. This further supports the argument advanced above on the 'economics' of sovereign debt and the intendment of the ICESCR. Evidently, treaty-based (statutory) restructuring framework would align more with the character of SDD, ie a state-based inaction requiring a state-based response.

4.3.1.1.2 *The Paris Club*

The Cold War ideological contest significantly impacted on the system of sovereign lending and borrowing; it affected the official bilateral approach to SDR and led to the establishment of the Paris Club in 1956.[178] Today, the Paris Club is perhaps 'the only specialized *intergovernmental* forum for debt restructuring of countries in debt crisis'.[179] The Paris Club is a group of 19 creditor nations, mostly countries of the Organisation for Economic Cooperation and Development (OECD), formed essentially to protect their interests.[180] Housed in the French Treasury Department, the Paris Club

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[173] Raffer 2015:248-249; Eichengreen & Portes 1989:12-13.
[174] Enrique 2010:234.
[175] Enrique 2010:235.
[176] Enrique 2010:235. Italics in the original.
[177] Enrique 2010:235.
[178] Enrique 2010:235-236. See also Enrique CP 2008. 'The emerging of a multilateral forum for debt restructuring: The Paris Club' https://unctad.org/en/Docs/osgdp20087_en.pdf (accessed 16 June 2018); Enrique PC 2015. 'The Paris Club: The emerging of a multilateral forum for debt restructuring' https://unctad.org/meetings/en/Presentation/gds_sd_2015-02-03-05_CosioPascal_en.pdf> (accessed 16 June 2018); Rieffel 1985:1-38; Hudes 1985:553-571.
[179] Enrique 2010:231. Italics in the original.
[180] Rieffel 1985:1-32; Enrique 2010:231-232; UNCTAD SDWG 2015:32.

first met in 1956 to restructure Argentina's debt and, between then and 2014, it had renegotiated sovereign debts in excess of $365 billion.[181]

The SDR framework developed by the Club is entirely a matter of practice without any legal basis or structure.[182] A constitutive arrangement would, invariably, constrain its interests. Without it, creditors' interests are guaranteed more protection as 'creditors set the terms, mostly in accordance with predefined standards'.[183] Notwithstanding the absence of any constitutive basis, it has, over the years, developed some operational procedures, guidelines and principles.[184] First, in line with creditor-interests, the Paris Club conceives sovereign debt as a purely contractual, commercial undertaking, despite the fact that the history of sovereign debt and the character of the parties involved suggest a mixture of both public and private elements as discussed in Chapter two.[185] In other words, the Club's practice revolves around the undergirding philosophy implicit in the idea of contract which does not accommodate matters of public interests like socio-economic rights.[186] Thus, a sovereign debtor facing SDD and in need of restructuring debts it owed to members of the Club must accept and operate within the same pure contractual philosophy. Consequently, the Paris Club does not restructure multilateral and non-official debts as, strictly, members of the Club have no privity of contracts regarding such loans.[187]

Second, a sovereign debtor's request for restructuring will be assessed based on whether the default is imminent or not; and this is determined using the IMF's assessment of the debtor's present expenditure and incomes.[188] Third, a meeting is arranged with representatives of the club's members, the IMF (as observer), the UNCTAD (as observer) and the sovereign debtor. Upon presentation by the latter, the Club would make a proposal which may be accepted or rejected by the debtor. If rejected, another proposal would be made until a final agreement is reached.[189] In other words, creditors make the 'offer' and determine the terms for the acceptance of

[181] Schier 2014:83-84.
[182] Schier 2014:83.
[183] UNCTAD SDWG 2015:41.
[184] Paris Club *The Six Principles* http://www.clubdeparis.org/en/communications/page/the-six-principles (hereafter 'The Six Principles') (accessed 14 July 2018).
[185] The Six Principles: Principle 1.
[186] The Six Principles: Principle 1.
[187] Enrique 2010:231.
[188] Schier 2014:83-84.
[189] Enrique 2010:241-248.

such offer. This, arguably, is not in the liberal spirit of freedom of contract. The resulting agreement is, theoretically, merely political in nature, not legal, in the sense that it is not binding on the parties.[190] In functional terms, however, it is binding.

In essence, the Paris Club's cardinal operational principles are as follows: It ensures consensus in decision-making and solidarity of members in the implementation of every resulting restructuring agreement; adopts a case-by-case approach; imposes IMF-designed conditionalities on the debtor; insists on comparability of treatment (ie a debtor must seek similar treatment from other non-Paris Club creditors); and equitable burden sharing among members, ie, any resulting debt relief shall reflect each creditor's exposure to the debt under consideration.[191] However, besides the unfair treatment of some debtors (eg Chile in 1972 and Cuba in 1982), the emergence of new creditor nations in the Middle-East and the BRICS nations is challenging the current relevance of the Paris Club.[192] In fact, some of these nations have refused to join the Club despite invitations.[193]

Interestingly, both the 'new' and 'old' creditor nations (ie some Middle-Eastern countries, the BRICS and members of the Paris Club) are states parties to the ICESCR with the exception of the US which only signed but is yet to ratify the Covenant.[194] The implication is that, as state parties, they all have individual and collective obligations not to frustrate a sovereign debtor's fulfilment of its socio-economic rights responsibilities.[195] In addition, the political nature of the restructuring agreement does not, by any stretch, affect their obligations to ensure international cooperation under the ICESCR especially in supporting the development of a legal framework for a fair,

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[190] Ibid 241.
[191] ILA 2010:12; Tan 2014:252; Enrique 2010:241; Schier 2014:83-85.
[192] ILA 2010:12. The UNCTAD notes:

> [N]ew sovereign creditors with considerable weight include China, Brazil, Venezuela, and Taiwan, Province of China, along with several oil-rich states from the Middle East. The Paris Club has invited some of these new lenders to become members of the Club, but they have not joined. The Paris Club has attempted to establish its restructurings as a standard for other bilateral creditors through the "comparability of treatment" clause contained in its Agreed Minutes. The clause obliges the debtor state to seek restructurings from other creditors on terms that are comparable to the concessions of the Paris Club. However, non-members of the Paris Club are reluctant to follow the terms set by the Paris Club. Some of these creditors have so far cancelled significant amounts of debt bilaterally at their own pace.

See UNCTAD SDWG 2015:32-34.
[193] UNCTAD SDWG 2015:32.
[194] South Africa is also a 'late-comer'. It ratified the ICESCR on 18 January 2015. See ESCR-Net 2015. 'Government of South Africa ratifies ICESCR' www.escr-net.org/news (accessed 14 July 2018).
[195] Coomans 2011:1-35, 7. See discussion on this in Section 3.4 of Chapter 3.

balanced SDR.[196] Arguably, it is only through cooperation that states can recognise and deal with the exogenous factors contributing to recurring episodes of SDD and prioritise the imperative for a sustained implementation of socio-economic rights-based programmes in debtor countries facing imminent SDDs. However, the Club's short-term, continuous rescheduling, conditionalities and IMF-designed austerity measures do not align with these imperatives thereby raising doubt about the 'mutuality' and legitimacy of the whole Paris Club arrangement.

Importantly, members of the Club have, at least, negative socio-economic rights obligations (ie to respect and protect) which are not confined to their respective jurisdictions.[197] As noted in Chapter two, the ICESCR does not have a jurisdictional delimitation.[198] Indeed, the extraterritoriality principle examined in Chapter Three might be invoked to further support this proposition because of the proven impacts of SDDs and especially the austerity-bound SDR on the progressive realisation of socio-economic rights.[199] It might be countered that the Paris Club's recognition of the imperative for restructuring sovereign debtors' debts in the face of imminent default seems like a realistic balance to prevent a debtor from bankruptcy and allow it to continue with its essential services, including sustained implementation of socio-economic rights-based programmes.[200] Admittedly, since 1988, the Paris Club has relaxed its terms and has included debt reliefs to debtors in its debt restructuring.[201] However, the increasing competition being faced by members of the Club as credit-

[196] Tan 2014:255-256.
[197] Coomans 2011:5.
[198] Coomans 2011:5.
[199] Coomans 2011:7; Michalowsky 2008:35-68; Villanova 2010:487. See discussion on this in Section 3.4 of Chapter 3 of this research.
[200] Some scholars have argued that the Paris Club actually supports development. See, for instance, Cheng G et al 2018. 'Official debt restructurings and development', 2-26 https://www.dallasfed.org/~/media/documents/institute/wpapers/2018/0339.pdf (accessed 13 February 2019); Cheng G et al 2016. 'From debt collection to debt provision: 60 years of official debt restructurings through the Paris Club', 2-12 https://www.esm.europa.eu/sites/default/files/wp20.pdf (accessed 13 February 2019).
[201] At the G7 Summit in Naples (1994) members of the Paris Club admitted that they 'had previously demanded too much debt servicing by many of the poorest countries'. See Enrique 245-248; Tan 2014:256. There are five different approaches. The 'Classic terms' approach which does not recognize debt relief; the 'Houston Terms' approach which offer longer repayment period on development assistance to lower-middle income countries; the 'Naples terms' approach which allows debt cancellation of up to 50-67 percent but is only opened to IDA members; Cologne terms' which allows up to 90 percent debt cancellation for HIPC eligible countries; and the 'Evian' approach which allows debt cancellation for non-HIPC eligible countries on flexible terms. See Weiss MA 2013. 'The Paris Club and international debt relief', 1-4 https://fas.org/sgp/crs/misc/RS21482.pdf (accessed 13 February 2018).

exporters might explain this relaxation. In addition, the impacts of the conditionalities and resulting IMF-induced austerity measures on socio-economic rights do not, in functional terms, support this counter argument or the late (perhaps pressurised) acceptance of debt relief as the research will now show.[202]

4.3.1.1.3 *Multilateral Debt Reliefs: HIPC and MDR Initiatives*

Before 1996, multilateral official debts had to be serviced at all costs because the creditors were (and still are) treated as 'preferred' or 'senior creditors'.[203] Debt relief was out of the equation. Creditor nations used the contract and moral hazard arguments to insist on repayment. This, it was hoped, would avoid fiscal irresponsibility on the part of sovereign debtors.[204] However, in September 1996, the IMF and the WB approved a debt relief programme targeting the HIPCs.[205] RDBs were also part of the programme. It is, thus, a coordinated action by multilateral organisations and governments to address the excessive debt burdens of these countries.[206] Although an *ad hoc* multilateral initiative, it became a key feature of contemporary SDR which built upon the initial Paris Club debt relief initiatives.[207] It also included 6% non-official debts.[208] This, arguably, reflects the continuing collaboration between multilateral creditors and other creditors to, first, protect their collective interests and, second, respond to the unsustainable debt burdens of poor countries following a barrage of

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[202] Lumina 2014:255-254; Mills 2018:302-322; Wills & Warwick 2016:629-666; Salomon 2015:10-13; Bear 2015:1-10; Konzelman2014:701-741; Tamamović 2015:95-122; Themelidou 2018:8-15; Graham 2016:124-157; Michalowsky 2008:1; Villanova 2010:487; Swaminatham 1998-1999:171; Blyth 2013. Edwards argues that:

> [O]n some grounds, and especially in terms of the turnarounds of the current accounts, the results have been quite impressive. The costs, however, have been high. Not only did real income decline, but real wages declined in most countries, and unemployment soared. There is little doubt that this is not a sustainable adjustment path. …. A sustained increase in the indebted countries exports, which is, of course, a prerequisite for a long-term solution to the crisis, will not only require an efficient tradable sector and a "realistic" real exchange rate but, more important, that the current protectionist trend in the industrial countries and in particular in the United States be reversed. …. Asking the highly indebted developing countries to pay their debts and at the same time impeding their exports from reaching the industrialized markets is not only unfair, but also politically unwise.

See Edwards 1987:159-208, 200-202.

[203] Enrique 2010:248; UNCTAD SDWG 2015:32.

[204] Kamlani 2008:267.

[205] Enrique 2010:248.

[206] IMF 2016. *Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): Statistical update.* https://www.imf.org/external/np/pp/eng/2016/031516.pdf (accessed 20 July 2018).

[207] Tan 2014:251 fn 6.

[208] Wright 2010:295-315, 297.

criticisms of their lending policies anchored on strict interpretation of sovereign debt as a pure commercial undertaking.[209]

To qualify for a debt relief (called 'decision point') under the HIPC initiative, a country must show the following: Eligibility to borrow from the International Development Association (IDA); evidence of economic reforms under the supervision of IMF and WB; and evidence of unsustainable debt (assessed in a creditor-focused way, ie as the net present value of a country's debts to its exports and present value of debt service to exports) which cannot be addressed through Paris Club restructuring.[210] The latter tied the initiative to the Paris Club. The 'completion point' of irrevocable debt relief depends upon progress in economic reforms and the adoption of the Poverty Reduction and Strategy Papers (PRSP) which replaced the much criticised SAP.[211] Thus, the HIPC initiative was managed by the IMF and the World Bank's IDA.

In 1999, following initial success and mounting criticisms by CSOs about the inadequacy of the debt relief, the G7 pushed for an enhanced HIPC initiative (HIPC II) to cover more sovereign debtors.[212] This was done thereby expanding the debt relief net by relaxing the eligibility criteria.

In addition, in 2005 the IMF along with the IDA and the AfDB adopted the MDR Initiative to cancel 100% debt claims against countries with less than $380 per capita income or those that reached the irrevocable debt relief stage (completion point) under HIPC II.[213] The debtor must show commitment and the debt must be owed to the IMF

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[209] Tan 2014:256-258; IMF & World Bank 2010. *Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): Status of implementation.* www.worldbank.org/debt (accessed 20 July 2018).

[210] Tan 2014:128. UNCTAD notes that the IMF's Debt Sustainability Assessments (DSAs) face a number of challenges as they '(a) necessarily involve projections about expected growth and other macroeconomic figures that are difficult to predict; (b) have at times focused on new money rather than on debt restructuring; (c) have at times been based on weak empirical assumptions'. See UNCTAD SDWG 2015:26. The Initiative was ostensibly aimed at bringing eligible country's debt service to exportsratio20-25% and the ratio of the present value of debt to export to 200-250%. That is what sustainability entails according to the IMF framework. See Enrique 2010:248.

[211] WB 2004. *From adjustment lending to development policy lending: News update.* http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/EM04Updates.pdf (accessed 9 May 2019); IMF 2009. *Poverty Reduction Strategy Papers [PRSP]: A factsheet.* https://www.imf.org/external/np/exr/facts/pdf/prgf.pdf (accessed 20 July 2018). However, there is a growing consensus that the PRSP and SAP are the same in substance. See UNDP 2003. 'Evaluation of UNDP's role in the PRSP process: Main report', 6-9 http://web.undp.org/execbrd/pdf/Evaluation%20of%20UNDP's%20role%20in%20the%20PRSP%20process%20(Vol.1).pdf (accessed 20 July 2018); Lumina 2014:253 fn 10.

[212] Enrique 2010:249.

[213] According to the IMF, this was done in support of efforts to meet the MDGs' targets. See IMF 2016:1.

at the end of 2004.[214] The MDR terminated in 2015 but the balance of the fund was transferred to the Catastrophe Containment and Relief Trust designed by the IMF to 'provide exceptional assistance to its poorest members hit by major public health disasters that could spread rapidly across borders'.[215]

For socio-economic rights, the advantage of the HIPC Initiative was that it linked 'debt relief to poverty reduction in an explicit way'.[216] This, in a sense, shows some responsibility, al beit a voluntary, moral one, towards the HIPCs' populations. However, although the HIPC Initiative may have had positive impacts on the debt burdens of eligible states, there is still no conclusive evidence that it actually reduced poverty and improved citizens' welfare and access to health care, education and food.[217] In addition, its operational framework suggests that the central objective was not really to support the fulfilment of these rights. Arguably, the core objectives were to, first, keep these countries within the creditor-determined international economic system and, second, help them to achieve IMF-defined 'sustainable debt' in order to resume normal debt service.[218] This is evident in the tightly controlled structural reforms on spending as dictated by the creditors.[219] Nor did the HIPCs get any fresh-

[214] IMF 2016:1.
[215] IMF 2016:3 fn 1.
[216] Enrique 2010:249.
[217] Sharp 2014:51.
[218] Tan 2014:258.
[219] The UN Independent Expert on Foreign Debt and Human Rights notes that (footnotes omitted):

> '[T]he gains from debt relief are often diluted by other factors, including conditions attached to debt relief and the lack of competitiveness of developing countries in an unequal global trading environment. High debt repayments and the conditions attached to debt relief and new loans - which typically limit public spending (even at the expense of funding essential public services, such as education and health care), promote economic liberalization (including privatization of public enterprises, investment deregulation and the introduction of user fees for access to public services) and prioritize debt service over fulfilment of basic needs - have not only exacerbated poverty, they have also had a particularly severe impact on access to education and health care in developing countries. For example, in 2004, the IMF condition that Zambia should freeze public sector wages resulted in the Government's failure to address the massive shortage of teachers through the recruitment of 9,000 newly qualified teachers. Similarly, a 2006 study by the United Nations Development Programme (UNDP) International Poverty Centre, which examined the effect of debt relief on "fiscal space" in Zambia, found that "the net fiscal gain from debt relief had been marginal because of the external policy conditionalities linked to the relief and associated ODA". Thus, even after receiving debt cancellation, Zambia will still not be able to significantly scale-up public spending or investment owing to the continuing demands for "excessively tight fiscal and monetary policies in its IMF loan arrangements. Debt relief conditions limit investment in education and health in many low-income countries. Indeed, A recent World Bank report notes: "[M]ost policy advice given to poor countries over the last several decades - including by the World Bank - has emphasized the advantages of participating in the global economy. But global markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries. These rules are the outcome of complex negotiating

start as a result of these initiatives.[220] More importantly, the terrible financial conditions of the eligible sovereign debtors had already devalued such debts and, to avoid reporting loss in the public accounting of the creditor governments, debt relief became a viable option.[221] This, in turn, would be reported as official development assistance (ODA).[222] In other words, debt relief is the same as ODA. Thus, either the latter or the former does not, in plain reality, exist. This is because ODA is originally designed to support poor countries' development efforts but not through debt reliefs. Consequently, the creditors' foreign aid agencies now handle the bilateral 'debts restructuring' with the indebted countries.[223] Enrique quite aptly sums up this, often ignored, rationalisation of debt relief of official creditors thus:

> [A]n important reason for official creditors to want to swap out of the foreign loan repayment obligations of their poorest debtors is that by any realistic assessment, the 'value' of the debt had substantially fallen due to the deterioration of the debtor's financial situation; i.e., the actual present value of the expected flow of debt servicing was less than the face value, and reducing the stock of debt is the most realistic solution. This notwithstanding, when the debt is partially cancelled the accounting procedures in the creditor governments require that reduction in the value of the asset concerned be balanced by an offsetting item. That item is a transfer from the budget, in order to avoid recording a loss. The budget transfer, in these cases, is typically earmarked as 'official development assistance' (ODA) or is

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processes in which developing countries have less voice"…'(citing World Bank 2006. *World Development Report 2006: Equity and Development* New York).

See UNHRC 2009. *Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights (A/HRC/11/10),* paras 24-27 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/128/05/PDF/G0912805.pdf?OpenElement (accessed 2 June 2017) See also UNHRC 2010. *Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the full enjoyment of all human rights* (A/65/260), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/478/85/PDF/N1047885.pdf?OpenElement (accessed 2 June 2017).

[220] It has been observed that the Initiative did not give the countries a 'fresh start', noting thus:

> the system for restructuring the official loans of developing countries was also biased towards the creditors, as it did not as a general rule provide sufficient debt relief to countries to renew sustainable growth and avoid the need for them to go back to the negotiating table…The debt of the HIPCs has been a special case, subject to considerable and prolonged civil society pressure that succeeded in increasing the amount of relief accorded. Today the debt workout processes for these countries have essentially been merged into the foreign aid regimes of their donors…Henceforth, the financial relationships of these debtors are to be governed by donor–recipient partnerships. This notwithstanding, the International Monetary Fund (IMF) and the World Bank estimated in August 2008 that thirteen of the twenty-three HIPCs that had exited from the program still had either "moderate" or "high" risks of debt distress (IDA and IMF, 2008), and this was before the global economic downturn gathered its awful momentum.

See Herman et al 2010:489-496, 490-491.

[221] Enrique 2010:250.

[222] Enrique 2010:250.

[223] Herman et al 2010:490.

> effectively coming from the ODA budget. This is why creditor countries insist on counting debt relief as ODA. It is worthwhile to note that this mechanism absorbs ODA that could otherwise have been used for a real transfer of resources to HIPCs.[224]

Carrying out debt relief through ODA leaves much to be desired as the two are (or ought to be), theoretically at least, different.[225] It seems like a convenient way to avoid debt relief as public policy. This is because creditor nations consider private, contractual governance as the ideal framework to deal with issues arising from SDD. It is, therefore, plausible to argue that such ad hoc debt relief initiatives were not out of the creditors' sense of responsibility; they were simply business decisions that reflect creditors' predominant commercial approach to sovereign debt. This is confirmed by the UNHRC Independent Expert on foreign debt and human rights that debt reliefs 'are fraught with many problems including lengthy conditionality', exclusion of more deserving countries and assessment by IFIs themselves showing that benefitting countries were at risk of relapsing back to unsustainable debt.[226] Indeed, the ODA itself has been shown to constrain the sustained implementation of socio-economic rights in the heavily indebted states as it feeds the corrupt in most of these countries.[227]

Therefore, although SDR by way of multilateral debt relief might temporarily support the implementation of socio-economic rights, the plain reality, however, is that it has a 'creditor logic' behind it and this only fuels the power imbalance in sovereign debt

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[224] Enrique 2010:249. Enrique further notes 'it will be necessary for creditors to…provide HIPCs' exports access to domestic markets without trade barriers, and to provide incentives to the private sector for investing in HIPCs. The HIPC Initiative requires, in other words, not only a coordinated official bilateral and multilateral creditor effort vis-a-vis the external debt of the poor countries, but coordination by essentially the same players over other financial and trade policies as well'. See Enrique 2010:250-251.

[225] The GPFDHR recognises that 'financing from debt relief must neither replace official development assistance nor be considered as such'. See GPFDHR 2012:para 57

[226] UNHRC 2011:10. The UNHRC quoted a World Bank report (World Development Report 2006. *Equity and Development* (OUP 2006)) stating thus: '[M]ost policy advice given to poor countries over the last several decades - including by the World Bank - has emphasized the advantages of participating in the global economy. But global markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries. These rules are the outcome of complex negotiating processes in which developing countries have less voice'. See UNHRC 2009:24-27. In addition, a UNHRC resolution notes that the debt relief initiatives were 'not intended to offer a comprehensive solution to the long-term debt burden'. See UNHRC Resolution 20/10 on the effects of foreign debt on human rights (adopted on 18 July 2012), para 9 https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/162/01/PDF/G1216201.pdf?OpenElement (accessed 9 August 2018).

[227] Christian Aid 2019. 'The new global debt crisis', 7 https://www.christianaid.org.uk/sites/default/files/2019-05/The-new-global-debt-crisis-report-May2019_1.pdf (accessed 9 August 2019).

governance.[228] The reliefs were not really about anti-poverty commitments.[229] HIPC, MDR and ODA are high-sounding initiatives which, without a genuine legal commitment, would mean little for the sustained implementation of socio-economic rights, but would mean a lot for continuing debt service to official creditors united by a common goal. In fact, IFIs' resistance to obligations under the ICESCR reinforces this claim. Critically looked at from this angle, official SDR regimes might not be socio-economic rights-friendly in terms of objectives, implementation and impacts.[230] Arguably, the 'mutuality' and, consequently, legitimacy of this type of SDR regime are, therefore, open to criticisms.

4.3.1.2 Frameworks for Restructuring Non-official Loans

History has shown that non-official creditors are often the most fiercely opposed to a statutory framework for SDR.[231] Bringing them within the regulatory ambit of international law has been problematic. Indeed, as the research will now show, they equally oppose any socio-economic rights responsibility except as a voluntary

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[228] UNHRC notes that before the initiatives the total debts stood at US$172 billion but in 2010, it decreased marginally to US$147.9 billion but 'it was projected to rise to US$163.3 billion in 2011 and US$178 billion in 2012 largely as a consequence of new loans taken out to mitigate the impacts of the global financial crisis'. See UNHRC 2011. *Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the full enjoyment of all human rights* (A/HRC/20/23) paras 2-6, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/128/80/PDF/G1212880.pdf?OpenElement (accessed 24 April 2018).

[229] Indeed, in a September 2018 release, EURODAD found that, from IMF data, in 2016 alone global debt reached an all-time high of $164 trillion, equivalent to 225% of global GDP. The policies (eg quantitative easing) implemented by the advanced economies after the 2008 Financial Crisis forced investors to withdraw their investments from developing countries thereby compounding these countries' socio-economic situations. See EURODAD 2018. '10 Years on: Global debt at an all time high, developing countries hit hard by fall out', https://eurodad.org/ten-years-on (accessed 20 June 2018).

[230] Scholars are divided on this point. Some have shown that these initiatives may reduce 'incentive to implement economic reforms', reduce output and, consequently impact the policy space for the implementation of socio-economic rights. See Rainhart CM & Trebesch C 2015. 'Sovereign debt relief and its aftermaths', 38, 2 https://research.hks.harvard.edu/publications/workingpapers/Index.aspx (accessed 18 September 2019). Others argue that these initiatives may support socio-economic rights. See Ferry & Raffinot 2018:1-32.

[231] Their resistance could be seen in early 2000 when they rejected a proposed SDR mechanism preferring, instead, the soft law and contractual solutions. See Tan 2014:255 fn 12. In this respect, Gulati & Skeel note that 'as April 2003 deadline for IMF proposal approached, investment bankers and sovereign debt lawyers continued to lobby against the strategy. The US Treasury had indicated willingness to consider the proposal but it still preferred the use of collective action provision. Support for an SDRM [Sovereign Debt Restructuring Mechanism] appears to have grown considerably among the debtor nations that are members of the IMF, but it is impossible to alter the IMF constitution and create a sovereign bankruptcy framework without the US support'. See Skeel & Gulati 2003:3245-3247, 3245.

standard without any legal teeth because their primary (perhaps only) objective is profit maximisation.[232] The research will now examine these approaches.

4.3.1.2.1 The London Club

Like the Paris Club, the London Club has no constitutive basis as it is an informal forum for bank creditors that meets to restructure debts and protect members' common interests.[233] Its operational framework, therefore, is entirely a matter of practice.[234] It is an *ad hoc*, voluntary forum which started in 1976 in order to facilitate and coordinate restructuring of these creditors' loans with a distressed sovereign debtor on a case by case basis.[235] It operates through a bank advisory committee which consists of representatives of banks that are more exposed to a potential or actual SDD, sometimes with the support of the IMF.[236] The extent of powers exercised by bank creditors could be seen during the restructuring of the Latin American debts in the 1980s in which they secured guarantees not just for the sovereign debts they held but also the corporate debts.[237] Despite their relatively limited number, there is a growing problem of hold-outs especially instigated by smaller banks, hence, in the 2012 Greek debt restructuring, private banks were represented by the IIF.[238]

However, as shown while examining the Latin American and Tequila Crises, these creditors often pile up more debts on sovereign debtors through the 'bridge loan' rescheduling in their bid to avoid non-performing loans while complying with regulatory reporting requirements.[239] The creditors often work with the IMF to offer 'short leash' (repeated) reschedulings.[240] Nor would they readily accept any socio-economic rights obligations.[241] Indeed, the members of this Club, as NSAs, use their commercial

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[232] Tan 2014:255.
[233] Semkow 1984:869-927, 920.
[234] Hudes 1985:559.
[235] ILA 2010:13.
[236] UNCTAD SDWG 2015:33.
[237] Buckley notes 'the largest banks had engineered the socialization of irrecoverable debts owed by private sector borrowers and the IMF facilitated, and at times directed, the process'. See Buckley 2009:1193.
[238] UNCTAD SDWG 2015:33.
[239] Power 1996:2708-2712.
[240] Enrique 2010:244.
[241] In the Equator Principles on Responsible Investments, however, investment banks declare that that 'they will not provide loans to projects where the borrower will not or is unable to comply with our respective social and environmental policies and procedures that implement the Equator Principles'. See The Equator Principles Association 2006. *The Equator Principles on Responsible Investments* (revised June 2013), preamble https://equator-principles.com./wp-content/uploads/2017/03/equator_principles_III.pdf (accessed 20 July 2019). See also UNEP

orientation to resist any attempt to develop a binding legal framework that would require them to take into account their debtors' socio-economic rights obligations in their dealings.[242] The general dominant narrative is that they are not bound by the ICESCR as they are not parties to it.[243]

However, as argued earlier, this argument is no longer sustainable in the light of the extraterritoriality principle and the Ruggie framework on human rights obligations of businesses.[244] The general negative obligations (ie to respect and protect these rights) are binding on them.[245] Indeed, their home countries may be held accountable for socio-economic rights violations using the tax-connection and/or failure of proper regulatory oversight.[246] They may equally be held directly accountable especially where they are complicit in violating socio-economic rights through, for instance, bridge loans or extending irresponsible, illegitimate loans to a corrupt regime or engaging in corrupt practices to procure such loans.[247] Indeed, since international law recognises their rights as creditors, it seems implausible to pick and choose the aspect of the law that should bind them.[248]

4.3.1.2.2 Bondholders

The most difficult, costly and time-consuming restructuring involves extra-territorial bondholders who are mostly indeterminate and spread across different states.[249] Here,

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Financial Initiative 1997. *Principles of Responsible Investment,* https://www.unpri.org/pri/about-the-pri> (accessed 20 July 2019); G 20 2017. *Operational Guidelines for Sustainable Financing.* https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/world/G7-G20/G20-Documents/g20-operational-guidelines-for-sustainable-financing.pdf? blob=publicationFile&v=1 (accessed 9 July 2019).

[242] International Chamber of Commerce (ICCom) 2008. 'ICCom views on business and human rights', https://cdn.iccwbo.org/content/uploads/sites/3/2008/12/ICC-views-on-business-and-human-rights.pdf (accessed 20 July 2019).

[243] Knox JH 2011. 'The Ruggie rules: Applying human rights law to corporations', 1 http://ssrn.com/abstract=1916664 (accessed 23 January 2018).

[244] UNHRC. 2011. *Guiding Principles on Business and Human Rights*: *Implementing the UN's Protect, Respect and Remedy' Framework* (12 March 2011); UN Economic and Social Council's Sub-Commission on the Promotion and Protection of Human Rights 2003. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. New York: UN; OECD 2011. *Guidelines for Multinational Enterprises 2000* http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 20 August 2018); UN Global Compact www.unglobalcompact.org (accessed 20 August 2018); ILO 2000.*Tripartite Declaration of Principle on Multinational Enterprises and Social Policy*, para 8; Deva 2014:14.

[245] Cernic 2014:152-156.

[246] Lone 2014:235-248.

[247] UNCTAD PRSLB 2012:9 explanation 2; Byrne 2014:618-619.

[248] Bederman 2000:235-254.

[249] Wright notes: '[T]hroughout history, defaults on debt owed to private sector creditors, such as commercial banks and bondholders, have taken almost a decade, on average, to conclude. Recent

bondholder committees often arrange, coordinate and renegotiate the debt mostly using supermajority as a threshold.[250] This may take the form of rescheduling or haircut or both.[251] However, a number of problems affect the effectiveness of this form of restructuring. First, because of the unmanageable number of bondholders, there is, almost always, a collective action problem (ie lack of coordination) despite the formation of bondholder committees.[252] Even among the multitude of bondholders, there are variations as, often, there are series of bonds issued with different terms thereby raising an aggregation problem. Second, there are frequent holdouts (minority bondholders resisting any resulting debt restructuring) litigation, mostly filed in domestic courts, to reclaim the full value of their debt notwithstanding the sovereign debtor's predicament of struggling to address the ensuing sovereign debt crisis.[253] Third, and as a consequence of the potential benefits of the holdout problem, a new industry of vulture fund litigation has emerged.[254] As already mentioned, 'vultures' purchase distressed debts at a give-away price and then engage in fierce litigation to reclaim the full value of the original debts.[255] The traditional contractual philosophy drives this industry as vultures continuously harass sovereign debtors, sometimes attaching valuable assets belonging to the debtor or its state-owned companies.[256] All these may have serious consequences on the socio-economic rights of the debtor's citizens.[257]

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research has also found that private creditors lose, on average, 40 percent of the value of their claim, and debtor countries exit default as or more highly indebted than when they entered default'. See Wright 2010:295.

[250] Dey 2009:485-529; Quarles 2010:29-38.

[251] Sturzenegger & Zettelmeyer 2007:349.

[252] Quarles 2010:29-38.

[253] Pitchford & Wright 2012:812-837.

[254] Blackman & Mukhi have argued that 'modern sovereign debt litigation was born from the rise of the secondary debt market and the attendant opportunities for arbitrage, which, in turn, gave life to an industry of professional suers of foreign states. The business plan of these entities is to purchase sovereign debt on the secondary market when it is being traded at a discount from its face value … because a country is so financially distressed that its debt is near or in default. The vulture funds take advantage of the lack of bankruptcy protection for foreign states by suing the financially distressed state and urging courts to take an expansive view of the exceptions to sovereign immunity…the vulture funds' managers speculate that they will be able to reap profits either by obtaining judgments and executing against nonimmune property of the state or by extracting profitable settlements because their lawsuits may have a significant nuisance value for the sovereign defendant'. See Blackman & Mukhi 2010:47-61, 49-50.

[255] In 2008, it was estimated that 11 HIPCs were targeted by vultures following the HIPC debt relief initiative. See UNHRC 2009:para 32; UNHRC 2010:para 20-42; Jrada 2012-2013:222-233.

[256] Guzman M & Stiglitz JE 2016. 'A soft law mechanism for sovereign debt restructuring based on the UN Principles', 2-8, 3 https://library.fes.de/pdf-files/iez/12873.pdf (accessed 15 June 2018).

[257] Laryea 2010:193-200; Blackman & Mukhi 2010:49-50. However, guided by the dominant creditor narrative, Fisch & Gentile point out that there are benefits attached to the culture of vultures and hold-

Therefore, a new 'strengthened' contractual framework has been developed to, in particular, tackle the collective action and holdout problems.[258] This involves making or inserting, *ex ante*, contractual provisions in the form of Collective Action Clause (CAC) and aggregation clause for a smooth, mutually acceptable SDR by the parties. These clauses would, presumably, allow future rescheduling and haircuts on the original, repayable amounts (on principal or interests or on both) where necessary.[259] Today, these clauses are found in most debt instruments. In fact, since the Latin American Debt Crisis (resolved through the Brady Bonds), there has been a growing employment of this contractual approach and, today, it may be described as the standard practice in sovereign bonds issuance in capital markets across the world as the US Treasury Department and the European Union (EU) favour it.[260]

Expectedly, the strengthened contractual framework fits into the traditional narrative of strict 'commerciality' of sovereign debt; hence, although it might address problems

outs thus: '[H]oldout creditors, by refusing to participate in restructurings of sovereign debt, serve as a check on opportunistic defaults and onerous restructuring terms. Moreover, the prospect of holdout by minority creditors may limit collusive behavior among the majority of the creditors. Holdout creditors, particularly vulture funds, also promote the functioning of the international capital markets. For example, by reducing the likelihood of opportunistic defaults, holdout creditors increase capital flows to sovereign debtors. Holdout creditors also provide value independent of the restructuring process by increasing liquidity in the market for sovereign debt, especially distressed debt'. See Fisch & Gentile 2004:1051. See also Wozny 2017:697-747, 726-736; Waulet 2011:3-5.

[258] Under the sponsorship of the US Treasury Department, the ICMA developed the *Standard Collective Action and Pari Passu Clauses for the Terms and Conditions of Sovereign Notes*. See ICMA 2014. *Standard Collective Action and Pari Passu Clauses for the Terms and Conditions of Sovereign Notes,* https://www.icmagroup.org/resources/Sovereign-Debt-Information/Downloads/ICMA%20Standard%20Pari%20Passu%20Provision%20August%202014.pdf (accessed 2 May 2019); ICMA 2015. *Standard Collective Action and Pari Passu Clauses for the Terms and Conditions of Sovereign Notes,* https://www.icmagroup.org/resources/Sovereign-Debt-Information/Downloads/ICMA%20Standard%20CACs%20Pari%20Passu%20and%20Creditor%20Engagement%20Provisions%20-%20May%202015.pdf (accessed 2 May 2019). See also IMF 2016. *Strengthening the contractual framework to address collective action problems in sovereign debt restructuring*, https://www.imf.org/external/np/pp/eng/2014/090214.pdf (accessed 2 May 2019); IIF 2019. *Voluntary Principles on Debt Transparency* https://www.iif.com/Portals/0/Files/Principles%20for%20Debt%20Transparency.pdf (accessed 9 July 2019); IIF 2013. *Principles for Stable Capital Flows and Fair Debt Restructuring*.

[259] See Lienau 2011:142 (noting 'these clauses provide that, in the event of a default, a restructuring of payment or other terms approved by a supermajority of bondholders will be binding on all. This approach can help to address coordination problems and avoid the threat of aggressive litigation by holdouts, which can diminish funds available for other creditors and derail the restructuring process as a whole. An aggregation clause inserted across a range of bond issues takes this a step further by providing that creditors across different bond series may all be bound by a restructuring agreement').

[260] Since 2013, CAC and Aggregation clauses are now mandatory in Eurobond issue. See, for example, Treaty Establishing the European Stability Mechanism (ESM) 2012:art 12(3) (which mandates the use of CACs for all Euro area government securities issued after 1 January 2013); Skeel & Gulati 2003:3245.

of aggregation and holdouts, it does not take into account any concerns bordering on public policy or essential interests as can be seen from endless attachments of sovereign debtors' assets.[261] In other words, it does not address the vulture fund problem.[262] Indeed, as vulture funds' 'rights' are founded on contract, this framework is likely to fuel attacks on debtor's assets. Studies have found that vulture funds' activities negatively affect the sustained implementation of socio-economic rights-based programmes.[263] Thus, the framework is, arguably, unjust to the population and may further widen the global socio-economic gap.[264] Indeed, notwithstanding the benefits of the freedom of contract philosophy in a purely private arrangement, any regime that is oblivious of socio-economic rights' obligations of states and of other actors cannot be said to be a fair regime.[265] It certainly does not reflect the 'justice of sovereign debt governance'. The Ruggie framework, it would be recalled, affirms the negative obligations of businesses to respect and protect socio-economic rights.[266] In

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[261] See, for instance, International Tribunal for the Law of the Sea (ITLOS) 2012. *The 'ARA LIBERTAD' (Argentina v Ghana) Case Order* (15 December 2012) http://www.worldcourts.com/itlos/eng/decisions/2012.12.15_Argentina_v_Ghana.pdf (accessed 15 July 2019); IMF & IDA 2005. *Heavily Indebted Poor Countries (HIPC) Initiative - Status of Implementation*, 19 http://siteresources.worldbank.org/INTDEBTDEPT/ProgressReports/20659519/081905.pdf (accessed 15 July 2019). Some of the popular cases filed by vulture funds include: *FG Hemisphere v Democratic Republic of Congo* 2011 637 F 3d 373 (claimant got over $200 Million judgement); *Donegal International v Zambia* 2007 *Lloyd Report* 397 (claimant got a $15 million judgement); *Kesington International v Congo Republic* 2008 *Weekly Law Report* 1144 (claimant got $118 million judgement);*Allied Bank International v Banco Credito Agricola de Cartago* 1985 757 F2d.516; *CIBC Bank and Trust Co v Banco Central do Brasil* 1995 886 F Supp 1105; *Dart v Brazil* 1995 886F Supp 1105; *Elliott Associates L P v Republic of Panama* 1997 975 F Supp 332; NML Capital Ltd v Republic of Argentina 2013 WL 4487563 (2d Circuit); *Elliot Associates LP v Banco de la Nacion* 1998 12 F Supp 2d 328, https://law.justia.com/cases/federal/district-courts/FSupp2/12/328/2499011/ (accessed 15 July 2019).

[262] Skeel & Gulati 2003:3245; Pitchford & Wright 2012:812-837.

[263] UNHRC 2010:para 33 (where the Independent Expert notes that 'vulture funds erode the gains from debt relief for poor countries and jeopardise the fulfilment of these countries' human rights obligations). In addition, by a resolution, rejected by Czech Republic, Germany, Japan, UK and US, the UNHRC resolves thus:

> 1. Condemns the activities of vulture funds for the direct negative effect that the debt repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil their human rights obligations, particularly economic, social and cultural rights and the right to development;
> 2. Reaffirms … that the activities of vulture funds highlight some of the problems in the global financial system and are indicative of the unjust nature of the current system'.

See UNHRC Resolution 27/30 (adopted 26 September 2014) (hereafter UNHRC Resolution 27/30), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/180/99/PDF/G1418099.pdf?OpenElement (accessed 20 July 2019).

[264] Pettifor 2000:138-144.

[265] Barry & Tomitova 2006:649-694.

[266] GPBHR 2011:para 11.

addition, the obligation to refrain from complicity in violating socio-economic rights is 'character-blind', that is, it applies to all, including vultures purchasing distressed, undervalued debts.

Unfortunately, while many sovereign debtors have been pushing for a statutory SDR framework, most creditors have been resisting this move.[267] Indeed, creditor nations continuously resist global efforts towards addressing vulture fund litigation.[268] This implicitly supports the opportunistic behaviours of vulture funds and might be a solid ground to hold the home countries and creditor nations responsible for obstructing the sustained implementation of socio-economic rights-based programmes in debtor nations. In other words, home states of extra-territorial creditors might be held accountable for the direct and indirect impacts of the activities of 'their vultures on the basis of tax connection, place of registration or centre of main interests.[269] Indeed, history shows that private creditors and their home states conveniently collaborated to enforce their debts, sometimes by gun-boat diplomacy and forced receivership on the basis of the moral sanctity of contracts. A 'collaboration' to ensure adherence to the

[267] For instance, the IIF, which represents the interests of private creditors, rejects any framework that would 'severely undermine creditor property rights and market confidence'. See IIF 2014. 'Views on the way forward for strengthening the framework for debt restructuring', 4 https://www.iif.com/news/capital-markets-and-emerging-markets-policy/iif-special-committee-financialcrisis-prevention (accessed 18 July 2018).

[268] For instance, Czech Republic, Germany, Japan, UK and US voted against UNHRC Resolution 27/30 which, among others, expressed 'concern about the voluntary nature of international debt relief schemes, which has created opportunities for vulture funds to acquire defaulted sovereign debt at vastly reduced prices and then seek repayment of the full value of the debt through litigation, seizure of assets or political pressure….[and] the fact that vulture funds, through litigation and other means, oblige indebted countries to divert financial resources saved from debt cancellation and diminish the impact of, or dilute the potential gains from, debt relief for these countries, thereby undermining the capacity of Governments to guarantee the full enjoyment of human rights of the population'. See UNHRC Resolution 27/30 (adopted 26 September 2014) preamble https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/180/99/PDF/G1418099.pdf?OpenElement (accessed 13 January 2019). Similarly, the US and Japan have consistently voted against a resolution for the repatriation of illicit funds while UK, Germany and France abstained. The resolution also expressed 'serious concern … that … while official development assistance remains an important source of finance for poverty alleviation and development, the substantial amounts lost to illicit financial flows - estimated at 946.7 billion dollars in 2011 - could help the efforts of developing countries to mobilize domestic resources for poverty alleviation, development and realization of human rights, and to reduce their dependence on external financing, which can lead to the erosion of ownership of national development agendas'. See UNHRC Resolution 25/9 (adopted on 27 March 2014):preamble; UNHRC Resolution 28/5 (adopted on 10 April 2015), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/074/71/PDF/G1507471.pdf?OpenElement (accessed 20 July 2019).

[269] Byrne 2014:609-620.

universally accepted standards of law and morality (socio-economic rights) would, arguably, be more fitting in this respect.

Therefore, based on the conception of sovereign debt governance advanced in Chapter Two, it can effectively be argued that definitive bonds and other contractual documents setting out terms and conditions of sovereign loans must not ignore the fundamental obligations to protect and respect socio-economic rights.[270] Doing so would put the legality and legitimacy of such agreements into question.[271] In addition, it seems implausible (perhaps unconscionable) for one to claim rights under international law but deny obligations under the same law on the basis of commercial exigencies and positivists' fragmentation thesis. The research will now expound on this argument using principles of general international law.

4.3.2 Socio-Economic Rights in SDR: Perspectives from General International Law

Because of the predominant creditor-based narrative of sovereign debt as a purely private, commercial undertaking which, as argued above, manifests creditor-diktat, the above SDR frameworks do not specifically accommodate socio-economic rights concerns or any third-party interests (including those of debtors' citizens) except on a voluntary, temporary debt relief basis. This appears to enjoy the support of the positivists' state-centric vision of international law using the fundamental principle of *pacta sunt servanda*.[272] The voluntary nature of the above frameworks means that debtors remain completely unprotected against creditors in the event of default and, thus, their citizens' socio-economic rights are openly exposed to the danger of such lack of protection. Legal and legitimacy issues therefore come into play here.[273]

This creditor-conditioned narrative is, however, contestable in the light of the above history and extant principles of general international law dealing with necessity, 'essential interests' in economic relations and the primacy of socio-economic rights as demonstrated in the previous chapter. It will now be shown that the primacy of socio-economic rights as well as the impacts of the recurring cases of SDDs on these rights

[270] Jagers 2014:179.
[271] UNCTAD SDWG 2015:40-42; Lienau 2016(b):151-214,177-186.
[272] Lienau 2016b:177-186; Tan 2014:249-272.
[273] Sudreau & Bohoslavsky note that: '[T]he fact that sovereign debt contracts constitute the preferred means of regulating sovereign debt transactions does not take away the political component of such transactions'). See Sudreau & Bohoslavsky 2015:619.

and on global peace and security are compelling enough to question this traditional, creditor-based narrative.

