3 SOCIO-ECONOMIC RIGHTS AND SOVEREIGN DEBT GOVERNANCE

1 Introduction

This chapter contextualises socio-economic rights within the sovereign debt regime. 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 realisation of these rights. This argument is supported, first, by the conferment of these rights on all peoples regardless of nationality, race, gender, religion or socio-economic status, and, second, by the imposition of responsibilities on duty bearers (most of whom are international actors) to respect these rights. 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 sovereign debt governance framework under international law.

In advancing this argument, I 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 of responsibility and accountability of international actors. It was observed there that some of the major sovereignty-constraining factors are human rights obligations imposed on states. 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, admittedly, is a tough

1 D Cassel 'A framework of norms: International human rights law and sovereignty' (2001) 22 *Harvard International Review* 62-63; S Scheipers *Negotiating sovereignty and human rights* (2013) 37-58.

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 holders. The same complexity arises with respect to the accountability of institutional investors, vulture funds, banks, extraterritorial bondholders (including so-called 'official bondholders' and hybrid creditors) and other non-state actors (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]

The chapter is structured as follows: Part 2 will identify the theoretical underpinnings of socio-economic rights within the broader human rights jurisprudence; Part 3 will examine the nature of socio-economic rights and the corresponding obligations of duty bearers; and part 4 will identify the connections between socio-economic rights and sovereign debt governance.

2 Human rights in context: Legal and theoretical issues

Scholars from different fields have attempted, without much success, one might add, to offer comprehensive explanations regarding the nature of human rights.[3] This is because the question as to 'what are human rights?' raises more questions than answers. Unfortunately, socio-economic rights are both products and part and parcel of the broader human rights jurisprudence. Therefore, locating these rights within the sovereign debt regime would logically involve exploring their roots, that is, understanding the nature and theoretical underpinnings of human rights in general.[4]

2 JL Černič 'Sovereign financing and corporate responsibility for economic and social rights' in JP Bohoslavsky & JL Černič (eds) *Making sovereign financing and human rights work* (2014) 139-160.

3 J Donnelly *Universal human rights in theory and practice* (2013) 7-23; J Finnis *Human rights and common good: Collected essays* (2011) 2-11; CR Beitz 'What human rights mean' (2003) 132 *Daedalus* 36-46 (Beitz 2003); CR Beitz 'Human rights as a common concern' (2001) 95 *American Political Science Review* 269-282 (Beitz 2001); A d'Amato 'The concept of human rights in international law' (1982) 82 *Columbia Law Review* 1110-1159; A Sarat & TR Kearns 'The unsettled status of human rights: An introduction' in A Sarat & TR Kearns (eds) *Human rights: Concepts, contests and contingencies* (2002) 1-24; J Tasioulas 'Human rights, legitimacy and international law' (2013) 58 *American Journal of Jurisprudence* 1-25; JW Nickle 'How human rights generate duties to protect and provide' (1993) 15 *Human Rights Quarterly* 77-86; T William *General jurisprudence: Understanding law from a global perspective* (2009) 173-201; M Freeman 'The philosophical foundations of human rights' (1994) 16 *Human Rights Quarterly* 491-514.

4 Freeman (n 3) 491-514.

However, because of the tendentious debates concerning these issues, it is important to limit and frame our discussions by laying out some preliminary points. First, on account of the scope of this book, the task here is limited to a brief examination of the nature, classifications, and legal basis of human rights, omitting much of the philosophical argumentations related to these rights.[5]

Second, the chapter will not devote much attention to the historical accounts on human rights. 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, to a large extent, are interconnected in 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 one to frame the discussion around the notion of human dignity in order to rationalise the corresponding responsibilities arising from a particular human rights claim that 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 origins. 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 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

5 The details can be found in relevant literature. See n 3 above.

6 Freeman (n 3) 493-497.

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 international level such as the International Criminal Court (ICC), the African Court on Human and Peoples' Rights (African Court), the Inter-American Court of Human Rights (IACrtHR), the 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, the Committee on Economic, Social and Cultural Rights (ESCR Committee) and the Committee on the Elimination of Discrimination Against Women.

out the intended route, it is now appropriate to delve into the discussion proper.

2.1 Nature of 'human rights'

The idea of 'human rights' has deeply penetrated legal philosophy, leading to many historical conjectures about its origin and what might be called a conceptual confusion about its meaning.[9] The two terms constituting human rights (that is, *right* and *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 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] This part, therefore, starts by uncoupling the term 'human rights'.

9 The literature on this subject is vast. See, eg, literature in n 3 above and the following: CNJ Roberts 'Grasping at origins: Shifting the conversation in the historical study of human rights' (2016) 17 *Chicago Journal of International Law* 573-608; C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 1-76; CR Beitz 'Human dignity in the theory of human rights: Nothing but a phrase?' (2013) 14 *Philosophy and Public Affairs* 259-290; J Tasioulas 'Towards a philosophy of human rights' (2012) 65 *Current Legal Problem* 1-30; EA Posner 'Human welfare, not human rights' (2008) 108 *Columbia Law Review* 1758-1801.

10 D Sarooshi 'The essentially contested nature of the concept of sovereignty: Implications for the exercise by international organisations of delegated powers of government' (2004) 25 *Michigan Journal of International Law* 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 (n 3) 497.

11 P Alston 'Putting economic, social and cultural rights back on the agenda of the United States' Centre for Human Rights and Global Justice Working Paper 22 (2009) 1-8; B Stark 'Economic rights in the US and international human rights: Toward an entirely new strategy' (1992) 44 *Hastings Law Journal* 79.

12 See, eg, C Invernizzi-Accetti 'Reconciling legal positivism and human rights: Hans Kelsen's argument from relativism' (2018) 17 *Journal of Human Rights* 215-228; J Tasioulas 'Taking rights out of human rights' (2010) 120 *Ethics* 647-678; WA Edmundson *An Introduction to rights* (2004) 119; JW Singer 'The legal rights debate in analytical jurisprudence from Bentham to Hohfeld' (1982) 6 *Wisconsin Law Review* 975; WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 16; M Cranston 'Are there human rights?' (1983) 112 *Daedalus* 1-17.

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 over 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 meanings for different people depending on circumstances and various contextual factors, such as legal tradition or orientation, political, economic, ideological, cultural, moral or philosophical perspectives.[17] For the present purpose, the concern is about what exactly is entailed in a 'right' in both sovereign debt governance and human rights contexts, that is, '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* exists to protect relevant interests.[21] Some of 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, conceived *right* as a beneficial duty and equated it with liberty or freedom to do or not to do self-regarded or self-interested acts that must not go against the wider public interests.[23] The latter is a critical utilitarian ingredient. However,

13 A Sen 'Human rights and the limits of the law' (2006) 27 *Cardozo Law Review* 2913, 2914.

14 Edmundson (n 12) 194.

15 R Martin *A system of rights* (2003) 435; Donnelly (n 3) 7-23; Edmundson (n 12) 3-14.

16 Eg, doing *right* as opposed to doing *wrong*. See Donelly (n 3) 7.

17 Tasioulas (n 12) 647-678; Edmundson (n 12) 3-14; Roberts (n 9) 576. See also M Hansungule 'The historical development of international human rights' in AR Chaudhry & JH Bhuiyan (eds) *An introduction to international human rights law* (2010) 1-30.

18 Beitz 2003 (n 3) 36; MDA Freeman *Lloyd's introduction to jurisprudence* (2001) 502.

19 Edmundson (n 12) 119-122.

20 As above