4.3.2.1 Socio-Economic Rights, Pacta Sunt Servanda and SDDs

There is no doubt that a sovereign debtor is bound by its commitments to repay and service its debts to creditors in the spirit of the fundamental CIL principle of *pacta sunt servanda* (ie, fulfilling contractual undertakings in good faith) as expressed in the VCLT.[274] This principle applies with similar force in both official and non-official loans.[275] However, there are exceptions to the principle. The first is the fact that both CIL and VCLT (which is the treaty on treaties) recognise a party's right to temporarily suspend its international obligation on the basis of supervening impossibility affecting continued performance of obligations under the original agreement.[276] On the basis of the above historical account, it is unarguable that SDDs, especially the ones caused by exogenous factors and regionalised or globalised market contagion and financial crisis, tend, almost always, to render continued debt servicing simply impossible and, indeed, unconscionable. Although neither the CIL nor the VCLT regards this as a 'right' to SDR, using the broad conception of the term 'right' and the Hohfeldian formula examined in the previous chapter, it can safely be argued that this qualifies as a 'right' emanating from the peculiar nature of the sovereign debt relationship.

Second, both CIL and VCLT allow a temporary suspension of obligation on the basis of the principle of *rec sic stantibus* where circumstances radically 'transform the extent of obligations still to be performed' under an agreement.[277] Needless to argue that SDDs, especially the ones caused by exogenous factors and globalised or regionalised contagion of debt markets, can fittingly constitute such circumstances as they, the above history has confirmed, tend to radically transform the extent of the unperformed obligations. Notwithstanding the impacts of the official SDR regime on socio-economic rights, in practice, official bilateral creditors do acknowledge the impracticality of continued performance in the face of economic crises probably because most states have experienced SDD in their histories.[278] Arguably, although the Paris Club is not a recognised subject of international law (ie, having no constitutive

[274] VCLT 1969:arts 26 & 27.
[275] VCLT 1969:art 3.
[276] VCLT 1969:art 61.
[277] VCLT 1969:art 62.
[278] Koetze 2015:5-8.

basis) the consensus-based practices of members of the Club and IFIs on the impracticality of continued debt servicing may qualify as a full blown 'right' to SDR with full regalia of CIL.[279] Indeed, notwithstanding the express declaration that the decision of the Paris Club is non-binding which, presumably, seeks to eliminate the evolution of an *opinion juris* component of such CIL rule, however, the latter is not determined by written declarations alone, it is a psychological element revealing a sense of legal obligation deducible from conducts, including, but not limited to, a declaration or writing.[280] In addition, its decisions directly affect persons other than the primary parties to the debt relationship. The problem, perhaps, would be the extent of such right to SDR and the fact that it is creditor-determined. The implication, however, would be to recognise a debt moratorium for the sovereign debtor in distress.

For multilateral creditors the suspension of payment might be problematic because of their so-called 'preferred creditor' or 'senior creditor' status.[281] However, they are now generally seen as part of the CIL law-making process and their recent roles in the SDR schemes, including debt reliefs, might support the proposition for a debt moratorium.[282]

The challenge would be with respect to the non-official creditors. First, both banks and bondholders might reject any 'right' to SDR on the ground that, being NSAs, the loan agreement is not a treaty.[283] This might hold substance with respect to the initial loan agreement. However, with respect to restructuring deals (subsequent agreements or re-negotiations) which often involve cooperation among creditor nations, private creditors and IFIs, it can be argued that such agreements may qualify as 'treaties' within the contemplation of the VCLT.[284] In fact, 'creditor collaboration' to renegotiate the terms of loan agreements occurred during the Greek debt crisis.[285]

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[279] Goldman 2014:96; Paliouras 2017:115–136.
[280] *North Sea Continental Shelf Case* 1969 ICJ Report 74-75. See also Verdier & Voeten 2014:389-434, 390-391 (noting that CIL only requires 'shared understanding'); Ferriera et al 2013:182-201, 190-191 (noting that *opinion juri* can be deduced from the same act constituting state practice).
[281] Raffer describes this as an 'illegal preference' which is the same as 'vulture behavior'. See Raffer 2015:8-9. Guzman & Stiglitz note that 'it could be justifiable to give seniority status to creditors that lend into arrears, helping the distressed debtor to continue the provision of essential services or to run countercyclical macroeconomic policies at the time they are most needed'. See Guzman & Stiglitz 2016:6; Steinkamp & Westerman 2014:495-552. The research will return to this in the next chapter dealing with sovereign debt claims.
[282] UN ILC Draft on CIL 2015:art 4(2).
[283] Silard 1989:968 fn 20.
[284] VCLT 1969:art 3.
[285] Kostaki I 2018. 'Greece's creditors reach deal on debt relief measures', https://www.neweurope.eu/article/greeces-creditors-reach-deal-debt-relief-measures/ (accessed 20 July 2019).

Second, because the loan agreement is presented as a contract between private entities in the spirit of the dominant creditor narrative, bank creditors may be justified to offer restructuring by another agreement which, in most cases, would extend bridge loans to debtors in order to enable them to report such debts as performing loans thereby pilling up more debt burden on the debtor. The hold-out bondholders and vultures would also be justified in pursuing litigation as a settlement strategy. However, these are creditors' options derived through analogy with principles obtained or applicable in many domestic insolvency systems. Therefore, using the same analogy, the debtor in these systems is afforded some form of protection especially by way of debt moratorium. This does not fit the creditor-diktat narrative, hence, the voluntariness of the existing regimes. In addition, as argued earlier, all non-official creditors have socio-economic rights obligations and their respective home countries equally have extra-territorial obligations under the ICESCR.[286] Therefore, it means any behaviour which, directly or indirectly, dilutes or dis-effectuates these obligations, would concurrently undermine the rights of debtor's citizens as provided under the ICESCR.

Third, and more importantly, the VCLT, UN Charter, ICESCR, UDHR, and other relevant treaties and several UN Declarations recognise that international actors (including non-official creditors pursuant to article 3 of the VCLT), whether in economic relations or not, must in all circumstances abide by, and always consider, the principle of international law on the 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[287] Thus, it is submitted that, putting a state in an 'either or situation', ie where it must decide between continuing debt service (which, by necessary implication, would mean cutting costs on welfare programmes through austerity) and continued implementation of socio-economic rights, would amount to a total disregard for this fundamental obligation thereby rendering any resulting SDR illegitimate (if not illegal).[288] Indeed, it can be argued that socio-economic rights have assumed the status of *jus cogens* and *erga omnes* obligations because of their overwhelming acceptability across the world.[289] Therefore, excluding their application

[286] GPBHR:para 11; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1998:para 18; Jagers 2014:188-195; Cernic 2014:142-156.
[287] VCLT 1969:preamble.
[288] Guzman & Stiglitz 2016:7 (noting 'any debt restructuring that resulted in the country violating its constitution or the UN Declaration of Human Rights would also lack legitimacy').
[289] Jagers 2014:188-195.

on the basis of commercial exigencies would do violence to the nature of these obligations.

4.3.2.1 Socio-Economic Rights, Necessity and SDDs

Another possible angle to look at the suspension of debt servicing and, consequently, to stay creditor actions (ie especially hold-out and vulture funds' litigations) under general international law is by invoking the principle of necessity using socio-economic rights as a debtor's 'essential interests'.[290] The recent codification of the necessity defence in the ILC Draft on State Responsibility and its endorsement by the ICJ give credence to this position.[291] Under this Draft, a state may plead necessity where it is facing a grave and imminent peril; it may avoid or suspend its international financial obligations in order to protect an essential interest which is facing a grave, imminent danger beyond its control and there is no other way to avert such danger beside such suspension.[292] Arguably, in the face of an imminent SDD, a sustained implementation of socio-economic rights-based programmes neatly fits into these criteria. Raffer has argued, for instance, that 'human rights and human dignity enjoy unconditional preference over *pacta sunt servanda* [hence] no one must be forced to fulfill contracts

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[290] The 2001 ILC Draft provides thus:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness, if:
> (a) The international obligation in question excludes the possibility of invoking necessity; or
> (b) The State has contributed to the situation of necessity.

See ILC Draft Articles on the International Responsibility of States 2001:art 25.

[291] Although not a treaty, ILC's drafts are accepted as authoritative statements of law. See *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ Reports 7:para 51 (holding that 'the court considers…that the state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation').

[292] In the 1980 draft, the Special Rapporteur set out the CIL conditions thus:

> [T]he threat to such an essential interest of the State must be extremely grave, representing a present danger to the threatened interest…and its occurrence must be entirely beyond the control of the State whose interest is threatened … The adoption by a State of conduct not in conformity with an international obligation…must truly be the only means available to it for averting the extremely grave and imminent peril which it fears; in other words, it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations. In addition, the conduct in question must be clearly indispensable in its totality, and not only in part, in order to preserve the essential interest which is threatened.

See ILC 1980. 'Eighth report on State Responsibility'. *Yearbook of the International Law Commission* ii (1):paras 8-14.

if that causes inhuman distress, endangers life or health or violates dignity'.[293] In other words, there is a financial necessity defence rooted in general CIL which might be invoked to ward off hold-out and vulture fund problems by showing the implications of continuing debt servicing on the realisation of these rights and peaceful co-existence of the state.[294] The debtor cannot solely be blamed for contagion following a globalised or regionalised financial crisis and other exogenous factors.

Thus, international law already recognises a suspension of debt obligation where payment would jeopardise vital, essential state services.[295] Although this, admittedly, may not be free from criticisms, it can hardly be contested that socio-economic rights are vital, essential services which require sustained funding by the state for any meaningful realisation. It is not a matter of 'either/or'.[296] Indeed, the measures adopted by Iceland (ie continuing the implementation of welfare programmes) during its debt crisis indicate the practicability of this approach.[297] In addition, it can hardly be contested that holdouts and vultures constitute existential threats to sovereign debtors.[298]

4.3.2.1 Socio-Economic Rights, Global Peace and SDDs

Flowing from the last point, a final argument to support the suspension of a sovereign debtor's debt service in recognition of the cost of SDDs on the realisation of socio-economic rights is from the perspective of the overarching rule of maintaining global peace and security under the UN Charter.[299] As the above history showed, SDDs are not just threats to the realisation of socio-economic rights as essential interests of the state, but might qualify as clear threats to global peace as evident in the Second World War and previous circles of destructions, deaths and debt defaults.[300] In the words of Goldman, peace in a positive sense includes 'enjoyment of basic socio-economic rights'.[301] Admittedly, the politics in the UN Security Council (UNSC) might become an obstacle in this regard especially as creditor nations who populate such council

[293] Raffer 2014:108.
[294] Sykes 2015:296-323; Alvarez-Jimenez 2015:175-180; Van Aaken 2015:181-186.
[295] *Société Commercial de Belgique* 1939 PCIJ Series 160. International trade law recognises a similar principle also. See GATT Articles XXI, XX and XIX.
[296] Reinisch & Binder 2014:115-128.
[297] Benediktsdotirr et al 2017:191-308; Raffer 2016:243–262.
[298] See UNHRC Resolution 27/30:preamble.
[299] UN Charter 1945:art 39.
[300] Goldmann 2012:153-175.
[301] Goldmann 2012:154.

continuously resist a fair statutory SDR framework.[302] Nonetheless, a sustained implementation of socio-economic rights obligations by state parties to the ICESCR would, unarguably, be a sure recipe for global peace, further deepening and sustaining international peace and security.[303] The powers of UNSC permanent members as bilateral creditors and their direct influence over the governance policies of both IFIs and debtor nations might support this proposition given the impacts of poverty on global security.[304] The feasibility of this proposition is, however, the problem. Indeed, it might not be an exaggeration to call the UNSC an 'all-creditors-club'.

Although the above argument supports the recognition (or perhaps existence) of a 'right' to SDR based on the primacy of socio-economic rights which would entail a suspension of debt service obligations under general international law, it should be admitted that the argument might also reinforce the creditor-diktat imbedded in the existing SDR regimes. In other words, in seeking to situate socio-economic rights of debtors' citizens within the apparently flawed and disorganised creditor-biased regime, it might ostensibly give a nodding legitimacy to the said regimes. However, this would be a mistake. It can be argued that the existing SDR regime does not qualify as a system, indeed it is often described as a 'non-system' which suggests that it operates *dehors* (ie outside) public international law while the above proposition is situated within such law.

In summary, it can hardly be contested that the argument has exposed the deep-seated legitimacy issues surrounding the existing SDR regime fuelled by creditor-diktat, while showing that using public international law, a counter-narrative can be produced to challenge the dominant, creditor-biased narrative.[305] In addition, it would enable a suspension of debt service only for a sustained implementation of socio-economic rights in the spirit of the public-private mix of sovereign debt governance as

[302] For instance, UNHRC 2014, Resolution 27/30 (26 September 2014).
[303] Loubert 2012:442-455.
[304] Goldmann 2012:168-175.
[305] Sudreau & Bohoslavsk argue that 'a basic - but important - objective is to acknowledge an outcome orientation governing sovereign debt contracting, which requires that sovereign actions (such as borrowing and lending) be in citizens' interest. This idea is based on a notion of sovereignty intrinsically linked to human rights and the *erga omnes* (rights or obligations owed towards all) effect of human rights obligations so that the impact of sovereign debt over states' capacities to promote and protect human rights is not something (legally) unfamiliar to lenders'. See Sudreau & Bohoslavsk 2015:624.

conceptualised earlier.[306] Indeed, it may qualify as a general principle of law because most domestic insolvency systems recognise debtor protection during bankruptcy.[307]

Not recognising the 'right' to SDR within the creditor-biased regimes would amount to disregarding the primacy of socio-economic rights; and, with recurring SDDs across the world, it would be a triple loss (ie, for the world, debtor and its citizens) but less (or no loss) for the creditors.[308] The 'right' to SDR should, therefore, be seen as a component of a sustained implementation of socio-economic rights' obligations within the sovereign debt governance regime. This is because, in the absence of a fair statutory framework for SDR, recurring SDD would make fulfilment of the ICESCR's obligations unsustainable, subjecting the rights to the vagaries of creditors and poorly regulated markets. Finally, it is worth noting that the argument does not, in any way, advocate for a repudiation of debt commitments; only a 'legal' suspension to enable the debtors 'cool off' from the debt crisis (debtor protection) and ensure priority for the implementation of socio-economic rights as essential interests of the state.[309]

4.4 SOCIO-ECONOMIC RIGHTS IN SDR: THE ROLES OF THE UN AND ITS AGENCIES

In the light of the history of recurring SDDs and the flawed, disorganised SDR regimes highlighted above, it would be appropriate to examine the efforts of the UN and its agencies on these issues vis-a-vis socio-economic rights. Interestingly, since the Latin American debt crisis, the UN and its agencies have become key players in the quest to develop a rights-based SDR regime. Regrettably, however, despite their laudable efforts, a fair statutory SDR regime devoid of creditor-diktat is yet to emerge. The research will now examine some of the major instruments and measures adopted so far.

[306] *Gabcikovo-Nagymaros*case:para 101 (holding that 'as soon as the state of necessity ceases, the duty to comply with treaty obligations revives').
[307] Raffer 2015:3-4.
[308] Creditors of course usually record loss following SDR but their gains before SDD often outweigh their subsequent loss while citizens' loss might be 'life-changing' or even 'life-ending' as the case may. See Sturzenegger & Zettelmeyer 2007:349.
[309] Paliouras 2017:115-136.

4.4.1. UNGA, 'Right' to SDR and Socio-Economic Rights

The UNGA has adopted measures, mostly in the form of declarations and resolutions, having direct bearing on or connections to socio-economic rights and SDR.[310] Indeed, it advances the debate by recognising the 'right' to SDR as argued above but through its resolutions and guiding principles only.[311]

4.4.1.1 Socio-Economic Rights in UNGA's BPSDRP 2015

The primacy of human rights, the numeric strength of sovereign debtors at the UNGA and the consistent pressure from CSOs helped to firmly place issues of public policy which, somehow, moderates the continuous creditor-diktat thereby pushing for reforms including debt relief initiatives.[312] In fact, since the early 1970s, the UNGA has become a platform for interrogating the predominant creditor-infused narrative of sovereign debt.[313] There is a general consensus among its members that the 'current non-system for sovereign debt restructuring remains fraught with perverse incentives, which in turn lead to destructive and inequitable outcomes'.[314] Consequently, the UNGA, by Resolution 69/319, adopted the BPSDRP in September 2015.[315] This was not, however, without the traditional resistance from the most influential creditor nations whose jurisdictions, literally, constitute the hub for non-official creditors and their activities (including litigation by holdouts and vulture funds), ie, US, Britain, Germany, Canada and Japan.[316]

The BPSDRP essentially consists of nine principles mostly reflected in or founded on CIL, treaties and general principles found in many domestic insolvency laws. They are:

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[310] See, for instance, fn 1 above. See also UNGA 1986. *Declaration on Right to Development* (adopted on 4 December 1986).
[311] Paliouras 2017:115-136; Lumina 2014:251-268.
[312] See fn 3 above.
[313] UNGA 1974(a). *Declaration on the Establishment of a New International Economic Order* (adopted on 1 May 1974).
[314] Guzman & Stiglitz 2016:1; Bagchi 2015:1-3.
[315] UNGA Resolution 69/319 (10 September 2015).
[316] Out of the 176 Member States that voted on UNGA Resolution 68/304 of September 2014, 124 voted in favor, 41 abstained, and 11 voted against. The group of countries that abstained or voted against the resolution were mostly creditor nations. A year later, out of the 183 countries that voted on UNGA Resolution 69/319 adopting the BPSDRP, 136 countries voted in favor, 41 abstained, and six countries voted against. The latter group included the US and the UK, the two major jurisdictions for sovereign debt issuances by emerging economies. Others were: Canada, Germany, Israel, and Japan. The UNGA BPSDRP 2015 followed the outcome of the work of the Ad Hoc Committee established under resolution 69/247. See UNGA Resolution 69/319 on BPSDRP (10 September 2015). For the pattern of resistance to SDR Framework, see the Commission on Human Rights Resolution 2004/18 (16 April 2004); UNHRC Resolution 12/119 (12 October 2009).

A ‘right’ to SDR (anchored on the overarching principle of sovereignty), good faith, transparency, impartiality, equitable treatment of creditors, sovereign immunity, legitimacy, sustainability, and majority restructuring.[317] Using the fundamental principle of sovereignty which, as illustrated in Chapter two, undergirds and permeates nearly all aspects of international law, the BPSDR recognises a debtor’s ‘right’ to SDR.[318] In other words, the decision to restructure belongs exclusively to the sovereign debtor but, once such decision has been made, there must be a transparent, impartial and good faith negotiation (ie, excluding self-help) between the debtor and its creditors to ensure a return to debt sustainability.[319] This is in the spirit of the principle of sovereignty.[320] Equitable treatment of creditors and majority treatment are imbedded into this ‘right’ while sovereign immunity limits the effects of foreign laws on sovereign debtors.[321] The BPSDR, therefore, requires that an SDR process be based on the rule of law and should ‘promote sustained and inclusive economic growth…minimizing economic and social costs, guaranteeing the stability of the international financial system and respecting human rights’.[322] It also outlaws hold-outs.[323]

However, although it aims at minimising the impacts of activities of hold-outs and vultures, the BPSDRP ostensibly endorses the contractual philosophy, perhaps in the spirit of ensuring a fair balance between debtors and creditors. The implication is that jurisdictions whose jurisprudence is built around this philosophy of sanctity of contract can hardly relegate the latter to prioritise any socio-economic rights concerns of debtor countries. For instance, Guzman and Stiglitz, while reviewing the potential impacts of a popular US court’s decision against Argentina brought by hold-outs, argued that had majority bondholders followed the examples of the hold-outs that sued, then ‘Argentina would have been in limbo, neither being able to repay nor to restructure its debts without inflicting unconscionable pain on its citizens - and even with such pain, repaying on its debt would not have been possible’.[324] In addition, as products of soft law instruments, the BPSDRPs’ effectiveness would depend on uniform domestication

[317] UNGA BPSDRP 2015:principles1-9.
[318] UNGA BPSDRP 2015:principles 1-4.
[319] UNGA BPSDRP 2015:principles 1-4.
[320] Paliouras 2017:121.
[321] UNGA BPSDRP 2015:principles 5-6.
[322] UNGA BPSDRP 2015:principles 7-8.
[323] UNGA BPSDRP 2015:principle 9.
[324] Guzman & Stiglitz 2016:5.

by countries which, to be realistic, is highly unlikely. Indeed, even the few countries (UK, Belgium and the UK's self-governing dependencies of Isle of Man and Jersey) that limit the recoverable amount by vultures through legislation have constitutional litigations to contend with.[325]

4.4.1.1 Socio-Economic Rights and Sustainable Debt in the SDGs Agenda 2030

Apart from the focus on food, water, free basic education and health, the defunct MDGs set targets for achieving sustainable debt for the poor countries under the goal on global partnership for development.[326] This was to be done through official debt reliefs, specifically the bilateral ODAs as well as the HIPC and MDR Initiatives.[327] However, apart from the inadequacies of these initiatives as argued above, the notion of 'debt sustainability' under the MDGs was as conceived and operationalised by the IMF and the WB with almost an exclusive focus on creditor claims, ie, debtor's capacity to continue debt service and its economic prospects.[328] It was, arguably, a narrow notion built on creditor-diktat. Therefore, without, among others, cooperation for a statutory SDR framework, MDG8 (global partnership for development) became a

[325] In 2016, a popular vulture fund (NML Capital) sued the Belgian Government over its legislation limiting vulture fund activities (ie limiting recoverable sums to the amount used in purchasing the junk bonds only). On 31 May 2018, the Belgium Constitutional Court dismissed the vulture's action. See EURODAD 2018. 'Debt justice prevailed at the Belgian Constitutional Court: Vulture funds law survives challenge by NML Capital' http://www.cadtm.org/Debt-justice-prevails-at-the-Belgian-Constitutional-Court-Vulture-funds-law (accessed 23 August 2018). See also UK's Debt Relief (Developing Countries) Act 2010. As noted earlier, notwithstanding the general condemnation, some scholars consider the positive roles of vultures as 'market-enforcers, liquidity-providers, and information-providers'. This is in line with the creditor-diktat narrative. Wozny, for instance, argues that 'vulture funds do make markets more efficient. If the advantages of vulture funds are significant enough, national legislative action that broadly bans vulture funds may be costly. … [V]ulture funds create numerous *ex ante* benefits. First, they provide incentives for corporations and sovereign states to promote more efficient capital structures. Second, they serve as a moral hazard counterbalance. Third, they provide liquidity on the secondary distressed debt market. And fourth, they serve as information-providers. These functions are highly valuable and result in a more efficient market'. See Wozny 2017:726-736.

[326] Raffer 2014:101-113.

[327] Indeed, the IMF declared that the MDR Initiative was in fulfillment of commitment towards realising the MDGs. See IMF 2016:1. The indicators for Targets 8B (addressing the special needs of the less developing countries) and 8D (dealing with developing countries' debt problem to enable them achieve debt sustainability) were ODA and debt sustainability respectively. See UN 2000. *Millennium Declaration*.

[328] Guzman & Stiglitz 2016:7 (noting 'standard approaches, such as that followed by the IMF, have generally ignored this broader perspective, as attention has been focused mostly on formal financial claimants'). See also Raffer 2014:101; Sudreu & Boholavsky 2015:619; Giffith J & Brunswikc G 2018. 'IMF conditionality: Still undermining healthcare and social protection? <https://eurodad.org/IMF-conditionality-undermining-healthcare> (accessed 20 August 2019).

distant dream.[329] Ironically, in 2011 the IMF and WB observed that only few poor countries were on track to meet this Goal.[330]

This means that ensuring sustainable debt through global partnership for development became one of the unfinished or unfulfilled agendas of the MDGs which were rolled over to the new 2030 Agenda for Sustainable Development in 2015.[331] This Agenda recognises the dilemma facing sovereign debtors and the broader implications of unsustainable debt to their drive towards sustainable development.[332] Like their predecessors, one of the central objectives of the SDGs is to comprehensively support and guide efforts towards a sustained implementation of socio-economic rights of debtor countries.[333] Invariably, therefore, they replicate the targets of specific socio-economic rights covered under the MDGs.[334] Unlike the MDGs, however, one of the targets of the SDGs is to 'assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and address the external debt of highly indebted poor countries to reduce debt distress'.[335]

However, the SDGs adopted the same creditor-focused conception of 'debt sustainability' as the MDGs.[336] In addition, like the MDGs, the SDGs are mere

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[329] Although there were improvements brought by debt relief initiatives as ODA increased from 2000 to 2015, it does not change the creditor-logic imbedded in the various ODA programmes which substitute debt relief with ODA. Indeed, studies have shown that general progress in the aspects of the MDGs were not solely attributable to the MDGs but largely to the remarkable growth witnessed in China and India. See De Man A 2017. *Right-based Approaches to Development and the Post-2015 Development Goals: A Critical Assessment*. Unpublished LLD thesis, University of the Free State, South Africa, 71-94.

[330] IMF & IDA 2011. *Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): Status of implementation and proposals for the future of the HIPC initiative,* para 5.

[331] This is now Goal 17 and is broadly called 'partnership to achieve all the goals'. According to the UN the SDGs are interconnected and are 'the blueprint to achieve a better and more sustainable future for all'. These interconnected goals are: no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible production and consumption; climate action; life below water; life on land; peace, justice and strong institutions; and partnership for the goals. See UN 2015. 'Sustainable Development Knowledge Platform' https://sustainabledevelopment.un.org/ (accessed 20 August 2018).

[332] Sustainable development means 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. See World Commission on Environment and Development (WCED)1987. *Our Common Future*. Report of the WCED. Chapter 2:para1.

[333] UNGA SDG 2015:preamble.

[334] SDGs 1-8 seek to fulfill the MDG gaps. See De man 2017:171.

[335] SDG 17, Target 17.4.

[336] Sudreu & Boholavsky 2015:619; Guzman & Stiglitz 2016:7.

objectives devoid of legal teeth, reflecting the creditor nations' continuous preference for non-binding commitments. Moreover, the SDGs' notion of international cooperation, under a global partnership for development, does not align with the one envisaged by the ICESCR. Hence, with the polarisation in the UNGA on sovereign debt issues, it seems highly unlikely that the non-binding commitments under the SDGs can make any difference. This might dampen the renewed hope that greeted the SDGs, but in functional terms and within the context of sovereign debt regime, it seems like doing the same thing all over again. Thus, the SDGs might suffer the same fate of the MDGs in the area of achieving sustainable debt by poor countries.[337]

4.4.2 Socio-Economic Rights in the UNHRC's GPFDHR

Arising from the extensive studies and reports by UNHRC's special rapporteurs and independent experts on the impacts of SAPs, illicit financial flows and sovereign debts on the realisation of human rights, the UNHRC adopted the GPFDHR.[338] This is, perhaps, the most far reaching instrument so far with specific, extensive provisions on SDR and socio-economic rights.[339] It seeks to complement the UN's GPBHR (ie, the Ruggie framework) and UNCTAD's PRSLB and to assist parties to sovereign debt contracts in balancing their contractual obligations with their obligations to respect, protect and fulfil, among others, socio-economic rights.[340]

In particular it reaffirms the individual and collective responsibilities of all debtors and creditors to 'respect, protect and fulfil human rights' so that their lending and borrowing activities especially the negotiation and implementation of loan agreements, debt servicing, restructuring and provision of debt relief 'do not derogate from these obligations'.[341] Accordingly, non-official creditors have 'a duty to refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of human rights'.[342] Interestingly, its approach to debt sustainability differs markedly from the creditor-based notion of

[337] De Man 2017:105.
[338] The GPFDHR was adopted following years of extensive studies by the UNHCR on the effects of sovereign debt on human rights. See Lumina 2014:260-268.
[339] UNHRC 2011. *Report of the Independent Expert on Foreign Debt and Human Rights: Guiding Principles on Foreign Debt and Human Rights* para 17 https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-23_en.pdf (accessed 20 July 2019).
[340] GPFDHR 2012:paras 1 & 2. See also UN Guiding Principles on Business and Human Rights.
[341] GPFDHR 2012:para 6.
[342] GPFDHR 2012:para9.

capacity to resume debt service and projection for economic growth.[343] It imposes obligations on creditors to carry out human rights impact assessments (HRIA).[344] Both debtors and creditors have a shared responsibility to prevent and resolve unsustainable debt and their mutual accountability is a precondition to ensuring an equitable global financial system.[345]

On SDR, the GPFDHR recognises that contractual terms must be honoured but circumstances making the debt unpayable may warrant changes to original obligations.[346] Hence, restructuring must not compromise a debtor's obligation to fulfil its socio-economic rights obligations.[347] Debt relief must also not compromise fulfilment of socio-economic rights obligations and should be distinguished from ODA.[348] In addition, change of circumstances might warrant a debt moratorium covering 'principal, interests, commissions and penalties'.[349] Loan contracts should restrict sale of debts on secondary markets without prior consent of the debtor, and creditors should avoid selling to notorious hold-outs and vultures.[350] Loans should not be conditioned on privatisation, investment, deregulation, trade and financial sector liberalisation thereby rejecting the IMF and WB SAPs, PRSPs and conditionalities.[351] BITs must also align with socio-economic rights obligations of debtors.[352] It also affirms the sovereignty of debtors in the following words:

> Creditor States and the international financial institutions must not take advantage of an economic, financial or external debt-related crisis as an opportunity to push for structural reforms in debtor States, however useful such reforms might be perceived to be in the long term. Such reforms should be initiated, formulated and implemented by the debtor States themselves.[353]

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[343] GPFDHR 2012:paras 65-66.
[344] GPFDHR 2012:paras 10-14 & 40. It defines HRIA as 'a systematic process, undertaken by an independent body with the full and informed participation of affected communities, based on the normative framework for international human rights law, which aims to measure the impact of an activity or project on the realization of human rights'. In addition UNHRC has developed Guidelines on HRIA. See UNHRC 2019. *Guiding Principles on Human Rights Impact Assessments of Economic Reforms:*paras 2-15, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/443/52/PDF/G1844352.pdf?OpenElement (accessed 28 August 2019).
[345] UNHRC GPFDHR 2012:paras 23-24.
[346] GPFDHR 2012:para 52.
[347] GPFDHR 2012:para 53.
[348] GPFDHR 2012:paras 55-57.
[349] GPFDHR 2012:para 58.
[350] GPFDHR 2012:paras 61-62.
[351] GPFDHR 2012:para 77.
[352] GPFDHR 2012:para 77.
[353] GPFDHR 2012:para 80.

Finally, it recommends the establishment of an independent, impartial SDR mechanism to fairly resolve sovereign debt disputes and determine the illegitimacy or odiousness of debts based on creditor's prior knowledge of lack of citizens' consent and absence of benefit to them.[354]

From the above, there is no doubt that the GPFDHR explicitly prioritises socio-economic rights in SDR and proposes a fairly balanced restructuring regime. However, despite its prioritisation of socio-economic rights, it has noticeable shortcomings. First, it ostensibly ignores the foundational document which provided for these rights in a concrete legal term, ie, the ICESCR. Beside a fleeting reference to the UN Charter and article 28 of the UDHR, it does not mention the ICESCR at all. This omission might reinforce the creditor-diktat narrative as the GPBHR's authority and legitimacy is now plainly reduced to a mere voluntary code, despite the fact that most of the principles were derived from general principles of law. Second, despite sovereign debt's historical link with the unfairness of the trading system, the GPFDHR does not clearly address this connection.[355] Third, it sacrifices precision in its attempt to be comprehensive. For instance, it treats all creditors (official and non-official) the same despite their distinct peculiarities. In addition, there are no well-defined criteria to measure or define what amounts to responsible lending or borrowing. It fails to acknowledge that blacklisting notorious vultures would do little to prevent the emergence of new ones given the successes recorded by the notorious ones. Fourth, although it recognises the growing trend of redefining investment to include debt instruments, it fails, even remotely, to acknowledge the legitimacy crises surrounding investment treaty arbitration and its tendency to frustrate any mutually agreed SDR. This, therefore, seems to be an endorsement of the investment arbitration regime despite rejection of same by many countries.[356]

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[354] GPFDHR 2012:paras 84-86.

[355] The only relevant reference is para 71 which requires that debtors and creditors should consider contingent liabilities from export credits in making decision. This is curious because the Independent Expert had submitted a detailed report on the nexus between sovereign debt and trade. See UNHCR 2010:paras1-14; UNHCR 2011:paras14-20.

[356] For instance, Venezuela and Bolivia have withdrawn from the ICSID Convention on allegations of investor-bias and there are moves by some countries to do the same. See Trackman 2012:603-665; Vincentelli 2010:409-455, 410. There are over 150 signatories to the Convention. For the contracting parties, see ICSID. 'List of Contracting States and Other Signatories of the Convention', https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home (accessed 2 September 2017).

4.4.5 Socio-Economic Rights in UNCTAD's Evolving SDR Frameworks

Apart from its observatory involvement in the Paris Club SDR regime, UNCTAD has been at the forefront of generating consensus-based principles on SDR since the Latin American and the Tequila Crises. It has, so far, developed three major SDR instruments in this regard.

4.4.1.1 SDR Code of Conduct 1980

Following the sustained pressure for the establishment of a New International Economic Order (NIEO) which started at the UN in the 1970s, the UNCTAD spearheaded the drafting and adoption of a 'code of conduct' setting out guidelines for SDR in 1980.[357] The Code contains guidelines which emerged through consensus of both creditor and debtor nations.[358] It defined the circumstances that may warrant approaching the Paris Club for restructuring. One of these is imminent or actual SDD.[359] Although the code recognised this imperative, it, however, only dealt with bilateral official loans disregarding extra-territorial creditors. It was also a mere voluntary code. Indeed, it only gave legitimacy to the creditor-diktat regime of the Paris Club which, until recently as shown above, does not recognise any concerns for socio-economic rights of debtors' citizens. Therefore, it was not a surprise that subsequent developments, including the explosive growth of non-official creditors after the Tequila crisis and the recent emergence of new creditor nations, pushed the Code into total irrelevance.

4.4.1.1 Socio-Economic Rights and SDR under the PRSLB 2012

In the wake of the Eurozone debt crisis, the UNCTAD came up with a much more robust set of SDR principles in the form of PRSLB.[360] The PRSLB is perhaps the most prominent intervention by UNCTAD so far, as it generates immense academic interests because of its novel provisions which generally reflect public and private interests on the matter.[361] It broadly consists of 15 principles couched in the forms of

[357] Enrique 2010:241.
[358] Enrique 2010:241.
[359] Enrique 2010:241.
[360] UNCTAD PRSLB 2012.
[361] Blankenburg & Wrigh 2016:1-8; Sudreau & Bohoslavsky 2015:613-634; Li & Panizza 2014:15-38; Bogdandy & Goldman 2013:39-72; Bohoslavsky & Esposito 2013:73-86; Waibel 2013:87-112; Bredimas et al 2013:135; Raffer 2013:163-188; Justo 2013:189-212; Han 2013:261; Tirado 2013:295; Weidemaier 2013:323; Gelpern 2013:347; Howse 2013:385; Buchheit & Gulati 2010:63-92; Bohoslavsky et al 2014:55-72, 63.

duties of both creditors and debtors with explanatory notes on, and implications of, each principle to guide practitioners. For instance, the creditor has the following responsibilities: to recognise that 'government officials involved in sovereign lending and borrowing transactions are responsible for protecting public interest (to the State and its citizens for which they are acting as agents)' (principle 1); enable debtors to make an informed decision (principle 2); determine due authorisation of the loan under debtor's laws (principle 3); make a realistic assessment of debtor's repayment capacity (principle 4); cooperate in enforcing UN sanctions against any debtor (principle 6); and behave in good faith to ensure efficient SDR so that hold-outs and vultures do not become 'abusive creditors'(principle 7).[362]

On the other hand, the government of a sovereign debtor has the following responsibilities: To protect the interests of their citizens in loan contracts (principle 8); to establish and follow a transparent legal framework for borrowing, as tax-payers would ultimately be responsible for repayment of such debt (principle 10); to make full and universal disclosure (including to its citizens) of the terms and conditions of any loan (principle 11); to ensure adequate audit, monitoring, management and sustainability of debts (principle 13); and to avoid overborrowing by weighing the costs and benefits of any loan to ensure that it has 'a prospective social return at least equal to the likely interest rate'.[363] In the face of debt crisis or where SDD becomes unavoidable, the debtor's 'first responsibility' is to communicate to its creditors to reach a mutually acceptable restructuring agreement while respecting 'seniority of debts' and its citizens 'should share an equitable burden of adjustment and/or losses'.[364] In addition, sovereign debt contract is binding although 'economic necessity can prevent the borrower's full and/or timely repayment'.[365] Creditor corruption in the borrowing process and violations of UNSC's sanctions might avail a debtor in the event of sovereign debt claims.[366] Finally, debtors have a responsibility to carry out an *ex ante* investigation to determine the 'financial, operational, civil, social, cultural and environmental implications' of project financing.[367]

[362] PRSLB 2012:principle 7.
[363] PRSLB 2012:principle 14.
[364] PRSLB 2012:principle 15.
[365] PRSLB 2012:principle 9.
[366] PRSLB 2012:principle 9.
[367] PRSLB 2012:principle 12.

Although very concise (and less wordy than the GPFDHR), the PRSLB's simplistic, polarised approach reduced sovereign debt governance to dualised duties of creditors and debtors only. Despite these duties, it does not recognise the socio-economic rights responsibilities of the parties. Moreover, its explanatory implications reveal the creditor-diktat undergirding it and this might affect its legitimacy and acceptability. For instance, citing examples of the IMF's special data dissemination standards under the principle of full disclosure, raises conflict of interests and legitimacy concerns because even the UNCTAD itself recognises that 'in reality, no creditor can play an independent role in a debt workout'.[368] In particular, its implicit reference to shifting debt burdens to the future generations might also go against the important principle of sustainable development.[369] Indeed, its conception of debt sustainability is very narrow and creditor-focused.[370] Although it acknowledges the importance of HRIA in project financing, it does not recognise any shared responsibility in this regard. In other words, it seems to squarely places the HRIA burden on the debtor. In addition, it does not contemplate any likely negative effects of loans advanced by extra-territorial creditors besides its brief reference to abusive creditors (holdouts and vultures). Nor does it define what amounts to abusive, or even responsible, sovereign lending and borrowing.

4.4.1.1 Socio-Economic Rights and SDR under the SDWG 2015

While recognising the fragmented, inefficient and disorganised SDR regimes, the UNCTAD developed the following five major principles to guide debtors and creditors in SDR in the 2015 SDWG: Legitimacy, impartiality, transparency, good faith, and debt sustainability.[371] Legitimacy entails acceptability of the workout on the basis, for instance, of its legal source (including alignment with human rights) and processes (including ownership by the citizens, inclusiveness of actors, predictability of results and legal review by an impartial tribunal).[372] Impartiality is a general principle

[368] UNCTAD SDWG 2015:27.
[369] WCED 1987. In particular, Implication 1 of Principle 8 of the PRSLB states '[s]overeign debts that are contracted by governments bind the continuing legal entity of the State, including its future administrations and future generations of its citizens. The government officials who authorize and execute such borrowings therefore carry responsibilities vis-à-vis the people who must ultimately repay the money'. See UNCTAD PRSLB 2012:principle 8.
[370] EURODAD 2016. 'Civil society position on the IMF and World Bank debt sustainability framework review' https://eurodad.org/files/pdf/5a7c224a7e99c.pdf (accessed 20 June 2018).
[371] UNCTAD SDWG 2015:para 19.
[372] UNCTAD SDWG 2015:para 20.

consisting of independence of actors, institutions and information.[373] Transparency entails exercise of public authority to make data open (eg on debt sustainability, institutions and processes).[374] The principle of good faith entails legitimate expectations of parties with respect to substantive fairness and procedural equality, standstill (stay) on payments, duty to negotiate and rejection of abusive creditors (hold-outs and vultures).[375]

Finally and more importantly, debt sustainability under the SDWG means that sovereign debt 'can be serviced without impairing the social and economic development of society'.[376] Thus, while avoiding the narrow creditor-focused conception in the PRSLB, it categorises sustainability into two types: narrow debt sustainability which focuses on debtor's financial position with probable projections for return to debt service; and 'full debt sustainability' which focuses on citizens' well-being, economic and social sustainability because SDR 'must not lead to violations of economic or social rights'.[377] However, despite this lofty improvement on the PRSBL, it can be observed that, the SDWG, being a Guide, is unarguably less authoritative compared to the former.

4.5 SOVEREIGN DEBT OBLIGATIONS, RESOURCE AVAILABILITY & THE PROGRESSIVE REALISATION OF SOCIO-ECONOMIC RIGHTS

According to the predominant creditor-diktat narrative, debtor's continuing debt service must be part of any restructuring package as it is necessary for regaining market access and returning to debt sustainability.[378] It would be recalled that reputation theorists rationalise the enforcement and repayment of sovereign debt on this basis.[379] It means, regardless of the gravity of a debt crisis, creditors' right to repayment must

[373] UNCTAD SDWG 2015:para 21
[374] UNCTAD SDWG 2015:para 22.
[375] UNCTAD SDWG 2015:para 23.
[376] UNCTAD SDWG 2015:para 24.
[377] UNCTAD SDWG 2015:para 24.
[378] See IMF 2016. *Strengthening the contractual framework to address collective action problems in sovereign debt restructuring,* https://www.imf.org/external/np/pp/eng/2014/090214.pdf (accessed 2 May 2019); ICMA 2014. *Standard collective action and pari passu clauses for the terms and conditions of sovereign notes,* https://www.icmagroup.org/resources/Sovereign-Debt-Information/Downloads/ICMA%20Standard%20Pari%20Passu%20Provision%20August%202014.pdf (accessed 2 May 2019); IIF 2013. *Principles for Stable Capital Flows and Fair Debt Restructuring* 15 https://www.iif.com/Portals/0/Files/content/Regulatory/2013_IIF_PCG_Report.pdf (accessed 14 August 2019).
[379] Tomz 2007:3-15.

be prioritised because it is for the 'good' of the debtor in the long-run. Without repayment, a debtor will be shut out of the debt market and this might negatively affect the fulfilment of even the minimum core obligations. Thus, it is framed as a beneficial practice for the debtor. While criticising such norm, Lienau observes that the 'debt continuity norm' controls the current sovereign debt regime as it 'keeps the core flow of capital safe and relatively free of controversy'.[380] Indeed, the above instruments and the SDR processes have implicitly accepted the 'exigency' of repayment during debt crisis as part of the 'norms' of SDR. The current practice largely reflects this. In fact, this 'norm' was widely deployed during the Latin American Debt crisis, the African Debt Crisis, the Asian Debt Crisis and the recent Eurozone Debt Crisis.

Importantly, however, the creditor priority norm lacks a concrete legal basis in international law. Unfortunately, some countries have now constitutionalised it within their domestic legal systems. For instance, in response to the Eurozone debt crisis, Spain's 2011 constitutional amendment provides that '[l]oans to meet payment on the interest and capital of the state's public debt shall always be deemed to be included in budget expenditure and their payment shall have absolute priority'.[381] In Greece, a legislative measure was adopted providing that in order to maintain fiscal stability, it is necessary to ensure 'servicing of the public debt at a priority'.[382] This formally gives priority to debt servicing. Consequently, the loan facility agreements arising from the recent Greek SDR imposed conditions requiring that 'the money from these loans was to be used exclusively for the repayment of debts to the country's creditors, as opposed to meeting domestic needs, such as the payment of salaries and pensions'.[383] In addition, structural reforms and austerity measures were imposed as preconditions for Greece to regain market access and attain debt sustainability.[384] Thus, creditors' interests take precedence. In the words of the Greek Truth Committee

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[380] Lienau 2014:1-3.

[381] Section 135 (3) of Constitution of the Kingdom of Spain (as amended2011).

[382] Law 2362/1995, article 1A(as amended April 10, 2012), Greek Parliament. Gulati et al quoted Worstell arguing thus:

> These are harsher terms than the British Empire ever imposed, even backed up by gunboats and the Royal Navy… An "all good efforts" commitment to debt repayment is usually enough but an absolute one is simply unheard of. It does, quite literally, say that if there's an outbreak of plague that sweeps through the country (or any other disaster you might like to think of) then Greece has to repay the debts before offering health care to its own citizens at a time of national disaster'.

See Gulati et al 2019:1-36, 2.

[383] Bantekas 2013:318.

[384] Principles for stable Capital Flow:9-10.

on Public Debt '[t]he use of the bailout money is strictly dictated by the creditors, and so, it is revealing that less than 10% of these funds have been destined to the government's current expenditure'.[385] The bailout program also disproportionately affected the vulnerable groups.[386]

In the case of Argentina, holdout creditors' lawsuits literally barred the country from the financial markets and constituted huge strains on its finances and domestic socio-economic rights obligations.[387]

However, critically juxtaposing this creditor priority norm with a debtor's socio-economic rights obligations presents a fundamental jurisprudential question of prioritisation of competing demands which, arguably, the sovereign debt regime has left unaddressed due to its creditor-biased character. This, in the context of debt crisis, is invariably an issue of distributive justice because of the apparent resource constraints that usually confront a distressed debtor. It requires simultaneously fulfilling obligations owed to multiple constituencies including socio-economic rights-holders. As examined in the previous Chapter, by their nature, socio-economic rights obligations of a sovereign debtor under the ICESCR depend upon resource availability and their realisation has to be achieved progressively.[388] The question is whether sovereign debt is an 'available resource' for the purpose of the obligation to progressively realise these rights 'to the maximum of its available resources'.

Because of the asymmetric performance characterising sovereign debt obligations, it may be appropriate to distinguish between the 'initial loan resources' and the 'debt repayment resources'. While the former is undoubtedly an 'available resource' suitable for deployment into the progressive realisation of socio-economic rights, it is not clear how the latter can be deployed for the same purpose because they are resources set aside, usually through budgetary provisions, for debt repayment. The predominant view is to treat the 'debt repayment resources' as creditors' property rights and therefore outside the scope of 'maximum available resources' of the debtor.[389] In other

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[385] Greek Truth Committee on Public Debt 2015. *Preliminary Report* 3, https://auditoriacidada.org.br/wp-content/uploads/2014/06/Report-Greek-Truth-Committee.pdf (accessed 20 June 2019) (hereafter 'Truth Committee 2015').
[386] Truth Committee 2015:38-41.
[387] Porzecanski AC 2017. 'Human rights and sovereign debt in the context of property', 3-34 https://ssrn.com/abstract=2961289 (accessed 14 June 2019).
[388] ICESCR:art 2(1); Waldron 2010:21-49.
[389] Tooze 2002:232-233; Michalowski 2008:35-68.

words, resources set aside for debt repayment are, *ipso facto,* not 'available resources' as they belong to the creditors and therefore cannot, strictly, be used for the fulfilment of socio-economic rights of debtor's citizens. By this view, there are no competing obligations on such resources to begin with.[390] Toolz, for instance, has argued, in the context of bilateral official debt, that 'with repayment overdue, the resources now arguably belong to the creditor rather than to the debtor State … [and] to require rescheduling or alleviation of debt would be tantamount to requiring a temporary transfer of resources from the creditor States to the debtor States'.[391] Michalowsky also maintains that it will amount to 'an unjustified forced transfer of resources from the North to the South … [because] if social rights obligations can be invoked against the fulfilment of repayment obligations, it is in fact the foreign creditor who is forced to assume the bill for the protection of the social rights of the people of the debtor state, despite not being under any such obligations'.[392]

Although this view seems plausible, it is, arguably, flawed from both normative and theoretical points of view. First, the notion of 'ownership' ascribed to the 'repayment resources' may be theoretically and ideologically contested.[393] Time must be factored into the analysis. In general, lending involves transfer and re-transfer of capital over a period of time such that the owner, without complete alienation, 'gives away his capital

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[390] Porzecanski 2017:2-34; Loncarich 2014:580.

[391] Tooze 2002:250.

[392] Michalowski 2008:47-50.

[393] There is, for instance, opposing conceptions of 'ownership' from capitalist and Marxist perspectives. In general, though, 'property' is a dynamic, changing concept which sometimes outgrows the underlying norms that established its functions in the society. Renner observes, for instance, that by overcoming feudal restrictions, capitalism 'ordained that everybody shall peacefully enjoy and keep his own…[but] peaceful enjoyment of one's own object becomes … title to surplus value, distributing the whole of the social product as profit, interest and rent among an idle class, and limiting the working class to the mere necessities of existence and procreation. In the end it [capital] reverses all its original functions'. He maintains thus:

> The owner has now no longer even detention of his property; it is deposited at some bank, and whether he is a labourer or a working capitalist, the owner cannot dispose of his own. He may not even be acquainted with the locality of the concern in which he has invested his property. …[And] month by month the bank messenger delivers to the owner of the revenue of his economic property… All property is conferred by the law, by the conscious exercise of the power of society. … Property is a matter of private law. … But contemporary property, capital as the object of property, though *de jure* private, has in fact ceased altogether to be private. No longer does the owner make use of property in a technical way… property in its technical aspect has been completely estranged from the owner. The Roman civil lawyer believes that *dominus rei suaelegem dicit*. As far as ownership of capital is concerned, this pronouncement is no longer true: it is society that disposes of capital and prescribes the laws for its use… Public law has for a long time recognised that where the whole of society is in principle concerned with an object, it can no longer be treated as a matter that is merely private'.

See Renner 1946:292-300.

without retaining anything'.[394] According to Renner, capital 'is transferred from the lender to the borrower and at the end of the agreed period it is immediately retransferred from the borrower to the lender'.[395] The interest is a consequence of title to possession, the fruit of the capital.[396] The ownership in this context is private, but the notion of 'sovereignty' as examined in Chapter Two, arguably makes the ownership of the capital different from ownership in private lending. Sovereignty over resources is a core principle of international law which, arguably, extends to the 'repayment resources'.[397] Thus, the resources set aside for debt repayment have a unique ownership clothed with sovereignty. Once there is no actual re-transfer, the debtor bears ownership of such resources.

Admittedly, both the 'initial' and 'repayment' resources are intrinsically connected, one giving rise to the other but, once lent, the sovereign debtor legally becomes the 'owner' of these resources. In other words, in the spirit of sovereignty, the debtor has the discretion to put the resources to its use. The right to SDR gives a concrete expression to this view. This reasoning holds even in cases of bridge-loans. It also holds in the case of IFIs' intervention by way of bailout as seen in the recent Greek bailout.[398] Although the IMF has succeeded in institutionalising the creditor-priority norm in the repayment of its facilities, this does not have any explicit legal backing in international law.[399] In addition, most of the 'repayment resources' normally emanate from the debtor's tax-payers. Tax-payers substantially repay both official and non-official loans. It is therefore absurd to view such resources as creditors' resources. This is supported by the sovereignty element in SDR as recognised in several UN declarations and resolutions including the recent UN BPSDRP.

Therefore, even when repayment becomes due, the 'ownership' does not automatically cross to the creditor, perhaps until a judicial pronouncement to that effect is made. This judicial intervention is undoubtedly a public law function thereby creating

[394] Renner 1946:140
[395] Renner 1946:140.
[396] Renner 1946:140-141.
[397] United Nations. 1974(a). *Declaration on the Establishment of a New International Economic Order* (adopted on 1 May 1974); United Nations. 1974(b). *Charter of Economic Rights and Duties of States* (adopted on 12 December 1974).
[398] Truth Committee 2015:3.
[399] Schadler 2014:2-10; Rutsel-Silvestre 1990:801-826.

a theoretical gap in the argument in favour of a private, contractual governance paradigm which animates creditor claims over the 'repayment resources'.[400]

In summary, the 'resources' set aside for debt repayment strictly belong to the sovereign debtor regardless of whether such repayment is due. Thus, in the event of sovereign debt crisis, there are bound to be competing demands on the entire state resources, including those set aside for debt repayment purposes. Unfortunately, creditor-priority norm in SDR and the conditions normally attached to debt reliefs and new loans tend to constrain debtors' financial capacity to progressively invest in socio-economic rights-based programmes. For instance, while noting Zambia's reduced attention to education and health care between 2004 and 2006, the UN Independent Expert on Foreign Debt found that high debt servicing costs, conditionalities attached to debt reliefs and new loans and prioritising debt repayments 'over basic needs' have exacerbated poverty and prevented employment of thousands of desperately needed public school teachers.[401]

Second, this view implicitly assumed that outright repudiation is the only way to guarantee the continued fulfilment of socio-economic rights during debt crisis thereby ignoring the value of debt moratorium. Third, the view is obviously influenced by the creditor-diktat narrative which conceived the relationship as a strictly two-sided creditor-debtor matrix under which the debtor's obligations are purely contractual owed to the creditors only. As argued earlier, it is a mistake to treat sovereign debt as purely and exclusively a two-sided affair because of its expansive and multi-stakeholder character especially the millions of citizens who, ideally, are the true beneficiaries of such debt. Fourth, this view is oblivious of the fact that official (especially bilateral) lenders may have extra-territorial socio-economic rights obligations and that private creditors have at least socio-economic rights responsibility to respect these rights. In addition, credit extension has undergone significant transformation with SWFs and erstwhile debtor nations now becoming influential creditors.

It can therefore be argued that the creditor-priority norm, even without an explicit international legal basis, could have a negative effect on the financial capacity of sovereign debtors to progressively fulfil their socio-economic rights obligations under

[400] Zumbansen 2007:191-233.
[401] UNHRC 2010:24-25.

the ICESCR. Yet, sovereigns borrow ideally to support the well-being of their citizens. According to Rassmussen:

> The needs of a state's citizens are actually part of the reason why sovereign borrowing is justified in the first instance. Part of the classical reasons for allowing the state to consume future assets today is that it allows nations to buffer their citizens from economic shock. When a country is in a downturn, it can borrow against good times. Such borrowing both lessens the current burden on its citizens and hastens the return of economic health.[402]

In fact, sovereign debts are usually 'guaranteed' by the taxing powers of the state. Advancing such loans would make more resources available to the state but repayment of same, especially in the event of sovereign debt crisis, may actually reduce such resources.

However, even in the absence of a debt crisis, a state is bound to face competing demands as 'a society in which there are no conflicting demands … is a society beyond justice'.[403] However, debt crisis increases the intensity of such competing demands. Thus, as noted in the previous chapter Waldron conceives these rights as part of his theory of justice. They are 'rights calculated to ensure that those in a society who are materially radically disadvantaged are, if possible, raised by collective provision above the level of radical disadvantage'.[404] Fundamentally, due to resource constraints, socio-economic rights are 'inherently budgetary' as they consist of rights which 'compete with one another and with other demands for funding' in the society.[405] This means 'there needs to be some sorting, balancing and prioritization among these demands [but it] does not follow that one subset of the demands (socioeconomic rights) must be abandoned in advance as impossible'.[406] Waldron argues thus:

> [Nozick's 'reverse' theory] gives priority to the right not to have one's material situation worsened, whether that situation consists in holding property rights or just in having access of some kind to the resources needed for a decent life. It gives these rights priority in exactly the sense that the 'reverse' theory is supposed to give priority to socioeconomic rights: property entitlements must work round them and no such entitlements are recognized if they are incompatible with these rights.[407]

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[402] Rasmussen 2004:18-19.
[403] Waldron 2010:21-49.
[404] Waldron 2010:39.
[405] Waldron 2010:46.
[406] Waldron 2010:28.
[407] Waldron 2010:31.

It can be argued that Waldron's 'level of radical disadvantage' aligns with the minimum core threshold as recognised in different theories, laws and instruments relating to socio-economic rights.[408] It consists of the basic minimum requirements for human survival and well-being. These include social safety nets required to be incorporated in any development-based projects including lending transactions.[409] Its main concern is the availability of the material bases for human well-being.

Therefore, prioritising socio-economic rights in the face of sovereign debt crisis would invariably unsettle the creditor-priority norm. This might be justified on account of the former's explicit legal basis and the latter's lack thereof. It might also be justified on account of the negative impacts of the creditor prioritisation norm on the progressive realisation of socio-economic rights as seen in Zambia, Greece and Argentina. Evidently, debt repayment may render the minimum core obligations nugatory. It might also be argued that prioritising socio-economic rights does not entail repudiation of the sovereign debt obligation; it only entails an imposition of debt moratorium until repayment capacity is regained and debt sustainability achieved.

4.5 CONCLUSION

This Chapter examined the influence of creditors in the sovereign debt regime and the interconnections between SDDs and SDR from a historical perspective leading up to the recent global policy initiatives which, both explicitly and implicitly, recognise the primacy of socio-economic rights thereby placing them within the broader sovereign debt governance discourse. The second section examined the historical trend of recurring SDDs and the resulting chaos characterised by self-help and vicious circles of conflicts, destructions and debts. Despite increased sovereign borrowing up to the late 19th century, self-help (ie, by way of forced receivership, gun-boat diplomacy and outright repudiation) remained the only recognised sovereign debt 'dispute resolution method', hence, private creditors enjoyed the support of their home states for this purpose. The first creditor-diktat move was to penetrate government and, subsequently, a subtle 'creditors-government romance' developed leading to invasion of debtor nations in the name of 'civilised' enforcement of creditor rights founded on contract. In this atmosphere, the section showed, welfare and anti-poverty struggles

[408] Young 2008:113-175; Dieterlen 2010:161-178; Michelman 2010:181-199; Tooze 2002:229-263.
[409] Tooze defines 'social safety nets' as 'a net of basic social protection for the most vulnerable groups in the debtor State'. See Tooze 2002:239.

were largely championed by the church although not framed in the language of 'rights' until after the Second World War which culminated in the adoption of the ICESCR. Unfortunately, this came with a rigid, positivists' institutionalisation which, wittingly and unwittingly, placed the IFIs as the central, indispensable players within the sovereign debt governance regime. Part of the consequences were increasing SDD episodes up to the Euro debt crisis. Thus, SDDs almost always, compromise the sustained implementation of programmes for the realisation of socio-economic rights in debtor countries.

The Chapter, in Section three, demonstrated the predominant creditor-based narrative permeating virtually all the existing SDR frameworks thereby raising legitimacy concerns. The Section then interrogated this narrative using the principles of general international law. It argues that this narrative could be displaced by the sovereign debtors' 'right' to SDR based on the primacy of socio-economic rights and the principles of necessity, global peace, contagion and exogenously-induced fundamental change of circumstances. This was supported, in Section four, by the evolving UN-driven measures designed, principally, to mainstream socio-economic rights and other public policy concerns into sovereign debt governance. However, the division occasioned by the sensitivity of this matter, as argued, could be seen in the character and contents of these new initiatives and their endorsement of the investment arbitration regime. In addition, following criticisms against the dominant debt sustainability framework, IMF issued another guide in 2018.[410] This, however, is not sufficient to address the legitimacy concerns. Section five criticised the creditor priority norm and argued for the prioritisation of socio-economic rights.

It is, therefore, worth concluding that throughout history, concerns for socio-economic rights have remained tendentious; even more so within the sovereign debt regime which is fuelled by opportunistic creditor behaviours anchored on a common, self-interested but, arguably, questionable narrative that completely relegates the 'human' implicitly embedded in global sovereign financing. The citizens ought to be at the centre of modern sovereign debt. The regimes cannot have an inkling of legitimacy where they, directly or indirectly, relegate the citizens and undermine efforts to protect citizens' socio-economic rights, safeguard their essential humanity and dignity or uplift

[410] IMF 2018. *Guidance note on debt sustainability.* http://www.imf.org/en/Publications/Policy-Papers/Issues/2018/02/14/pp122617guidance-note-on-lic-dsf (accessed 23 September 2018).

their welfare. The imbalance, unfairness and chaos inherent in the existing disorganised and non-systemic SDR regime reflect the dictates and interests of creditors without regard to these issues. In addition, the deep involvement of IFIs in virtually all the SDR processes raises conflict of interests and partiality concerns which impeach the legitimacy of these regimes. They cannot be unbiased in an SDR system in which they are creditors.

Although the evolving non-binding instruments are steps in the right direction, they may achieve little in addressing the long-held narrative which, arguably, lacks support in public international law. In fact, these instruments appear to have reproduced principles rooted in international and domestic laws and, by implication, the so-called 'right' to SDR may not be a new innovation after all. Although there is a growing consensus on the need to mainstream socio-economic rights into the sovereign debt governance regime through recognition of the status of the citizens, it seems the influence of creditor-diktat and its positivists' vision of international law might frustrate this consensus from crystallising into a fairly balanced statutory SDR framework. The persistent refusal to move away from the contractual framework has the effect of incentivising abusive creditors and derailing efforts towards the realisation of socio-economic rights. It is not in the spirit of international cooperation envisaged by the UN Charter, ICESCR, UDHR and the SDGs. In essence, the disorder in the SDR regime is deepened by self-interest and, consequently, the regimes are begging for legitimacy and some modicum of rule of law. It would be interesting to see how the courts and international tribunals, presumably the vanguards of the rule of law, view this in the light of, arguably, the unquestionable primacy of socio-economic rights. This will be the theme of the next chapter.

CHAPTER FIVE

SOCIO-ECONOMIC RIGHTS IN SOVEREIGN DEBT ADJUDICATION

5.1 INTRODUCTION

Despite the predominance of the positivists' state-centric narrative of IHRL, the research has shown that there is a growing consensus recognising the centrality of socio-economic rights in the evolving sovereign debt regime.[1] In particular, the previous chapter has demonstrated how the global community acknowledged this imperative through the adoption of different soft law instruments. In addition, creditors' socio-economic rights responsibilities are now incorporated, *al beit* insufficiently, into the broader business and human rights framework. The research has also argued that socio-economic rights could qualify as 'essential interests' to justify debt moratorium especially within the context of the defense of necessity in CIL. Others even argue that such situation may warrant a complete repudiation.[2]

Importantly, international courts and tribunals have been adjudicating and giving their perspectives on these issues. Therefore, it is important to extend the discussion to the realm of sovereign debt adjudication (SDA) by examining the attitudes of adjudicators towards socio-economic rights as 'essential interests' in sovereign debt governance. This is because, by the stakeholder approach to sovereign debt governance, international tribunals are critical stakeholders, increasingly exercising jurisdictions over sovereign debt claims.[3] In other words, SDA is a key component of the sovereign

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[1] Michalowski 2008:35-68; Hunt 2002:111; cf Tooze 2002:229; Michalowski 2004:33; Friedman 2000:191; Ambrose 2005:274; UN Human Rights Commission 2000, *Debt Relief and Social Investment: Linking the HIPC Initiative to the HIV/AIDS Epidemic in Africa, Post-hurricane Mitch Reconstruction in Honduras and Nicaragua and the Worst Forms of Child Labour Convention, 1999 (Convention No 182) of the International Labour Organization.* New York: UN.

[2] Mockiene 2010:16.

[3] ILA 2018. *Report submitted by the Committee on the Procedure of International Courts and Tribunal to the 78th Biennial Conference of the International Law Association,* 1-5 http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_InternationalCourts.pdf (accessed 20 January 2019). Using Guzman's definition, Alvarez notes that 'a tribunal is defined as a disinterested institution to which the parties have delegated some authority and that produces a statement about the facts of a case and opines on how those facts relate to relevant legal rules…' and that 'international adjudication, like its domestic counterpart, is routinely seen as involving four basic elements: (1) independent judges applying (2) relatively precise and pre-existing legal norms after (3) adversary proceedings in order to achieve (4) dichotomous decisions in which one of the parties clearly wins …'. See Alvarez 2003:405, 407. See also Petersmann 1999:753-790, 753 fn 2; Koh 1991:2347-2402, 2371; Martinez 2003:429-529, 430; Reisman 1969:1-27.

debt governance regime. Unfortunately, the increasing judicialisation of the regime has not received the deserved attention in the literature.[4]

Since the Second World War, international tribunals have gained prominence as key institutional actors shaping, first, the form and substance of specific regimes of international law, and second, the progressive development of the general international legal system. In performing these roles, these tribunals are strengthening and deepening international rule of law, holding global actors accountable for their actions.[5] They are, thus, widely accepted as institutions for global democratic accountability.[6] Interestingly, as noted in the previous chapters, international tribunals have an obligation to adjudicate in conformity with the principles of justice and international law which invariably includes 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[7] Therefore, their perceptions, attitudes and decisions would be critical in shaping the evolving sovereign debt governance regime. This would help in determining the weight the regime attaches to socio-economic rights.[8]

Unfortunately, international adjudication involves a complex legal process and, not surprisingly, is theoretically in a state of fuss.[9] SDA is part of this complex legal process. In particular, the increasing resort to international adjudicative fora especially through the ISDS mechanism by non-official creditors and the innovative deployment

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[4] Crow & Escoba 2018:87-118; Steininger 2018:33-58.

[5] UN Charter 1945:art 33; UN Office of Legal Affairs 1992:3-7; Beaulac S 2009. 'The rule of law in international law today', 197-223 https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/3093/international-rule-law.final.pdf?sequence=1> (accessed 26 March 2019); Andreas F et al 2018. 'Oslo Recommendations for Enhancing Legitimacy of International Courts', 1-5 https://www.jus.uio.no/pluricourts/english/blog/geir-ulfstein/2018-08-01-biij.html (accessed 10 January 2019); International Center for Ethics, Justice and Public Life & the Pluri Courts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order 2018. *Oslo Recommendations for Enhancing the Legitimacy of International Courts* https://www.brandeis.edu/Ethics/Pdfs/Oslo%20Reccs%20Legitimacy%20of%20ics.Pdf (accessed 10 January 2019); Allee & Peinhardt 2010:1-124; Caron 2006:401-422, 402; Born 2012:775-879; Shelton 2009:537-571; Paulus P 2010. 'International adjudication', 1-20 http://www.uni-goettingen.de/de/430924.html (accessed 14 January 2018); Bjorklund 2007:101-163; Higgins 2003:12-15; Franck 2005:1559-68; Brower & Sharpe 2003:216; Helfer & Slaughter 1997:273-391, 367-368.

[6] Beaulac 2009:197-223.

[7] VCLT 1969:preamble & art 31(3)(c). See also Petersmann 2009:31-34.

[8] ICJ Statute 1945:art 38(1)(d).

[9] Steinitz M 2012. 'Chapter 7: Transnational legal process theories', 12-18 http://ssrn.com/abstract=2151555 (accessed 23 May 2019); Koh 1996:181; Koh 1991:2347; Koh 2006:745.

of other novel legal strategies by vulture funds and holdout creditors to reclaim the full value of their debts have increased the complexity of the sovereign debt governance regime.[10] It raises jurisdictional and doctrinal concerns regarding the scope, objectives and functions of SDA. The doctrinal issues include determining the status of non-parties especially the debtor's citizens and the place of socio-economic rights in the adjudicatory process. Importantly, adjudicating sovereign debt claims has a potential jurisprudential consequence: It might lead to a further judicialisation of the sovereign debt governance regime.[11] This is important because, first, the idea of adjudication correlates with the justice of sovereign debt governance as earlier conceptualised. Second, the frequency of creditor litigation has contributed to the adoption of global legal and policy initiatives as examined in the previous chapter. These initiatives are redefining the relationship between sovereign debt and socio-economic rights. For instance, citizens' concerns are now increasingly being incorporated into soft law instruments because of the potential impacts of sovereign debt crisis on citizens' welfare and dignity.[12] In addition, one of the objectives of these initiatives is to address the persistent imbalance and the legitimacy crisis confronting this regime especially in the area of adjudication.[13] Third, the private-public divide which undergirds the private, contractualist paradigm of the sovereign debt regime, dissolves in the context of SDA thereby giving credence to the transnational, pluralists' governance paradigm.

It is, therefore, important to examine how socio-economic rights feature in SDA in the light of the recent developments in this area, and the recurring debt crises across the world. As indicated earlier, it is surprising that the attitudes of international tribunals towards these developments have so far remained largely (perhaps completely) unexplored in the literature.[14] This gap is worth exploring here especially in view of the increasing push for a comprehensive creditor accountability framework in the area of sovereign debt governance.[15] In other words, without understanding adjudicators'

[10] Park & Samples 2017:1033; Hopwood 2018:19; Thomas 2017:419; Weidemaier WMC & Gelpern A 2013. 'Injunctions in sovereign debt litigation', 2-6 http://ssrn.com/abstract=2330914 (accessed 10 November 2018).
[11] Landes & Posner 1979:236-240.
[12] See, for instance, the UNGA BPSDRP 2015, UNHRC's GPFDHR 2012 and UNCTAD PRSLB 2012.
[13] Lienau 2016:151-214.
[14] Crow & Escoba 2018:87-118; Steininger 2018:33-58; Lupo-Pasini 2018:1-30.
[15] Briercliffe N 2017. 'Holding investors to account for human rights violations through counterclaims in investment treaty arbitration', 1-3 http://www.jdsupra.com/legalnews/holding-investors-to-account-for-human-59713/ (accessed 23 August 2019).

attitudes towards socio-economic rights in this regime, it might be difficult to concretise creditors' socio-economic rights responsibilities or to hold them liable for the impact of their activities on the realisation of these rights. It might also be difficult to advance any intelligible proposition in this regard. It should be admitted, however, that although the involvement of international tribunals in the sovereign debt regime could aid in shaping creditors' socio-economic rights responsibility, creditor accountability still remains a tendentious issue especially with regard to certain official creditors who possess a functional immunity and a *de facto* 'preferred creditor' status in SDR.[16]

Therefore, this chapter sets out to examine these issues and how they relate to socio-economic rights. Apart from locating socio-economic rights in SDA, the chapter seeks to demonstrate a paradigm shift in sovereign debt governance: The increasing expansion of private creditors' options to other international law regimes which, first, reveals the changing dynamics of SDAs from espousal claims to ITA and human rights-based claims, and, second the cross-regime interaction as evidenced by the recognition of socio-economic rights-based counter-claims in ITA.

Because official creditors almost always do not resort to adjudication as discussed in the previous chapter, the present chapter will be limited to three classes of sovereign debt cases all connected to private creditors: state-state espousal claims, ITA and human rights-based claims.[17] As outlined in the introductory chapter (section 1.7), the following factors were used as the case selection criteria: The sovereign debt crisis which provides the factual and contextual basis for instituting the debt recovery claim; the existence of one or more features of sovereign debt as conceptualised in Chapter Two; the existence of a sovereign respondent; raising of socio-economic rights-related defenses by the sovereign respondent; and the elements of debt recovery in the substantive creditor claims. Thus, espousal claims by creditors' home countries, investment treaty arbitration and human rights-based cases satisfy these criteria. However, pronouncements of mixed claims commissions and International Criminal

[16] Schadler S 2014:1-8.
[17] It must be admitted that there is an exceptional case showing official creditor 'holdout': The case of Russia against Ukraine -*Law Debenture Trust Corp plc v Ukraine:*655. See also Weidemaier WMC 2016. 'Contract law and Ukraine's $3 billion debt to Russia', 1-11 http://ssrn.com/abstract=2725178 (accessed 15 June 2019); Feria-Tinta & Wooder 2017:1-6; Yu 2017:535.

Court do not, for instance, satisfy these criteria and are therefore excluded from the case review section.

Before delving into these categories, however, the Chapter, in the next section, will contextualise SDA within the broader transnational legal theories of adjudication in line with the stakeholder approach to sovereign debt governance. The section will demonstrate the multifunctionality of SDA, arguing that it goes beyond mere dispute resolution as it involves an exercise of public authority which might directly affect the realisation of the socio-economic rights of sovereign debtors' citizens. It will examine the main reasons behind the increasing internationalisation of bondholder litigation on the one hand, and the paucity of state-state SDA on the other. Section three will then examine espousal of claims by creditors' home states (herein called 'state-state SDAs') and related official creditors' issues vis-à-vis socio-economic rights.

Section four will examine the non-official creditors' approach with a specific focus on ITA and human rights-based creditor claims. It will examine the attitudes of arbitrators towards socio-economic rights using specific cases. It will also briefly examine the viability (and perhaps suitability) of the emerging trend of invoking specialised human rights courts by private creditors for the determination of their sovereign debt claims. Using these cases from the three forms of SDA, Section five will identify and examine the emerging trends and adjudicators' attitudes towards socio-economic rights. Section six will summarise and draw some conclusions.

5.2 SOVEREIGN DEBT ADJUDICATION: THEORIES, FORMS AND SCOPE

It is worth noting here that there is currently no specific international tribunal vested with jurisdiction over sovereign debt claims largely because of normative hybridity and the absence of a legal framework on SDR. This vacuum contributes to the rising holdout and vulture funds' litigations.[18] It allows these creditors to invoke or choose from multiple domestic and international adjudicative fora to enforce their claims.[19] Thus, SDA is a specie of both international and transnational adjudications.[20] This, arguably, makes it the most complex form of adjudication. An SDA may arise either following events of default and restructuring or following disagreement over the

[18] Finnigan 1986:153; Mauro 2014:249; Weidemaier & Gelpern 2013:4-8.
[19] Oellers-Frahm 2001:67-104.
[20] Sykes 2005:631; Schultz 2011:59; Michaels 2011:417; Carter 2004:795.

interpretation of terms or application of loan contracts. Regarding the former, an SDA is initiated to determine holdout creditors' claims against sovereign debtors or to question regulatory measures adopted by the sovereign debtor following any default in order to return the country to debt sustainability.[21] Regarding the latter, an SDA merely clarifies contractual terms and obligations. Thus, the form an SDA takes depends upon the prescribed governing law and the dispute settlement mechanism (DSM) set out in the relevant clauses of the loan contract, definitive bonds and/or investment treaty commitments of the concerned creditor and debtor nations respectively.

However, notwithstanding the forum/jurisdiction clause contained in either the definitive bonds or the loan contract, the possible invocation of multiple DSMs presents practical and theoretical challenges worthy of examination here. In particular, the multiplicity of adjudicative fora and their potentially conflicting jurisprudence could blur the contours of SDA. In addition, conceiving this form of adjudication as an instrument exclusively in the hands of the parties like other transnational adjudication might negate the public policy elements and multiplicity of interests inherent in sovereign debt governance.

5.2.1 Theorising Sovereign Debt Adjudication: A Stakeholders' Perspective

Undoubtedly, sovereign debt dispute is a form of international financial dispute.[22] According to the PCIJ, a 'dispute' arises where there is a 'disagreement on a point of law or fact, a conflict of legal views or interests between two persons'.[23] Romano considers 'international dispute' broadly as any dispute involving a sovereign state.[24] It is a dispute 'between two or more parties, at least one of which, the defendant, will

[21] Goldmann M 2018. 'Foreign investment, sovereign debt, and human rights', 2-20 https://ssrn.com/abstract=3103632 (accessed 23 March 2019).

[22] Lupo-Pasini classifies international financial disputes into four groups: '(i) contractual disputes concerning the violation of contractual commitments by the sovereign, such as the restructuring of a sovereign bond; (ii) supervision disputes, which concern a supervisory measure affecting a financial institution, such as the decision of a bank supervisor to remove a bank's CEO or to impose fines; (iii) resolution and insolvency disputes, which deal with a range of measures adopted in the context of a crisis; (iv) "other" disputes, which include government measures affecting the life of a financial institution but that are not motivated by a regulatory or commercial reason. Such measures broadly include, the privatization of the financial sector, expropriations in the context of war, or broad emergency measures during a crisis'. See Lupo-Pasini 2018:10.

[23] *Mavromattis Palastine Concession (Greece v UK)* 1924 PCIJ Series A11; *Abaclat and Others* v *The Argentine Republic*:para 255; *Case Concerning East Timor* 1995 *ICJ Reports* 89, 99.

[24] Romano 2007:792-795.

be a state or an individual acting on behalf of a state … [with a DSM]… specifically designed to monitor and enforce the obligatory rules of the regime'.[25]

Although sovereign debt disputes tend to have some political elements, this research is specifically concerned with the legal aspect of such disputes which often lead to adjudicatory decisions. In this context, a disagreement between parties to a sovereign debt contract must be a justiciable conflict capable of being resolved by an adjudicative body to qualify as a sovereign debt dispute.[26] This means such a dispute must be specific with respect to the subject matter; it must be specific with respect to the claim of rights or grievance complained of; the claim must be made against, and specifically resisted or denied or counter-claimed by a recognised international subject; and it must be capable of engaging the jurisdiction of an adjudicative body established 'by inter-governmental agreement … or by agreement between a national government and a foreign private entity, where the court is legally situated either fully or partly outside the national juridical and governmental system of any state'.[27]

From the above, a sovereign debt dispute must be capable of being resolved through adjudication. Adjudication is, however, one among several available DSMs.[28] Broadly, 'adjudication' is a form of third-party social ordering which is usually in the form of arbitration and judicial settlement.[29] It governs social relations and is designed to ensure social cohesion and to establish justice through dispute resolution and

[25] Keohane et al 2000:457-488, 459.
[26] UN Charter 1945:art 36(3); Lauterpatch 1928:277-317.
[27] *South China Sea Arbitration (Philippines v China)* 2016 PCA Case No 2013-19. See also Grossman 2013:61-105; Krisch 2014:1-40; Hovell 2016:147-166, 148; Benvenisti E & Agon S 2018. 'The law of strangers: The form and substance of other-regarding international adjudication', 9-21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013014 (accessed 23 June 2019); Kingsbury K 2011. 'International courts: Uneven judicialization in global order', 1-6 http://ssrn.com/abstract=1753015 (accessed 23 June 2019).
[28] Bilder 1986:1-32, 4.
[29] Schill 2015:1-6; Franck et al 2017:1117-1178; Posner & Yoo 2005:1-74; Bingham 1988:141-154; Gent 2013:66-77, 67.

affirmation of societal normative expectations.[30] It is 'a device which gives formal and institutional expression to the influence of reasoned argument in human affairs'.[31]

Thus, an adjudicative decision arises from reasoned arguments advanced by the disputing parties.[32] In the words of Fuller, 'adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments'.[33] The participation is not in the form of a blanket demand or defence, but by way of a meaningful assertion or denial of rights supported by facts and legal principles.[34] In other words, a key, distinctive feature of adjudication is the determination of claims of rights by allowing the affected parties to actively participate in the process leading up to the decision. The effects of such decision may, however, extend beyond the parties depending upon the form and structure of such adjudication as well as the regime or controlling legal setting within

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[30] Adjudication is sometimes used synonymously with judicial settlement. In a broad jurisprudential sense, however, adjudication precedes judicial settlement and, as used in this research, it goes beyond judicial settlement. See Romano 2006:2-4; Landes & Posner 1976:236-240 (noting that 'the provision of judicial services precedes the formation of the state'); Keohane et al 2000:461; Wood 2017:1-16. Fuller opines thus:

> [A]djudication in the very broadest sense includes a father attempting to assume the role of judge in a dispute between his children over possession of a toy. At the other extreme it embraces the most formal and even awesome exercises of adjudicative power: a Senate trying the impeachment of a President, a Supreme Court sitting in judgment on the powers of the government of which it is a part, an international tribunal deciding a dispute between nations… It includes adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission, as in labor relations and in international law. It also includes tribunals that assume adjudicative powers without the sanction either of consent or of superior governmental power.

See Fuller 1978:353-409, 357; Paulus 2010:1-10 (noting that '[c]lassical international dispute settlement consists in the resolution of a dispute between two or more parties by a neutral third party, ideally a court or an arbitral tribunal, in an adversarial procedure on the basis of international law').

[31] Fuller 1972:357; Helfer& Slaughter 1997:320-378; Sikkink 1993:411-441, 411-412; Smith 1994:839-840.

[32] Fuller notes thus:

> The litigant must therefore, if his participation is to be meaningful, assert some principle or principles by which his arguments are sound and his proofs relevant. … A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact that the latter rests upon some principle. Hence, … issues tried before an adjudicator tend to become claims of right or accusations of fault … Three aspects of adjudication that seem to present distinct qualities are in fact all expressions of a single quality: (i) the peculiar mode by which the affected party participates in the decision; (2) the peculiarly urgent demand of rationality that the adjudicative process must be prepared to meet; and (3) the fact that adjudication finds its normal and "natural" province in judging claims of right and accusations of fault.

See Fuller 1978:369.

[33] Fuller 1978:369.

[34] Fuller 1978:369.

which it operates.[35] The parties' respective positions must meet 'the peculiarly urgent demand of rationality' in order to persuade the third party adjudicator.[36] This, in a sense, confers legitimacy to the adjudicating process. Other legitimacy-conferring factors include the adjudicator's source of authority, the governing or applicable law and the final acceptance of, or compliance with, the outcome.[37]

However, the issue of legitimacy of international adjudication has always been problematic. This is because, unlike the domestic system of adjudication, international adjudication is not controlled by a specific constitutional system. In other words, unlike the relatively well-ordered, structured, centralised and hierarchically organised domestic system, international adjudication is largely horizontal, operating in a generally authority-deficient legal order with multiple, often uncoordinated, courts and tribunals driving it.[38] These tribunals are not uniformly structured. Most of them do not have compulsory jurisdictions.[39] Their principal mandates or jurisdictions vary in terms of their respective constitutive instruments.[40]

Scholars have advanced different typologies to explain international adjudication. For instance, Born divides it into 'first generation' and 'second generation' adjudications, distinguished largely by a tribunal's jurisdictional reach and functional effectiveness.[41] Helfer and Slaughter distinguish between 'international adjudication' and 'supranational adjudication' in the following words:

> [S]upranational adjudication, [is an] adjudication by a tribunal that was established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties-whether between a private party and a foreign government, a private party and her own government, [or] private parties themselves … Traditional international adjudication, by contrast, involves only state-to-state litigation. Tribunals engaged in supranational adjudication may also exercise jurisdiction over state-to-state cases.[42]

[35] Fuller 1978:357.
[36] Fuller 1978:369.
[37] Treves 2017:19-42.
[38] Alter KJ 2011. 'The evolving international judiciary', 2-8 http://ssrn.com/abstract=1859507 (accessed 25 October 2018); Shelton 2009:537; Kingsbury 2011:278.
[39] Romano 2007:792-795; Born 2012:775-879.
[40] Shelton 2009:537.
[41] Born 2012:775-879.
[42] Helfer & Slaughter 1997:289-290.

Accordingly, supranational adjudication enables a tribunal to establish an enforcement linkage with the domestic legal system.[43] Along the same line, Keohane et al distinguish between 'interstate' and 'transnational adjudication'.[44]

There are various theoretical propositions about the functions, significance and objectives of these forms of adjudication. For instance, the private law-inspired consent theory conceives international adjudication as an agency relationship between the disputing parties on the one hand and the tribunal on the other, hence the latter is exclusively a dispute resolution forum subject to the will of the disputing parties.[45] In this sense, adjudication is simply a result of delegation of authority to the tribunal.[46] Another variety of the consent theory considers adjudicators as trustees rather than agents.[47] One of the key elements of this theory is that adjudication is monofunctional, ie its function is simply to settle disputes.[48]

Ironically, the consent theory reflects the idea of sovereignty. This is because a tribunal cannot be seized of jurisdiction except with the prior consent of a state party concerned. Support for this theory can be found in the declaration of the PCIJ that 'no State can, without its consent, be compelled to submit its disputes … to arbitration, or any other kind of pacific settlement'.[49] This view is often extended to the monofunctionality perspective of international adjudication. For instance, Posner & Yoo argue that international tribunals are 'simple, problem-solving devices… [which] are likely to be ineffective when they neglect the interests of state parties and, instead, *make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute*'.[50] This implies that

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[43] Helfer & Slaughter 2005:899-956 (noting that supranational tribunals are those that allow direct access by private parties).
[44] Keohane et al 2000:457-458.
[45] Romano 2006:2-5.
[46] Keone et al 2000:459.
[47] Majone 2001:104; Scott & Stephan 2004:563.
[48] Bogdandy & Venzke 2011:979-1004; Bogdandy & Venzke 2012:7-41; Bogdandy A & Venzke I 2012.'On the functions of international courts: An appraisal in light of their burgeoning public authority', 1-20 http://ssrn.com/abstract=2084079 (accessed 3 June 2018) (hereafter 'Bogdandy & Venzke 2012b'); Venzke 2011:99-131; Schill 2011:1083-1110.
[49] *Status of Eastern Carelia* Advisory Opinion 1923 PCIJ Series B 27.
[50] Posner & Yoo 2005:6-28; cf Helfer & Slaughter 1997:273; Helfer & Slaughter 2005:899; Posner & Yoo 2005(b): 957-973. Ginsburg & Mc Adams observe:

> [I]nterstate dispute resolution originated in ancient times… It was particularly well developed in the form of arbitration among the ancient Greek city-states. The Greeks attributed the origin of arbitration to the gods of Olympia, whose interactions paralleled the

international courts and tribunals are continuously dependent on the parties' consent as their ultimate source of legitimacy, authority and jurisdictional foundation. Therefore, their pronouncement must be strictly limited to the parties involved and the issues they raised.[51] This also finds expression in international commercial arbitration (ICA) and ITA.[52] As will be discussed subsequently, the latter is regime-specific adjudication designed to offer an impartial dispute resolution mechanism in disputes between foreign investors and their host state pursuant to free trade pacts or international investment agreements (IIAs) especially BITs. On the other hand, ICA involves adjudicating cross-border commercial disputes outside the investment treaty regime.[53] Parties' consent is far more pronounced in ICA although it is the progenitor of modern ITA, ie ITA developed in the shadow of ICA. The conventional wisdom in both, however, is that of monofunctionality of adjudication. For instance, in *Romak v. Uzbekistan*[54] the tribunal held that:

> The Arbitral Tribunal has not been entrusted, by the Parties ... with a mission to ensure the coherence or development of 'arbitral jurisprudence'. The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general.[55]

Although the consent theory reflects CIL, it is, however, too restrictive and functionally questionable as it reduces tribunals' functions to only dispute resolution (ie

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> relations among city-states. Arbitration was sometimes carried out by intergovernmental organizations, known as *amphictyones*, which were formed among several states that shared religious sites, as well as by city-states. Competition between multiple potential arbitrators meant that there was some incentive for the arbitrators to signal accurately… The arbitrators did not rely on centralized enforcement, but on persuasion and reason for legitimacy. We do not know precisely how many of these decisions were enforced, but there does seem to be evidence that many of them were complied with in the absence of centralized enforcement. In the modern period, an important juncture in the development of routinised procedures for international dispute resolution was the *Alabama* arbitration between the United States and Britain, concluded in 1872.

See Ginsburg & McAdams 2003:1229-1339. See also Stephan 2002:333-352; King Jr & Graham 1996:42-53, 48; Fraser 1926:179-208.

[51] Posner & Yoo 2005:6-7; cf Helfer& Slaughter 2005:910-915; Brower 2008:259-310, 265.

[52] Schill notes: 'Investment treaty arbitration, therefore, is an adjudicatory process that has little in common with commercial arbitration, where the parties under the principle of party autonomy have full liberty to determine not only which law to apply, but also whether to render a decision based in law or *ex aequo et bono* ... Investment treaty disputes therefore involve core issues of public law in any area touching upon economic policy-making'. See Schill 2011:1084.

[53] Schill 2011:1084.

[54] *Romak SA v Uzbekistan* 2009 IIC 400. See also *AES Corporation v Argentina* 2005 12 ICSID Reports 308:para 30; *GEA Group v Ukraine* 2011 IIC 487:para 90.

[55] *Romak SA v Uzbekistan*:para 171.

monofunctionality). Also, it is purely state-centric in its approach as it mainly operates in the shadow of inter-state adjudication. It, arguably, ignores the reality of universal values shaping adjudication and the increasing internationalisation of trade, finance and investments occasioned by the irresistible forces of economic globalisation. The latter phenomenon enables individuals to operate on the same level as states in their commercial undertakings. Furthermore, the theory also ignores the corresponding proliferation of international tribunals established to address the complex legal problems arising from these issues and phenomenon. The form and content of such consent is also unclear thereby raising concerns about the genuineness of such consent.[56]

Thus, contrary to the consent paradigm, compulsory jurisdiction is becoming common today. For instance, Romano argues that today most tribunals' jurisdictions are 'triggered often, and in certain cases solely, unilaterally'.[57] Indeed, even 'arbitration, which for centuries has been a quintessential consensual exercise, has … been increasingly resorted to unilaterally'.[58] Born also asserts that today international tribunals have assumed a significant position by rendering enforceable decisions in the field of trade, finance and investments.[59] Also, Yoo & Posner's claims that dependent tribunals designed to serve parties' interests are more effective while independent ones with extra-party considerations are ineffective, have been shown to be untenable.[60] This is because, as Helfer & Slaughter have argued, 'tribunals do far more than simply settle disputes between contesting parties'.[61] The world has become a 'community of law' where the 'participants-both individuals and institutions-understand themselves to be linked through their participation in, comprehension of, legal discourse'.[62]

Adjudication in this 'community of law' reflects the desire to manage the complex diversity of actors and their interests on the global stage. Today,

[56] Cinotti 2015:105-117.
[57] Romano 2006:5.
[58] Romano 2006:5-10.
[59] Born 2012:34.
[60] Helfer & Slaughter 2005:36-38.
[61] Helfer & Slaughter 2005:1-58. Cf Posner & Yoo 2005(b):957.
[62] Helfer& Slaughter 1997:289-297.

> states are themselves composed of governments interacting with a panoply of non-state actors: individuals, groups, corporations, and voluntary organizations [...and this] web of potential relationships between private parties, supranational entities, and domestic government institutions lies at the heart of supranational adjudication.[63]

This perspective appears to align with the evolving global governance regimes and the transnational legal theories seeking to explain the transformative role of law in a globalised society.[64]

Therefore, in functional terms, international tribunals have become global institutions with immense jurisprudential clout.[65] Unsurprisingly, there is a growing consensus suggesting a paradigmatic shift away from a monofunctional understanding of adjudication to public law theory built around the notions of multifunctionality, global cosmopolitanism, common human values and collective communitarian interests.[66] According to this theory, international tribunals are multifunctional actors exercising public authority affecting the rights of individuals and shaping the expectations of global actors and their communities.[67] For instance, using global cosmopolitanism, Bogdandy & Venzke argue that international adjudicative institutions derive their legitimacy not only from the consent of the parties, but from their exercise of public authority as institutions administering justice 'in the name of the peoples and the citizens'.[68] They are multifunctional actors because their functions extend beyond settling disputes in concrete cases; their decisions 'contribute to the stabilization and development of the law' and they 'review and legitimise the authority exercised by other actors on different levels of government - be it the authority of international or domestic bodies'.[69] In exercising their jurisdiction, they can (and often do) 'affect the freedom of others in pursuance of a common interest'.[70] In the same vein, they affect

[63] Helfer& Slaughter 1997:289-297.
[64] Zumbansen 2013:117-138.
[65] Bogdandy & Venzke 2011:979-1004; Bogdandy & Venzke 2012:7-41.
[66] Bogdandy & Venzke 2012:7-20.
[67] Venzke I 2016. 'Investor-state dispute settlement in TTIP from the perspective of a public law theory of international adjudication', 1-12 http://ssrn.com/abstract=2742173 (accessed 24 July 2019).
[68] Schill 2015:5.
[69] Venzke 2016:5-7.
[70] Bogdandy & Venzke 2012:7-41.

individuals and institutions through their law-making function which is becoming 'more dynamic and more powerful'.[71]

For instance, in the context of sovereign debt dispute, adjudications can, both directly and indirectly, affect the state's capacity to fulfil its socio-economic rights commitments. Indeed, as demonstrated in the previous Chapter, studies have shown that creditor litigations impact the fiscal capacity of debtor states.[72] Apart from the huge cost of such adjudication, the judgement or award, as the case may be, could disrupt sustained financing of socio-economic rights-based programmes of the debtor state.

In addition, international tribunals' decisions and law-making function are increasingly being seen as global public goods.[73] This is because of their non-excludability, utility and implicit authority in shaping normative expectations of global actors.[74] The tribunals have, arguably, become law-makers in their own rights through interpretation and application of treaties and dispute resolution function even in the absence of an institutionalised *stare decisis* doctrine.[75] The evolution and application of rules with the support of *stare decisis*-like reverence further supports the judicialisation of different regimes of international law, including sovereign debt governance.

While acknowledging the difficulties of extending this public law, multifunctional understanding to ITA, Schill argues for an integrated theory of international adjudication because of the increasing judicialisation of the investment treaty regime.[76] The integrated theory seeks to tie ITA to the public law theory. The recent moves to

[71] This aligns with the international public authority approach to sovereign debt governance. According to Venzke 'public authority [is] a capacity … to affect others in the exercise of their freedom in pursuit of a common interest'. See Venzke 2016:5-6. See also Jacob 2011:1029.
[72] Schumacher J et al 2018. 'Sovereign defaults in courts', 33-35 https://ssrn.com/abstract=2189997 (accessed 14 June 2019).
[73] Paine J 2018. 'International adjudication as a global public good?' 1-20 http://www.ejil.org/pdfs/23/3/2304.pdf (accessed 25 June 2019).
[74] Paine 2018:1-20.
[75] Venzke 2016:2-5; Jacob 2011:1029. In *Saipem Spa v Bangladesh,* the tribunal held that 'it has a duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'. See *Saipem v People's Republic of Bangladesh* 2009 IIC 378 (ICSID):para 67.
[76] Schill 2015:6 (noting '[i]ntegrated theories of international adjudication would benefit both permanent courts and international arbitration and become the framework for a fruitful cross-fertilisation between both forms of international adjudication...').

establish an Investment Court System under the Transatlantic Trade and Investment Partnership (TTIP) lends support to the integrated approach.[77]

However, the multifunctionality effect seems to be the same in both permanent and *ad hoc* tribunals, specific or general regimes, ICA or ITA. Therefore, it would be an oversimplification to consider tribunals' function as that of exclusively resolving parties' disputes. Indeed, the current practice in most investment arbitration institutions is supporting the multifunctionality approach. First, the formal recognition of *amicus curia* briefs in these forms of adjudication dealt a blow to the party-exclusivity argument as non-parties have now been recognised as participants often advancing reasoned arguments to help in the final determination of claims.[78] Through this, for instance, citizens' socio-economic rights' concerns have found a direct entrance point into ISDS.[79] This also aligns with the stakeholder approach to sovereign debt governance. In the words of Bantekas:

> Sovereign debt is not simply a contractual assumption of debt by the state through a loan transaction, but is largely conditioned by other extraneous factors. These include, among others: The many and varied purchasers of government bonds; … *taxpayers that will be forced to forego some of their bank deposits or pay discriminatory taxes towards reviving the economy, or otherwise forfeit property rights because of their latent inability to keep up with their personal debts. … All of these would qualify as third parties to arbitral proceedings, at the very least*.[80]

In fact, the legitimacy crisis facing ISDS and the limited regulatory space granted to states on public policy grounds are connected to the monofunctionality and party-exclusivity position of the private, contractual governance paradigm. These, among others, have led to increasing agitation for the reform of the ISDS regime.[81]

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[77] Venzke 2016:7-24; Titi C 2016. 'The European Union's proposal for an international investment court: Significance, innovations and challenges ahead', 1-44. http://ssrn.com/abstract=2711943 (accessed 25 June 2019). See also *AES v Argentine Republic* 2005 12 ICSID Report 308; *Saipem v People's Republic of Bangladesh*.

[78] Bastin 2017:125-143,126.

[79] *Ubaser v Republic of Argentina* 2012 IIC 969 (ICSID) (henceforth reference will be made to the investment treaty arbitration electronic report available at https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (accessed 9 August 2018).

[80] Bantekas 2014:159-177, 161-163. Italics for emphasis.

[81] See, for instance, Roberts A 2018. 'Incremental, systemic, and paradigmatic reform of investor-state arbitration', 1-24 https://ssrn.com/abstract=3189984 (accessed 14 June 2019); Puig & Shaffer 2018:361-409; UN Commission on International Trade Law (UNCITRAL) 2015. *United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration* New York: UN; UNCITRAL 2014. *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* New York: UN.

Consequently, the growing trend now is the establishment of an investment court system which would, invariably, incrementally and formally judicialise the investment treaty regime with explicit treaty interpretation and law-making functions. As will be argued later, unless a human rights approach is adopted, these functions could negatively affect non-parties such as debtor's citizens thereby undermining their status and their rights. Hence, tribunals are now striving to accommodate these concerns.

Finally, the inherent public policy elements and treaty-based dynamics in modern trade, finance and investment relationships make it implausible to limit the adjudicative function exclusively to the parties' objectives or interests in these and other areas. This does not underrate the requirement of consent in adjudication.[82] It only accommodates a broader, functional perspective in line with state practice and global imperatives.

Therefore, arising from the above, SDA should be understood in the context of the peculiar nature of sovereign debt itself, the multi-stakeholder approach to sovereign debt governance and the multifunctional public law theory of adjudication. This is because, first, in sovereign debt, creditors comprise both public and private entities. This creates the possibility of employing both inter-state and transnational (ie at the instance of private creditors) adjudications. Thus, like investment arbitration and inter-state adjudication, public international law principles would ineluctably become applicable and employable by parties to buttress their 'reasoned' or 'urgent rationality'. Importantly, there are certain common human values that cannot simply be shelved aside in these forms of adjudication without impeaching the latter's legitimacy. This concerns both inter-state and transnational adjudications. According to Paulus, as states become agents of common, community interests of humanity and their citizens, international tribunals have now assumed an objective role of 'arbiters of international public or community interests …. [filling] gaps in positive international law to advance human values and of balancing State rights and individual rights…'.[83]

Second, although most creditors' primary objective in employing adjudication is to recover their unpaid debts, in the context of sovereign debt, the diversity of creditors

[82] *Alemanni v Argentine Republic* 2014 IIC 666 (ICSID) (reference to the Investment treaty arbitration electronic report https://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf (accessed 14 March 2018)): paras 284-285.
[83] Paulus 2010:5.

and their distinct and sometimes conflicting interests in the event of default raise inter-creditor concerns.[84] Indeed, official creditors rarely employ adjudication to enforce their claims.[85] Most multilateral creditors, for instance, enjoy a *de facto* preferred creditor status.[86] As will be examined later, this, in part, explains their non-resort to adjudication.

Third, as noted earlier, the absence of a legal framework means there is no regime-specific system of SDA.[87] It is, thus, a fragmented, patchwork of different systems of adjudication: national, regional, transnational and international. Domestic courts of creditor nations are often vested with jurisdictions in non-official loans or bonds, but enforcement of the resulting judgement has always been challenging despite the dominant practice of waiving sovereign immunity by debtors.[88] Thus, permanent, *ad hoc* and other regime-specific international and transnational adjudicatory mechanisms (eg ISDS, ICA, human rights courts, etc) have become potentially employable by creditors, subject, of course, to relevant treaty or contractual limitations as may be determined at the jurisdiction and admissibility stages of such adjudications.

Finally, despite the functional/jurisdictional variations of international tribunals and the non-applicability of *stare decisis*, there is a growing consensus that their pronouncements have 'guiding' effects in subsequent cases across different regimes.[89] In investment arbitration, for instance, this is leading to what is now referred to as 'arbitral common law' thereby further concretising the judicialisation process.[90] For instance, in *Saipem v Bangladesh*, the tribunal held thus:

> [The tribunal] has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[91]

[84] Bohoslavsky 2010:387-412.
[85] See, however, *Law Debenture Trust Corp Plc v Ukraine:*655.
[86] Schadler 2014:1-8.
[87] The League of Nations' proposed International Loans Tribunal could not see the light of the day. Ever since, there has not been any significant effort to establish one. See Waibel 2011:324-326.
[88] Ahmed et al 2010:39-46; Schumacher et al 2018:3-30.
[89] Stone 2011:3-21.
[90] Stone 2011:7.
[91] *Saipem SpA v People's Republic of Bangladesh*:para 67.

This position seems to agree with the 'community of law' proposition advanced by Helfer & Slaughter.[92] It also captures the reality of multifunctional adjudication and the stakeholder approach to sovereign debt governance which considers courts and tribunals as critical stakeholders in the sovereign debt regime. Importantly, by following 'solutions established in a series of consistent cases', arbitrators are shaping normative expectations and building a coherent jurisprudence.[93] In the words of Stone, 'arbitral tribunals are actively engaged in building *jurisprudence*: a judge-made, precedent-grounded, law of investment arbitration, created in order to stabilise (potentially explosive) strategic environments, to entrench specific frameworks of argumentation, and to legitimise their own law making'.[94] Needless to argue that the 'laws' emanating through this process are, *ab initio*, conscious, consent-based but outside the direct control of the states. Indeed, the ITA system is simply 'the reasoning of law professors', ironically driving a judicialisation process without a judiciary.

Nonetheless, the public, multifunctional theoretical approach finds expression in the areas of human rights, finance and investments laws. Adjudication in these areas occur within treaty-based dispute settlement frameworks which, depending upon the purpose, could be a state-state (inter-state) or an ISDS framework or both.[95] As will be elaborated later, most dispute settlement frameworks in finance and investment are provided under IIAs or investment chapters of free trade agreements (FTAs).[96] Even among IIAs and FTAs, there are variations in the designs of the DSM frameworks reflecting states' consensual law-making desires.[97] However, most IIAs share a common clause exempting regulatory controls on account of necessity, public interests and public order. This is not a treaty design only. It is a CIL principle in general international law extended to both the established and the evolving regimes.

[92] Helfer & Slaughter 2005:34-35.
[93] Stone 2011:7.
[94] Stone 2011:7.
[95] UNCTAD 2003. *Dispute settlement: State-state*. Geneva: UNCTAD 3-21.
[96] UNCTAD 2003:8.
[97] UNCTAD 2003:12.

5.2.2 The Contours of Sovereign Debt Adjudication

Having theorised international sovereign debt adjudication as a multifunctional, decentralised adjudicatory system, it is now appropriate to draw its contours within the context of this research in order to identify the relevant tribunals and the suitable cases for review. From the above discussion, a logical inference is the fact that sovereign debt adjudication is mostly initiated by holdout creditors against their debtors to recover the value of their debts following events of default. The adjudicative forum, governing law and the DSM are usually defined and limited by the contractual documents and/or treaties depending upon the character of the parties and the nature of the contract (ie official or non-official). Usually, official loans prescribe arbitration as the preferred DSM while non-official loans and bonds prescribe either judicial settlement or arbitration before domestic adjudicative fora especially in London and New York or, in some cases, adjudication by way of ICA, or both. In this respect, it is a matter of contract.[98]

Thus, third party arbitration and judicial settlements could be employed by both official and non-official creditors to enforce their claims. However, arbitration appears to be more convenient as it, comparatively, offers more advantages for creditors.[99] Not surprisingly, today arbitration clauses are gaining more grounds in sovereign debt contracts.[100] For official creditors, another possible adjudicative fora would be the ICJ and mixed claims commissions.[101] In practice and as noted above, however, official creditors rarely resort to SDA. Hence, while there is a paucity of state-state SDA, the research could not find any reported IFIs-state SDA. The reason for the latter situation, as will be examined later, may not be unconnected to the functional immunity and the *de facto* creditor status of some multilateral creditors.

However, while there is little or no increase in official (state-state and IFIs-state) creditor litigation activities, there is a significant increase in non-official creditor litigation activities.[102] Express waiver of sovereign immunity contributes to the rising

[98] Waibel 2011:253.
[99] Cross 2006:335-365, 337-338.
[100] Waibel 2011:211-212; Cross 2008:337-340.
[101] Waibel 2011:252-270; Bantekas 2014:174.
[102] Schumacher et al 2018:30-35. Of course, there are mixed claim commissions and state-state cases of sovereign debt adjudications in the past. See, for example, *Germany et al v Venezuela (Preferential Claims Case)* 1904 Tribunal of the Permanent Court of Arbitration; Drago 1907:692.

wave of this form of litigation.[103] Recently, ITA (through ICSID and UNCITRAL), regional economic courts and human rights tribunals have become additional sovereign debt adjudicative fora as non-official creditors seek effective debt collection mechanisms thereby expanding their possible options to other related (or perhaps unrelated) regimes of international law. This is not free from challenges. For instance, although a sovereign is always the defendant in both creditor claims and human rights cases, there are fundamental substantive and procedural variations in these types of cases.[104] While human rights complaints are adjudicated in regime-specific (usually regional human rights courts) tribunals, creditor claims enjoy no such regime-specific tribunals. Nevertheless, there can always be a cross-regime interaction especially in the interpretation and application of relevant provisions of treaties and principles of law.[105] The essential point is that although creditors' expansion to other regimes has opened the doors for possible forum shopping, it has also opened the doors for more cross-regime interactions as revealed in the next sections.

Within the context of ITA, Goldman identifies two forms of SDAs.[106] The first is where holdout creditors reject any debt restructuring or haircut and, instead, seek full repayments of their debts through the courts or tribunals. The second involves a situation where 'investors holding investments in the real economy attack individual measures taken by the host state in the context of a debt crisis. These cases normally focus on the question whether the debt crisis provides sufficient justification for the chosen course of regulatory action'.[107] This is a 'debt crisis' approach to SDA.

However, this research broadly identifies four varieties of SDAs. First, there are SDAs by way of espousal of claims initiated by the creditors' home government against a sovereign debtor. This is strictly a state-state SDA although it would have been

[103] Schumacher et al 2018:1-3. See also *Republic of Argentina v Weltover Inc* 1992 504 US 607. An example of express waiver is found in the Final Prospectus concerning Turkey's 6.00% Notes due January 14, 2041 which states thus: 'Turkey will irrevocably waive, to the fullest extent permitted by law, any immunity, including foreign sovereign immunity, from jurisdiction to which it might otherwise be entitled in any action arising out of or based on the debt securities which may be instituted by the holder of any debt securities in any state or federal court in the City of New York or in any competent court in Turkey'. See *Final Prospectus, Republic of Turkey* (10 August 2006) http://www.sec.gov/Archives/edgar/data/869687/000119312513007856/d460766d424b5.htm (accessed 15 January 2019).
[104] For example, the character of the claimants, contractual basis of creditors' claims, etc.
[105] As will be shown in the next section. See *Urbaser v Argentina*.
[106] Goldmann 2018:6.
[107] Goldmann 2018:6.

needless without the private creditors' interests as the basis of the actual complaint. Events of default may not be at issue here. Second, there are SDAs initiated by holdout creditors in domestic courts pursuant to the loan contract or definitive bonds.[108] This is by far the most widely employed because of its simplicity and contractual basis. However, because of the character of the debtor, enforcing judgement has always been problematic. Third, there are SDAs initiated by holdout creditors by way of ITA or other systems of international adjudication solely with the aim of rejecting or frustrating a debt restructuring deal and reclaiming the full value of their original debts.[109] This too is problematic especially because of its unsettled legal basis and a series of legitimacy concerns confronting it.[110] Fourth, there are SDAs also initiated by investors by way of ITA to challenge regulatory measures by the sovereign debtor as a result of an impending or actual sovereign debt crisis.[111] The latter are the 'debt defence' cases. In the words of Goldman, 'this category concerns primarily the defences which the host state may invoke' to reject such claims.[112] The problem here is that these cases are similar to a typical investment treaty claim.

Nevertheless, except the first variety of SDA which may not necessarily result from debt default, all the other cases are necessarily triggered by events of default, the ensuing crisis and the adoption of remedial measures by the sovereign debtor concerned with a return to debt sustainability. Indeed, as will be examined subsequently, the fourth category of SDA is essentially an investor-host state dispute usually triggered by measures adopted to address sovereign debt crisis. All four categories, however, fit into the stakeholder approach to sovereign debt governance.

Importantly, the public-private elements in sovereign debt governance, which are visible in the enforcement of claims against sovereign debtors, contribute to these variations.[113] However, in line with the scope of this research, the case reviews here will focus only on the few cases of international and transnational SDAs. Pure contract-

[108] Schumacher et al 2018:5-35.
[109] Goldmann 2018:6.
[110] See, for instance, Park & Samples 2017:1033; Hopwood 2018:19; Thomas 2017:419; Waibel 2007:711-759; Ishikawa 2014:63-98; Griffin & Farren 2005:21-24; De Roa 2013:131-154; Strik 2012: 183-204; Norton 2012:291-316; Clement & Black 2014:24-27; Burke-White W 2008. 'The Argentine financial crisis: State liability under BITs and the legitimacy of the ICSID system', 1-31 http://ssrn.com/abstract=1088837 (accessed 24 June 2017).
[111] Goldman 2018:6.
[112] Goldman 2018:6.
[113] Waibel 2011:19-20; Schumacher et al 2018:2-19.

based, domestic cases are outside the scope of this research. In other words, the research is not concerned with the countless domestic SDAs which mostly occur in the courts of the creditor nations. This is because, first, including domestic SDAs will require a broader conception of sovereign debt to include both domestic and external debts. Second, it will be simply impossible to review and determine attitudes of the adjudicators or draw any discernible trend in the cases emanating from diverse domestic jurisdictions on SDAs. As rightly observed by the ICJ in the *Norwegian Loan case*, 'in matters of … international loans the decisions of courts of various countries … have not been characterised by such a pronounced degree of uniformity and certainty as to permit a forecast…'.[114] In plain reality, the cases would be unmanageable. Third, as indicated in the previous chapter, the creditor nations' positions favor the contractualist, creditor-diktat narrative which is unquestionably biased against sovereign debtors and overlooks the public policy and exogenous elements characterising sovereign financing.

Therefore, for the above reasons, the focus here will be on the three internationalised forms of SDA: espoused creditors' claims, ITA-based sovereign debt cases and human rights-based debt claims.

5.3 SOCIO-ECONOMIC RIGHTS & SDAs BY OFFICIAL CREDITORS

As noted above, SDAs at the instance of official creditors are rare today.[115] As shown in the previous Chapter, up to the early 20th century, state-state resolution of sovereign debt crisis often involved multiple approaches including notably the resort to the use of force, gun-boat diplomacy and forced receivership. Indeed, in the past SDD was considered by some as a just cause of war.[116] These were practical, extra-legal solutions lacking grounding in legal principles and rule of law.[117] In the words of Weidemaier 'formal legal enforcement was virtually unavailable to sovereign lenders during the early twentieth century'.[118]

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[114] *Case of Certain Norwegian Loans (France v Norway)* 1957 ICJ Report paras 46-47, https://www.icj-cij.org/files/case-related/29/029-19570706-JUD-01-00-EN.pdf (accessed 12 August 2018).
[115] Gray & Kingsbury 1992:97-134.
[116] Mitchener & Weidenmier 2005:3-14; Weidemaier 2010:338-341; Ahmed et al 2010:46.
[117] Weidemaier 2010:338; Mitchener & Weidenmier 2005(b):472.
[118] Weidemaier 2010:338.

However, with the adoption of the *Second Hague Convention on the Limitation of the Employment of Force for the Recovery of Contract Debts* (Recovery of Contract Debt Convention), states began to exercise restraint.[119] By this Convention, according to the ICJ, 'an intervening power [creditor nation] must not have recourse to force before it has tried arbitration'.[120] Thus, following the First World War, resort to the extra-legal approaches reduced dramatically as states began to use the courts and arbitral tribunals to resolve sovereign debt disputes mostly through diplomatic protection and mixed claim commissions.[121] Dispute resolution became more formalised.[122]

The general sense of 'rule of law' was further reinforced following the Second World War. Indeed, human rights standards were significantly incorporated into the evolving international dispute resolution mechanisms. However, since the late 1950s, official bilateral debts are usually resolved through non-adjudicatory means in the Paris Club or through bilateral negotiations which, as argued in the previous chapter, have little or no regard for the socio-economic rights obligations of the debtor and creditor nations respectively.[123] This further explains the paucity of state-state SDAs in recent decades.

In addition, the compulsory jurisdiction of the ICJ can only be invoked in inter-state disputes or by way of diplomatic protection upon exhaustion of local remedies.[124] For instance, the case initiated in 2014 by Argentina at the ICJ titled 'Dispute concerning judicial decisions of the USA relating to the restructuring of the Argentine sovereign debt' could not proceed because the USA did not consent to the court's jurisdiction.[125]

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[119] *International Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts* (The Hague 18 October 1907); Drago 1907:692.
[120] *Norwegian Loans* case:para 24.
[121] See, for instance, *Preferential Treatment of Claims of Blockading Powers against Venezuela* 1904 PCA (22 February 1904) http://www.pca-cpa.org/showpage.asp?pag_id=1029 (accessed 12 August 2018).This reflects the creditor diktat narrative. See Ahmed et al 2010:40-42; Weidemaier 2013:123-131; Weidemaier WMC & Gauthier M 2017. 'Venezuela as a case study in limited (sovereign) liability', 2-10 https://ssrn.com/abstract=2882835 (accessed 12 August 2019).
[122] Mettala 1986:219-245.
[123] Gelpern 2014:308-326; Schumacher et al 2018:2-3; Blocher J & Gulati M 2016. 'The borders of sovereignty', 2-7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557830 (accessed 16 April 2019).
[124] *ICJ Statute*:art 34(1).
[125] In its request, Argentina 'contends that the United States of America has committed violations of Argentine sovereignty and immunities and other related violations as a result of judicial decisions adopted by US tribunals concerning the restructuring of the Argentine public debt'. See ICJ 2014. 'Press Release No 2014/25: The Argentine Republic seeks to institute proceedings against the United States of America before the International Court of Justice. It requests US to accept the Court's jurisdiction https://www.icj-cij.org/files/press-releases/4/18354.pdf (accessed 10 August 2018); Deutsch A

5.3.1 State-State SDAs & Socio-Economic Rights: Espousal of Creditors' Claims

Notwithstanding the rarity of state-state SDAs, there are few reported espoused debt cases worthy of consideration here.[126] The research will examine these cases to gauge the trend. As hinted earlier, the focus will be on espousal of private creditors' claims by their home states.[127] Espousal of private claims is sometimes referred to as 'diplomatic protection' or 'diplomatic intercession'.[128] It is a state-state action 'to secure redress of alleged wrong done [to its] individuals or corporations'.[129] According to Koessler, it is an interposition grown out of feudal representation of a serf (who lacked legal standing) by his lord in the court of the Baron.[130] Thus, 'its peculiarity is based on the fact that the claim of a private person, normally without judicial standing as

'Argentina seeks Legal Case against US in the Hague', https://uk.reuters.com/article/uk-argentina-debt-usa-courts/argentina-seeks-legal-case-against-u-s-in-the-hague-idUKKBN0G724U20140807 (accessed 10 August 2018).

[126] It is important to note the peculiarity of the recent case between Russia and Ukraine (*Law Debenture Trust Corp plc v Ukraine*:655) which raised issues of responsible lending. Although commenced at the English court the issues raised essentially concerned public international law. Through a trustee of its sovereign wealth fund (National Wealth Fund), Russia subscribed to $3b Eurobonds issued by Ukraine. In the event of dispute, the bonds prescribed either litigation in English courts or arbitration at the London Court of International Arbitration. Russia opted for the former and sought for a summary judgment since it is 'an ordinary debt claim'. Ukraine, on the contrary, contended that Russia compelled it into the contract 'on onerous terms' and consequently, it was entitled to repudiate same on account of duress, *ultra vires* and internationally wrongful acts of Russia which impeded performance of the contract. Although socio-economic rights issues were not directly raised in defense, Ukraine argued that the debt was contracted by a Russian puppet government which lacked capacity to do so under the Ukrainian Budget Law. It argued that the non-payment was justified as a counter-measure against Russia to force it to cease interference with its territory and economy. Ukraine's economy was hit by the debts and Russia had vetoed official intervention by the IMF. Clearly, the geopolitical factors made the case peculiar: Russia (the creditor) was directly controlling the bondholder when it 'annexed' Ukranian (debtor's) territory before the latter's default. Weidemaier describes the case as 'a garden-variety debt enforcement case … [which] is unique in the annals of sovereign debt litigation'. Weidemaier 2016:1-7. The court based its reasoning on English Law of Contract and entered a summary judgment against the sovereign debtor. Interestingly, it held that 'once a state is recognised as such, as a matter of international law, it has unlimited capacity to borrow, and such capacity is recognised under English law… The reason for the absence of case law to this effect may simply be that the principle has never been questioned' (para 129-130). On the defence of duress the court held that it is one of the 'core examples of issues upon which domestic courts should refrain from adjudicating' as it would be inappropriate to adjudicate on 'rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law' (paras 295iv & 307x). Despite this, however, the court did not make any pronouncement on socio-economic rights or even the defence of necessity under CIL. This is not surprising given the contractualist approach adopted by the court from the outset. See also Gelpern 2014:308-326; Weidemaier 2016:3-7; Feria-Tinta M & Wooder A 2017. 'Sovereign Debt Enforcement in English Courts: Ukraine and Russia meet in the Court of Appeal in USD 3 bn Eurobonds Dispute'. *Essex Street Bulletin* 20:1-6.

[127] Bjorklund 2007:123; Koessler 1946:180-194.

[128] Koessler 1946:180.

[129] Koessler 1946:180.

[130] Koessler 1946:180.

against a foreign state, is espoused by a state and thus converted into a government claim which will be heard by the appropriate international tribunal'.[131]

Indeed, investment arbitration claims are mere delegated espousal claims.[132] In other words, ITA emerged partly to address the deficiencies of state-state espousal claims by enabling investors to initiate direct claims against states. The research will now review some of these cases.

5.3.1.1 *Russia v Turkey* (*Russian Indemnities* Case)

This case arose out of a delay in paying war indemnities and certain monetary claims of Russian citizens in Turkey.[133] While Russia contended that it was a state-state debt, Turkey argued that the claim was inadmissible as individual Russian subjects were the direct creditors of the principal sum. The tribunal rejected Turkey's objection.[134]

Despite Turkish instalmental payments of the debts following the financial crisis of 1881-1902, Russia demanded interests to cover the delayed period. Turkey contested the claim for interests as falling outside the original indemnity agreement. Accepting this obligation, Turkey reasoned, would make a sovereign debtor a 'debtor to a greater extent than it would have desired, and would risk compromising the political life of the State, by injuring its vital interests, overturning its budget, by preventing it from defending itself against an insurrection'.[135] In the event liability is found, however, Turkey urged the tribunal to exempt it on ground of *force majeure* because of its financial crisis of 1881-1902 which forced it to delay the payment.[136] Russia countered

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[131] Koessler 1946:180.

[132] Bjorklund notes thus:

> The 'delegated espousal' model builds on the traditional view that states are the only proper subjects of international law … Thus, an injury to a national of the state is an injury to the state itself, for which the state could seek redress under the doctrine of espousal. A state that negotiates the ability for its national to bring a claim on his or her own behalf is thus delegating its espousal capability to its national. This approach is also known as the 'derivative rights' model because the individual's rights derive from those of the state. 'Delegated espousal' may seem unduly cumbersome, but it is consistent with the view that states negotiate treaties to confer benefits on themselves, and that a violation of a treaty is an injury to the state. Most investment treaties do not preclude the possibility of espousal; while in most cases an individual will prefer to bring a claim himself, he retains the option of trying to persuade his home state to pursue a claim on his behalf.

See Bjorklund 2007:123-125.

[133] *Russian Claim for Interest on Indemnities (Russia v Turkey)* 1912 PCA 1-15 https://pcacases.com/web/sendAttach/643 (accessed 10 August 2018):para 9.

[134] *Russian Indemnities* case:paras 3-4.

[135] *Russian Indemnities* case:para 2.

[136] *Russian Indemnities* case:para 6.

that within the same crisis period Turkey had paid bigger debts to other creditors but agreed in principle that 'the obligation of a State to fulfill treaties may give way "if the very existence of the State should be in danger, if the observance of the international duty is … "self-destructive"…'.[137]

The tribunal held that, through the parties' correspondence, Russia had implicitly renounced its claim to interests.[138] Absent this renunciation, however, the tribunal held that Turkey was liable under international law to pay interest for delayed payments of the principal debts in the following words:

> [T]he general principle of the responsibility of States implies a special responsibility in the matter of delay in the payment of a monetary debt … If a State is condemned to compensatory interest damages … for the non-fulfillment of an obligation, it is a debtor to a degree which it may not have voluntarily stipulated, even more so … in the case of delay in the payment of a conventional monetary debt. Moreover, *however little the responsibility may imperil the existence of the State, it would constitute a case of force majeure which could be pleaded in public international law as well as by a private debtor'*.[139] (Italics for emphasis).

However, the tribunal rejected the defence of *force majeure* because Turkey repaid other comparatively larger loans without any peril to its existence.[140] Nevertheless, the tribunal held, *obita*, that Turkey had proved that

> from 1881 to 1902, [it was] in the midst of financial difficulties of the utmost seriousness, combined with domestic and foreign events (insurrections, wars) which forced it to make special disposition of a large part of its revenues, … and, generally, it could satisfy its obligations only through delay and postponements, and even then at great sacrifice.[141]

It is clear that the tribunal accepts the idea of sovereign debt moratorium on account of financial crisis, recognising the dilemma of satisfying competing obligations at the same time. However, weighing of competing debt obligations was the determining factor for the tribunal. In other words, where the amount covering debt servicing would be so huge as to negatively impact the continued functioning of vital public services, its suspension might be excused. It should be admitted that the tribunal did not refer to socio-economic rights in any way. However, this is understandable because at the time of the award these rights have not yet been legally recognised at the international

[137] *Russian Indemnities* case:para 6.
[138] *Russian Indemnities* case:para 9.
[139] *Russian Indemnities* case:para 4.
[140] *Russian Indemnities* case:para 6.
[141] *Russian Indemnities* case:para 6.

level. Nevertheless, the tribunal recognised debt moratorium to finance vital state interests.

5.3.1.2 *Great Britain v Costa Rica* (*Tinoco* Arbitration)

This is another espousal claim. It concerns the validity of sovereign debts advanced to the Tinoco government by the Royal Bank of Canada and the Central Costa Rica Petroleum Company, both British corporations with British shareholders.[142] The successor of the Tinoco government nullified the debts by an act of parliament because the debts contravened the pre-Tinoco Costa Rican constitution hence the agreement to submit to arbitration. The British government, on behalf of its citizens, claimed that the loans were valid having been contracted by both the *de facto* and the *de jure* government of Costa Rica while the Costa Rican government contested these claims. No sovereign debt crisis accompanied this dispute hence no socio-economic rights issues were raised. The whole case centred around the validity of the loan and not obligations arising from it.

However, in invalidating the loan, the sole arbitrator conceived a valid sovereign debt as one incurred to advance a legitimate governmental purpose which, invariably, would, today, include fulfilling socio-economic rights obligations. The arbitrator found that the lender did not advance the money 'to the government for its legitimate use' but for the personal use of the retiring president Tinoco and his brother.[143] In other words, for a sovereign loan to be valid and recoverable it must be obtained 'for legitimate government purposes' not for 'personal and unlawful uses' of state officials.[144]

Although the arbitrator did not consider any socio-economic rights issues, he developed a fundamental creditor responsibility theory that is relevant today. Under this theory, a creditor, to be entitled to repayment, must establish that the debt in issue was incurred for a 'legitimate government purpose' which, for the present research, would include general and specific governmental operations and commitments

[142] *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v Costa Rica)* 1923 1 UN Report of International Arbitration Awards 369-399, 394 http://legal.un.org/riaa/cases/vol_I/369-399.pdf> (accessed 11 January 2019).
[143] *Tinoco Arbitration*:394.
[144] *Tinoco Arbitration*:394.

towards the citizens. This fits into the concept of responsible lending under the Principle for Responsible Sovereign Lending and Borrowing (PRSLB). Indeed, the notion of 'legitimate government purpose' has become part of the ongoing efforts at addressing the legitimacy crisis facing the sovereign debt regime today.[145]

5.3.1.3 *Belgium v Greece* (*Belgium Bank* Case)

This is also an espousal claim against Greece filed at the PCIJ.[146] Belgium claimed that Greece had failed to satisfy an arbitral award on payments of its debt to a Belgium bank (Societe Commerciale de Belgium) thereby violating its international obligations.[147] This arose out of the non-payment of a loan originally advanced to finance the construction of rail which loan was deemed part of Greece's external debt.[148] Greece defaulted owing to the 1932 financial crisis.[149] The loan contract provided for arbitration in the event of disputes, hence, the creditor took the matter of non-payment to arbitration and obtained an award which Greece failed to pay insisting, instead, that it is part of its external debt.[150] While acknowledging its obligation to pay the debt, Greece argued that 'by reason of its budgetary and monetary situation, however, it is materially impossible for the Greek Government to' do so.[151] In other words, repayment should be based on 'budgetary and monetary capacity of the debtor'.[152] It was impossible to pay because of its financial position and a prior SDR with its bondholders preventing discrimination.[153]

The PCIJ did not make pronouncement on these issues due to objections raised on the grounds of *res judicata* and abandonment of the claims.[154] Nevertheless, the court noted, *obita*, that negotiating repayment between Greece and the private creditor was outside its jurisdiction but, were such negotiation to happen, it would be 'highly desirable' to have regard to 'Greece's capacity to pay'.[155] The court noted that it cannot

[145] Lienau 2008:63-111; Lienau 2016:151-214.
[146] *Societe Commerciale de Belgium (Belgium v Greece)* 1939 PCIJ Judgment Series A/B 160-179 https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_AB/AB_78/01_Societe_commerciale_de_Belgique_Arret.pdf (accessed 12 August 2018)
[147] *Belgium Bank* case:164.
[148] *Belgium Bank* case:165-166.
[149] *Belgium Bank* case:166.
[150] *Belgium Bank* case:169.
[151] *Belgium Bank* case:164.
[152] *Belgium Bank* case:165.
[153] *Belgium Bank* case:171.
[154] *Belgium Bank* case:174-175.
[155] *Belgium Bank* case:178.

invite the parties 'to agree upon an arrangement corresponding to the budgetary and monetary capacity of the debtor'; nor can it 'indicate the bases for such an arrangement'.[156]

Although the technical issues prevented the court from making a pronouncement on the defences of impossibility of performance and *force majeure*, it seems the court was a bit sympathetic to the Greek situation. Unsurprisingly, no socio-economic rights issues were raised due to the time the case was brought, as mentioned in the *Russian indemnities* case.

5.3.1.4 The French Loan Cases: Serbian, Brazilian & Norwegian Loan Cases

These are cases initiated by the French government on behalf of French bondholders through espousal procedure. The cases fall under the first form of SDA (ie espousal claims) because they, almost entirely, focused on resolving conflicting interpretations regarding the actual currency for the debt servicing under the respective bonds. Nevertheless, they raised some fundamental issues worthy of consideration here.

In the first, the *Serbian Loan* case, for instance, the French bondholders contended that the debt servicing was to be done according to a gold standard while the Serbian government argued that it was to be done according to the prevailing legal tender in France (ie the Franc).[157] Although no socio-economic rights considerations were raised, the Serbian government raised impossibility of performance (ie following depreciation of the value of the French currency) according to the gold standard as demanded by the bondholders as a defence. In a split decision, the PCIJ rejected the defense and held that the contractual documents evidenced an intention to pay according to the gold standard so as to avoid possible currency devaluation.[158] With respect to the effect of the First World War, it held thus:

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[156] *Belgium Bank* case:176-177.

[157] *Case Concerning the Payment of Various Serbian Loans issued in France (France v Serbia)* 1929 PCIJ Judgment Series *A* 5-49 (Serbian Loan Case) https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret.pdf (accessed 12 August 2018).

[158] See Honourable Justice Bustamante *Serbian Loan case* (Dissenting Opinion) available at https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret_1.pdf (accessed 12 August 2018); Honourable Justice Pessoa *Serbian Loan case* (Dissenting Opinion) available at https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret_2.pdf (accessed 12 August 2018); Honourable

> It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations.[159]

The court considered the espousal procedure and held that 'by taking up a case on behalf of its nationals before an international tribunal, a State is asserting its own right - that is to say, its right to ensure in the person of its subjects, respect for the rules of international law'.[160] Finally, it held that municipal law governs sovereign bonds and 'a State is entitled to regulate its own currency … so long as it does not affect the substance of the debt to be paid and does not conflict with the law governing such debt'.[161]

Similarly, in the *Brazilian Loan* case, the facts of which were on all fours with the *Serbian Loan* case, the PCIJ held that 'the economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations'.[162] This, without doubt, is a private contractualist posture which is arguably inconsistent with the logic and public policy elements of external sovereign debt.[163] It was held that there was no impossibility of performance due to currency fluctuation as the parties intended to apply the gold standard.[164] Importantly, subsequent sovereign debt adjudications were significantly influenced by the *Serbian Loan* and *Brazilian Loan* cases.

Finally, in the *Norwegian Loan* case the French government raised similar questions of interpretation with regard to the debt servicing currency.[165] The court characterised the dispute as 'intrinsically international' because '[t]he question of the treatment by a State of property rights of aliens - including property rights arising out of international loans - is a question of international law'.[166] It held that the Hague Convention of 1907

Justice Novacovics *Serbian Loan case* (Dissenting Opinion) available at https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret_3.pdf (accessed 12 August 2018).

[159] *Serbian Loan* case:para 40.

[160] Ibid para 17.

[161] Ibid para 42-43.

[162] *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* 1929 PCIJ Judgment No 15, 93-126 (*Brazilian Loan* case):para 120.

[163] Honourable Justices Pessoa and Bustamante gave dissenting opinions.

[164] *Brazilian Loan* case:para 126.

[165] *Norwegian Loan* case:9.

[166] *Norwegian Loan* case:paras 37-38.

relating to Contract Debts 'indirectly recognizes that controversies of [this] character are suitable for settlement by reference to public international law' and that the Convention specifically mentioned disputes 'arising from contract debts' as suitable for arbitration.[167]

Unlike the pre-Second World War cases, there was no reference to *force majeure* defence here. There was also no reference to any human rights instrument or public policy issues probably because of the court's pure contractualist posture. Nevertheless, the court recognised the hybridity of norms (ie at both the national and international levels) in the sovereign debt regime. It equally does note emphasise the strict private, contractualist paradigm which creditors often invoke to reject any socio-economic rights-based considerations.

In all three cases, therefore, the courts followed the dominant contractualist approach. However, in the *Serbian Loan* case, the court speculated that 'in the second phase of the proceedings [ie the parties' agreed post-judgement arbitration], considerations of equity and necessity may come into account'.[168] Thus, given a similar situation today, the court would probably not adopt such an approach partly because of the strong influence of human rights considerations in international adjudication as will become evident subsequently and the significant evolution of the sovereign debt regime over the years, especially the adoption of soft laws as examined in the previous chapter. This perhaps might explain the position of the ICJ in the case of *Guinea v Democratic Republic of Congo* (DRC) as the research will now examine.

5.3.1.5 *Guinea v Democratic Republic of Congo* (*Diallo* Case)

This is a peculiar espousal claim initiated at the ICJ covering complex issues of debt recovery, expropriation of investments and violations of human rights.[169] The Republic of Guinea filed a diplomatic protection claim on behalf of its citizen (Mr Diallo) at the ICJ claiming, among others, that the DRC committed wrongful acts engaging its international responsibility by not paying debts owed to 'Guinea in the person of its

[167] *Norwegian Loan* case:paras 37-38.
[168] *Norwegian Loan* case:para 20.
[169] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* 2010 ICJ Reports 639 (*Diallo case*); *AhmadouSadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 2007 ICJ Reports 582, 588 (hereafter 'Diallo Objection') https://www.icj-cij.org/files/case-related/103/103-20070524-JUD-01-00-EN.pdf (accessed 12 August 2018).

national' and his companies.[170] Mr Diallo was arrested, detained and removed from the DRC for demanding payment of the debts. Accordingly, Guinea asked for reparation and compensation. The DRC objected on the ground of non-exhaustion of local remedies and that Guinea cannot espouse a claim for recovery of debts in the name of companies registered in the DRC. In particular, the DRC argued that Mr Diallo was removed partly because of his

> increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire … [as] … the total sum claimed by Mr Diallo as owed to the companies run by him came to over 36 billion United States dollars … which represents nearly three times the [DRC's] total foreign debt.[171]

His removal was therefore justified on ground of public order.[172] While rejecting diplomatic protection by substitution on behalf of the DRC companies of Mr Diallo (ie due to their separate legal personality), the ICJ held that diplomatic protection can be extended to cover enforcement of guaranteed human rights.[173] Therefore, Guinea was entitled to assert the direct rights of its national who is an investor in another country where he exhausted local remedies.[174] In the words of the ICJ

> owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[175]

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[170] *Diallo Objection*:588.
[171] *Diallo case*:para19.
[172] *Diallo case*:para 81.
[173] *Diallo case*:para 39.
[174] *Diallo case*:para 65.
[175] *Diallo case*:para 39. However, the court noted that:

> The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative.

See *Diallo* case:para 88. Of particular note is the separate opinion of Judge Cancado Trindade, arguing for a humanised approach beyond inter-state adjudication by the ICJ thus:

> [D]*ignitatemvivere* surely stands above property rights. … [The ICJ has] to pronounce on the rights of human person[s], beyond the inter-State straightjacket … [because] the State exists for the human being, and not vice-versa. … [I]nternational tribunals should pursue their common mission - the realization of international justice, [by engaging in] dialogue … to recover their faith in human justice. … [T]hey will thus be striving towards securing to States as well as to human beings what they are after: the realization of justice.

Although the court declines pronouncement on the debt claims on account of the separate legal personality principle, this case is significant as it implicitly confirms the important place of human rights in espousal claims for debt recovery. In fact, from debt recovery and investment guarantees, the case was, surprisingly, transformed into a human rights protection action with copious references to, and reliance on, human rights as *jus cogens* as well as the UDHR and the ICCPR. There was no reference to the ICESCR although the right to dignity, which is common to both Covenants, was examined. In particular, it referred to Article 5 of the African Charter on Human and Peoples Rights which provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being' and held that 'the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments'.[176] This confirms the *jus cogens* status of human rights. However, no issues of socio-economic rights of debtor's citizens were raised at all. This might be because of the peculiar nature of the claim.

5.3.1.6 Espousal of Creditors' Claims, SDR and Socio-Economic Rights

From the above, it is clear that socio-economic rights were not central to the espousal of creditors' claims over the years. Indeed, the pre-Second World War cases were framed as contract-based claims governed by municipal laws. The defences raised were therefore anchored on such contracts. In particular, *force majeure* and impossibility defences were raised. However, as the *Diallo* case shows, this trend is changing thanks to the remarkable evolution of human rights norms under treaties, CIL, general principles and judicial decisions. There is a gradual recognition of the role that human rights play in these forms of international adjudication. The UDHR, ICCPR and *jus cogens* status of human rights have been acknowledged.

In addition, the fact that both the parties in espousal claims are states means that situating the preeminence of their socio-economic rights obligations within this class of SDAs would not be entirely implausible. Therefore, although the issues of socio-economic rights were not directly raised in the above cases the dilemma facing the

See *Diallo case* (Separate Opinion of Judge Cancado Trindade):paras 18-22, 83-85, 93-106,185, 244-245.

[176] *Diallo* case:paras 87 & 157.

sovereign debtors was acknowledged by the adjudicators. In addition, the *Diallo* case hints at a gradual paradigmatic shift towards 'humanity principle' which might allow socio-economic rights to be invoked in state-state debt claims. Indeed, such adjudication may not preclude the socio-economic rights obligations of the parties to the disputes, that is, where both are signatories to the ICESCR. This would extend to their extra-territorial responsibilities. It is not a case of enforcing rights against businesses (ie the original, private creditors asking intervention of their state). It concerns direct socio-economic rights responsibilities of the states concerned and this extends to the extraterritorial application of these rights as provided under Maastricht Principles, as discussed in Chapter Three.

5.3.2 IFIS & Socio-Economic Rights in SDA

Before examining the other two forms of SDA it is important not to overlook IFIs' role in SDA. Although IFIs have the capacity to initiate claims in international tribunals, the research could not find a reported case in which they seek to enforce any debt claims against their borrowers.[177] Enforcement of sovereign debt by IFIs is governed by their Articles of Agreement, operational policies and the relevant loan contract.[178] Of course, there are notable variations in their approaches to enforcement depending on the objectives and operational frameworks of each IFI. The IMF, for instance, does not initiate adjudication to enforce payments of its outstanding credits. This is because, first, the IMF is a 'collateralised bilateral swap agent', hence, technically, its borrowers cannot default.[179] Its credits are uniquely designed to address balance of payment problems and this is effected through the purchase-repurchase currency exchange arrangement.[180] The implication is that, unlike bonds and private loans, IMF credits are internationalised, treaty-based loans outside the province of any municipal

[177] The ICJ stated that it was 'established that the Organization has capacity to bring claims on the international plane'. See *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* 1949 ICJ Reports 184-185. This applies to all IGOs and they can sue to enforce obligations owed to them by states. See also Suzuki & Nanwani 2005:177; Kaminska 2015:1-2; Katselas 2011:1-3; ILC 2008. *Report of the UN Special Rapporteur (Giorgio Gaja) on Responsibility of International Organizations* New York: UN.

[178] Scott 1964:185. See also ICJ Statute 1945:art 34(1) & (2).

[179] Kaminska 2015:2-4.

[180] Members draw on the IMF's pool of members' currencies and special drawing rights (Special DRs) through a purchase-repurchase mechanism. The member purchases either Special DRs or the currency of another member in exchange for an equivalent amount (in Special DRs terms) of its own currency; the borrowing member later reverses the transaction through a repurchase of its currency held by the IMF with Special DRs or the currency of another member. See IMF 2016. *Articles of Agreement of the IMF* (as amended 2016) Washington: IMF art XXII.

contract law. Indeed, the Executive Directors perform a quasi-judicial function by interpreting the Articles of Agreement's provisions on members' special drawing rights.[181]

Indeed, the IMF enjoys a *de facto* preferred creditor status.[182] This is a payment priority accorded to the IMF. While other creditors face looming uncertainty, struggling to enforce their claims probably through adjudication, the IMF is assured of payment.[183] The preferred status is often justified on the ground that it offers protection to IMF's resources and it mostly uses these resources to rescue its indebted members. This, it is reasoned, is because the IMF is

> the closest thing to an international lender of last resort ... [and the] preferred status permits the IMF to help distressed countries formulate policies necessary for restoring economic stability and a manageable level of debt, and to have credibility-enhancing "skin in the game" while putting its own financial resources at minimal risk.[184]

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[181] The Special DR is the 'principal reserve asset of the international monetary system'. It is an interest-bearing reserved asset created in 1969 and serves as a unit of account held by the IMF and its members. The value of Special DRs is measured by a basket of major, usable currencies (ie Renmenbi, Yen, Dollar, Pounds and Euro). Members' Special DR allocations reflect their respective quotas (shareholding). A member can freely exchange its Special DR allocation for a usable currency to settle balance of payment problem. See IMF Articles of Agreement 2016:arts XV-XXIII. In particular, article XXIX(c) requires submission to arbitration only in the event of member's withdrawal or disagreement on interpretation after resort to the Executive Board and board of governance: 'Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration … of three arbitrators, one appointed by the Fund, another by the member or withdrawing member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Fund'. IMF's Articles of Agreement provides that a member's disagreements with the Board on special drawing rights or withdrawal 'shall be submitted to arbitration'; and IMF by-laws provide that 'the President of the International Court of Justice is prescribed as the authority to appoint an umpire whenever there arises a disagreement of the type referred to in Article XXI(d) or Article XXIX(c)'. See IMF Articles of Agreement:arts XXII & XXIX(c) & (d)*;* IMF 2016. *By-Laws, Rules and Regulations* Washington: IMF sec 23.

[182] Wood 1982:4; Stockmaver 1985:26; Schadler S 2018. 'The IMF's preferred creditor status: Questions after the Eurozone crisis', 1-6 https://voxeu.org/article/imf-preferred-creditor-status-and-eurozone-crisis (accessed 11 June 2019); Schadler 2014:2-7; Schadler S 2013. 'Unsustainable debt and the political economy of lending: Constraining the IMF's role in sovereign debt crises', 2-6 https://www.cigionline.org/sites/default/files/no19.pdf (accessed 11 June 2019).

[183] Martha 1990:801-826.

[184] Schadler notes:

> Until the Eurozone crisis, the rules governing IMF policies provided a strong underpinning for the benefits of the status. The softening of those rules in the course of the Eurozone crisis weakens the case for the status. In view of the relatively strong track record of the pre-euro-crisis rules governing the IMF's lending, it would be precipitous to abandon the preference on the basis of the IMF's decisions in the Eurozone crisis alone. But the preferred creditor without a strong framework is a recipe for moral hazard. Should there not be a firm recommitment to a strong framework, the case for discipline through market forces will gain momentum.

See Schadler 2018:4-5.

In practice, defaulting on this form of official loan is rare as debtors want to avoid being cast as pariah which might block their access to the debt markets.[185] In the words of Schadler, 'rarely has the IMF not been paid on time, and even less frequently has it not been fully repaid'.[186] Similarly, Woods reasoned that, as an internationalised debt, 'a default on IMF or World Bank debt is, in effect, a default towards more than 140 members of the international community'.[187]

However, this preference lacks legal basis and has been severely criticised as encouraging moral hazard while at the same time subordinating other creditors' claims.[188] The IMF's Articles of Agreement does not recognise it but some scholars have suggested that it is part of IMF's mandate to 'require adequate safeguards' for its resources.[189]

Importantly, although the IMF does not resort to SDA, it has, however, shaped the debate about holdout and vulture funds litigation behaviour in its bid to support an orderly restructuring.[190] Unfortunately, as argued in the previous chapter, IMF's

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[185] Schadler 2018:1-5.

[186] The Eurozone crisis challenged the relevance of this status. In 2011, the European Union's European Stability Mechanism (ESM) recognises a form of 'next-in-line' preferred status as its 'loans to member states will enjoy [preferred creditor status] in a similar fashion to those of the IMF, while accepting [preferred status] of the IMF over the ESM'. See Schadler 2018:1-5; *Chrysostomides & Others v Council of European Union & Others* Case T-680/13 (13 July 2018) available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013TJ0680&from=EN (accessed 12 August 2019).

[187] Wood observes thus:

> In the case of the League Loans in the 1930s, the League Loans Committee argued for priority since they emphasised that the League Loans formed part of a powerful and useful reconstruction machine in the interests of all creditors and so were entitled to front rank. On the basis of this general principle (amongst others) it is invariably the case that debt owing to the IMF (usually obligations by the debtor to repurchase its currency originally sold for foreign currencies pursuant to a standby arrangement) is never rescheduled. IMF standbys are usually crisis short-term measures. They pave the way to recovery through conditionality, thereby encouraging parallel financing by banks. Article IX, Section 6, of the IMF Articles of Agreement provides: '... all property and assets of the Fund shall be free from restrictions, regulations, controls and moratoria of any nature'. World Bank debt is similarly treated.

See Wood 1982:8.

[188] Rutsel-Silvestre 1990:801-810.

[189] Schadler 2018:4-5.

[190] See, for instance, UN BPSDRP 2015, UNCTAD SDWG 2015, UNCTAD PRSLB 2012, IIF 2013. *Principles for Stable Capital Flows*; IMF 2015. *IMF policy paper: Reforming the Fund's policy on non-toleration of arrears to official creditors,* http://www.imf.org/external/np/pp/eng/2015/101515.pdf> (accessed 12 August 2018).

somewhat strict contractualist stance enables these behaviours to fester as, for instance, the Principles for Stable Capital Flow requires that creditors' contractual rights 'must remain fully enforceable' subject to their voluntary agreement for a restructuring through a prior collective action clause (CAC).[191] Its acclaimed apolitical nature relegates socio-economic rights considerations especially in its debt sustainability standard.

Like the IMF, the WB also prefers negotiation and disciplinary action by way of sanction and suspension of further disbursement and membership against a sovereign debtor who defaulted on its loan facilities rather than adjudication.[192] Its different loans and development financing agreements are generally internationalised. For instance, the WB's *Revised General Conditions 2017* provides that the rights and obligations of the parties 'under the Legal Agreements shall be valid and enforceable in accordance with their terms notwithstanding the law of any state'.[193] These agreements often make provisions for arbitration.[194] The logic is to minimise publicity. Indeed, third parties are explicitly excluded in that 'the parties to such arbitration shall be the [International Development] Association and the Recipient [borrower]'.[195] In addition, like the IMF, the WB and most MDBs equally enjoy functional immunity from local judicial proceedings thereby raising accountability concerns.[196]

To summarise, the fact that there are no SDAs at the instance of IFIs is explainable in terms of their operational structures, legal and historical factors. The vital point for the present purpose is that the preferred creditor status reduces the risk of default and the possibility of adjudication at the instance of multilateral official creditors. The implication is that there are no cases involving IFIs to review for the purpose of determining the attitude of adjudicators. This, arguably, shields them from further

[191] Principles for Stable Capital Flow:principle 3.
[192] The World Bank 2017:260; The World Bank Group 2017. *Revised IBRD and IDA General Conditions*, http://documents.worldbank.org/curated/en/577851500256855740/Revised-IBRD-and-IDA-General-Conditions> (accessed 9 August 2018) (hereafter 'IBRD Revised General Conditions 2017'); IBRD 2017. *General conditions for IBRD financing: Development policy financing,* https://policies.worldbank.org/sites/ppf3/PPFDocuments/c67d8e10919544beabd87720cd23b825.pdf (accessed 9 August 2018).
[193] IBRD Revised General Conditions 2017:Article IX, sec. 9.01.
[194] IBRD Revised General Conditions 2017:Article IX, sec. 9.03.
[195] IBRD Revised General Conditions 2017:Article IX, sec. 9.03 (b).
[196] UN 1947. *Convention on the Privileges and Immunities of the Specialized Agencies* (adopted on 21 November 1947 and entered into force on 2 December 1948). See also Bradlow 2017:45-68; Bradlow 1996:47-90.

judicial scrutiny and compounds the case for socio-economic rights responsibility of IFIs. In addition, their functional immunity hinders accountability.[197] Admittedly, following a barrage of criticisms in this respect, the IFIs have now developed some internal accountability mechanisms to enable them to align with human rights standards in their operations.[198] However, beside their ineffectiveness, these mechanisms lack legal teeth thereby undermining the quest for IFIs' accountability.[199]

Nonetheless, it is possible to raise socio-economic rights concerns in IFIs-states arbitration as both parties are responsible actors under international law although IFIs are not signatories to the ICESCR.[200] IFIs' role in undermining these rights are no longer in doubt. The challenge, however, is with regard to establishing how their loan operations undermine these rights, ie the causality and reasonable foreseeability of harm occasioned by their loan operations.[201]

5.4 NON-OFFICIAL CREDITORS, SDA & SOCIO-ECONOMIC RIGHTS

Unlike official creditors, bank creditors, institutional investors and bondholders frequently employ SDA to challenge SDDs. Most reported SDAs were handed down by domestic tribunals of different jurisdictions hence, as noted above, they are outside the scope of this research. It should be emphasised that while the waiver of sovereign immunity enables debtors to easily access the debt markets, it also exposes them to potential litigation.[202] The focus here will be on ITA and human rights-based SDAs in the international arena.

5.4.1 ITA, SDA & Socio-Economic Rights

This subsection examines socio-economic rights in ITA-based SDAs. Before delving into the specific cases, some context is important.

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[197] Bradlow 2017:53-60.
[198] See IMF 2000. *Making the IMF's independent Evaluation Office (EVO) operational* http://www.imf.org/external/np/eval/evo/2000/Eng/evo.htm (accessed 9 August 2018); IBRD & IDA 1993. *World Bank Inspection Panel* http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf (accessed 9 August 2018); Altholz & Sullivan 2017:5-15; Bradlow 2005:403.
[199] Bradlow 2017:45-68.
[200] See discussion on this in section 3.3.4.2.1 of Chapter 3 of this thesis.
[201] Tooze 2002:230.
[202] Schumacher et al 2018:2-19.

5.4.1.1 ITA: Nature and Jurisdictional Basis

ITA is different from *ad hoc* state-state arbitration through espousal procedure, IFIs-state arbitration and ICA. The most popular ITA institutions are the ICSID and the United Nations Commission for International Trade Law (UNCITRAL).[203] Apart from the institutional and procedural variations there are not much differences between these institutions, especially with regard to their objectives of enabling more investments and empowering investors to question states' decisions affecting their investments. For this reason, ICSID arbitration would be used here as a contextual example of ITA-based SDA.

ICSID was established under the 1965 ICSID Convention as a self-contained, specialised DSM designed to avoid the difficulties of espousal procedure and to balance the interests of investors and states.[204] It is, therefore, totally independent of the domestic legal systems of its members.[205] Thus, like espousal of claims, it operates in the shadow of public international law. However, as will be examined later, espousal of claims and ICSID arbitration are mutually exclusive under the ICSID Convention.[206]

Historically, for decades capital-exporting states desired for an effective mechanism to protect the property rights of their nationals located in other countries.[207] Diplomatic protection had been deeply politicised and was, often, ineffective.[208] Following failures

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[203] UNCTAD 2003:7-19; UNCTAD 2010:2-7.

[204] The ICSID Convention provides that '[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention ...'. See ICSID Convention 1965:art 27. See also ICSID 2009:23-24; Broches 1966:261.

[205] Delaume 1986:23-39.

[206] ICSID Convention 1965:arts 26 & 27. In its Commentary, the ICSID observed thus:

> The Convention recognizes the right of a private party, within the limits laid down in the Convention, to proceed against a foreign State before an international arbitral tribunal in its own name, rather than seek the diplomatic protection of its national State or have that State bring an international claim. It would seem to be a natural concomitant of the recognition of the private party's right of direct access to an international jurisdiction, to exclude action by its national State in cases in which such access is available under the Convention; and the same would seem to be true in cases in which the private party is a defendant rather than a plaintiff. Since the exclusion of the national State rests on the premise that the other Contracting State will abide by the provisions of the Convention, the rule of exclusion is subject to an exception in the event that premise falls away; in that event the right to give diplomatic protection and to bring an international claim remains unaffected.

See ICSID 2009:23-24.

[207] Sornarajah 2007:18-22 & 34-39.

[208] Sornarajah 2007:18-39 & 211-217.

at the level of the UN, the WB, tightly controlled by capital-exporting countries, decided to device an alternative in line with its mandate of promoting economic development.[209] Accordingly, the ICSID was established in 1966 by, and is still closely related to, the WB in its quest to encourage inflow of foreign investments into developing countries and to promote economic development.[210] Apart from formulating the ICSID Convention, the WB, subject to the parties' choice of arbitrators, plays a significant role in the constitution of arbitral panels and, to a large extent, funds the ICSID.[211] It is equally a depository for members.[212]

Although this link between the WB and the ICSID seems to have been normalised, it can be argued that it raises a further legitimacy concern. Perhaps, as noted above, sovereign debt disputes of the types seen today (eg vultures activities and Eurozone crises' official intervention) were hardly contemplated at its conception.[213] Otherwise, the WB, being a global creditor institution itself, should, arguably, not have been able to deliberately conceived and controlled a DSM in which other creditors, albeit private creditors, can directly sue their debtors.[214] This is, unarguably, a legitimacy concern because of the possibility, however remote, of partiality on the part of the WB in favor

[209] ICSID 2009:17; Lowenfeld 2009:48-49.
[210] Delaume 1986:23.
[211] ICSID Convention 1965:arts 17, 37-40.
[212] ICSID Convention 1965:art 73.
[213] ICSID 2009:6-12.
[214] There is evidence suggesting the WB had performed a 'direct adjudicatory' role prior to the establishment of the ICSID. For instance, preparatory to the establishment of the ICSID, the WB itself observed thus:

> The question was asked whether the establishment of the Center [ie ICSID] would not essentially amount to 'institutionalizing' the Bank's present activities in assisting in the solution of investment disputes… The present activities of the Bank … in the field of investment dispute settlement fall into three categories. The first comprises the two cases involving full scale conciliation, namely the Suez Canal Compensation and City of Tokyo Bonds cases. … The second comprises a larger number of cases in which the President has undertaken to designate impartial arbitrators, umpires or experts in connection with the solution of existing or future disputes. The third category comprises instances in which the Bank seeks to help parties to disputes to agree on a method of solving their dispute outside the framework of the Bank, for instance by recourse to commercial arbitration…. One of the ideas underlying the present proposals is to relieve the Bank of some of the extra-curricular burdens it is from time to time asked to assume, and to transfer these burdens to an organ somewhat removed from, although linked to, the Bank. To that extent one could say that they aim at 'institutionalizing' the Bank's present dispute settlement activities. … The further question was asked whether establishment of the Center would not deprive parties to a dispute of the valuable possibility of requesting the services of the Bank. … Establishment of the Center would not mean that the Bank could or would no longer act directly in connection with investment disputes. It would mean that the Bank would be in a position to be more selective and to limit its intervention….

See Note by the General Counsel transmitted to the Executive Directors (19 January 1962) in ICSID 2009:6-12. See also Lalive 1980:123-161.

of its fellow (private) creditors. Indeed, a similar concern was raised at the point of conception of the ICSID, but it was uncritically rejected because, it was argued, neither the WB nor the ICSID was to function as an arbitrator or a conciliator.[215] In this regard, the WB reasoned thus: 'The fact that it [ie WB] is a creditor of most of its members has never put its impartiality in question'.[216] This argument seems to contradict the WB's own admission, at the time, that it had facilitated the resolution of certain financial disputes.[217] Indeed, the argument is even less persuasive today given the increasing resort to ICSID arbitration by non-official, holdout creditors to reclaim the full value of their debt as will be examined later.[218] Furthermore, the WB was well aware of the previous botched efforts to establish an international loans tribunal, hence, it could not have re-engineered this process without clear articulation of its objectives to its members.

The legitimacy concern notwithstanding, the original idea was to enable investors to have direct access to arbitral tribunals in the same way that state-claimants have access to the ICJ.[219] The architects of the ICSID believed that this would, on the one hand, allay the fears of investors by guaranteeing their rights and offering them a depoliticised, impartial and effective DSM, and, on the other, enable developing states

[215] The WB's General Counsel wrote:

> The question was also asked whether establishment of the Center might not involve the Bank in disputes with which it would prefer not to be concerned. At the present time, the Bank is free to accept or reject a request for its services in connection with dispute settlement…. It is true that the Center would not have the discretion which the Bank can now exercise. However, it is hard to see how this could be a source of embarrassment to the Bank. The proceeding in question, whether conciliation or arbitration, would not be conducted either by the bank itself or by the Center, but by conciliators or arbitrators selected from the roster of the Center or indeed, if the parties so decided, by persons outside the roster.

See Note by the General Counsel transmitted to the Executive Directors (19 January 1962) in ICSID 2009:6-12.

[216] For instance, the WB's General Counsel wrote:

> The question was asked whether the fact that the Bank can itself be regarded as an 'investor' would not tend to raise doubts as to the impartiality of a Center sponsored by, and affiliated with, the Bank. … . The Bank is an international cooperative institution which lends funds for the benefit of its members which are also its shareholders. The fact that it is a creditor of most of its members has never put its impartiality in question. This would seem to be borne out by the requests addressed to the Bank by member governments for assistance in the solution of investment disputes. Apart from this, the administrative apparatus of the Center would not, as noted earlier, itself engage in conciliation or arbitration'.

See Note by the General Counsel transmitted to the Executive Directors (19 January 1962) in ICSID 2009:6-12.

[217] ICSID 2009:6-12.

[218] In 2017 alone, 65 ITA cases were initiated. See UNCTAD 2018:91.

[219] ICSID 2009:1-3.

to attract much needed foreign capital for their economic development.[220] Although this seems to be a logical narrative for FDI, there is, however, little or no convincing evidence to show a positive correlation between sovereign financing and the investment protection regime.[221]

Nevertheless, article 25 of the ICSID Convention provides that 'the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre'. The initial draft of this provision reads: 'The jurisdiction of the Center shall be limited to disputes between Contracting States and nationals of other Contracting States and shall be based on consent'.[222] Such consent 'may be evidenced by an undertaking of such party … or by the acceptance by such party of the jurisdiction of the Center in respect of a dispute submitted to it by another party'.[223]

Under the ICSID Convention, consent to arbitration excludes other remedies although a state may require exhaustion of local remedies as a precondition for its consent.[224] Consequently, consent to arbitration precludes diplomatic protections or espousal of private claims.[225] Interestingly, the method of expressing such consent was not clear at inception.[226] ICSID tribunals often refer to provisions on consent to arbitration under BITs as an offer to ICSID arbitration which the investor may accept by a request for arbitration.[227] Although this practice has somewhat become part of CIL, the Convention does not specifically contemplate it.[228] In the words of Lowenfeld, one of the architects of the ICSID:

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[220] Report of the Executive Directors on the Convention (10 September 1964) 6-14 in ICSID 2009:606-607; Note by A Broches, General Counsel, transmitted to the Executive Directors paras 1-7, in ICSID 2009:1-3.
[221] See Report of the Executive Directors on the Convention (10 September 1964) para 12, in ICSID 2009:606-607.
[222] ICSID 2009:33-34.
[223] ICSID 2009:33-34.
[224] ICSID Convention 1965:art 26.
[225] ICSID Convention 1965:arts 26-27.
[226] Lowenfeld 2009:57.
[227] *Abaclat* case:para 258.
[228] According to Lowenfeld:

> [T]he ICSID Convention, the very wide acceptance of substantially identical BITs, and the substantial body of precedents, taken together, do represent a contribution to customary international law, a body of law that cannot and should not stand still … [T]he combination of ICSID and BITs clearly served as a stimulus to foreign investors. But the combination has

> Nothing in the text says the consent by the State must have been given in the investment agreement giving rise to the dispute, or even that there must have been an investment agreement. *But the link was unexpected, and I am fairly certain, unplanned*. There is no doubt that the vast number of BITs containing consent to arbitrate under ICSID has effected a major transformation of the Convention.[229]

In addition, a state may exclude or restrict its consent to certain types of disputes by way of notification to ICSID.[230] Indeed, in the *Abaclat* case (as will be discussed below), the tribunal assumed jurisdiction partly because Argentina did not notify the ICSID of such restriction, nor did it, under the relevant BIT, explicitly exclude sovereign debt from the category of protected investments.[231]

Importantly, the terms 'investment', 'investment disputes' and 'investor' were left deliberately undefined.[232] In practice, however, ICSID tribunals adopt a 'double-barrel' approach, ie they first refer to definitions of 'investment' in the relevant BIT or investment chapters of FTAs for guidance, and then, second, they examine 'investment' under the provision of article 25 of the ICSID Convention.[233] In other words, there has to be an intersection between article 25 and the provisions of the enabling investment agreement on the meaning of 'investment' for the tribunal to assume jurisdiction.[234] The definition of 'investment' in these agreements are often broad and elastic, covering tangible and intangible properties, values and rights.[235] Naturally, BITs' definitional scope would vary depending upon contexts, objectives, national resources and priorities of the respective parties. This is, however, limited by the objective (ie the outer limits) of article 25 of the ICSID Convention.[236]

> clearly transformed the Convention, filled in the gaps necessary to make ICSID an important institution, and as I see it, contributed to the progress of customary international law.

See Lowenfeld 2009:57.

[229] Lowenfeld 2009:57. Italics for emphasis.

[230] ICSID Convention 1965:art 25(4).

[231] The tribunal in the *Abaclat* case held that 'a State has the possibility under Article 25(4) ICSID Convention to notify the Centre of the class or classes of disputes from that it would not consider submitting to the jurisdiction of the Centre. No such notification has been made by Argentina… [therefore] …, there is no reason to exempt foreign debt restructuring situations from the scope of application of the BIT. See *Abaclat* case:paras 476-479.

[232] ICSID 2009:22.

[233] *Abaclat* case:paras 344 & 387; *Ambeinte* case:paras 212-235, 356 & 438.

[234] *Phoenix v Argentine Republic* 2009 IIC 367; *Ambiente Dissenting Opinion*:para 277.

[235] Sornarajah 2007:220-228.

[236] *Abaclat* case:para 200.

According to the popular *Salini* case, an economic activity must meet the following criteria to qualify as an 'investment' under article 25: (a) it must amount to a substantial contribution of the investor; (b) it must be for a certain duration; (c) the investment activity must involve an operational risk; (d) there must be a certain regularity of profit; and (e) a contribution to the economic development of the host state.[237] A shareholder, whether having majority or minority shares, would qualify as an investor capable of initiating a claim.[238] The danger is that this might give rise to multiple claims by different shareholders of the same company.[239] Even more problematic is where the investment agreement is unclear as to the status of credits advanced by a foreigner and bondholders. The interpretive jurisdiction of the tribunal in line with the provisions of the VCLT and CIL would be invoked for clarification. This will now be examined in view of the policy implications in the context of SDR.

As noted above, it is arguable whether sovereign debt qualifies as 'investment' to enable ICSID tribunals to exercise jurisdiction over sovereign debt claims. In his dissenting opinion in the famous *Abaclat* case, Abi-Saab raised the following vital question:

> Do ICSID tribunals have jurisdiction over sovereign debt instruments issued internationally, expressed in foreign currency and payable abroad, governed by various external laws and subject to the jurisdiction of various external courts, and traded as dematerialized security entitlements in global capital markets?[240]

Although Abi-Saab answered the question in the negative, there are two schools of thoughts on this issue. The first school argues that debt instruments are not typical investments as defined in the *Salini* case in that most of the substantive investment protection guarantees cannot address the creditors' desire for enforcement.[241] In addition, on policy grounds, ICSID arbitration might encourage holdout, thwart SDR and the tribunal may not be able to determine debtor's payment capacity in the event of an award.[242]

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[237] *Salini v Morocco* 2001 41 ILM 609:para 52.
[238] Sornarajah 2007:220-226.
[239] UNCTAD 2005:17.
[240] Dissenting Opinion of Professor Georges Abi-Saab in the *Abaclat* case (hereafter '*Abaclat Dissenting Opinion*') para 269. See Also *Ambiente Dissenting Opinion:*paras 171-173.
[241] Waibel 2007:711-759.
[242] Waibel 2007:750-759. See also Waibel 2011:209-251.

The second school considers sovereign debt as an 'investment'.[243] Furthermore, ICSID arbitration offers a depoliticised, binding, impartial, effective adjudication forum away from the shortcomings of domestic tribunals struggling with the pervasive effects of sovereign immunity.[244] While rejecting the *Salini* test, the majority in *Abaclat* held that 'with regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred'.[245] Thus, portfolio investments and bonds, may qualify as 'investments'.[246] Some BITs are explicit on this. In *Fedax v Venezuela*,[247] for instance, promissory notes were held to qualify as investments under the BIT.

However, it would be a mistake to ignore the force of parties' consent in the constitution and legitimacy of international adjudication. By nature, ICSID arbitration must reflect the parties' consent and this is determined by the inclusion or exclusion of a dispute through either an ICSID reservation or explicit BIT definition of 'investment'. For instance, in the *Alemanni* case, the tribunal held that 'as a fact of international economic life, sovereign bond issues were plainly within the normal field of contemplation of the Contracting Parties'.[248] Indeed, modern BITs often explicitly exclude sovereign debt from the definitional scope of investment, suggesting that the old generation BITs were not focused on sovereign debt, but FDI.[249] For instance, the recent 2016 Morocco-Nigeria BIT explicitly states that 'for greater certainty,

[243] Griffin & Farren 2005:21-24; Simones 2012:9-37; Norton 2012:291-316; Clement & Black 2014:24-27; Youngjin & Sangwook 2014:75-96.
[244] Norton 2012:302.
[245] *Abaclat* case:paras 346-374.
[246] *Abaclat* case:paras 376-387.
[247] *Fedax NV v Venezuela* 1998 37 ILM 1378. The Tribunal concluded that 'loans qualify as an investment within ICSID's jurisdiction, as does, in given circumstances, the purchase of bonds. Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case like this'. See *Fedax NV v Venezuela*:para 29.
[248] *Alemanni v Argentine Republic:*para 320.
[249] A notable example is the EU-Canada Comprehensive Economic and Trade Agreement (CETA) which exempts negotiated sovereign debt restructurings from the scope of application of the fair and equitable and expropriation standards. See EU-Canada Comprehensive Economic and Trade Agreement:annex x. See also United States-Uruguay BIT and NAFTA (art 11.39); Morocco-Nigeria BIT 2016 (art 1) which clearly excludes sovereign debt instrument.

"investment" does not include: a) debt securities issued by a government or loans to a government; b) portfolio investments'.[250]

Importantly, the ICSID Convention is only a procedural mechanism for the enforcement of investors' substantive rights. The substantive safeguards are provided under thousands of IIAs.[251] These include the standards on national treatment (NT), fair and equitable treatment (FET), most favoured nation (MFN) and compensation for expropriation.[252] Importantly, these safeguards are founded on property rights and therefore have human rights flavor. These safeguards are generally considered to create a tension between socio-economic rights and investors' property rights.[253] However, recent developments in treaty drafting and investment policies have shown that the two are not necessarily mutually exclusive. In fact, as will be shown later, investors, including creditors, now resort to human rights courts to enforce these rights.

In this regard, BITs are, essentially, products of the parties' consent and normally recognise local regulatory imperatives of their respective signatories. It should be admitted though that, by their nature, BITs are not specifically meant to protect the socio-economic rights of citizens of their signatories.[254] However, they recognise several regulatory and public policy considerations intrinsically connected to the protection and realisation of these rights.[255] Most BITs make exemptions or provide

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[250] Morocco-Nigeria BIT 2016:art 1.

[251] At the end of 2017, there were 3322 IIAs. See UNCTAD 2018:8. The enthusiasm for signing IIAs has been declining over the years. In 2017 for instance, the number of terminated IIAs (22) exceeded the number of new IIAs (18). See UNCTAD 2018. 'IIA Issue Note: Recent Developments in the International Investment Regime', 2 https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (accesses 13 February 2019).

[252] Sornarajah 2007:233-256.

[253] Peterson LE 2009. 'Human rights and bilateral investment treaties - Mapping the role of human rights law within investor-state arbitration', 1-12 http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf (accessed 3 May 2017); Simma 2011:573-596.

[254] According to UNCTAD:

> [H]uman rights issues have been relatively slow to arise in the IIA arbitration context. Indeed, IIAs themselves are generally silent with respect to human rights matters, and do not expressly reference human rights-related obligations of States, much less seek to introduce any new human rights duties or obligations for governments or investors. For their part, governments have rarely articulated clear views as to the relationship between IIAs and human rights.

See UNCTAD 2009. 'Selected recent developments in IIA and human rights', 3 http://www.unctad.org/en/docs/webdiaeia20097_en.pdf (accessed 3 May 2017).

[255] Sacerdoti 2013:351-383.

defences for parties' regulatory measures which might violate these substantive investment guarantees on account of public order, necessity and protection of essential state security or interests.[256] In addition, BITs cannot override *jus cogens* and prior socio-economic rights treaty obligations of the concerned state parties. A review of some selected cases would shed more light on this.

5.4.1.2 ITA, Sovereign Debt and Socio-Economic Rights: Case Review

The research will now review selected cases in which issues related to SDR and socio-economic rights were raised, starting with the cases arising out of the Argentine debt crisis (2001-2002). The common factual features of these cases are the debt crisis and the post-default emergency measures adopted by Argentina to address the crisis. While the line of defence adopted by Argentina (including issues of socio-economic rights) was almost the same in all the cases, it will be observed that the tribunals in the first three cases could not conclude the merit phase on account of cost or out of court settlement.

5.4.1.2.1 Abaclat & Others v Argentina

Although this matter was eventually settled with a payment of over $1billion to the creditors during the merits phase, the decision on jurisdiction in this case influenced subsequent ITA SDAs connected to the Argentine debt default of 2001. It also recognised, for the first time, the utility of investment arbitration in the sovereign debt scheme.[257]

5.4.1.2.1.1 The Facts and Parties' Positions

Following the 1980s' debt crises, Argentina embarked upon massive economic reform by among others, signing numerous BITs with other countries to encourage inflow of investments, deregulating the economy, privatising public utilities and issuing sovereign bonds in line with a specific legislation setting out the framework and procedures for such undertakings.[258] Consequently, between 1991 and 2001 Argentina issued over $186 billion worth of sovereign bonds in domestic and

[256] Sacerdoti 2013:351-383.
[257] *Abaclat* case:paras 376-387.
[258] *Abaclat* case:paras 43-44.

international debt markets.[259] Out of 179 bonds issued, 173 were denominated in foreign currencies and the claimants purchased 83 of the 173 series of bonds which were contractually governed by laws of different countries.[260] During 1997-1999, the country experienced dwindling revenues and increasing debts due to crippling economic recession, raising of interest rates in the USA and the exogenous effects of the Brazilian, Russian and Asian Financial Crises.[261] In 2001, capital inflow dwindled while outflow (ie capital flights) reached $15 billion thereby endangering the banking system.[262] Despite a series of measures including export incentives, restriction on bank withdrawals and cutting public spendings, Argentina eventually defaulted on all its sovereign bonds in December 2001, leading to massive social and political unrests.[263] A Law of Public Emergency and Reform of the Monetary Exchange Regime (Federal Law No 25, 561 of 2002) on social, economic and financial issues was enacted leading to a devaluation of the local currency. The citizens were devastated: unemployment reached 21%, underemployment at 19% and poverty increased to 54%.[264]

Argentina proposed an exchange offer to all bondholders in 2003 and 2004. On account of the systemic defaults, the claimants, constituting about 180 000 Italian bondholders holding bonds worth $13.5 billion, engaged in negotiation with Argentina but it failed. In line with the reality of its repayment capacity, Argentina made a GDP-linked exchange offer covering over $81 billion, entitling each bondholder to choose among par bonds (same principal but lower interest than the non-performing debts), discount bonds (reduced principal but higher interests) or quasi-bonds (principal and interest lower). This was accompanied by the Law of Public Emergency and Reform (Law No 26, 017), often called Cramdown or Lock Law by creditors, prohibiting reopening of the exchange offer. The claimants held-out, they did not participate in this exchange, preferring, instead to negotiate a better deal.[265] They did not succeed hence they instituted an ICSID arbitration pursuant to the Argentina-Italy BIT in

[259] *Abaclat* case:para 50.
[260] *Abaclat* case:para 51.
[261] *Abaclat* case:para 53
[262] *Abaclat* case:para 54.
[263] *Abaclat* case:paras 55-60.
[264] *Abaclat* case:para 61.
[265] *Abaclat* case:paras 82-85.

2006.[266] In 2010, while the case was pending, some claimants participated in another exchange offer but over 60 000 of them continued the ICSID action.

In their claims, the bondholders argued that through its debt defaults, Argentina deprived them of the value of their investments.[267] They alleged that Argentina was a rogue debtor who repudiated its debt servicing obligations by 'a unilateral, punitive exchange offer' pursuant to its emergency legislation and other measures.[268] Consequently, these acts violated Argentina's obligations under the BIT, ie the exchange offers amounted to expropriation of bondholders' investments, different treatments accorded to domestic pension funds violated national treatment standard and the emergency law amounted to unfair and inequitable treatments.[269]

Argentina argued that there was no violation of any of the substantive protections in the Argentina-Italy BIT as non-payment of debts only creates contractual, not treaty, claims in international law.[270] It argued that it did not consent to this type of adjudication as the action was a 'legally unsupported attempt to turn a sovereign's non-payment of external debt that is governed by other States' laws ... into a violation of investment treaty protection'.[271] Even if it is a treaty claim, Argentina argued, there was no violation because 'the 2001 crisis was unprecedented and could not be resolved merely through economic reform, that Argentina's actions were in accord with the actions of other sovereign debtors, and that there was no bad faith on Argentina's side'.[272] Importantly, it argued that 'opening of ICSID arbitration with regard to sovereign debt restructuring would be counterproductive and go against current efforts to modernize foreign debt restructuring process ... as it would encourage hold outs'.[273] This contention, the claimants argue, 'is outdated and irrelevant' and that 'the major threat to the efficiency of foreign debt restructuring would be rogue debtors, such as Argentina. Consequently, opening the door to ICSID arbitration would create a supplementary

[266] *Abaclat* case:para 91.
[267] *Abaclat* case:para 238.
[268] *Abaclat* case:para 238.
[269] *Abaclat* case:paras 309-311.
[270] *Abaclat* case:paras 233, 234 & 307.
[271] *Abaclat* case:para 234.
[272] *Abaclat* case:para 308.
[273] *Abaclat* case:paras 471 & 512.

leverage against such rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring'.[274]

5.4.1.2.1.2 The Decision & the Dissenting Opinion

In assuming jurisdiction, the majority tribunal held that the action is not a pure contract but a treaty claim as Argentina's default was an exercise of sovereign power not justified by any contractual instrument.[275] The default, according to the tribunal, constituted a prima facie treaty violation and that 'as debtor of the bonds, [Argentina] has failed to perform its obligations under these bonds' but justified its actions 'on the exceptional circumstances surrounding its public debt' rather than on contractual defences contemplated by the bonds.[276] The tribunal reasoned that redressing these circumstances through emergency legislation 'had the effect of unilaterally modifying Argentina's payment obligations, whether arising from the concerned bonds or from other debts'.[277] Furthermore, the tribunal held that justifying contractual non-performance on the basis of sovereign insolvency was untenable although it accepted that generally

> an insolvent debtor may, in principle, benefit from special regimes such as bankruptcy or other mechanisms of financial redress, and such mechanisms can very well affect the way a contract is performed by partially or fully liberating the debtor from its obligations thereunder.[278]

This cannot avail Argentina because of the absence of a bankruptcy mechanism under international law setting out the competent regulatory authorities and 'specific procedure taking into account both the debtor's and the creditors' interests, and the provision of distribution principles of the debtor's assets with regard to the entirety of the creditors' group and not just with regard to a specific contract or creditor'.[279] Thus, Argentina cannot be 'liberated' in this regard by 'fixing sovereignly the modalities and terms of such liberation based on its sovereign power [which] is neither based on nor

[274] *Abaclat* case:paras 514 & 537-588.
[275] *Abaclat* case:paras 320-325.
[276] *Abaclat* case:para 320.
[277] *Abaclat* case:paras 320-324.
[278] *Abaclat* case:para 324.
[279] *Abaclat* case:paras 320-325.

does it derive from any contractual argument or mechanism'.[280] The tribunal concluded:

> The present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general. ... Whilst it is true that there exists no international bankruptcy regime for States, certain principles have nevertheless been developed by the international community with regard to sovereign debt restructuring.[281]

The latter reasoning seems unpersuasive because, as argued in the previous chapter, the so-called 'principles' 'developed by the international community' have serious legitimacy deficit.[282] The notion of 'international community' itself is a fuzzy term at best. Therefore, without setting out these 'principles' 'developed by the international community' and the specific convenient forum, the tribunal held that ICSID arbitration is not incompatible with claims arising from SDR because, 'to the extent that the … actions of Argentina relating to its foreign debt restructuring may… affect Claimants' rights, there is no reason to exempt foreign debt restructuring situations from the scope of application of the BIT'.[283] The tribunal concludes that the proceeds of the issued bonds were made available to Argentina and 'served to finance Argentina's economic development'.[284] It recognises Argentina's defense rights but held that its policy arguments on the propriety of ICSID in SDR were inapposite and therefore it cannot reject the claim based merely on policy considerations.[285]

On the argument against holdout creditors' arbitration, the tribunal held that

> the present policy considerations are controversial and based on Respondent's assumption that the biggest threat to the stability and fairness of sovereign debt restructuring are holdout creditors. Policy reasons are for States to take into account when negotiating BITs and consenting to ICSID jurisdiction in general, not for the Tribunal to take into account in order to repair an inappropriately negotiated or drafted BIT.[286]

[280] *Abaclat* case:paras 320-325.
[281] *Abaclat* case:paras 320-325.
[282] See Sections 4.3, 4.4 and 4.5 of Chapter 4 of this thesis.
[283] *Abaclat* case:paras 476-479.
[284] *Abaclat* case:para 378.
[285] *Abaclat* case:paras 548-549 & 603.
[286] *Abaclat* case:paras 549-550.

Arguably, the tribunal used an FDI-focused, old generation BIT to adjudicate a sovereign debt dispute. Not surprisingly, the tribunal was not unanimous as there was a strong dissenting opinion by Abi-Saab.[287] Referring to the *travaux préparatoires* of the ICSID Convention, he argues that there is a 'hard core' meaning of 'investment' intended by the framers which 'cannot be waived even by agreement of States parties to a BIT'.[288] Thus, sovereign debt under the BIT and ICSID Convention is not a protected investment because the purpose of the ICSID Convention was to provide an alternative to investors by providing a neutral forum to serve as an additional (alternative) procedural guarantee for the investors against host state's regulatory actions.[289] He insists that limitations to ICSID arbitration by state parties in a treaty is designed to protect 'the collective interest of its population'.[290] This reflects the first school of thoughts as examined in 5.4.1.1 above. He questioned the characterisation of the claim as a 'pure treaty claim' as all the claims were originally anchored on contract and the homogeneity arose out of the economic crisis which led to 'Argentina's cessation of payment'.[291] In other words, the treaty claim arose out of the 'same fact pattern' created by the debt crisis but this cannot be severed from the original contractual base.[292] Further, extraterritorial investors who purchased on a secondary markets have no territorial link and therefore their bonds might be inconsistent with the letter and spirit of the ICSID Convention.[293] In rejecting the presumption that the bonds 'served to finance Argentina's economic development', Abi-Saab argues that

> Not all funds made available to governments are necessarily used as "investment" in projects or activities contributing to the expansion of the productive capacities of the country… [as such] funds can be used to finance wars, even wars of aggression, or oppressive measures against restive populations, or even be diverted through corruption to private ends.[294]

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[287] See *Abaclat Dissenting Opinion*.
[288] *Abaclat Dissenting Opinion*:paras 2-15.
[289] *Abaclat Dissenting Opinion*:para 2.
[290] *Abaclat Dissenting Opinion*:para 158.
[291] *Abaclat Dissenting Opinion*:para 144
[292] *Abaclat Dissenting Opinion*:para 144
[293] *Abaclat Dissenting Opinion*:paras108-109.
[294] Abi Saab notes thus:

> Spiritism apart, the object and purpose of these two treaties - the ICSID Convention and the BIT - are described as being exclusively to afford maximum protection to foreign investment and foreign investors; as if these treaties were 'unilateral contracts' creating rights for the benefit of one party only. In consequence, according to this vision, all the provisions of these treaties have to be interpreted exclusively with this aim in mind… Viewed from this perspective, all the limitations to the jurisdiction of ICSID tribunals, whether inherent or patiently and carefully negotiated and stipulated in the treaty to protect the interests of the State party (which are after all, the collective

Abi Saab situates his argument within the broader policy considerations rejected by the majority and argues that the majority proceeded on 'a subjective, partial and truncated representation of the object and purpose of the ICSID Convention and the BIT, as being exclusively the effective protection of investment, all but totally disregarding the legitimate interests of the host State'.[295] In particular, on the policy argument of SDR, Abi-Saab maintains that

> the ICSID Convention did not foresee [SDR] and… financial markets did not contemplate [ICSID arbitration] then or now, … [yet] the majority award blows hot and cold at the same time, uncritically adopting the Claimant's policy arguments over the Respondent's, to which it hardly gave any attention.[296]

He argued that, although policy consideration should not be the decisive factor in adjudication, an international arbitrator 'cannot be totally blind to the social, economic and political environment which constitutes the larger context of the case'.[297] Therefore, policy considerations can, 'within the permissible margin of interpretation, shed light on what makes sense or nonsense among possible alternative solutions, when seen against the larger background'.[298] This is because the *Abaclat* case 'is the first ICSID case that involves a sovereign debt financial instrument … that is totally unhinged and detached from any specific economic activity or project in the host country'. Therefore, addressing this issue would help 'the international community and countries borrowing abroad [to] resolve the present and future sovereign debt crises and how the burden for such crises will be shared between taxpayers and creditors; a perennial challenge that is now occupying the daily headlines and confronting countries at all levels of development'.[299]

> interests of its population) are seen as obstacles in the way of achieving the 'purpose' of the treaties, which have to be overcome at any price and by whatever argument. This unilateral vision is in stark contrast to the 'object and purpose' of the ICSID Convention, as expressed in the Report of the Executive Directors in the following terms: 'While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States....'

See *Abaclat Dissenting Opinion:*paras 113-159.

[295] *Abaclat Dissenting Opinion:*para 261.

[296] *Abaclat Dissenting Opinion*:para 265.

[297] *Abaclat Dissenting Opinion*:para 265.

[298] *Abaclat Dissenting Opinion*:para 265.

[299] *Abaclat Dissenting Opinion*:paras 266-269.

On the desirability of ICSID arbitration to the evolving sovereign debt regime, Abi Saab argued that an incoherent system of adjudication is unsuitable in the context of sovereign debt disputes. He reasoned thus:

> Indeed, in view of the actual profound structural crisis of the international financial system; the absence of agreed international procedures regulating State bankruptcy; and the intense international discussions and efforts to improve the sovereign debt restructuring process, the present case raises, in an acute manner, an international public policy issue about the workability of future sovereign debt restructuring, should ICSID tribunals intervene in sovereign debt disputes. It suffices to ponder the potential disrupting effect of different *ad hoc* tribunals following separate ways or deciding at cross purposes with the desperate international efforts to reconstruct a semblance of a coherent international financial architecture.[300]

Finally, Abi Saab reiterates the investor-bias visible in most ICSID arbitration. In particular, he rejects

> the tendency of certain ICSID tribunals to consider any limitation on their jurisdiction - to protect the legitimate interests of State parties - as an obstacle in the way of achieving the object and purpose of these treaties, which they interpret as being exclusively to afford maximum protection to investment, notwithstanding the legitimate interests of the host State.[301]

In summary, the dissenting opinion in *Abaclat* re-echoes the enforcement dilemma facing parties to sovereign debt contract in the transnational context. It exposes the fallacy of the predominant contractual governance framework as creditors struggle to supplement the domestic private law mechanism with a transnational regime whose legitimacy is open to question. The implication is that a sovereign debtor may be dragged to multiple adjudication fora by different creditors. It will surely incentivise holdouts and vulture funds to frustrate an ongoing or potential debt restructuring.

5.4.1.2.1.3 Socio-Economic Rights & the Abaclat Case

Argentina's defences to the claims anchored on necessity and competing obligations were not addressed as there was no decision on the merit. Although at the jurisdictional phase Argentina did not frame its objection on the basis of its socio-economic rights obligations, it alluded to the inevitability of the defaults vis-a-vis its constitutional responsibility to ensure public order and economic stability to guarantee the general well-being of its citizens. Neither the majority decision nor the dissenting

[300] *Abaclat Dissenting Opinion*:para 271.
[301] *Abaclat Dissenting Opinion*:paras 272-274.

opinion contextualised their reasoning along this line. While the majority decision characterises the claims as treaty-based private investors' rights, it however acknowledges the rising unemployment and socio-political crisis which the debtor faced.

The dissenting opinion cautioned against 'overzealous' protection of creditors' treaty-based rights in disregard of the legitimate interests of the sovereign debtor and its population. Indeed, Abi-Saab has advocated for a 'sharing' of the sovereign debt burden by both tax-payers and creditors. This may imply accepting the necessity of austerity measures by the citizens; it may also imply recognising that SDR and debt moratorium are necessary for resuming both debt service and social services to the people. This may, arguably, support the game-theoretic proposition advanced in the previous chapter that if a loss is inevitable then, since both the creditors and debtors have a socio-economic rights responsibilities, the best option would be a prioritisation in favour of debt moratorium and a rejection of creditor claims that compounds, at least during the debt crisis, the socio-economic conditions of the citizens. This might potentially minimise the possibility of trading off socio-economic rights commitments.

However, despite the recognition of the interests of the debtor and its population, the dissenting opinion adopted a private law approach to sovereign debt governance. This, it is submitted, is a contradiction in terms because the private contractualist approach does not sufficiently align with the interests of the debtor's citizens either. It allows domestic holdout litigation against sovereign debtors. Hence, both the majority decision and the dissenting opinion do not examine the socio-economic rights situations occasioned by the debt crisis, the latter being the basis of the claim. This is surprising because the majority decision was anchored on the treaty-based obligations of the debtor interpreted with the aid of the VCLT. Yet, the latter clearly prioritises *jus cogens* and obliges tribunals to have regard to human rights in their interpretative jurisdiction.[302]

[302] VCLT 1969:preamble & art 31(3)(c). See also Petersmann 2009:31-32.

5.4.1.2.2 The Case of *Ambiente Ufficio v Argentine Republic* (*Ambiente* Case)

The facts of this case are on all fours with those of the *Abaclat case*.[303] Unsurprisingly, the majority decision closely followed the *Abaclat* majority decision but the dissenting opinion, although followed some of the reasoning of Abi-Saab in that case, advanced a *pacta sunt servanda* perspective on SDA, ie a state-state SDA.

5.4.1.2.2.1 The Facts and Parties' Positions

In June 2008, the claimants numbering 119 (reduced to 90 after an exchange offer in 2010) filed a request for arbitration at the ICSID alleging that Argentina (the Respondent) had, by defaulting on its debts, violated its international obligations under the Argentina-Italy BIT of 1990 and was therefore liable for compensatory damages arising from such defaults.[304] They claimed that the post-default legislative measures implemented by Argentina were unfair, inequitable and amounted to expropriation of their investments.[305] In particular, they alleged that Argentina violated the FET standard in the said BIT because the events of default and the subsequent legislative measures dictating the debt restructuring complained of, 'eliminated [their] rights to capital and interest'.[306] They maintained thus:

> [B]y refusing to restore their rights even after Argentina's economic situation came back to normal, [the] Respondent committed a gross violation of the obligation[s] to protect the investors' legitimate expectations, to respect the stability of the investment environment as well as the requirements of reasonableness, proportionality and due process.[307]

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[303] *Ambiente Ufficio SpA v Argentine Republic* 2013 IIC 576 (ICSID) (henceforth reference will be made to the ITALAW report available at https://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf (accessed 20 January 2019) paras 10-13. The majority decision's reliance on the *Abaclat* case was remarkable, noting thus:

> The present Tribunal will therefore not hesitate to benefit, where applicable and appropriate, from the reasoning of the *Abaclat* Tribunal. Far from adhering to any doctrine of *stare decisis* or considering itself legally bound by the findings of the *Abaclat* Tribunal, this implies a process of critically engaging with the majority decision, but also with the counter-arguments contained in the Dissenting Opinion of Professor Abi-Saab. … [T]he present Tribunal agrees with many, though not all, considerations and views expressed in the *Abaclat* Decision. …[But] the reasoning of the *Abaclat* Decision can thus be of relevance to that of the present Tribunal only if and to the extent that the Parties in the present case have submitted arguments similar to, and compatible with, those marshaled in the *Abaclat* case.

See *Ambiente* case:paras 12-13. This was criticized by the dissenting arbitrator. See *Ambiente Dissenting Opinion*:paras 40-50.

[304] *Ambiente* case:paras 1-2, 115, 336-347 & 542.

[305] *Ambiente* case:para 63.

[306] *Ambiente* case:para 529.

[307] *Ambiente* case:para 529.

Accordingly, Argentina's default and restructuring allegedly 'led to the total and irreversible annihilation of Claimants' rights'.[308] These, they argued, were sovereign acts constituting 'a violation of the Respondent's obligation to refrain from measures of expropriation of the investors' right and property, without immediate, adequate and effective compensation'.[309] In particular, Law No 26. 017 (ie one of the Emergency Laws enacted by Argentina) prohibited settlement or reopening of the exchange offer at the instance of holdouts and the Argentine Supreme Court had upheld the constitutionality of this debt restructuring law as a 'non-justiciable political question'.[310]

Finally, the claimants argued that the operative time for consent to arbitration is determined by the recognised principles of treaty interpretation as provided in the VCLT.[311] If these interpretative tools are employed, the claimants believed, they will qualify as 'investors' within the meaning of article 25 of the ICSID Convention especially as their loans contributed to the economic development of Argentina. They reasoned that they qualify as 'investors' because 'the investment at stake is the overall loan which made funds available to finance Respondent's budgetary needs'.[312]

The respondent, on the contrary, questioned the competence of the tribunal arguing that it did not give the requisite consent to arbitration in respect of sovereign debt disputes by ICSID tribunals regarding 55 different bond series held by multiple individuals.[313] It argued that some of the claimants were vulture funds who purchased their bonds after the events of default.[314] They were equally remotely connected to the bonds as they acquired their interests through intermediaries.[315] As such, Argentina argued, 'causing any right deriving from the issuance of security entitlements related to debt securities traded on capital markets to be subject to the provisions of the extensive network of BITs would hinder the issuance, circulation, payment and restructuring thereof'.[316]

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[308] *Ambiente* case:paras 532.
[309] *Ambiente* case:paras 530.
[310] Referring to the Argentine Supreme Court decision in *Galli, Hugo G. y otro/PoderEjecutivo Nacional* s/ amparo, Final decision, (5 April 2005) Case No G 2181 XXXIX (hereafter '*Galli* case'). See *Ambiente*case:paras 565-566.
[311] *Ambiente* case:paras 98 & 129.
[312] *Ambiente* case:paras 384 & 385-398.
[313] *Ambiente* case:paras 67 & 327.
[314] *Ambiente* case:paras 67 & 365-67.
[315] *Ambiente* case:para 327.
[316] *Ambiente* case:para 363.

There was equally no *prima facie* evidence that the non-payment of debts and the emergency-induced SDR that followed constituted violations of substantive standards contained in the Argentina-Italy BIT.[317] As the SDR was voluntary and a default is not a violation of international law, the FET standard 'does not prohibit debtors from offering options for the repayment of obligations in situations of need and from restructuring its debt in accordance with their real ability to pay'.[318] Nor was there any expropriation as the claimants were fully in control of their bonds and security entitlements.[319] Finally, the restructuring legislation which prohibited reopening the exchange offer could be set aside if the claimants had recourse to domestic courts as, by Argentine law, international law takes precedence over local law.[320] Importantly, Argentina referred to and relied on the UNCTAD's PRSLB and the Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets[321] to argue that there would be no international responsibility if a government, by reason of financial crisis, suspends debt servicing.[322]

5.4.1.2.2.2 The Decision & Dissenting Opinion

While substantially relying on the *Abaclat* case, the majority tribunal held, among others, that purchasing bonds on the secondary markets is 'part and parcel of a single investment [constituting] the overall loans which made funds available to finance the Respondent's budgetary needs'.[323] According to the tribunal, the risk of SDD and SDR is more than 'an ordinary commercial risk'.[324] Therefore, the *Salini* test was satisfied especially as 'the funds generated through the bonds issuance process were ultimately made available to Argentina and must be deemed to have contributed to Argentina's economic development'. In view of the volume of the bonds involved, the contribution was certainly significant to Argentina's development.[325] On the emergency laws which forced and controlled the debt restructuring/exchange offer, it held that 'it was notably through the operation of Law No. 26.017 that the Respondent

[317] *Ambiente* case:paras 521-525.
[318] *Ambiente* case:paras 524-525.
[319] *Ambiente* case:para 526.
[320] *Ambiente* case:para 615.
[321] IIF 2004. *Principles for Stable Capital Flows and Fair Debt Restructuring* (revised October 2013) https://www.iif.com/portals/0/files/private/2013_IIF_PCG_Report_3.pdf (accessed 22 May 2018).
[322] *Ambiente* case:paras 617-619.
[323] *Ambiente* case:paras 425 & 434-438.
[324] *Ambiente* case:para 485.
[325] *Ambiente* case:paras 468-469 & 485-87.

sought to influence the terms of the bonds/security entitlements issued by it'.[326] Therefore, 'it was not so much the failure to pay, but the use of the Respondent's sovereign prerogatives when restructuring its debt, notably including the adoption of Law No 26. 017, which qualify the Respondent's acts as potential breaches of the Argentina-Italy BIT and thus as *treaty* claims'.[327] Quoting the reasoning in the *Abaclat* case in *extenso*, it held that 'whatever types of legislative acts and different legal consequences engendered by them one might envisage, Law No. 26.017 and related legislative and regulatory acts did in fact unilaterally modify Respondent's payment obligation'.[328]

On the effects of the restructuring legislation on domestic remedies, the tribunal, using interpretation rules in the VCLT and CIL, held that this law and subsequent Supreme Court's decision rendered recourse to domestic remedies futile.[329] In particular, the Supreme Court was not willing to set aside or interfere with the debt restructuring given its understanding of international law that 'if a Government decided to suspend the payment of debt for reasons of financial necessity or public interest, this was generally accepted by the international community'.[330] This, the Supreme Court reasoned, is because there is 'a principle of international law that precludes a State's international responsibility in case of suspension or modification, in whole or in part, of the payment of the external debt, in the event the State is forced to do so due to reasons of financial necessity'.[331] The tribunal therefore concluded thus:

> [G]iven the Supreme Court's stance on international law, it is very doubtful whether a reference … to Argentina's international obligations under the BIT would have changed the picture. It may well be that the Constitution endows international treaties with a higher normative rank than [local] laws, but a BIT would still be inferior to the provisions of the Constitution itself. The Supreme Court in *Galli* emphasizes the powers of Congress to settle domestic and foreign debt, notably in emergency situations, and accepts the debt restructuring process as emanating from this constitutional power.[332]

Interestingly, it is worth noting here that the tribunal did not address Argentina's policy arguments regarding the implication of allowing 'vulture arbitration' on the existing

[326] *Ambiente* case:paras 507-510.
[327] *Ambiente* case:para 543.
[328] *Ambiente* case:paras 545-548.
[329] *Ambiente* case:para 618.
[330] Quoting the Supreme Court in the *Galli* case.
[331] *Ambiente* case:paras 618, quoting the *Galli* case.
[332] *Ambiente* case:paras 618-620.

SDR regime in international law. Nor was there any analysis or factoring of the public policy exceptions under the BIT concerned in the decision. Understandably, the tribunal could not pronounce on the necessity and other defences raised by Argentina as the matter was discontinued on account of failure to pay arbitration cost.[333]

The tribunal's reliance on the reasoning in the *Abaclat* case was very obvious. Therefore, in his dissenting opinion, arbitrator Bernerdez strongly argues that since 'under general international law the restructuring of sovereign debt by a State … in situations of national emergency are not *prima facie* an internationally wrongful act, it is difficult to visualize how the Respondent might have committed a *prima facie* breach of the … BIT'.[334] The intention of the parties to a BIT (primary consent) is always the paramount consideration and not the intention of the parties to the dispute arising from the said BIT (secondary consent).[335] He questioned the tribunal's

> excessive zeal in the protection of the interests of alleged foreign investors (noticeable also in several other investor-host State arbitral decisions) [which] does not fit well into the realities of international public law system and disregards the rules governing the interpretation of treaties.[336]

He argues that a tribunal must not forcibly use 'the ICSID framework out of concern for access to justice; that is for States to undertake if injustice is perceived'.[337] According to him, a state is not liable under international law for exercising its regulatory powers to address the general welfare of its people.[338]

While rejecting the majority's 'selective endorsement' of the facts in the *Abaclat* case, he observed that a global analysis of the facts in this case would have revealed that 'Argentina's 2005 restructuring of its sovereign debt follows the principles, steps and methods general[ly] applied at the relevant time by the international community to this kind of sovereign financial operation with international overtones'.[339] He argues that

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[333] *Ambiente Ufficio SpA v Argentine Republic* ICSID Case No ARB/08/9 Order of Discontinuance of Proceedings (28 May 2015):paras 20-23.
[334] *Ambiente* case Dissenting Opinion of Santiago Torres Bernárdez (hereafter '*Ambiente* Dissenting Opinion'):para 2.
[335] *Ambiente Dissenting Opinion:*paras 5-9 &12-13.
[336] *Ambiente Dissenting Opinion:*paras 3-5.
[337] *Ambiente Dissenting Opinion* fn 19.
[338] *Ambiente Dissenting Opinion:*para 17. See *Saluka Investments BV v The Czech Republic* 2006 *International Investment Claims* 210:para 254.
[339] *Ambiente Dissenting Opinion:*para 65.

there was no proper consent to ground the arbitration in the first place and that the sovereign debt in question was not an 'investment'.[340]

In the context of the *Salini* test, he argues that the bonds do 'not satisfy ... the hard core of the objective requirements defining traditionally an "investment" under the ICSID Convention, described succinctly as contribution/duration/risk[as they did] not contribute to the economic development of Argentina'.[341] He argued that neither the issuance of sovereign bonds nor the sovereign default problems was a subject-matter of consideration within the framework of the negotiations leading to the elaboration of the ICSID Convention and that, in practice, a sovereign debt dispute arising from debt restructuring has never been presented before the ICSID for adjudication until the *Abaclat* case.[342] Accordingly, regardless of inclusion or exclusion in the BIT definition, sovereign debt is *ipso facto* outside the province of ICSID arbitration as the ICSID Convention controls the BIT and not the other way round.[343] In other words, his conception of investment, for the purpose of arbitration, excludes sovereign debt because 'in 1965, the time of the tradable Brady sovereign bonds of the 1990s and later markets was still far away ... Their transactions are in fact alien to the very notion of "host State"...'.[344] Importantly, unlike the majority decision, he noted the evolving international framework on sovereign debt restructuring under the auspices of the UN, IMF and the UNCTAD thus:

> [T]he Tribunal's attention was called to the 'Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets' noted in 2005 by the Monetary and Financial Committee of the Board of Governors of the IMF. Since then, as it is in the public domain, UNCTAD launched in 2009 the initiative to formulate a set of global principles to promote responsible sovereign lending and borrowing practices, an initiative endorsed by the United Nations General Assembly, and in 2012 a consolidated version of the UNCTAD 'Principles on Promoting Responsible Sovereign Lending and Borrowing' was achieved in Doha on the occasion of UNCTAD XIII, inaugurating the phase of endorsement and implementation of the Principles, whose principle 15 deals with unavoidable 'Restructuring' of sovereign debts obligations in a state of economic necessity.[345]

[340] *Ambiente Dissenting Opinion:*paras 109-145 & 151-168.
[341] *Ambiente Dissenting Opinion:*paras 179-185.
[342] *Ambiente Dissenting Opinion:*paras 211-217 & 247, 336.
[343] *Ambiente Dissenting Opinion:*paras 336-355.
[344] *Ambiente Dissenting Opinion:*paras 267 & 316.
[345] *Ambiente Dissenting Opinion:*paras 330.

He briefly touched on the question of norm conflict and, while insisting on the principle of *pacta sunt servanda* as the basis of his opinion, noted that 'the values protected by the BIT are important, but they are certainly not higher in importance than those protected by the rules enumerated by the ICJ [*ju cogens* obligations or obligations protecting essential human values in the form of *erga omnes*]'.[346]

In summary, the dividing line between the majority decision and the dissenting opinion was the normative principles governing sovereign debts in the international context. The pro-creditor majority decision was influenced by the transnational private law paradigm while the dissenting opinion was influenced by the public law paradigm. The latter takes into account the sovereign debtors' concerns and public policy considerations while the former does not.

5.4.1.2.3 *Giovanni Alemanni and Others v Argentine Republic* (*Alemanni* Case)

This case further affirms non-official creditors' use of ICSID as an adjudicative institution for sovereign debt disputes.[347] It was also influenced by the *Abaclat* and *Ambiente* cases.[348]

5.4.1.2.3.1 The Facts and Parties' Positions

The case involved a similar factual background and was brought pursuant to the same Argentina-Italy BIT as the above two cases. It was initiated by 183 (reduced to 74 after the restructuring of 2010) holders of 51 bonds, challenging the SDR of 2005 (accepted by 76.1% of Argentina's bondholders) and 2010 (accepted by 92% of bondholders).[349] In particular, they claimed Argentina violated its treaty obligations to guarantee FET, full protection and security and not to expropriate without the payment of prompt, adequate and immediate compensation.[350] The premise of their claim was that Argentina was a rogue and irresponsible borrower who, despite IMF warnings, pursued 'profligate and undisciplined policies' leading to a rising foreign debt profile,

[346] *Ambiente Dissenting Opinion:*paras 338 & 356-357.
[347] *Giovanni Alemanni and others v Argentine Republic* (reference will be to the ITALAW report available at https://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf (accessed 9 May 2018).
[348] *Alemanni* case:paras 254-255.
[349] *Alemanni* case:paras 1-3 & 203.
[350] *Alemanni* case:para 31.

massive and unsustainable borrowing and that, 'had Argentina been a responsible policy-maker and enforcer and a prudent spender and borrower, it would have prevented the 2001 crisis and would have been able to service its debt commitments'.[351] The debt to GDP ratio rose from 35% in 1994 to 150% in 2002.[352] It was, they maintained, unconscionable for Argentina to allege that it was not the author of its own debt default and that it was an 'innocent victim of the crisis leading to its default'.[353] They argued that by the restructuring of 2005 Argentina grossly understated its repayment capacity and imposed 'on the holders of its bonds … an outrageous take-it-or-leave-it offer unprecedented in the history of sovereign debt restructuring and totally out of keeping with the commonly accepted guidelines of sovereign debt restructuring'.[354]

The claimants further asserted that the bonds were the same as borrowing under a loan agreement and, with a high risk of repudiation and default, they qualified as 'investment' for the purpose of ICSID arbitration.[355] They agreed that the financial crisis caused 'a run on the Argentine banks …and … a moratorium on all payments on the external debt, resulting in …"the largest sovereign default in history"'.[356] However, they argued that Argentina caused the crisis and therefore, the default 'constituted a repudiation of the Respondent's promise to honour its financial obligations and to pay the full amount of principal and interest at the agreed maturity dates'.[357]

Apart from its defences to the claim, Argentina raised objections with regard to the litigious behaviours of holdouts and vultures. It argued thus:

> [I]n view of the fact that the Exchange Offer was based upon terms that would make it possible for Argentina to pay its new debt in the long term, offering to pay a higher amount to any other creditor at a later time would have defeated the purpose of the initial restructuring and would have led Argentina once again to the position of unsustainable debt existing before the Exchange Offer.[358]

[351] *Alemanni* case:para 74.
[352] *Alemanni* case:paras 74-76.
[353] *Alemanni* case:para 74.
[354] *Alemanni* case:paras 75-92.
[355] *Alemanni* case:paras 101-107 & 185-195.
[356] *Alemanni* case:para 33.
[357] *Alemanni* case:paras 33-42.
[358] *Alemanni* case:paras 124 & 319.

In rejecting a multi-party, unrelated contractual claim, Argentina compared the ICSID Convention with the Inter-American Convention on Human Rights[359] and maintains that such proceeding 'would impair Argentina's fundamental right to analyse and address each claim individually'.[360]

Argentina argued that the default was caused by external shocks, deep contraction of its GDP which was greater than USA's contraction during the Great Economic Depression of the 1930s and reduced public revenue leading to the worst political, social and economic crisis in its history.[361] Since there was no international legal framework on SDR, the resulting restructuring did not obliterate the bondholders' contractual rights under the original bond hence holdouts could pursue their claims in the different jurisdictions stipulated by the respective bonds and, consequently, no sovereign actions in Argentina could affect these rights outside Argentina.[362] However, such holdouts 'cannot reasonably expect that the sovereign debtor will be able to pay them a sum higher than that accepted by the creditors who did participate in the restructuring'.[363] This, Argentina reasoned, is because 'no holder of interests would choose to participate if he knew, or even had the reasonable expectation, that another person, in a similar position, would later receive a better offer'.[364] That is why Argentina accorded 'the same treatment to all creditors who are in a similar position'.[365] This is more so in case of claimants who purchased their bonds after the default (vultures).[366]

Accordingly, Argentina argued, there was no treaty violation. This is because 'a mere failure to pay a contractual debt cannot in itself amount to a violation of international law, nor does international law preclude a debtor from offering terms of settlement to its creditors or to offer special treatment to creditors who do accept settlement terms'.[367] Holding otherwise, Argentina argued, would endorse bad faith of holdout and vulture creditors.[368] In line with the evolving SDR regime embodied in, among

[359] Organisation of American States 1969. *Inter-American Convention on Human Rights* (adopted on 22 November 1969 and came into force on 18 July 1978).
[360] *Alemanni* case:paras 131-132.
[361] *Alemanni* case:paras 40-41.
[362] *Alemanni* case:paras 49 & 62.
[363] *Alemanni* case:paras 43.
[364] *Alemanni* case:para 43.
[365] *Alemanni* case:para 43.
[366] *Alemanni* case:paras 154 & 216.
[367] *Alemanni* case:para 63.
[368] Citing Principles for Stable Capital Flows 2013. See *Alemanni* case:para 171.

others, the UNCTAD's PRSLB and the Principles for Stable Capital Flows, 'the conduct of creditors, in the event of a default, was to be evaluated against the agreed framework principles worked out under the aegis of the G-20 for sovereign debt restructurings'.[369] According to this evolving regime, debtors and all classes of creditors are required to cooperate 'to ensure that the terms for amending existing debt contracts and/or a voluntary debt exchange are consistent with market realities and the restoration of growth and market access'.[370]

5.4.1.2.3.2 The Decision

In 2014, the tribunal rendered a unanimous decision noting that following the majority in the *Abaclat* and *Ambiente* cases is a 'simple wisdom' while avoiding the key question raised by Argentina regarding the policy implications of holdout arbitration.[371] The tribunal held that the violations complained of and the jurisdictional objections were so intertwined as to require deferment to the merits phase.[372] The complaints of the claimants arose out of Argentina's SDD and would only qualify as a 'dispute' where 'the interest represented on each side of the dispute [is]… in all essential respects identical for all of those involved on that side of the dispute'.[373] It compares with the *Bayview* case where multiple claimants were alleging violation of their water rights.[374] It held that sovereign debts constitute investment under the ICSID Convention because 'when the Convention was under negotiation, sovereign bonds were actually used as an example of the potential breadth of the Convention's reach in terms of what sorts of future dispute could be put before an ICSID tribunal'.[375] Therefore, Argentina's formal default on its external debt was a prima facie violation of the BIT guarantees of FET and non-expropriation.[376] It concluded thus:

> [T]here is no denying that, by a combination of governmental policy and legislative action - thus quintessentially sovereign acts - the Republic of Argentina went beyond a mere failure to pay the sums contractually due to its creditors, and that this happened under circumstances which lay outside the

[369] *Alemanni* case:para 171.
[370] *Alemanni* case:para 171.
[371] *Alemanni* case:paras 255-256 & 267-271.
[372] *Alemanni* case:para 293. See *Bayview Irrigation District and others v United Mexican States* 2007 IIC 290 (ICSID).
[373] *Alemanni* case:paras 292-295.
[374] *Alemanni* case:para 294.
[375] *Alemanni* case:para 296.
[376] *Alemanni* case:paras 298-300.

> normal legal remedies and controls that exist for the benefit of creditors in the case of private bankruptcy. The Tribunal does not believe that it can seriously be argued that this combination of circumstances is not capable of constituting a breach of the treaty guarantees.[377]

In addition, the tribunal relied on the decision of the *Ambiente* tribunal to the effect that redress in domestic courts as prescribed by the BIT would have been futile because of Argentina's Supreme Court's understanding of international law that 'international responsibility is precluded where a State suspends or modifies payment of the external debt for reasons of financial necessity'.[378]

Having ruled that sovereign bonds were investments within the contemplation of the relevant BIT, it however, observed that 'the Tribunal is sensible of the issues raised by the Respondent which it can well understand might be regarded as serious matters on the international bond markets'.[379] Notwithstanding, it relied on the *Abaclat* case and concluded thus:

> As a fact of international economic life, sovereign bond issues were plainly within the normal field of contemplation of the Contracting Parties at the time when the BIT was under negotiation, and they could readily have introduced an exception in that regard into an appropriate place in the BIT if that had been what they wanted. The answer to the Respondent's assertion lies in the first place therefore … not in asking the Tribunal to import policy considerations into one area while vigorously rejecting them in others, but rather in a sober analysis of whether, given that the original Bond issues were plainly capable of falling within the concept of 'investment in the territory of Argentina' under the BIT, the same necessarily applies to derivative rights of the kind held by the Claimants.[380]

Finally, in December 2015 the tribunal discontinued the proceedings without a decision on the merits on account of non-payment of arbitration cost.[381] The case followed the pro-creditor interpretations of the majority decisions in the *Abaclat* and *Ambiente* cases even as SDR cases were never adjudicated by ICSID tribunals in the past despite recurring debt crises. The *Alemanni* case, therefore re-echoes the gradual embededdness of transnational private law into the sovereign debt regime.

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[377] *Alemanni* case:paras 300-315.
[378] *Alemanni* case:paras 315-316.
[379] *Alemanni* case:para 320.
[380] *Alemanni* case:para 320.
[381] *Giovanni Alemanni and others v Argentine Republic* (Discontinuance of Proceedings) (14 December 2015) ITALAW 17-25 https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207009.pdf (accessed 9 May 2018).

It should be observed that the above three tribunals' decisions did not address the defences relating to the debt crisis but, by accepting the claims, they took an unprecedented position on SDR which, arguably, relegates the debtors' other competing obligations during crisis to the background. This appears to contradict the positions in the espousal claim cases. Thus, the merit phase cases (ie the SDC cases to be examined hereunder), as the research will now show, were more sympathetic to the debtors' 'obligatory dilemma' and the severe impacts of the crisis on the citizens' human rights.

5.4.1.2.4 The SDC Cases: *EDFI v Argentina* (*EDFI* Case), *Urbaser v Argentina* (*Urbaser* Case), *Impregilo v Argentina* (*Impregilo* Case) & *Sempras v Argentina* (*Sempra* Case)

These cases bear virtually the same factual situations involving, among others, accumulation of debts due to non-payments of subsidy costs arising from investments in the real economy. Unlike the above three cases, these cases proceeded to the merit phase and awards were handed down hence, socio-economic rights issues were directly raised, contested and pronounced upon.[382] Although the cases were not initiated as bondholders' claims like the above three cases, they, however, fit into the research's forms (and Goldman's second classification) of SDAs because their factual background and the defences put up by Argentina were directly connected to the debt defaults of 2001 and the emergency legislative and executive measures adopted in a bid to return the country to debt sustainability.[383] Accordingly, for the present purpose, the research will only touch on the relevant factual and legal issues arising out of the debt crisis.

5.4.1.2.4.1The EDFI Case

The facts are similar to the above cases in the context of the debt crisis. In a bid to modernise and grow its economy, Argentina embarked upon a massive deregulation

[382] *EDF International SA and Others v Argentine Republic* ICSID Case No ARB/03/23 (11 June 2012) 1-1346, https://www.italaw.com/sites/default/files/case-documents/ita1069.pdf (accessed 9 May 2018); *Urbaser v The Argentine Republic* supra; *Impregilo v Argentine Republic* ICSID Case No. ARB/07/17 (21 June 2011) https://www.italaw.com/sites/default/files/case-documents/ita0418.pdf (accessed 09 May 2018); *Sempra v Argentina* 2007 IIC 304.
[383] Porzecanski 2016:40-77; Ziff 2011:345-386.

and privatisation of public enterprises in the 1980s and 1990s.[384] The claimants, French companies, filed a request for arbitration under the ICSID Convention pursuant to the Argentina-France BIT of 1991 and the Argentina-Luxembourg BIT claiming over $120 million arising from alleged breaches of contract partly occasioned by the debt crisis and non-payments of debts.[385] The dispute arose out of an electricity tariff charged under an agreement between the claimants and the government of the Mendoza Province of Argentina pursuant to a legal framework designed to reorganise, privatise and stabilise electricity transmission and distribution services.[386] The tariff rates were regulated by a federal currency convertibility law pegging the exchange rate of Dollar to the Peso on the basis of one to one.[387] The rationale, according to the claimants, was to allow for a long-term debt financing from the international capital markets.[388]

By the provisions of a local law, which were incorporated into a subsequent contract with the power generation company, the government was to compensate the claimants for the purchase of power at a higher price than the price at the wholesale market (ie reimbursements for extra costs).[389] In addition, the government undertook to subsidise electricity tariff for the elderly, rural farmers for irrigation purposes and for public lightening services (ie compensation for subsidy).[390] The government stopped making both payments, forcing it to accumulate debts.[391] Consequent upon the debt crisis, the government owed over $5 million in subsidy and compensation costs.[392] The claimants' local representatives' recovery claims were rejected by the Supreme Court for failure to exhaust administrative remedies first. The government agreed to re-pay the outstanding amounts following a renegotiation.[393] Furthermore, by government directives, the claimants were forced to accept government's issued notes/bonds as

[384] *EDFI* case:paras 54-60.
[385] *EDFI* case:paras 1-10
[386] *EDFI* case:paras 54-62.
[387] *EDFI* case:paras 78-83.
[388] *EDFI* case:para 292.
[389] *EDFI* case:paras119-120.
[390] *EDFI* case:paras 127-30.
[391] *EDFI* case:paras 121 & 271-279.
[392] *EDFI* case:paras 118-133.
[393] *EDFI* case:paras 123-126.

valid payments (ie instead of currency) for electricity resulting in a 20 per cent loss for the claimants.[394]

As a result of the debt crisis and the ensuing economic turmoil, Argentina enacted the Law of Public Emergency and Reform of the Monetary Exchange Regime (Federal Law No 25, 561 of 2002) which devalued the Peso (ie on the ratio of three Pesos to one Dollar) thereby setting aside the fixed-parity, convertibility currency regime in order to encourage exports.[395] But the law froze the tariff rates under the agreement as obtained before the emergency law (pesification) thereby forcing the claimants to shoulder the inflationary risks. However, the government could not pay its debts to the claimants' representatives.[396] The law also prohibited a suspension or an alteration of performance of public services/utilities contracts.[397] Unfortunately, in July 2002, the claimants' local representative also defaulted on its debts and the claimants, consequently, decided to employ the ISDS mechanism pursuant to the Argentina-France BIT and Argentina-Luxemburg BIT.

The ICSID tribunal assumed jurisdiction.[398] At the merit phase, the claimants claimed that the non-payments of subsidy costs and compensations as well as the emergency measures adopted arising from the debt crisis violated the FET, national treatment, and full protection and security standards under the Argentina-France BIT.[399] They also argued that the government's actions, notwithstanding the debt crisis, were arbitrary, unreasonable, unjustified measures amounting to indirect expropriation.[400]

For the present purpose, one of the fundamental issues of contention between the parties was what the tribunal calls 'the preemptive nature of international human rights laws which might have prohibited the observance of the Treaty'.[401] In this regard, the claimants argued that the BITs and CIL ordinarily define and control treaty-based rights and their violations. Therefore, by the ILC Draft on International Responsibility of States and VCLT, no emergency law can excuse non-payments and other breaches

[394] *EDFI* case:paras 280-283.
[395] Referring to Federal Law No 25, 561 of 2002 (Emergency Law). See *EDFI* case:paras 143-145.
[396] *EDFI* case:paras 150, 296-7.
[397] *EDFI* case:paras 154-155.
[398] *EDFI* case:paras 158-163.
[399] *EDFI* case:paras 181-190.
[400] *EDFI* case:paras 201-203.
[401] *EDFI* case:para 183.

amounting to treaty violations.[402] On the contrary, the respondent argued that the claimants' rights were exercisable in accordance with the prevailing circumstances and the legal regime relevant to the economic crisis.[403] The latter altered the economic expectations of the parties and those of the population hence 'the emergency laws were legitimate and reasonable to allow for the gradual economic and social recovery which would benefit all constituents'.[404] Importantly, Argentina argued that its investment treaty obligations must not be construed in such a manner as to undermine its international human rights obligations and, therefore, 'the Treaty should be construed and interpreted consistently with international canons aimed at fostering respect for human rights'.[405]

In particular, Argentina advanced a socio-economic rights' justification that it was necessary to adopt the emergency measures complained of

> in order to guarantee the free enjoyment of certain basic human rights –'such as, *inter alia*, the right to life, health, personal integrity, education, the rights of children and political rights [which were] directly threatened by the socio-economic institutional collapse suffered by the Argentine Republic, where tens of people lost their lives, the right to health, to personal integrity, to work and safety.[406]

The *jus cogens* status of these rights was also advanced to justify the SDC-induced emergency measures adopted by Argentina.[407] The reasoning was that investors' treaty rights

> should not be deemed absolute to the detriment of the Argentine population's entitlement to universal human rights enshrined in international instruments such as the 1948 U.N. Universal Declaration of Human Rights, the 1966 U.N. International Covenant on Civil and Political Rights, the 1989 U.N. Convention on the Rights of the Child, and the 1969 American Convention on Human Rights... [as] these multilateral pacts proscribe the abrogation or suspension in any situation of those rights contained thereunder; hence, the non-derogable nature of such rights is said to be conclusive evidence that they are tantamount to *jus cogens.*[408]

Therefore, measures designed to ensure the sustained enjoyment of these rights must be excused from international responsibility because '[t]he Government … [pursuant

[402] *EDFI* case:paras 182-190.
[403] *EDFI* case:para 187.
[404] *EDFI* case:paras 299-300, 305, 392 & 427-428.
[405] *EDFI* case:para 192.
[406] *EDFI* case:para 192.
[407] *EDFI* case:para 193.
[408] *EDFI* case:para 193.

to the American Convention on Human Rights] … was not supposed to suspend the exercise of human rights but to ensure of (sic) their satisfaction at reasonable levels'.[409] In adopting the emergency measures complained of, Argentina's main objectives, it maintained, were 'to avoid hyperinflation, improve fiscal situations and halt deterioration of life conditions'.[410]

Unsurprisingly, the claimants rejected the characterisation of socio-economic rights as candidates for a *jus cogens* norm. While accepting that investors' rights must give way to *jus cogens* norms, they insisted, however, that with the exception of norms against genocide and slavery, there are no specific international human rights assuming the status of *jus cogens* which would warrant the adoption of the measures complained of.[411] In their words, 'it is preposterous to suggest that any *jus cogens* norms required Argentina to repudiate the claimants' rights … or that Argentine citizens hold a supervening right to consume electricity at certain reduced prices'.[412] They maintained that simply because states' duties under the ACHR were non-derogable it does not make the corresponding rights to qualify as *jus cogens* norm because, by the VCLT, the latter is a norm 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[413]

In addition, while relying on, among others, the *Russian Indemnities* case, Argentina advanced the BIT-based public emergency and CIL necessity defences arguing that the measures adopted were excused because they sought to maintain public order by 'ensuring internal safety, in the face of situations such as violent internal insurrections, riots, lootings and crimes, extended social tension, or the possibility that the fundamental order be disintegrated and the government lose effective control over the State's territory'.[414]

[409] *EDFI* case:para 194.
[410] *EDFI* case:para 416.
[411] *EDFI* case:para 191.
[412] *EDFI* case:para 191.
[413] *EDFI* case:paras 195 & 221-226.
[414] *EDFI* case:paras 482-485, 507, 520-522.

In addition, by article 3(2) of the Argentina-Luxemburg BIT, investors protection shall be 'without prejudice to measures necessary for the maintenance of public order'.[415] This is because, 'the main purpose of BITs is to rule in normal situations and do not particularly address exceptional situations'.[416] Furthermore, it argued, this is a universally accepted position as, for instance, the ECHR (articles 8-11 and 15) permits States to adopt emergency measures 'to the extent strictly required by the exigencies of the situation …[and] necessary in a democratic society'.[417]

Using article 25 of the ILC Draft on State Responsibility for Internationally Wrongful Acts 2001 (ILC Draft on State Responsibility)[418], Argentina argued that by halting increasing poverty, 'personal as well as property rights and obligations of the general public' qualify as 'essential interests' because the survival of Argentina as a state, public order and economic viability were directly at stake and should, therefore, be prioritised over contractual commitments.[419] Indeed, citing UN reports on the social impacts of the Argentine debt crisis, it argued that there were sufficient evidence that

> life, health, liberty and security of individuals, as well as the institutional continuity of the state, were seriously at risk - social unrest claimed the lives of several and a wave of lootings, kidnappings and vandalizing ensued, levels of unemployment and poverty sharply increased, and healthcare services experienced dire shortages in medicine resulting in the outbreak of diseases such as yellow fever, dengue, malaria, and tuberculosis.[420]

The debt crisis had 'impoverished the people of Argentina due to budgetary and financial limitations suffered by the government'.[421] It further submitted that there was general consensus that the debt crisis came largely because of exogenous factors: Argentina's debts were 'indexed to the US dollar' (ie dollar-denominated debts) and IFIs' recommendations to return to debt sustainability 'proved insufficient'.[422] Indeed, 'several exogenous factors, including the rise in interest rates, the collapse of emerging markets, devaluation of the Brazilian currency, and the fall of exports-value'

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[415] *EDFI* case:para 883.
[416] *EDFI* case:para 486.
[417] *EDFI* case:para 489.
[418] ILC 2001. *Draft articles on state responsibility for internationally wrongful acts* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 22 July 2019).
[419] *EDFI* case:para 516.
[420] *EDFI* case:para 529.
[421] *EDFI* case:para 534.
[422] *EDFI* case:paras 531-532.

were the immediate, direct causes of the debt default.[423] Despite this, it submits, Argentina lost support from international organisations and creditor nations.[424] Consequently, the only reasonable way out was 'the issuance of a decree cancelling [the] said indexation' and restructuring by way of haircut.[425]

On the contrary, the claimants reject the necessity defence because, first, the debt crisis did not put Argentina in any grave and imminent peril as there was no 'significant institutional rupture, such as disintegration of the rule of law or of the constitutional order that could have caused a state of ungovernability or anarchy'.[426] Second, Argentina directly caused the crisis by years of persistent fiscal indiscipline and accumulation of unsustainable debt.[427] Hence, the debt crisis was simply 'self-generated', not exogenous. Third, Argentina did not provide specific evidence to show that the post-default measures it adopted were 'the only way to protect social and political stability' especially as other measures compatible with its international obligations existed at the time of the statutory debt restructuring measures.[428] Fourth, the necessity defence covers a temporary period because, according to article 27 of the ILC Draft on State Responsibility, the invocation of the defence is 'without prejudice to … compliance with the obligations in question, if and to the extent that the circumstance precluding wrongfulness no longer exists'.[429] Therefore, if the debt crisis ends, the 'obligation regains full force and effect'.[430] In other words, the defence only temporarily precludes wrongfulness, not exempting liability permanently.[431] Fifth, the high level of poverty arising from the crisis did not qualify as an 'essential interest'. They advanced the following policy argument:

> [I]f the mere existence of a severe economic crisis or of a high level of poverty were by themselves sufficient to constitute an essential interest for purposes of the State of Necessity defense, there would be numerous countries in the world that would subsist in a quasi-permanent state of necessity. …[T]he exceptional nature of the rule of necessity would consequently be degraded to a generic opt-out mechanism for countries to circumvent their international treaty obligations, since then every country with a risk of hyperinflation or other severe

[423] *EDFI* case:paras 565-566.
[424] *EDFI* case:para 551.
[425] *EDFI* case:para 532.
[426] *EDFI* case:para 526.
[427] *EDFI* case:paras 569-576.
[428] *EDFI* case:paras 536 & 543-556.
[429] *EDFI* case:para 579.
[430] *EDFI* case:paras 579-584.
[431] *EDFI* case:paras 590-592.

> macroeconomic maladjustment as well as every country with a poverty level higher than 40% would be exempted from international treaty obligations…[I]t is unreasonable to propose that sovereigns with a high country risk must be considered, almost by definition, to be in a state of necessity.[432]

Like all the above tribunals, this tribunal relied heavily on the VCLT's principles of interpretation with respect to good faith and a treaty's context, purpose and objects.[433] It also relied on the provisions dealing with conflicts between *jus cogens* and treaty provisions.[434] Consequently, the tribunal held that Argentina cannot rely on its domestic law to violate its international obligations on FET and contractual obligations via the 'umbrella clause' of the BITs.[435]

Importantly, for the purpose of this research, the tribunal recognised that socio-economic rights may qualify as *jus cogens* but this will require some compelling evidence to show that the non-payments of debts and the subsequent emergency measures adopted would directly guarantee the said human rights.[436] In other words, Argentina did not adduce specific evidence to link these rights to the emergency measures. The tribunal noted that although it is 'sensitive to international *jus cogens* norms' from which no derogation is permitted, including human rights', in the circumstances of the present case this defence cannot avail Argentina.[437] It reasoned thus:

> The Tribunal does not call into question the potential significance or relevance of human rights in connection with international investment law. However, … no showing has been made that Argentina was not able to comply with the relevant treaty provisions later, through a rectification of the economic equilibrium which had been disrupted by the Emergency Measures … [N]o evidence persuades the Tribunal that [the] Respondent's failure to re-negotiate … in a timely fashion, so as to re-establish the economic equilibrium … was necessary to guarantee human rights.[438]

In other words, showing a causal nexus between the debtor's action and the protected human rights in question is a question of evidence. It held that Argentina violated its treaty obligations under the BIT and the terms of the agreement pursuant to the

[432] *EDFI* case:para 522.
[433] *EDFI* case:paras 891-895.
[434] VCLT 1969:art 53; *EDFI* case:paras 895-897.
[435] *EDFI* case:paras 905-907.
[436] *EDFI* case:paras 909-911.
[437] *EDFI* case:paras 909-914
[438] *EDFI* case:paras 909-914.

applicable 'umbrella clauses'.[439] However, the tribunal held that Argentina cannot be held liable for the non-payment of debts governed by its laws in the absence of evidence showing denial of justice.[440] There was no indirect expropriation as a result of the emergency measures and no violation of the standard of full protection and security.[441] The claim of payment through bonds was also not substantiated.[442] Although Argentina violated the FET standard, the tribunal noted that 'investor's expectations must be balanced against the host state's need to take action in the public interest at a time of crisis'.[443]

Nevertheless, the tribunal rejected the defence of necessity. The tribunal first rejected the public order defence based on the Argentina-Luxemburg BIT as the claimants' substantive claims were not premised on the said BIT but on the Argentina-France BIT (ie the governing *lex specialis*).[444] The defence in the latter BIT was also not meant to be 'a shield against host state liability for treaty violation'.[445] On the basis of the CIL necessity defence, the tribunal noted thus:

> [Although it] does not call into question respondent's good faith [that the emergency measures were]… enacted to safeguard the country's vital interests such as protecting of Argentina's indigent population, … the tribunal is not convinced that those measures were the only means by which the respondent could have protected its population.[446]

This is because, according to the tribunal, the evidence showed that Argentina partly caused its debt crisis. Necessity, in the words of the tribunal, is not 'an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult'. Argentina failed to show that its actions were necessary to protect its essential interests and that it did not contribute to the situation complained of.[447] Indeed, the tribunal held that

> [a]lthough external factors may have aggravated the economic turmoil, Argentina was responsible at least in part, for creation of a poor economic climate, through the government's continued failure to achieve primary surpluses sufficient to stop an unsustainable debt ratio.[448]

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[439] *EDFI* case:paras 941
[440] *EDFI* case:paras 941 & 963-1080.
[441] *EDFI* case:paras 1108-1115
[442] *EDFI* case:paras 1084-1085.
[443] *EDFI* case:paras 1005-1040.
[444] *EDFI* case:paras 888-890 & 1150-1152.
[445] *EDFI* case:paras 1157-1162.
[446] *EDFI* case:paras 1165-1172.
[447] *EDFI* case:paras 1171.
[448] *EDFI* case:paras 1171-1178.

Therefore, it can be inferred that the tribunal has implicitly embraced the notion of socio-economic rights justification to suspend debt service. It thoroughly examined this in the context of the defence of necessity. Interestingly, the tribunal appears to have re-echoed the inconsistent ICSID jurisprudence on the substantive content of the defence of necessity in the context of SDC.[449]

5.4.1.2.4.2 The Impregilo Case

In the *Impregilo* case*,* a case concerning a contract for the provision of water and sewage services directly affected by the debt crisis, Argentina argued, among others, that the emergency measures it adopted to deal with the debt crisis were necessary 'in order to guarantee its inhabitants the human right to water... [as]… the obligations assumed by the Argentine Republic as regards investments do not prevail over the obligations assumed in treaties on human rights'.[450] Consequently, 'the obligations arising from the BIT must not be construed separately but in accordance with the rules on protection of human rights'.[451]

The tribunal held that the human rights obligation of Argentina to provide water to its citizens qualified as an 'essential interest' under the CIL defence of necessity.[452] It agreed that the debt default and the ensuing crisis were so 'grave and imminent' as to warrant the adoption of these measures. Indeed, it noted that 'so alarming was the situation that the United Nations General Assembly resolved to suspend the payment of Argentina's membership dues on account of the crisis, which was the first case in history where this was done'.[453] It held thus:

> [T]he term 'essential interest' can encompass not only the existence and independence of a State itself, but also other subsidiary but nonetheless "essential" interests, such as the preservation of the State's broader social, economic and environmental stability, and *its ability to provide for the fundamental needs of its population*. It follows that, in addition to Argentina's overall stability, *the need to provide the population with water and sewage facilities represented an "essential interest"* … The situation was indeed critical. … Argentina's crisis of 2001-2002 resulted in a massive default on the public

[449] See, for instance, *LG & E Energy Corp & Others v Argentine Republic* 2007 46 ILM 36 (ICSID); *CMS v Argentine Republic* 2005 44 ILM 1205. See also Waibel M 2005. **'**Two worlds of necessity in ICSID arbitration: CMS and LG & E', 1-7 http://ssrn.com/abstract=1566488 (accessed 20 May 2018).
[450] *Impregilo* case:paras 230-231.
[451] *Impregilo* case:paras 230.
[452] *Impregilo* case:paras 230-239.
[453] *Impregilo* case:para 241.

> debt, on the domestic as well as the international level. … The Arbitral Tribunal accepts that there was a grave and imminent peril to the "essential interest" of Argentina's economic and social stability.[454](Italics for emphasis).

Despite accepting the 'the fundamental needs of its population' such as the right to water as 'essential interests' and the fact that 'international market forces and events taking place in, inter alia, Mexico, Southeast Asia, and Russia affected adversely the economy of Argentina, culminating in the crisis of the early 2000s', the tribunal, however, held that Argentina 'contributed significantly' to the debt crisis by years of fiscal indiscipline and subsidisation of provincial governments'.[455] This is troubling in light of the above findings. Nevertheless, the strict interpretation given to the defence of necessity on policy ground seems to have been extended to the socio-economic rights 'defence' because, like in the *EDFI* case, the tribunal fused socio-economic rights into the CIL defence of necessity. The tribunal also treated the BIT defence within the context of the CIL defence.

5.4.1.2.4.2 The Urbaser Case

In the *Ubaser* case, a case with similar facts as the *Impregilo* case except for the BIT, the defence of necessity and a socio-economic rights-based counterclaim were raised following the debt crisis which, like in the above cases, instigated the investment claim.[456] Interestingly, the case also raised issues of norm-conflict. Argentina decided to put the claimants in the spotlight. The counterclaim relates to the legitimate expectations of Argentina's citizens arising from the claimant's failure to discharge its investment obligations thereby affecting the 'basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty'.[457]

Argentina argued that its BIT obligations are not to be interpreted in isolation from its other rights and obligations under international law.[458] Consequently, it acknowledged that, as a signatory to the ICESCR ,it has an obligation to ensure the right of everyone to an adequate standard of living, including adequate food, clothing and housing but

[454] *Impregilo* case:paras 346-350.
[455] *Impregilo* case:paras 358-359.
[456] *Urbaser* case.
[457] *Urbaser* case:para 1156.
[458] *Urbaser* case:para 1158.

that, by articles 29 and 30 of the UDHR, the International Labor Office's (ILO) Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (as amended in 2017)[459], the UN Draft Code of Conduct on Transnational Corporations[460], the CESCR General Comments, 'the rules contained in the Universal Declaration of Human Rights and the corresponding International Covenant are applicable to multinational companies'.[461]

Unsurprisingly, the claimants objected to the counterclaim arguing that as human rights are directly binding on states and not private companies under IHRL, Argentina is the true guarantor of its citizens' rights to water, health and decent environment, not the claimants.[462] Besides, they argued, BITs do not protect states from breach by a private investor but protect the latter from violations by the former.[463] This is because their obligations are contractual, not treaty-based and, therefore, they cannot be held responsible for any alleged harm on the population arising from the non-fulfillment of their contractual obligations.[464] By pleading necessity, they argued, the counterclaim has been rendered nugatory because 'circumstances that allegedly caused the state of necessity would have affected both parties'.[465]

The tribunal held that it is wrong to assume that only investors have rights under a BIT because, by the dispute resolution provision of the Spain-Argentina BIT (ie the *lex specialis*), 'there is no provision stating that the … host State would not have any right under the BIT …No distinction is made in respect of the party entitled with (sic) the rights that are at the basis of the dispute… they can be rights of the investor as they can be rights of the host State'.[466] The tribunal further reasoned thus:

> As far as recourse to the 'general principles of international law' is concerned, such reference would be meaningless if the position would be retained that the

[459] ILO 1977. *Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy* (amended in 2017) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (accessed 22 July 2019).
[460] UN Commission on Transnational Corporations 1983. *UN Draft Code of Conduct on Transnational Corporations* 1984 23 (3) ILM 626-640.
[461] *Urbaser* case:para 1160.
[462] *Urbaser* case:para 1157.
[463] *Urbaser* case:paras 1167-9.
[464] *Urbaser* case:paras 1167-1172.
[465] *Urbaser* case:para 1173.
[466] *Urbaser* case:paras 1183-1187.The tribunal pointedly raised the question 'whether any host State's rights under the BIT shall be denied because of the very nature of BITs deemed to constitute investment law in isolation, fully independent from other sources of international law that might provide for rights the host State would be entitled to invoke and to claim before an international arbitral tribunal. See *Urbaser* case:para 1186.

> BIT is to be construed as an isolated set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors. […] The BIT does not represent … a set of rules defined in isolation without consideration given to rules of international law external to its own rules.[467]

Based on the above, the tribunal recognised the idea of corporate human rights responsibility as advanced in this research.[468] It rejects the notion of state-centrism in the context of socio-economic rights responsibility. The assertion that 'guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants' is no longer tenable because it has the effect of excluding private parties from human rights obligations.[469] Similarly, it rejects the argument based on non-subjectivation of companies in international law because '[w]hile such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions'.[470] It concludes thus:

> [I]nternational law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. … The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.[471]

This supports the proposition advanced earlier in Chapter Three that focusing on the character of the violators rather than the violation itself belittles the significance of human rights.[472] Indeed, the tribunal specifically referred to the UN Guiding Principles on Business and Human Rights, the UDHR, ICESCR, ILO's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy and the VCLT. Because of the significance of the tribunal's pronouncement it will help to quote it in *extenso* here. It concludes thus:

> The 1948 Universal Declaration of Human Rights proclaims … that 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social service' (Art. 25(1)). … [I]n order to ensure that such

[467] *Urbaser* case:paras 1189-1192.
[468] *Urbaser* case:paras 1193-1198.
[469] *Urbaser* case:paras 1193
[470] *Urbaser* case:paras 1193-95.
[471] *Urbaser* case:paras 1193-95.
[472] See Section 3.3.4 of Chapter Three of this thesis.

> rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights, which then implies a corresponding obligation, as stated in Article 30 of the Declaration … The Declaration may also address multinational companies.… Similarly, the 1966 International Covenant on Economic, Social and Cultural Rights states that States Parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Art. 11(1) and 12), …[Therefore] the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parties, public and private parties, not to engage in activity aimed at destroying such rights… The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.[473]

However, the tribunal declined to hold the claimants accountable for Argentina's failure to ground the claimant's alleged obligation on IHRL (but on contract) especially because the provision of socio-economic rights is an obligation of performance.[474] Nevertheless, it affirms the corporate *duty to respect* by holding that the claimants may be responsible 'in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties'.[475] The counterclaim failed specifically because Argentina could not concretise or support its arguments with factual evidence showing harms to specific individuals or group of individuals.[476] It is, thus, a question of causation.

Finally, with respect to the defence of necessity, Argentina argues that external shocks, raising of US interest rates and the IMF's admission of wrong diagnosis and erroneous policy prescriptions were the causes of the debt crisis.[477] In particular, 'the measures adopted by the Argentine Republic prevented the human right to water from being adversely affected and, with it, the right to an adequate standard of living, food and housing'.[478] It argued:

> Unlike other countries, the Argentine Republic did not receive any external aid to avoid or manage its crisis. On the contrary, on December 5, 2001, the IMF denied the release of funds in the amount of USD 1,260 million. … It maintained public order, protected its essential security interests, preserved the essential

[473] *Urbaser* case:paras 1196-1202.
[474] *Urbaser* case:paras 1209-1210.
[475] *Urbaser* case:para 1210.
[476] *Urbaser* case:paras 1220-1221. See also Crow & Escoba 2018:87-118; Briercliffe 2017:1-3.
[477] *Urbaser* case:para 701.
[478] *Urbaser* case:para 702.

> human rights and the existence of the financial system. There is no obligation, either under domestic or international law, which may override Argentina's duty to guarantee the free and full exercise of the rights of all persons who are subject to its jurisdiction.[479]

However, the claimants argue that such defence was not recognised under the Spain-Argentina BIT and CIL defence. This, according to the claimants, cannot preclude liability arising from the measures adopted following the debt crisis. This is because Argentina caused the crisis by its 'excessive public spending over recurring revenues that led to unsustainable accumulation of public debt and ultimately to sovereign default that fatally undermined the basis for Argentina's financial and economical (sic) stability'.[480] They argued that Argentina can fulfill its human rights obligations to its citizens and the obligations to its investors simultaneously.[481]

The tribunal held that there was a situation of necessity warranting the adoption of measures complained of, but it cannot exist permanently, ie beyond a specific period.[482] It doubts the strict interpretation often given to article 25 of the ILC Draft with respect to rights which 'may accrue directly to any person or entity other than a state'.[483] According to the tribunal, both internal and external factors caused the crisis but there must be a direct causal connection showing that

> the Government's acts were such that they either were directed towards a crisis resulting in the emergency situation that the country experienced in early 2002, or at least of such a nature that the Government must have known that such crisis and emergency must have been the outcome of its economic and financial policy.[484]

In other words, 'an allegation stating that the Argentine Government substantially contributed to these events requires a showing of a link of causality between such conduct and the outbreak of the crisis'.[485] The tribunal reasoned that Argentina had no option but to suspend its debt payments and adopt the emergency measures

[479] *Urbaser* case:paras 704-706.
[480] *Urbaser* case:paras 686-688.
[481] *Urbaser* case:para 694.
[482] *Urbaser* case:paras 718-719.
[483] *Urbaser* case:para 717.
[484] *Urbaser* case:paras 710-711.
[485] *Urbaser* case:para 714.

complained of.[486] Importantly, the tribunal examined the issue of norm-conflict in the context of human rights and investors' obligations thus:

> [T]he question whether "other means" were available has to be captured in both perspectives: the wide one, taking into account the needs of Argentina and its population nation-wide, and the narrower one of the situation of investors engaged in performing contracts protected by the international obligations arising out of one of the many BITs. Claimants have not addressed the first part of the question. Respondent has made more than a prima facie showing that the emergency measures taken were the only ones available to the Argentine Government at the time, taking into account the extreme economic, institutional and social disturbances suffered by the country and its population. It would have been incumbent on Claimants to offer at least a serious indication as to the nature of other measures that had been available to the Government at that time. Claimants' focus was exclusively on its own interests and the protection they allegedly derive from the BIT.[487]

In other words, prioritising BIT protected rights (ie 'narrow state obligations') over human rights (ie 'general obligations') is simply disingenuous. Insisting that the two can be fulfilled simultaneously in the face of an unprecedented debt crisis is equally disingenuous. Both depend upon limited (perhaps non-existent) resources. In the words of the tribunal:

> [The] claimants' argument is too short. It does not resolve the conflict between the obligation to guarantee the [investors'] right and the access of the poor and vulnerable population to water when this cannot be ensured otherwise than by failing to comply with the host State's obligations toward the Concessionaire. … In respect of the emergency measures …, the same legal structure is to be observed: the Government of Argentina [is] under an obligation, based on Constitutional Law as well as on elementary policy of protecting the population's health, to preserve their access to drinking water.[488]

Some important points are worth noting here. First, although the lack of evidence to substantiate the counterclaim led the tribunal to reject it, the tribunal expressly admitted the pre-eminence of socio-economic rights responsibilities in the context of competing international obligations during a sovereign debt crisis. Hence, private creditors' rights cannot override socio-economic rights. The latter are essential, fundamental needs of the citizens. It is their essentiality that makes the corresponding obligations non-derogable at least to satisfy the minimum core of the relevant socio-economic rights obligations.

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[486] *Urbaser* case:para 716.
[487] *Urbaser* case:paras 716-725.
[488] *Urbaser* case:paras 716-725.

Second, like the above two cases, the tribunal also situated socio-economic rights within the context of the CIL defence of necessity. In other words, the status of socio-economic rights should be understood in the context of the emergency measures adopted to deal with the debt crisis. Third, unlike in the above cases, the tribunal here expressly recognised corporate socio-economic rights responsibilities supported by both hard and soft laws. This unarguably extends to private creditors adopting ITA to enforce their rights. Finally, it can be implied that with the necessary evidence, there can be socio-economic rights-based counterclaims in an ITA-based SDA. The implication of this is to put the rights-holders in the middle of this form of adjudication. This could redefine socio-economic rights litigation especially from the procedural angle.

5.4.1.2.4.2. The *Sempra Case*

In this case, the tribunal did not consider the debt crisis as 'grave and imminent' despite citing the non-derogable socio-economic rights obligations under the ACHR, but nonetheless considered a 'loan' to be a protected investment.[489] The case involved, among others, the non-payment of subsidy costs and claims for compensation arising from the claimants' inability to access international market to cancel a bonded loan due for maturity during the debt crisis.[490] While observing that the defence 'raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners', the tribunal held that the survival of the state was not 'imperiled by the crisis,…[as] the constitutional order was not on the verge of collapse'.[491] This is curious because if proven political instability, rioting, loss of lives and properties, unemployment and severe malnutrition and deaths, were not 'grave' enough, then one wonders what would qualify as 'grave peril'. Perhaps the tribunal had in mind external aggression and civil wars. However, the latter are not ISDS standards but state-state standards. Arguably, even a small riot can imperil credits and investment activities.

[489] *Sempra case*:paras 214-398.
[490] *Sempra case*:paras 214-269.
[491] *Sempra case*:paras 332-338.

Nevertheless, the tribunal considered the defence of necessity from multiple angles: domestic law, BIT, human rights and CIL perspectives.[492] On the latter, it held that the conditions must be cumulatively satisfied. However, the available evidence showed that the crisis did not compromise the existence of the state, it did not involve essential state interest and that it was caused by both endogenous and exogenous factors.[493] Under the BIT's defence precluding measures designed to maintain public order, international peace and 'essential security interests' in safeguarding investors' rights, the tribunal used the above CIL standards to reject the defence because, it reasoned, 'international law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle'.[494]

Thus, adopting these conditions means determining 'essential security interests' is not 'self-judging' (ie a state determining its own essential interests).[495] Curiously, however, it held that the 'essential interests' of the claimants would be impaired by the necessity defence because 'in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations'.[496] Yet, the tribunal did not examine the human rights obligations under the ACHR at all. Interestingly, one fundamental issue raised by Argentina was the legitimate expectations of the state and its citizens from the investors.[497] The tribunal was however silent on the issue. It only noted but downplayed the argument in favor of lowering investment protection standards during the debt crisis and held thus:

> The manner in which the law has to be applied cannot ignore the realities resulting from a crisis situation, including how a crisis affects the normal functioning of any given society. This is the measure of justice that the Tribunal is bound to respect. The Tribunal will accordingly take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards.[498]

This case only confirms the inconsistencies of the tribunals on this issue. It seems curious to use CIL requirements on the defence of necessity where a BIT makes

[492] *Sempra case*:paras 325-332.
[493] *Sempra case*:para 348.
[494] *Sempra case*:paras 374-378.
[495] *Sempra case*:paras 382-389.
[496] *Sempra case*:paras 390-397.
[497] *Sempra case*:paras 289-318.
[498] *Sempra case*:para 397.

provisions for this particular defence. This is because of the obvious variations in their wordings. For instance, while CIL uses 'essential interests', most BITs use 'essential security interests'. Of course, CIL can be invoked to fill a vacuum but only where the relevant treaty is silent.

5.4.1.2.5 *Postova Banka AS & Anor v Hellenic Republic* (The *Postova Banka* Case)

Unlike the Argentine SDC, this case illustrates the complexity of a SDD within a highly integrated currency union.[499]

5.4.1.2.5.1 Facts & Parties' Positions

This is a 'bank-bondholder' ICSID arbitration claim brought pursuant to the Slovakia-Greece BIT of 1991 and Cyprus-Greece BIT of 1992 following the Greek debt crisis of 2010. The claimants purchased Greek government bonds governed by Greek law in 2010 when Greek bonds were already downgraded in 2009 and the country had began implementing austerity measures prescribed by the IMF, EC and the ECB.[500] The bonds contained no CAC.[501] According to the governing Greek law, the bonds were syndicated, ie they were issued to some recognised participants to deliver to primary dealers who then transferred to third parties on the secondary market.[502] By 2011, the Greek economy deteriorated and the IMF concluded that a private sector haircut was necessary to ensure debt sustainability.[503] On this account, a Private Creditor Committee negotiated a 53% haircut but the claimants did not participate in the negotiation.[504] Since none of the bonds contain a CAC clause, a Greek Bondholder Act (Law 4050/2012)[505] was enacted cramming down on non-participants on the condition that half of the eligible bondholders participated and a two-third voted in favor of the haircut.[506] Upon launching the restructuring by way of an exchange offer, over 90% of the bondholders participated and over 94% voted in favor. The claimant's

[499] *Postova Banka AS and Istrokapital SE v The Hellenic Republic* 2015 IIC 679 (ICSID).
[500] *Postova Banka* case:paras 45-51.
[501] *Postova Banka* case:para 57.
[502] *Postova Banka* case:paras 52-59.
[503] *Postova Banka* case:paras 61-64.
[504] *Postova Banka* case:paras 65-66.
[505] Bondholder Act (Law 4050/2012) approved by the Greek Parliament on 23 February 2012.
[506] *Postova Banka* case:para 67.

representative, however, voted against the exchange offer. The claimant reclassified their bonds from tradable to 'hold to mature' bonds.

Apart from the defences against the substantive claims, Greece raised objections, among others, that the obligations assumed under Greek law cannot violate BIT standards and that the bonds were not protected investments under the relevant BITs and the ICSID Convention, hence, there was no *prima facie* violation of the treaty guarantees.[507] Using the *Salini* requirements and *Abaclat's* dissenting opinion, it argued that debt instruments were outside the province of ICSID arbitration.[508] According to Greece, a bond is different from a loan 'in so far as loans imply contractual privity and are usually tied to a specific operation or to an underlying investment in the host State'.[509] The relevant BITs exclude sovereign bonds in their definitions of 'investments' and the said bonds had no territorial nexus with Greece nor were they meant to contribute to its development.[510] It argued that the reclassification exposes the claimants as vulture funds and speculators seeking to cash in on an impending IMF and EU bail-out despite the imposition of austerity measures, and also in order to protect their balance sheet in compliance with their domestic banking regulations.[511]

On the contrary, the claimants argued that sovereign bonds are the same as loans since they are monetary and contractual claims and therefore, according to the VCLT and other principles of treaty interpretation, bonds traded on the secondary markets qualify as 'investments' under the ICSID Convention and the relevant BITs.[512] In addition, the funds derived from the bonds were made available to Greece's government.[513]

5.4.1.2.5.2 The Decision

While declining jurisdiction, the tribunal referred to the VCLT for interpretative guidance and held that simply because parties to a BIT desire to create a conducive

[507] *Postova Banka* case:paras 91-97 & 213-217.
[508] *Postova Banka* case:paras 98-99.
[509] *Postova Banka* case:para 99.
[510] *Postova Banka* case:paras 100-103 & 110-116.
[511] *Postova Banka* case:paras 107-118 & 158-168.
[512] *Postova Banka* case:paras 127-131 & 212.
[513] *Postova Banka* case:paras 142-143.

investment climate for investors, 'does not mean that, in case of doubts, the treaty must be interpreted in favor of the investor, or that promoting investment is the sole purpose of the treaty'.[514] It held that unlike in the *Abaclat* and *Ambiente* cases, the parties to the BIT here did not intend to include sovereign debt as covered investment for protection and adjudication purpose.[515] Importantly, the tribunal considered sovereign debt as 'an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State'.[516] According to the tribunal it possesses the following features:

> First, it is clearly a method of financing government operations, from investments in infrastructure to ordinary government expenditures… Second, it is a key instrument of monetary and economic policy…*Third, sovereign debt is subject to a high degree of political influence and risk. A sovereign State engages in much more complex decisions, both in negotiating and structuring the debt and in payment thereof, and repayment is subject not only to the normal credit risk of any credit operation, but also to political decisions that are extremely sensitive for the inhabitants of the given State, such as a tax increase or a reduction in public expenditure or investment to repay the sovereign debt*…Fourth, while ordinary credits generally embody the interest of the main parties to the credit agreement - debtor and creditor - and the influence of third parties is limited, sovereign debt is highly influenced to different degrees by both internal and external factors.[517]

The above distinguishing features make the two-sided, private law paradigm unsuitable in this regard. In particular, there are multiple, often conflicting interests that defy the contractual governance framework.

Finally, the tribunal held that there are two forms of sovereign bonds: sovereign bonds that are used for general budgetary funding purposes and those used for public works or services.[518] This classification follows some decisions of mixed claims commissions.[519]

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[514] *Postova Banka* case:paras 310 & 249-292. The tribunal distinguished the case from the *Abaclat* case. See *Postova Banka* case:paras 300-364.
[515] *Postova Banka* case:paras 332-340.
[516] *Postova Banka* case:para 324.
[517] *Postova Banka* case:paras 318-323. Italic for emphasis.
[518] *Postova Banka* case:para 364.
[519] *Postova Banka* case:paras 364-365.

5.4.1.2.5.3 Socio-Economic Rights in the Postova Banka case

The case was terminated in *limine* as it did not proceed to the merit phase, hence, the respondent's defences were never examined.[520] In its defence to the merit phase, however, Greece raised issues of fiscal austerity measures and the impact of the financial crisis on its population's welfare. Indeed, as examined in Chapter Three, socio-economic rights were directly impacted by these measures. Although the tribunal did not allude to these issues for procedural reasons, its conceptualisation of sovereign debt recognises that 'repayment is subject … to political decisions that are extremely sensitive for the inhabitants of the given State, such as a tax increase or a reduction in public expenditure or investment to repay the sovereign debt'.[521] Interestingly, this recognition aligns with the decisions and findings of the ECrtHR rights court and the Greek Financial Crisis Commission.[522] It also aligns with the citizens' approach to sovereign debt governance.

5.4.1.2. 6.*Gramercy v Peru* (The *Gramercy* Case)

This is the most recent sovereign debt ITA case.[523] In early 2018, Gramercy Funds commenced investment arbitration against the Republic of Peru under the Peru-US BIT and UNCITRAL Arbitration Rules 2010.[524] The case involves the Peruvian

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[520] Argyropoulou 2018:179-222.

[521] *Postova Banka* case:paras 318-323.

[522] See *Koufaki & Adedy v Greece* ECtHR Nos 57665/12 and 57657/12 (7 May 2013), https://hudoc.echr.coe.int/app/conversion/pdf/library=ECHR&id=002-7627 (accessed 23 July 2019) (*Koufaki* case); *Mamatas and Others v Greece* 2016 ECtHR Nos 63066/14, 64297/14 and 66106/14 (21 July 2016); ECtHR 2016. *Information Note on Mamatas v Greece ECtHR No 198, 21 (July 2016)* https://www.echr.coe.int/Documents/CLIN_2016_07_198_ENG.pdf (accessed 23 July 2019) (*Mamata's* case). See also Truth Committee on Public Debt 2016. *Greece Truth Committee on Public Debt: Preliminary report* 38-41, https://auditoriacidada.org.br/wp-content/uploads/2014/06/Report-Greek-Truth-Committee.pdf (accessed 12 February 2019); European Court of Auditors 2017. *Special Report: European Commission's intervention in the Greek financial crisis* 1-6 https://www.eca.europa.eu/Lists/ECADocuments/SR17_17/SR_GREECE_EN.pdf (accessed 12 February 2019).

[523] *Gramercy Funds Management LLC & Gramercy Peru Holdings LLC v Peru* 2016 UNCITRAL https://www.italaw.com/cases/3879 (accessed 12 February 2019).

[524] *Gramercy* case (Statement of Claim):paras 11-27. See also UNCITRAL 2010. *Arbitration Rules* (amended in 2018 - incorporating UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration 2014) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (accessed 23 July 2019). The transparency rules seek to address the transparency deficit of the ISDS system. See also UN 2014. *UN Convention on Transparency in Treaty-based Investor-State Arbitration* (adopted 10 December 2014 and came into force 18 October 2017)

government land bonds issued to compensate for the 1969-79 expropriation of more than nine million hectres of land. Claimants purchased 9700 of these bonds between 2006 and 2008. Peru decided not to use the consumer price index to assess and pay the holders of the land bonds as compensation. This followed a constitutional court's order and executive policies on the payment of these land bond compensation to holders. The claimants, therefore, alleged that the value of their bonds was expropriated and Peru violated the FET and other guarantees under the said BIT.[525]

Peru argued that the claimants are vultures and that, unlike in the *Postova Banka* and *Abaclat* cases, the land bonds are not the same as sovereign bonds.[526] Importantly, it specifically advanced defences based on its socio-economic rights obligations to its citizens. It argued that since the Peru-US BIT allowed for protection of legitimate welfare objectives, the bondholder process and other measures complained of by the claimants were in accord with Peru's fundamental obligations to its citizens to promote their welfare and implement basic services 'bearing in mind that it is financially impossible to make a payment of this nature [ie debt servicing] and magnitude in a single sum without impacting fiscal resources, and consequently the basic services for the poorest population of our country'.[527]

Unfortunately, as of February 2019, the tribunal has not delivered any award and, therefore, no arbitrators' perspectives are available for the purpose of examination here. Nevertheless, it indicates the growing relevance of socio-economic rights-based 'defences' following the above cases on the debt crises in Argentina and Greece. Both the claimants and respondent made copious references to, among others, the *Abaclat*, *Postova Banka* and *Ambiente* cases.

5.4.2 Human Rights-based SDAs

There had been SDC instigated complaints lodged at the UN human rights treaty bodies but, as noted earlier, the focus here is on adjudication.[528] In particular, some

http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html (accessed 23 July 2019).

[525] *Gramercy* case (Statement of Claim):paras 261-262.

[526] *Gramercy* case (Statement of Defence):paras 55-58 & 207-211.

[527] *Gramercy* case (Statement of Defence):paras 240-241.

[528] *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* 2012 ECSR 80; Human Rights Committee 'Decision adopted by the Committee under the Optional Protocol, concerning

private creditors instituted claims against Greece at the ECrtHR as a result of its sovereign debt crisis resolution measures.[529] There is one prominent case in this respect: the *Mamatas* case.[530] In this case, over 6000 holdout creditors filed three separate applications at the ECrtHR challenging the Greek government's post-default legal measures (ie Law No 4050 of 2012 compelling a forcible haircut) as expropriation and interference with their possession, thereby violating their rights to property and non-discrimination under the ECHR.[531]

The ECrtHR assumed jurisdiction and recognised the property rights of the claimants, but held that the Greek government should be allowed a margin of appreciation to deal with its debt crisis without obstruction by private interests. Using its jurisprudence on discrimination and interference with property, the court held that the measures adopted by Greece under the circumstances were reasonable and proportionate. The court held that although there was interference with possession, such 'interference pursued a public-interest aim, that is to say preserving economic stability and restructuring the national debt, at a time when Greece was engulfed in a serious economic crisis'.[532] This was necessary otherwise Greece 'would have been unable to honor its obligations under the old bonds'.[533] It held thus:

> If dissident bondholders had feared that the value of their bonds would decrease … they could have exercised their rights as bondholders and sold their bonds on the market … It thus transpired that the collective action clauses and the consequent restructuring of the public debt had been an appropriate and necessary means of reducing the Greek public debt and saving the respondent State from bankruptcy.[534]

Communication No 2868/2016' (30 November 2017) www.docstore.uhchr.org/FilesHandler.ashx?/6QkGID%2FPPRiCAqhKb7yhsjvfljqil84 (accessed 9 January 2019).

[529] *Mamatas* case and *Koufaki* case. The latter is not a creditor claim hence it will not be examined here. In the case, public servants challenged the Greek government's measures of cutting salaries of public sector workers following the debt crisis as discriminatory and interference with possession of their property. The court held that the government had a margin of appreciation and the aim of the adopted measures complained of 'was not merely to remedy the immediate acute budgetary problem but also to strengthen the country's financial stability in the long term' and that the complainants failed to show that 'their situation had deteriorated to such an extent that their very subsistence was in jeopardy'. See Information Note on the Court's case-law No 163 May2013:2-3.See also Argyropoulou 2018:165-205.

[530] There is also the recent ECJ's decision on Cypriot SDC. See *Chrysostomides & Ors v Council of European Union* Case T-680/13 (13 July 2018) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013TJ0680&from=EN (accessed 9 May 2018).

[531] *Mamatas* case:1-2.

[532] ECrtHR 2016. 'Haircut on bonds held by individuals geared to restructuring Greek public debt during the crisis did not violate their property rights: Mamatas & Others v Greece'. ECrtHR 256:1.

[533] *Mamatas* case:4.

[534] *Mamatas* case:4.

Thus, the ECrtHR exhibits a negative attitude towards holdout litigation. The priority is public, not private creditor, interests. This agrees with the prioritisation of 'essential interest' over property rights of creditors.

5.5 DISCERNING THE ATTITUDES OF THE COURTS AND ARBITRAL TRIBUNALS

Despite the factual and contextual variations in the above cases, there are discernible trends and attitudes that may be deduced here. This can be seen in the following areas:

5.5.1 Pro-creditor Disposition and other Legitimacy Issues

In the state-state and ITA-based SDAs, the priority of the courts and tribunals has almost always been the creditors' interests. This is understandable because the state-state claims were espoused by their home states while ITA has traditionally been pro-investors. Interestingly, since both parties in the former are states, it seems plausible to argue that socio-economic rights obligations cannot be downplayed in the name of commercial interests. Unfortunately, respondents in these cases did not specifically raise socio-economic rights defences, nor can the socio-economic rights obligations of the espousing state be engaged immediately or automatically without a concrete counterclaim. In other words, courts and tribunals are confined to issues raised by the parties. Nevertheless, the point remains that the parties before the courts are subjects of IHRL and may be signatories to the ICESCR and other related instruments. A socio-economic rights justification or counterclaim may be raised especially in view of the extraterritorial reach of these rights. Importantly, however, in the period when most of the espousal cases were instituted, IHRL was at its infancy. This might explain the non-invocation of socio-economic rights issues and the rare employment of the CIL-based defence of necessity.

In addition, in all but one of the recent investment treaty sovereign debt disputes so far adjudicated, the decisions favored the creditors. This contravenes studies suggesting that respondent states were favored in ISDS proceedings.[535] It also confirms the popular notion that the ISDS system seeks only to protect the investor

[535] UNCITRAL 2018:paras 8-17.

hence capital exporting states must sign BITs to ensure the safety of their nationals' capital abroad. As noted above, the tribunal in the *Ubaser* case has rejected this asymmetric notion of ISDS by holding that states, like investors of the other contracting states, have rights under any BITs and may initiate counterclaims in any BIT-based claim or proceeding. Indeed, the tribunal only rejected the counterclaim on account of lack of evidence of human rights violations, not on account of impropriety.

Unsurprisingly, the human rights-based SDA favored the debtor. The regime is intrinsically pro-citizens and the disposition of the adjudicators naturally reflects this. This clearly raises concerns around *forum non-convenience*. It, however, confirms the creditors' push for adjudicative options and the tendency for regime interaction and further norm conflict.

Importantly, the above ITA tribunals were not clear regarding the status of sovereign debt as a form of investment. Indeed, it is still unsettled whether creditor claims were intended as covered investments (ie to warrant 'tribunalisation' of sovereign debt) by the architects of the ISDS regime. Although the tribunal in the *Alemanni* case insisted that these were part of the original ISDS framework, there are views from some of the architects of ICSID and inferences from the *trevoir* suggesting otherwise.[536]

In addition, despite the quality of the awards, the inconsistencies and lack of unanimity were so pronounced as to raise doubt regarding the 'justice' of the decisions.[537] Other 'justice' concerns include divergent interpretation and application of treaty standards, arbitrators' independence and impartiality, over-theorising of sovereign debt disputes and huge costs (preventing complete determination of two cases - the *Ambeinte* and *Alemanni* cases). The genuineness of consent to ITA-based SDAs equally raises doubt because most IIAs grounding these decisions were old generation treaties with little appreciation of the complexity of modern sovereign financing.[538] Undoubtedly, all these are legitimacy impeaching factors. Unsurprisingly, some recent treaties (eg the

[536] Waibel 2011:209-251.
[537] UNCITRAL 2018:paras 9-10.
[538] UNCTAD 2018. 'IIA Issue note: Recent developments in the International Investment Regime' 2 https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (accessed 9 January 2019).

Morocco-Nigeria BIT) have explicitly excluded sovereign debt from the province of ISDS.

5.5.2 Rising Holdouts and Vulture Funds Arbitrations

In some of the above investment treaty cases, the tribunal completely ignored the policy implications of allowing vulture funds that purchased bonds after the debt default occurred primarily to recover through investment arbitration. For instance, despite being raised in the *Postova Banka*, *Ambiente* and *Alemanni* cases, no pronouncements were made on this issue. This raises fundamental concerns. First, one of the implications of this attitude is that the non-payment of debt is now capable of engaging sovereign debtors' international responsibility contrary to a long-term state practice.[539] Second, despite efforts by specific countries such as Belgium and the UK to tackle, albeit insufficiently, vultures' purchase of poor countries' distressed debts and several resolutions of the UNGA and UNHRC on the same, ITA has clearly opened another avenue for sovereign debt profiteering behavior thereby defeating these initiatives. Third, with this attitude, the GPFDHR may have little or no effect on curbing vulture funds behaviours. Moreover, the huge cost of arbitration would inevitably add financial burden to the debtor. The *Abaclat* case, for instance, resulted in a settlement of over $1 billion payable to holdouts by a recovering debtor with huge budgetary demands including the compelling need to fulfill its socio-economic rights obligations.[540]

Importantly, as evidenced by the *Postova Banka* case, holdouts might deliberately frustrate SDR on account of perceived gains from international bailout funds. This can undermine the drive towards debt sustainability and could heighten the severity of austerity measures. Indeed, as noted earlier, an empirical study has found that holdout

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[539] *Noble Ventures v Romania* 2005 IIC 179 (it was held 'the Tribunal recalls the well-established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State'.); *Azurix v Argentina* 2004 43 ILM 262.

[540] *Abaclat and others v Argentina* (Settlement Agreement of 29 December 2016) https://www.italaw.com/sites/default/files/case-documents/italaw8023.pdf (accessed 10 January 2018); *Abaclat and others v Argentina* (Consent Award) https://www.italaw.com/sites/default/files/case-documents/italaw8024.pdf (accessed 10 January 2018). See also Task Force Argentina 2016. 'Press release: Task Force Argentina announces final Argentina settlement for Italian bondholders http://www.tfargentina.it/download/TFA%20Comunicato% 2022%20aprile%202016_eng.pdf (accessed 20 July 2019).

creditors often get a better deal due to the costly consequences of not paying them: non-access to capital market and attachment of goods outside the sovereign debtor's jurisdiction.[541] For instance, as of January 2018, Greece continued to service the 64 billion Euro claims of holdouts who avoided the restructuring.[542]

Unsurprisingly, the approach of the human rights court (the *Mamatas* case) is to balance creditors' rights with public interests, which informed the adoption of the post default measures complained of thereby giving some margin of appreciation to states to avoid liability and to adopt policies to return to debt sustainability. The court frowns at holding out of SDR in the name of private property. This stark contrast (between ITA and human rights-based approach) is, to say the least, confusing but understandable given their distinct orientations and objectives.

Finally, despite the ICSID Convention's disapproval of espousing claims upon filing complaints by creditors, there is room for multiplicity of creditor claims because of the unstructured horizontality of international adjudication. Indeed, by affirming jurisdiction in all but one ICSID case (*Postova Banka*), the tribunals simply transformed the sovereign debt restructuring efforts of the concerned debtors as not only treaty violations but also capable of grounding a contractual cause of action.

5.5.3 Norm Conflict & VCLT Principles of Treaty Interpretation

Virtually in all the above ITA cases, the tribunals relied heavily on VCLT and the CIL principles on state responsibility for wrongful acts as embodied in the ILC's Draft. Interestingly, in all their interpretations, the tribunals (except in the *Ubaser* case) did not refer to the VCLT's requirement that international courts and tribunals should have regard to the need to respect universal human rights in their interpretative jurisdiction.[543] Evidently, except in the *Diallo* and *Ubaser* cases, the tribunals were more focused on the BIT grounding the treaty claims.

There were few remarks on norm-conflict between debt servicing obligations and creditors'/investors' rights. For instance, *Ambiente's* dissenting arbitrator briefly

[541] Schumpeter et al 2018:3.
[542] Schumpeter et al 2018:3.3-20.
[543] VCLT 1969:preamble & art 31(3)(c).

touched on norm-conflict but emphasised on the alignment between primary consent and secondary consent to satisfy the *pacta sunt servanda* principle. Importantly, however, in the *Ubaser* case, the tribunal extensively discussed norm-conflict favoring socio-economic rights of citizens and suspension of debt servicing during SDC over BIT obligations.[544] In fact, the tribunal recognizes *jus cogens* as the topmost norm.

5.5.3 Socio-Economic Rights, Defence of Necessity & Counterclaims

In both espousal and ITA cases, the tribunals were relatively silent on socio-economic rights and the ICESCR despite arguments on that ground especially in the ITA cases. The arguments advanced by the sovereign debtors in this regard were all rejected. Nevertheless, there were infrequent references to the UDHR, ICESCR, ICCPR, ACHR and the ECHR. Interestingly, the tribunals, especially in the cases involving Argentina, seem to situate these rights within the context of the defence of necessity. Indeed, other investment treaty cases seem to dwell more on this issue. For instance, in the *Imbreglio* case the tribunal rejected the defence of necessity, yet it held that socio-economic rights may qualify as 'essential interests' for the purpose of the defence of necessity. However, on almost similar facts but different BITs, the tribunal in the *Ubaser* case upheld the defence of necessity and framed the causality test which requires showing that the debtor directly caused the debt crisis. It places the burden of proof on the claimants.

However, all the tribunals appear to have treated both the BIT and the CIL necessity defences as the same. This was also the position in the *Sempra* and *EDFI* cases. It may be observed that fusing these distinct defences into one seems implausible because BIT defences are, comparatively, always party-determined and measured. In addition, equating socio-economic rights founded on treaties and CIL with the CIL-based defence of necessity might create a misalignment of sorts. Jurisprudentially, the 'defence of necessity' is a *defence* to liability claims while socio-economic rights are in the category of *claims* (complaints) by right-holders. More so the requirements of the defence of necessity must be satisfied cumulatively.

[544] *Urbaser* case:paras 1183-1187.

However, it is clear that in all the cases where the defence of necessity was raised, there was an implicit (in some cases express) recognition that fulfilling a socio-economic rights obligation qualify as an 'essential interests' although the strict application of the necessity requirements resulted in a rejection of the defence in most of the cases. This seems questionable because the essentiality of these rights is arguably rooted in treaties, CIL, general principles and *jus cogens*.

Notwithstanding this strict approach, raising socio-economic rights in counterclaim to sovereign debt claims is plausible. It dilutes the efficacy of the strict, cumulative requirements of the CIL-based defence of necessity. It is also plausible to specifically situate the interests of the right-holders within the counterclaim by way of evidence. Raising them as basis for suspending conflicting obligations of debt servicing at a given time places them not as *defences* to *liabilities per se* but as *priorities* in the discharge of competing obligations. The life and dignity premises upon which they are founded demand this prioritisation. Indeed, as argued in Chapters Three and Four, most socio-economic rights contained in the UDHR and ICESCR have now assumed the status of CIL and *jus cogens*. Therefore, raising the latter as a counterclaim to sovereign debt claims is plausible. It is also plausible to specifically situate the interests of the right-holders within the counterclaim. It is a matter of proof.

Interestingly, the *Ubaser* tribunal gives a nodding approval to the socio-economic rights-based counterclaims. This is certainly an important development. It is, for instance, in line with the intention of the architects of the ICSID to cover 'disputes involving claims by as well as against states'.[545] If creditors insist on invoking ICSID in a sovereign debt dispute despite the legitimacy cloud hovering over it, then it seems logical to allow such counterclaims. Although it is doubtful whether the framers intended the states' claims to be founded on human rights, it seems fair to argue that the framers must have realised that a state's complaint against investors must be linked to the well-being of its population. This seems plausible for three reasons. First, it aligns with the unity of sovereignty advanced in this research. Second, both the ICSID Convention and the twin covenants (ICCPR and ICESCR) were generationally-

[545] ICSID 2009:21. The WB observed that the 'Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases'. See Report of the Executive Directors 1964 para 13, in ICSID 2009:21.

linked, ie they were adopted within the same period (ie 1965-1966). Third, the property rights of investors, the core value requiring safeguards in the form of standards for full protection and security, FET and national treatment, were already part of IHRL.

5.5.4 Creditors' Socio-Economic Rights Responsibilities

In most of the espousal and ITA cases reviewed, the socio-economic rights responsibilities of businesses were not directly raised. For ITA, this is probably because of the predominant notion that investment arbitration protects investors and not the primary consenting, contracting states. However, in virtually all the cases, there is an explicit and implicit recognition of the dilemma facing sovereign debtors and their obligations towards their citizens in the event of debt crisis. Importantly, in the 2016 *Ubaser* case, the tribunal recognised that state-centrism is no longer tenable and that corporate human rights obligations are now well-recognised in the face of the explosive growth of UN-based initiatives on business and human rights. Although there were no specific pronouncements on the GPFDHR and the UNCTAD PRSLB with respect to creditor human rights responsibilities, these are all considered as complements to the GPBHR (ie the Ruggie Framework) as shown in the previous chapter.

Therefore, the arbitral tribunal's affirmation of corporate human rights responsibilities further consolidates on this emerging legal framework. Although this is far from entrenching a creditor socio-economic rights accountability framework, it however, recognises the imperative for suspending debt servicing during debt crisis, prioritising human life and dignity over creditor rights. This perhaps is the crux of the justice of sovereign debt governance.

Regrettably, the justice of sovereign debt governance was not examined in most of the recent ITA cases. It seems economic necessity overrides the quest for justice.[546] Nevertheless, it is fair to argue that the balancing of obligations raises critical issue of justice. It seems, the tribunals' broad recognition of necessity in the face of the dilemma facing sovereign debtors is a question of justice too.

[546] Gelpern 2016:2-6.

Finally, in none of the above cases was the issue of the human rights obligations of extra-territorial creditors specifically raised or pronounced upon. The corporate human rights responsibilities recognised in the *Ubaser* case seem to extend to them. However, there are non-corporate entities among these creditors. It is unarguable that as individuals they equally shoulder responsibilities not to undermine the realisation of socio-economic rights anywhere.

5.6 CONCLUSION

This Chapter attempted to navigate through the inconsistent and incoherent jurisprudence on sovereign debt governance with a focus on the place of socio-economic rights in the old and the new cases on SDA. After mapping the contours of contemporary SDA, it excluded the domestic SDAs and the state-state mixed claims commissions. The chapter then focused on the reported state-state SDA with a focus on espoused claims before and after the Second World War. Due to the absence of requisite consent, the ICJ could not proceed to consider the initial state-state case of *Argentina v US* in which Argentina questioned the roles of US and its private creditors in Argentina's devastating debt crisis of 2001-2002. It noted the gradual recognition of human rights in creditors' espousal actions as evidenced in the *Diallo* case. The old cases appear to recognise the possibility of conflicting obligations and the notion of necessity within sovereign debt governance. It argued that by the character of the parties involved, socio-economic rights issues might suitably be adjudicated and pronounced upon by international courts and tribunals.

The chapter then proceeded to SDAs initiated by private creditors. It laid the foundation on the character of sovereign debt claims in cases of investment arbitration. It noted the two broad categories of these cases (ITA and human rights-based claims) and examined first, those emanating from Argentina's debt crisis and then those emanating from the Greek debt crisis and Peru. It examined in detail all those terminated in *limine* and the policy implications of these decisions on the evolving sovereign debt governance regime. It highlighted the polarising views among the arbitrators. The chapter then reviewed the few cases which proceeded to the merit phase and identified the tribunals' treatment of socio-economic rights vis-à-vis the defence of necessity. Finally, the chapter drew and identified some trends and arbitrators' attitudes emphasising on the legitimacy concerns of incoherent

jurisprudence, incentivising disruptive holdout and vulture funds behavior, norm-conflict, socio-economic rights and defence of necessity, and the evolving creditor socio-economic rights responsibilities.

In conclusion, there is evident expansion of creditor claims beyond the contractual forum to international courts, ITA and human rights fora. The absence of a regime-specific court is at the heart of these unrestrained creditor actions beyond the contractual instrument. Regardless of the 'unspecificity' of forum, Courts and tribunals have been playing crucial roles in the evolving sovereign debt governance regime. Since the self-help era of gun-boat diplomacy and forced receivership ended, they have become critical arbiters between creditors and sovereign debtors sitting in domestic courts, mixed claim commissions, international courts and arbitral tribunals. Interestingly, the human rights system strengthens their positions as the vanguards of the rule of law. However, the multitude of adjudicating fora and the increasing expansion of creditors' dispute resolution avenues has further widened the already existing power imbalance in favour of creditors. This is evident in the resort to ITA and human rights courts by holdout creditors despite the legitimacy crisis bedevilling the former dispute settlement system.

In addition, the availability of secondary debt markets allows vulture funds to be employing investment arbitration to reclaim the full values of distressed debts mostly through out of court settlements. The implication of this is to constrain the budgetary capacity of sovereign debtors and possibly thwart the sustained implementation of socio-economic rights-based programmes. Another effect of these is to roll back the legislative gains recorded around the world and the UN-based soft laws on SDR aimed at curbing vulture fund activism in the sovereign debt regime.

However, despite these problems, it should be admitted that courts and tribunals can give legitimacy to an otherwise legitimacy-deficient system. Coherent and consistent jurisprudence might strengthen the sovereign debt regime. Even more legitimacy-conferring is the court's recognition of socio-economic rights during debt crisis. The recent arbitral awards and human rights-based decisions on SDC have prioritised restoring debt sustainability over debt servicing. Importantly, the tribunals now recognise that socio-economic rights responsibilities extend to businesses including private creditors. These, in a sense, are legitimacy-conferring steps.

A critical trend observed in this chapter is the expansion of creditors' SDA options: from espousal of creditors' claims to investment arbitration and human rights-based adjudications. There is a discernible creditor tendency to use every available international adjudicatory means to avoid the pitfalls of enforcing domestic judgments against sovereign debtors. Creditors have been creatively employing these new adjudicatory avenues. There is a conscious avoidance of contractual forum. The implication has been undermining the growing consensus against sovereign debt profiteering by holdouts and vulture funds' profiteering activities. The implication is a gradual process of 'decontractualisation' of sovereign debt. Ironically, the creditor-diktat narrative seems to support this process. It does not matter as long as creditors' interests will be advanced and protected. Because of this expansionary trend and its implications, it can, thus, be argued that contract should no longer be the basis of precluding observance of human rights standards in all forms of SDA. There should be no doctrinal gap in advancing the essential needs of human beings in the face of devastating debt crisis.

Although the recognition of socio-economic rights-based counter-claims in ITA might give voice to debtors' citizens and expand the debtors' options, it comes with deep complications: Establishing socio-economic rights violations by the debtor because citizens are strictly non-parties and the substantive instruments invocable (ie ICESCR, ICCPR, ACHPR, BITs, etc) are state-focused. Added to these are the extent of creditors' liability and the quantum of damages claimable.

The next chapter will reflect on these issues, revisit the research thesis, offer some recommendations on the way forward, conclude and raise questions for further research. Nevertheless, it is not out of order here to state that the *Diallo* case has shown that the espousal doctrine can be extended to human rights complaints.

CHAPTER SIX

REFLECTIONS & CONCLUSIONS

6.1 INTRODUCTION

In conclusion, this Chapter revisits the central theses advanced in the previous Chapters. The Chapter then identifies the key challenges to the prioritisation of socio-economic rights considerations in SDR and their proper mainstreaming into the general sovereign debt regime. Thereafter, it summarises the whole research, offers some suggestions and draws some conclusions. The Chapter also identifies the research's specific contributions to knowledge and then raises questions for further research.

6.2 RE-VISITING THE RESEARCH THESIS

The main aim of the research was to locate socio-economic rights within the evolving sovereign debt regime. In reality, countries cannot do without borrowing. Indeed, many countries breathe through the nostril of debt as development becomes a common global aspiration for all. However, sovereign borrowing, repayment and enforcement have become deeply problematic. Multiple interests coalesce to increase the complexity of this regime; the governance space has expanded. The sovereign debt regime is one of several evolving global governance regimes that have been struggling to embrace the complex transformative elements brought by the phenomenon of economic globalisation. Recurring sovereign debt crises over the past couple of decades have exposed the fundamental defects of this regime as competing interests struggle to shape its form and substance to their respective advantage. Without a comprehensive statutory framework or a central coordinating international authority, sovereign debtors, the primary subjects of traditional international law, have been building direct contractual relationships with thousands of private creditors, considered as non-subjects in traditional international law. Added to this 'public-private partnership' are the bilateral and multilateral debt relationships with different other official creditors.

Sovereign borrowing, repayment, restructuring and enforcement in these circumstances present complex practical and doctrinal challenges. On the one hand, a sovereign debtor signatory to the ICESCR has committed itself to the full realisation

of socio-economic rights progressively (ie over time but effectively and expeditiously) 'to the maximum of its available resources' and, using these available resources as a matter of priority, to meet the minimum core obligation of providing basic education, primary health care, essential food and shelter. On the other hand, creditors, not being signatories to ICESCR and grounding their claims on contract, require uninterrupted repayments unless an interruption is anticipated *ex ante* by the contractual documents. In fact, past episodes of sovereign debt crises across the world reveal that even the minimum core obligations suffer tremendously to keep the flow of capital to the creditors.

Without much guidance from international law, this invariably raises issues of prioritisation, sorting or balancing of conflicting obligations of sovereign debtors during debt crisis. In particular, there are dual concerns: the extent to which contractual obligations may be honoured where citizens' rights face danger of non-realisation; and the limits below which the minimum core obligations cannot be compromised in an effort to satisfy obligations owed to creditors. In addressing these dual issues, the research adopted a regime-interactional approach to determine the place of socio-economic rights in the sovereign debt regime. Doing this requires, first, determining the extent of creditors' socio-economic rights responsibilities and discerning the place of socio-economic rights or their underlying values in sovereign debt adjudication.

Thus, the research employed the doctrinal methodology, hence, textual and case analyses become necessary. The research used a combination of theories, especially the social justice-based theories and transnational legal theories, to develop what it considers a suitable theoretical framework that captures the dynamics of contemporary sovereign debt without the unnecessary doctrinal attachment to the age-long public-private bifurcation. This is because, as a global governance regime, sovereign debt governance defies this traditional bifurcation. The latter divide, the research argued, does not adequately capture the public-private elements and the unconventional mix of normative evolutionary processes and values (eg legal and social norms, hard and soft laws) inherent in the contracting, restructuring and enforcement of contemporary sovereign debt.

The research, accordingly, advanced some key arguments. First, it exposed the unsuitability of the private law paradigm and how it literally incentivised sovereign debt

profiteering thereby undermining socio-economic rights and their underlying philosophies of equality and social justice. It argued for the prioritisation of socio-economic rights especially during debt crisis. In this situation, contract alone is incapable of justifying the relegation of these rights or their underlying values. In fact, any action or inaction by official or non-official creditors that practically renders the socio-economic rights commitments of a state empty may negate these rights and contribute to their non-fulfillment by such indebted state. This would arguably include acts of creditor nations or those of their alter egos (eg Paris Club, state owned enterprises, SWFs and buyers of their debts at a discount like vulture funds) having extraterritorial effects on the realisation of socio-economic rights of indebted states. These acts' causal link to the undermining of socio-economic rights could fit the 'reasonable foreseeability test' as provided by the evolving extraterritoriality principles embodied in the 2011 Maastricht Principles. This extraterritorial test might be extended to cover inadequate regulation of tax-paying non-official creditors operating within the regulatory jurisdictions of such creditor nations.

The research observed a regime convergence trend and argued that BHR and the sovereign debt governance regime have been converging gradually as evident in the substantive contents of both the creditor-initiated and the non-creditor initiated governance instruments over the past decade or so. Although the non-creditor based initiatives specifically prioritise socio-economic rights, virtually all the standards (ie GPBHR, GPFDHR, Draft Guiding Principles on HRIA, PSDRP, PRSLB, IMF's Strengthened Governance Framework based on ICMA's reform of CAC clauses, and IIF Fair Debt Restructuring Principles and *Voluntary Principles for Debt Transparency*) recognise the need to address sovereign debt profiteering activities and illegitimate debt contracts. Second, as a consequence of this trend, socio-economic rights responsibilities of both official and non-official creditors are becoming inseparable from those of the sovereign debtors under the ICESCR. This could be supported by established and evolving principles of international law: sovereignty, obligation for international cooperation under the ICESCR, and different responsibilities in BHR instruments especially those in GPBHR and GPFDHR. In particular, it is reinforced by the 'sovereignty' element which, first, influences the fiduciary relationship between citizens and their government and, second, reconfigures the ownership of 'debt resources' to recognise debtor's full discretion over both the 'initial and 'repayment'

resources. This effectively questioned the widely held view that debtor's repayment resources' transforms into creditors' property once repayment becomes due. Thus, once a sovereign debt relationship is formed, the 'debt resources' become available for, among others, the fulfilment of the debtor's socio-economic rights obligations under the ICESCR.

In addition, history shows the enduring collaboration between non-official and official creditors. The first of such collaborations was the 'creditor-government romance' which began during the medieval period. This collaboration manifested itself through gun-boat diplomacy and forced receivership in the 19th and early 20th centuries. Apart from enforcing war-related debts, creditor nations further imposed economic sanctions on sovereign debtors to recover debts owed to their private creditors. This initially involved controlling debtor's sources of revenues but, subsequently, with the evolution of the 'rule of law civilisation', extended to cover espousal of claims before international adjudicatory institutions. This collaboration is still visible today with even a stronger tax connection between non-official creditors and their home states. The research contends that based on this connection, it might not be implausible to impose a joint responsibility to respect socio-economic rights of debtor's citizens on both private creditors and their home government. The Maastricht Principles seem to have implicitly embraced this proposition.

The second collaboration is seen in the bridge-loan option which often compounds debtor's debt burdens. This is done mainly to satisfy bank creditors' reporting obligations under their home state's laws. The third collaboration involves the IFIs, EU, IIF and the G 20 illustrated during the Eurozone crisis and the ensuing chaos that especially negatively affected individuals who were radically disadvantaged by the global financial system. Despite the impacts of this and other crises on global financial stability and development, both official and non-official creditors continuously resist statutory reforms to address the underlying problem of lack of framework for sovereign bankruptcy. The advantage of creditor priority offered by this 'non-system' arguably incentivised creditors' resistance to a statutory framework. The implications of this resistance include inability to effectively address sovereign debt profiteering by holdouts and vulture funds

A third major argument advanced is that the creditor-biased narratives of the sovereign debt regime do not enjoy any clear support from general international law. Indeed, the much cited principle of *pacta sunt servanda* under CIL and VCLT recognises a party's right to suspend its obligation on the basis of either impossibility of performance or radical change of circumstances. This could support arguments for repayment standstill. Other principles of general international law, which could serve a similar purpose, include suspension of obligations pursuant to CIL and treaty defences of necessity, especially where continued debt servicing would jeopardise the debtor's vital essential interests conceived by the research to include sustained implementation of socio-economic rights-based programmes. A contractual obligation that imperils these interests could endanger life and dignity of citizens. In addition, the overarching principle of maintaining global peace under the UN Charter could offer a breathing space to sovereign debtors during debt crisis, especially a highly contagious one with exogenous elements. Based on these principles, it seems plausible to accord priority to socio-economic rights considerations over creditor interests during debt crisis. As both creditors and debtors have socio-economic rights responsibilities, there is no justification to prioritise creditors' contractual rights when doing so would render the citizen's rights empty and unfulfilled.

A fourth argument, flowing from the previous point and the convergence thesis, is that creditors' socio-economic rights responsibilities would be meaningless without a recognition of repayment standstill during debt crisis (ie suspension of debt service). This is because the realisation of socio-economic rights might be endangered by, for instance, the activities of holdouts and vulture funds which often undermine efforts towards a return to debt sustainability and smooth restructuring. Importantly, an implied standstill entails prioritisation of socio-economic rights obligations during debt crisis.

A fifth major argument advanced in support of the convergence alluded to above was that as creditors continue to cherry pick from different regimes to enforce their claims, sovereign debt adjudications have increasingly been traversing different legal regimes previously perceived to be incompatible, on account of the outmoded public-private divide. This could be seen in the employment of ITA and human rights courts for the adjudication of sovereign debt claims. The diametrically opposed dispositions of these tribunals do not align with the core objective of legal ordering, ie establishing a

structured order driven by jurisprudential certainty or predictability, protection of juridical rights and effectiveness of available remedies. This could be seen in the incoherent approaches of tribunals to the socio-economic rights-related defences and necessity defence to debt-related claims.

The research argued that although tribunalising sovereign debt disputes could address some of the governance problems of the sovereign debt regime, it has its limits. First, the nature of sovereign debt precludes the exclusivity of the private law paradigm. Multiplicity of interests and the inherent public character of debt crisis makes this unsuitable. Second, as creditors continue to expand their debt recovery options to ITA through the ICSID, the question of legitimacy of ITA rears its head. ICSID is an institution of the WB and despite the professional competence of its arbitrators, it cannot genuinely be said to be neutral. It is simply a creditor-institution. Indebted countries have always been the respondents in ICSID tribunals, hence the allegation of bias cannot be avoided. Although the gradual recognition of socio-economic rights-based counter claims seems promising, this alone cannot cure the neutrality-deficit.

6.3 SUMMARY

In advancing the above and other arguments, the research first, in Chapter One, laid bare the impacts of the recurring sovereign debt crises across the world on the realisation of socio-economic rights as numerously documented by the UNHRC, UNGA and other organisations. Despite major reforms post-GFC, there has been an unprecedented rise in sovereign debt stocks across the world. Using this information, the Chapter problematised the research pointing out how debt crises constantly put strain upon limited state resources meant to, among others, realise the socio-economic rights of rights-holders thereby raising questions of potential regime collision. This informed the central research question, viz: What is the place of socio-economic rights in the evolving sovereign debt regime? This question produced two subsidiary questions: a) To what extent does the sovereign debt regime recognise creditors' socio-economic rights responsibilities?; and b) To what extent do socio-economic rights or their underlying values feature in the enforcement of sovereign debt claims? A doctrinal methodology was adopted in answering these questions. In doing so, a theoretical framework along the line of theories of social justice and global law was developed.

Using this theoretical framework, the research, in Chapter Two, offers what it calls a 'multi-stakeholder approach' to sovereign debt governance by specifically situating debtors citizens within this regime as both beneficiaries and legitimacy-conferring 'sovereigns'. Doing this necessarily requires clarifying and contextualising the 'sovereign' in 'sovereign debt'. The Chapter demonstrated what it calls 'the unity of sovereignty' to emphasise the fiduciary link between the citizens and their government and the indispensability of both to the international capacity of the sovereign debtor to contract or procure external loans and other legal undertakings. The Chapter then conceptualised 'sovereign debt governance' using the notions of 'global governance' and 'international economic justice'. It examined the two competing approaches to sovereign debt governance reflective of the public-private bifurcation and then rejected both, particularly the private law paradigm, as unsuitable to the governance of a complex, normatively hybrid phenomenon defying this traditional bifurcation. It then employs global law as a more suitable theoretical paradigm for the conceptualisation of sovereign debt, mainly because of its accommodation of complex legal hybridity, public-private mix and pluralistic normative creation, application and enforcement processes.

The research then proceeded to Chapter Three to specifically answer the question on creditor socio-economic rights responsibilities in sovereign debt governance. The Chapter built the discussion around the underlying values of human dignity and life. It first laid a theoretical and historical foundation of human rights on these values. Thereafter, the Chapter conceptualised socio-economic rights as expressions of these values hence the focus on the radically disadvantaged group because the latter group tends to be impacted more negatively by sovereign debt crisis. However, the Chapter acknowledged the state-centric character of IHRL. This explains the research's argument on the intrinsic relationship between creditors' socio-economic rights responsibilities and sovereign debtors' socio-economic rights obligations under the ICESCR. After highlighting the nature and extent of the obligations of states and IGOs under the ICESCR, the Chapter examined the historical antecedent and current position of BHR as captured in the GPBHR, which was conceived as a global governance regime by Ruggie, its architect. It is, therefore, reflective of the evolving global law as exemplified by transnational legal theories that embrace the inherent hybridity of norms and the public-private mix in global governance regimes, including

the sovereign debt regime. The Chapter identified the specific obligations of creditors and how the interaction between IHRL and the sovereign debt regime has become increasingly unavoidable.

Chapter Three therefore introduced the research's critical discussions on SDR in international law with regards to socio-economic rights in Chapter Four. The latter Chapter, which attempted to partly answer the other secondary research question, in line with the research's theoretical framework, advanced a counterargument to the rationalisation of the creditor-biased SDR regime. Laced with history and doctrines, the Chapter traced the relationship between sovereign debt and the values undergirding socio-economic rights to the Westphalian global order which ironically favored the sovereign debtors because of the doctrine of absolute sovereign immunity. The two World Wars dramatically altered this relationship as the private law paradigm forcefully emerged with the aid of the fictitious public-private divide. Although the ICESCR and the broader IHRL fully came into being after the Second World War, this divide ensured the continued dominance of creditor interests in virtually all SDR frameworks involving both the official and non-official creditors as seen in the activities of the Paris Club, London Club, IIF and the IMF. Following massive campaigns for 'debt justice', debt relief initiatives were launched. Although these initiatives substantially reduced the debt burdens of poor countries, they did not address the underlying problem of creditor-diktat and, in fact, further reinforced the private-public divide and other creditor-based narratives. However, the Chapter argued that there has been a growing recognition of the fiction embedding these narratives and that international law has not endorsed them hence the development of several soft laws such as PRSLB, GPDHR, SDWG and BPSDRP all of which, along with the GPBHR, embraced, to a varying degrees, socio-economic rights or their underlying values. This development has been recognised in sovereign debt adjudication as elaborated on in Chapter Five.

Chapter Five concluded the assessment of the place of socio-economic rights in the sovereign debt regime by examining the enforcement limb of such regime, discerning, in the process, the attitudes of adjudicators towards socio-economic rights or their underlying values. In doing this, the Chapter conceptualised international SDA using the dispute's subject matter, debt crisis and the character of the parties as the key determinants of this form of adjudication. Accordingly, three forms of adjudication were

identified: State espousal of private creditors' claims (state-state SDA), ITA-based SDAs and human rights-oriented SDAs. Starting with the state-state SDAs, the Chapter showed the paucity of official creditor-based claims largely because of the influence of the private law paradigm, the immunity of IFIs and their preferred creditor status. The Chapter also showed that in this form of SDA, adjudicators tend to have little sympathy for sovereign debtors although some of them have implicitly recognised debt moratorium in situations of crisis, while others expressly acknowledged the influential role of human rights in cases which were ordinarily commercial in nature. ITA-based cases equally tend to have little sympathy for debtors although the recent cases expressly referred to the PRSLB and the GPBHR to underscore the evolving trend in SDR processes. Indeed, the *Ubaser* case seems to have opened the gate for socio-economic rights-based counter-claims to ITA claims. These cases also implicitly acknowledged socio-economic rights as potential ingredients to the necessity defence under either BIT or CIL. Finally, the human rights-oriented SDA examined (*Mamatas* case) has, unsurprisingly, expressly recognised the need to prioritise debtors' socio-economic rights obligations and their underlying values above creditors rights. The case prioritised the sovereign debtor's right to SDR over creditors' property rights.

6.4 PRIORITISING SOCIO-ECONOMIC RIGHTS: THE CHALLENGES

Despite all the arguments advanced in this research, it has to be admitted, however, that to specifically prioritise socio-economic rights or even mainstream these rights or their underlying values into the sovereign debt regime would require addressing a number of doctrinal and practical hurdles. The main hurdles identified by the research are as follows:

1. The Public-Private Divide

The first major hurdle, of course, is the age-long public-private divide. This divide arguably feeds the narratives of the private, contractual governance framework even though, as the research has shown, it is a fictitious wall constructed by positivists and neoliberal legal theorists to advance the doctrinaire elements of market fundamentalism and its penchant for governance by self-regulation. Unfortunately, this divide has been defended, if not protected, by the major creditor nations who, clearly, benefit from the existing inequitable global economic governance architecture, despite many of them having made commitments under the ICESCR. They persistently reject

any multilateral treaty on SDR. They tenaciously push the 'sanctity of contract' argument which, even without a bankruptcy regime in international law, views debt default strictly as an actionable act. This is behind the logic of the 'regaining market access' argument which clearly prioritises debtor's repayment obligations to creditors above debtor's obligations to its citizens. It is the same doctrine that, arguably, supports illegitimate debts and the illicit financial flow especially from mostly heavily indebted countries to the financial institutions in the North, despite several UN Declarations and Resolutions against it as discussed in Chapter Four.

Furthermore, this public-private divide has produced additional doctrinal implications each of which, in and of itself, constitutes an obstacle to prioritisation of socio-economic rights and their underlying values in SDR.

2. Conceptual Vacuum

The public-private divide, as a consequence, creates a conceptual vacuum in sovereign debt governance scholarship. There has not been an agreed upon conceptual framework that would allow a seamless interaction between socio-economic rights jurisprudence and the sovereign debt regime. Although international tribunals have been making some in-roads in this regard, scholars are sharply polarised, ie between those supporting a public (statutory) ordering framework and those supporting the private ordering paradigm to the exclusion of the former. Both, however, as the research has argued, missed the normative hybridity and the public-private mix inherent to this regime. Nevertheless, this scholarly polarisation makes the emergence of an agreed conceptual framework a pretty difficult endeavour. Needless to point out that, without an agreed doctrinal consensus on the appropriate governance framework, it might be difficult for socio-economic rights considerations to be taken into account in the resolution of sovereign debt crisis.

3. State-Centrism

This age-long doctrine is equally a consequence of the public-private divide and could be seen in both IHRL and the sovereign debt regime. In the latter, official creditors insist on debt continuity against sovereign debtors regardless of any legality or legitimacy issues surrounding the contracting of such debt hence, the Paris Club and the IMF deal only with indebted states. In the same vein, IHRL emphasises state-

centrism as states are the primary duty-bearers of human rights obligations, hence, private creditors often justify their objection to socio-economic rights responsibilities on this basis. Added to this is the persistent refusal of IFIs to become parties to the ICESCR even as they can easily do so as distinct entities without necessarily affecting the separate, individual obligations of their members under the Convention. Finally, state-centrism might theoretically counteract the 'unity of sovereignty' argument which accommodates the place of debtor's citizens through the umbilical fiduciary linkage with their government. This is because according to the dominant state-centric human rights accountability system citizens are pitched against their own state for the purpose of human rights protection rather than as 'partners'.

4. Public-Private Divide and Human Rights

Underlying the public-private divide is the liberal notion that such divide primarily exists in order to protect human rights, ie protecting the private domain and all the freedoms it entails from the potential arbitrariness of the public domain. This, it must be admitted, is an important value defining the human rights movement although, as the research will subsequently show, it loses its appeal or persuasiveness outside the territorial state.

5. Disorder in Adjudicatory Jurisprudence & Institutional Illegitimacy

As a consequence of the theoretical polarisation between public and private law scholars(in a regime that belongs to neither, one might add), the scope of sovereign debt adjudication crosses the public and the private realms, national and international domains. This creates a chameleon-like 'jurisprudential chaos' incapable of bringing coherence, predictability and order into the sovereign debt regime. This incentivises the culture of 'forum cherry-picking' or forum shopping by creditors. Indeed, some of the adjudicatory institutions were employed in a manner akin to a fishing expedition as, for instance, the ICSID had never, before the Argentine debt crisis, been consciously considered as an adjudicatory institution regarding the enforcement of sovereign debt claims. Besides being a creation of a creditor institution (WB), its pro-creditor disposition has raised serious legitimacy concerns prompting many countries to withdraw from the ICSID Convention.

6. The Causality Question

Another major hurdle is that of establishing a causal connection between creditors' lending activities and the violation or undermining of socio-economic rights arising from a particular sovereign debt crisis. Fixing responsibility where it rightly belongs is one of the core ideas shaping the concept of justice. For instance, moral culpability for a legal wrong is often viewed as a compelling ground for liability. However, this is a complex issue in sovereign debt relationships not least because the loans' positives might actually outweigh the negatives. In other words, the presence or absence of the loan has to be linked to the enjoyment or deterioration of socio-economic rights conditions of the citizens. Even in the event of official intervention by IFIs, the lending programme and its conditionalities might actually advance the enjoyment of socio-economic rights in the long run, but could deteriorate the situation in the short term. Importantly, exogenous factors affecting the values of debts in global capital markets might make it difficult to identify a 'culpable creditor' for the purpose of fixing responsibility.

Furthermore, the question of causality invariably raises the issue of appropriate remedy, ie the nature, quantum and form of remedy to address any creditor actions undermining socio-economic rights and the identity of the specific parties entitled to such remedies. This is because a wrong without a remedy is, strictly, a legal misnomer.

7. Rights-holders as Creditors: The Cases of Pensioners & SWFs

Ironically, the credit space has been expanding to the extent that socio-economic rights-holders below the level of radical disadvantage could actually become creditors, thereby questioning any pre-determined positionality about who is or is not a creditor. Two examples might illustrate this irony. First, among the array of private creditors are usually pension funds of retirees, the latter looking for a promising and secured retirement. These pensioners could fall within the vulnerable group protected by socio-economic rights. In some bankruptcy regimes (eg the USA) priority is given to this group in bankruptcy pay-out situations. However, this is not the case in the sovereign debt governance regime. The other 'unusual creditors' are SWFs. Although usually registered as distinct private entities, SWFs represent and often invest funds on behalf of socio-economic rights-holders (citizens) some of whom might be below radical disadvantage. They are state-owned investment vehicles. Through the SWFs, new

creditor nations (ie BRICS and Middle-Eastern states) have been changing the debtor-creditor dynamics of the sovereign debt regime.

8. Other Hurdles

Apart from the above, there are a host of other hurdles to the mainstreaming of socio-economic rights into sovereign debt governance. First, the complex inter-relationship between trade, investment and finance and their implications on global poverty and socio-economic rights obligations under the ICESCR raise additional problem areas in need of holistic integration, ie beyond just socio-economic rights and sovereign debt. Second, creditors are essentially in business for profit and, like many businesses, their lending activities are usually influenced by this objective. Thus, the incentive factor is a major practical obstacle. Third, the reality of structural economic and political powers as seen in the control of IFIs by creditor nations is another problem. Finally, the lack of normative content to the notion of 'international cooperation' under the ICESCR is also a challenge.

6.5 RECOMMENDATIONS

In view of the research's main thesis as recapitulated above and the theoretical framework adopted to advance same, the following recommendations might help in addressing the above challenges:

1. Sovereign Debt Governance as a 'Modified' Global Law

Most of the challenges connected to the fictitious public-private divide can be conveniently addressed when the sovereign debt regime is treated as a specie of global law, reflecting the transformative character of norm creation, application and enforcement in a complex atmosphere created by economic globalisation. Transnational legal theories have, it would be recalled, advanced certain normative core values informing this evolving body of law. While not endorsing the entire characterisation of normative ordering as advanced by transnational legal theories, three core features of their perspective of global law are relevant for the present purpose. First, the age-long doctrinal binaries such as public-private divide have little or no role in global norm creation, application and enforcement processes. Second, the diversity of legal sources opens up the legalisation space to embrace both legal and social (ie strictly non-legal) norms as effective factors influencing behaviours of

actors. Third, the authority-deficit does not necessarily entail the absence of norms thereby avoiding the statists' constructions of the positivists and realists in favour of a functional, more nuanced, sociologically-inspired network of governance spaces cutting across local, national, regional and international communities with multiplicity of interests and stakeholders. Interestingly, global law recognises the paradox of contract which allows non-contractual acts and institutions (eg arbitration) to emanate out of contract. For the purpose of this research, the important modification, however, is to recognise the limit of contract in the sovereign debt crises and related problems. Contractual reforms cannot address problems which are intrinsically public in nature as illustrated in Chapters Four and Five.

The advantage of this 'modified' global law approach is its adaptive flexibility to embrace the legal complexities brought by financial globalisation. While not rejecting this phenomenon, some insights from the values undergirding socio-economic rights (ie equality, social justice and other anti-poverty philosophies) can give it more legitimacy. In particular, it can address most of the doctrinal hurdles imposed by the statists' approach to legal theory. First, it will address the governance and conceptual vacuums created by the public-private divide because it is not rooted in these competing legal paradigms. The scholarly polarisation might also disappear. It offers a better conceptual framework that aligns with the character of sovereign debt which is not intrinsically incompatible with human rights especially socio-economic rights considerations in sovereign debt contracting, debt servicing, restructuring and enforcement of debt claims. This clearly exposes the limits of, and contradictions within, the dominant private, contractual governance paradigm with its narratives of 'regaining market access' through prioritization of creditor repayments, maintaining the preferred creditor status of IFIs and the logic of spontaneous order and market self-regulation.

Second, the claim that the public-private divide enables human rights protection holds little substance because global law is not territorially circumscribed as accountability for human rights violations may be extracted even outside the territorial boundaries as seen in the decisions of the ICJ, ICC, UN treaty and non-treaty human rights institutions and various regional human rights institutions. In fact, over the past couple of decades, this divide has ironically encouraged corporate greed, human rights violations and other corporate wrongs including sovereign debt profiteering. Although

this might require further research, it is sufficient to remember that the existing BHR governance framework (ie the Ruggie framework) is in line with the global law approach. Admittedly, the framework's underlying theoretical assumption for corporate human rights accountability is the circuitous indirect accountability approach which is a product of state-centrism. Nevertheless, the BHR framework underscores the accountability gap and governance inadequacies brought by state centrism in IHRL and the need for more efforts towards ensuring full corporate accountability. Therefore, global law can hold both official and non-official creditors responsible for their actions which undermined the fulfillment of socio-economic rights with further refinement and development of the BHR regime without the public-private divide thwarting this development. BHR

Third, the jurisprudential incoherence as well as jurisdictional overlap and uncertainties occasioned by the public-private bifurcation might disappear or, in the absence of a regime-based adjudicating forum, at least be minimised in SDAs. Fourth, global law embraces regime interactions rather than regime collisions. This would capture the triangular links between trade, investment and finance and their impacts on the realisation of socio-economic rights.

Finally, the widely held view that creditors' property rights would automatically crystalise upon default is also a narrative of the private, contractual governance paradigm which needs to be critically rethought and discarded. This is because it completely ignores the peculiarities of sovereign debt, treating it the same way as a private, localised debt. This, as the research has argued, contravenes the uncontestable principle of permanent sovereignty over resources, including financial resources, which, although originally aimed at protecting natural resources, can apply with equal force to 'sovereign debt resources' because of their inextricable link to the former as citizens' resources. Citizens are the rights-holders and the ideal beneficiaries of sovereign debt. This 'resource' character of sovereign debt can remove the private property narrative and it could place such 'resources' within the province of socio-economic rights as 'available resources' under the ICESCR.

Apart from the above implications arising from the proposed reconceptualisation of sovereign debt governance, there are statutory-based reforms that may be considered.

2. Statutory Recommendations

To ensure the prioritisation of socio-economic rights in SDR and to adequately mainstream these rights into the sovereign debt regime, certain 'statutory steps' should be taken either by way of a binding legal instrument or an incremental soft law developments process. These include the following:

a. The Incremental Approach for SDR

This entails specifically embedding socio-economic rights considerations into the sovereign debt crisis resolution framework through gradual but conscious development of soft law instruments. Over the years, the UNCTAD and the UN have embraced this reform method as seen in the PRSLB, GPFDHR and BPSDRP. These instruments were however, inadequate as seen in Chapter Four. They could not adequately address sovereign debt profiteering (eg through litigation by holdout and vulture funds), debt secrecy and incidents of excessively unsustainable debts. The GPFDHR's wordiness makes it clumsy. Although the GPFDHR can be amended, its lack of creditor buy-in means a more concise but specific instrument incorporating socio-economic rights considerations may not be a bad idea.

This seems better than a hard law, treaty approach. The latter approach can directly mainstream socio-economic rights into the sovereign debt regime. However, because of the resistance by creditors, as seen in the past, a comprehensive treaty on SDR may not realistically materialise in the near future. Nevertheless, a specific treaty by debtor nations might instigate further actions especially because of the changing character of sovereign debt whereby erstwhile debtors have been turning into creditors. In other words, indebted nations championing such a treaty prioritising socio-economic rights considerations in SDR and addressing legitimacy and debt profiteering problems today may become creditors tomorrow.

b. The BHR Approach

This is a more realistic option than both the incremental and the SDR treaty approaches because of the almost universal appeal enjoyed by human rights and the near consensus that greeted the formulation and adoption of the GPBHR. In particular, the research pointed out that since 2014 (up to the time of writing in July 2019) the UNHRC has been working to develop a concrete, legally binding instrument on BHR.

This may or may not materialise especially with the vociferous opposition by some countries. Nonetheless, a binding BHR instrument can be employed to address some of the problematics of sovereign debt governance especially through direct imposition of socio-economic rights responsibilities on private creditors.

This may be done as part of a broader duty to respect the socio-economic rights of debtors' citizens which requires duty-bearers to refrain from compromising the realisation of socio-economic rights. It can be extended to cover already existing legal principles with a human rights flavour in at least four ways. The first is to extend non-official creditors' duty to respect socio-economic rights to a compulsory recognition of a debt moratorium or standstill for debtors during debt crisis. This would offer temporary protection to a distressed sovereign debtor to enable it to focus on dealing with the impacts of default on the economy and its citizens, which could entail prioritising socio-economic rights obligations of the debtor. Indeed, a temporary space afforded to the debtor akin to bankruptcy protection can end or minimise the negatives arising from creditors' activities. Interestingly, the idea of bankruptcy protection is a common feature of many domestic insolvency systems and may therefore qualify as a general principle of international law. However, this proposition gives the principle a human rights flavour worthy of incorporation into a binding BHR instrument. Accordingly, this means the act of affording opportunities for economic recovery to debtors by non-official creditors will be part of the latter's separate and collective responsibility to respect socio-economic rights.

Second, private creditors' responsibility to respect socio-economic rights of debtor's citizens can be extended to cover their due diligence obligations through, for instance, conducting an impartial human rights impact assessment (HRIA) of their credit activities. Borrowed from the principle of environmental impact assessment (EIA), HRIA is a systematic process of measuring the potential impacts of a project or proposed project on human rights. Unlike EIA, however, HRIA is rooted in the philosophies of IHRL. There is less controversy on this obligation as it has already been captured under the GPBHR, GPFDHR, OECD Guidelines on MNCs and the Guiding Principle on HRIA 2019. As the research has shown, these standards require non-official creditors to respect socio-economic rights by carrying out human rights

due diligence and not to put their debtors in a situation that would compromise the full realisation of these rights.

Thus, giving this principle a binding flavour might enhance socio-economic rights protection. It must be admitted, however, that the downside of this proposition is that the obligation may not be relevant to non-project financing debts especially extra-territorial bonds.

Third, by imposing a standstill obligation to respect a debtor's right to restructure its debt, all creditors should be obligated to participate and cooperate in the proposed SDR. This should be seen as part of creditors' responsibility to respect. Non-participation might indicate creditors' intention to initiate a hold-out litigation which often prolong return to debt sustainability. These obligations are also reflected in some domestic bankruptcy regimes and, therefore, could qualify as general principles applicable to sovereign debt relationships. Cooperation in SDR is not the same as compelling creditors to accept debt restructuring terms. However, as part of the responsibility to respect, non-official creditors' cooperation to mutually agree on SDR means they refrain from taking any disruptive actions. It also requires recognising the resource-constraints being faced by the debtor and the imperative to prioritise its expenditures in a way that will preserve its internal order, critical security interests and continued existence.

Fourth, creditors' duty of full disclosure of the terms and conditions of the loan contract or restructuring should also be framed as part of their duty to respect socio-economic rights of the debtor's citizens. Such disclosure should be to the whole world in light of the experience of the GFC and the continuous complicity of non-official creditors with repressive regimes. Framing the disclosure standard as a human rights obligation will support the global efforts to tackle illicit financial flows, address the problem of secret debts and will help to sanitise the financial system. This can strengthen global economic governance and address issues of entrenched inequality. Fundamentally, it can give the citizens of debtor countries more say in financial transactions affecting their well-being.

Finally, this evolving treaty framework can address all other grey areas with respect to creditors' socio-economic rights responsibilities in sovereign debt governance such as the following: Degree of creditor's fault to trigger liability; defining what amounts to

'undermining' of socio-economic rights; clear definition of the 'radically disadvantaged group' and the nature, quantum and form of remedies that such group may be entitled to; and the role of exogenous factors, origin or source of any debt crisis in fixing liability. In particular, the problem of causality needs to be addressed. The reasonable foreseeability test embodied in the Maastricht Principles needs further refinement.

c. The BIT Approach

Sovereign debtors can avoid being entangled in the ICSID-based ITA with the attendant consequences of this measure on its socio-economic rights obligation by either withdrawing from the ICSID Convention or expressly excluding sovereign debt from the jurisdiction of ICSID tribunals. The latter seems to be the better option. South Africa, for instance, has expressly excluded investment treaty arbitration in its 2015 Protection of Investment Act, although this law includes debt instruments in its definition of 'investment' under section 2. Alternatively, socio-economic rights-based defences or other jurisdiction-limiting considerations (socio-economic rights safeguards) might be inserted by sovereign debtors into their respective BITs to protect them and their citizens from sovereign debt profiteering activities. The *jus cogens* status of human rights can be restated in the BIT. The BIT can also reduce the standard of proving the necessity defence in the unlikely event of SDA.

In dealings with official creditors, the debtor can also insist on similar safeguards drawing attention to the obligations of the official sector to the realisation of socio-economic rights. The IFIs need to realise the benefits of signing the ICESCR. This can enhance their image and legitimacy.

3. Rethinking Global Economic Governance

The global economic system needs to be reformed in line with the broader ideals of socio-economic rights. Conceptualising sovereign debt governance along the line of transnational legal theories and global law alone cannot, admittedly, sufficiently address the institutionalised inequities and injustice manifested in the exercise of structural powers in the global economic system as seen, for instance, in the sovereign debt regime. First, although IFIs and the informal groupings of creditor nations have been dictating the direction of the system, it seems it has become increasingly difficult for them to escape accountability issues in so far as their actions negatively affect the

poor and the fulfilment of socio-economic rights obligations. However, the best way to ensure full accountability of IFIs in this respect is by them becoming signatories to the ICESCR. Second, the preferred creditor status needs to be dropped regardless of the values of seniority of debts because it normally creates an inter-creditors inequity. It also creates a moral hazard problem. This is because, as the Greek debt crisis showed, IFIs are not immuned from reckless behaviours. Third, ICSID arbitration needs to focus on typical investment disputes because adjudicating over sovereign debt claims by ICSID tribunals creates a perception of partiality as sympathy towards creditors looks more like a situation where an institution established by a creditor adjudicates the dispute of a fellow creditor.

4. Reforms through Contracts

Although the research rejects the strengthening of the private, contractual governance framework as unsuitable for the sovereign debt regime, it recognises that contemporary sovereign debt financing is initiated largely through contract negotiation hence the proposition on global law. The growing trend of issuing GDP-linked bonds in sovereign financing is a good, pro-debtor practice that could significantly minimise recurring debt crisis and dilute the efficacy of the private law paradigm while, at the same time, hedging against endogenous and exogenous economic risks.

In addition, at the contracting stage it may not be out of place for a debtor to insist on inserting socio-economic rights safeguards into the contract. Although creditors' financial powers and debtor's desperation at such time might hinder the insertion of these safeguards, debtors' desperation is an exaggerated creditor narrative because creditors are equally desperate for profitable investments. Therefore, these safeguards can be employed to link sovereign debt contract with the debtor's socio-economic rights obligations under ICESCR. This will greatly narrow the governance gap with regards to non-official creditors' socio-economic rights obligations as it will have the effect of explicitly incorporating human rights requirements into sovereign debt contracts.

6.6 CONCLUSION

Today, the language of sovereign borrowing and lending has been intrinsically embedded into the development discourse. Borrowing is widely considered as an important tool for development. In a sense, it is an existential necessity, at least for the

borrowing countries of the South. This is not surprising because borrowing has the advantage of enabling a state to immediately invoke its future undertakings in order to finance the development imperatives of the present.

Unfortunately, this advantage of borrowing has given rise to an international lending industry whose greed and insatiable quest for profit have been compromising the developmental objectives of the borrowing countries using age-long legal and economic doctrines which, since the 2008 GFC, have been questioned and discredited by scholars. Through its established architecture and supporting doctrines and narratives, the industry encourages excessive, unsustainable borrowing while, at the same time, rejecting statutory reform proposals designed to regulate it. Irresponsible lending is viewed as a business decision unconcerned with public policy despite its catastrophic effects on global financial stability and its developmental implications. Market self-regulation has become the creditors' preferred approach to address the apparent inadequacies and other governance gaps visible in the sovereign debt regime. Self-regulation finds doctrinal support in the private law paradigm which views debt as an essential private, commercial endeavour to be governed exclusively by contract. Accordingly, it is against the liberal philosophy to interfere with the so-called natural, spontaneous rule of law function of the market. The public-private divide sustains this paradigm and its narratives.

However, this approach justifies creditors' litigation upon default, frustrates debt restructuring efforts and sustains the culture of sovereign debt profiteering especially by vulture funds. Rather than address the governance problems, this exclusive contractual self-regulatory reform approach only compounds them. The results have been accumulation of unsustainable debts and a vicious circle of recurring debt crises that almost always affect the most radically disadvantaged in the society. In 2018 alone, the global sovereign debt stocks reached an unprecedented level of $66 trillion signalling a looming debt crisis. The poor are almost always at the receiving end. Interestingly, global financial stability is today widely considered as a public good, yet the IFIs and creditor nations driving this financial system have continuously supported the contractual governance framework. In the same vein, unofficial creditors have consistently resisted moves towards statutory reforms. Unfortunately, multiple regimes interaction is not contemplated by the private law paradigm.

Therefore, in critiquing the private law paradigm and its underlying philosophies, this thesis has advocated for a reconceptualisation of the sovereign debt governance framework in a manner that prioritises socio-economic rights considerations in the resolution of sovereign debt crisis without necessarily negating creditors' debt repayment rights. The only exception, perhaps, would be in cases where such debts are tainted by apparent illegalities and illegitimacy. Admittedly, this is not an uncontroversial proposition. However, once the public-private wall is deconstructed, the interests of the ideal beneficiaries of sovereign debt would no longer be considered as extraneous to sovereign debt relationships.

Over the years, citizens' socio-economic rights and their underlying values have, arguably, struggled under the intense pressure of economic globalisation and neoliberal market fundamentalism. In fact, the minimum core obligation of respective state parties to the ICESCR has been losing its functional significance as sovereign debt crises continuously jeopardise or undermine its fulfillment. Unfortunately, the global economic power structure further compounds the situation with both official and non-official creditors having a significant leverage over indebted countries.

In this context, contemporary transnational legal theories embraced, rather than reject, the complexities of economic globalisation. Global governance regimes can interact through broad conceptualisation of 'legalisation' to embrace what is now called 'global law' and its flexible constituents of legal ordering. In this sense, both the BHR and the sovereign debt regimes can interact fully without doctrinal hurdles. It is in this interaction that the prioritisation of socio-economic rights and their underlying philosophies is anchored. The evolving BHR regime supports the imposition of socio-economic rights responsibilities on non-official creditors while the ICESCR contemplates similar, even wider, responsibilities for official creditors who are its signatories. In the light of the shortcomings of the dominant private law paradigm, it is submitted that the peculiarity of sovereign debt needs to be factored into any governance framework. Sovereign debt is essentially a debt with a public-private mix, a hybridity of norms and a multiplicity of interests beyond the two-sided creditor-debtor matrix. The multiplicity of interests in particular requires a balancing or prioritisation of competing debtor obligations in the event of crisis. It is, therefore, plausible to, first, link the question of legality of sovereign debt to the fiduciary relationship between

citizens and their government and, second, accommodate the citizens within a multi-stakeholder approach to sovereign debt governance.

In functional terms, a regime that affects citizens, especially those radically disadvantaged in society, in both direct and indirect ways cannot be self-contained under the guise of contract. The creeping effects of the investment treaty regime and international development law into the sovereign debt regime ironically exposed the paradox of the self-containedness thesis being championed by financialisation. The sovereign debt regime is not a stand-alone regime. It has complex linkages with international trade, investment and finance regimes. The latter regimes tend to limit sovereign debtors' policy spaces. Hence, the inequities of these regimes have found expression in the sovereign debt regime. Conditionalities accompanying loans from IFIs further constrain policy spaces, limit sovereignty and derogate from or at least undermine the socio-economic rights obligations of debtors. This is not limited to the IFIs. The structure of the existing global economic governance system leaves much to be desired. It has continuously entrenched inequality within and between nations. It has continuously relegated the poor and the vulnerable.

However, debt contracting, servicing and enforcement need not be incompatible with pre-existing socio-economic rights commitments of sovereign debtors. Citizens are at the heart of both commitments. Sovereign debt governance needs to adequately align these obligations in a holistic, human rights-sensitive manner. After all, debt is about development, and development is about ensuring social justice and equality for all especially those radically disadvantaged.

6.7 CONTRIBUTIONS TO KNOWLEDGE

From the above, the research's main contributions to knowledge may be summarised thus:

a. Providing a new multi-stakeholder, citizen-focused perspective of reconceptualising sovereign debt governance away from the dominant private law paradigm.
b. Identifying specific socio-economic rights responsibilities of creditors in the context of the evolving BHR and SDR governance standards.
c. Demonstrating the emerging trend of convergence between BHR and the sovereign debt regimes.

d. Locating socio-economic rights and their underlying philosophies in the sovereign debt regime from the contracting to the adjudication phases.

6.8 QUESTIONS FOR FURTHER RESEARCH

For reason of scope, the research could not dwell on other vital questions. Going forward, however, the following questions may be explored further:

1. To what extent can the socio-economic rights responsibilities of creditors be practically enforced in a globalised society governed by a global law, without the support of state mechanisms?
2. Given the increasing domestic proscription of sovereign debt profiteering across the world, what is the relationship between the domestic debt management system and the evolving global sovereign debt regime and how does this relationship influence the realisation of socio-economic rights within the domestic constitutional system?
3. What are the implications of GDP-linked sovereign bonds on global financial stability?
4. To what extent can a human rights-based notion of debt sustainability reduce recurring debt crises across the world?

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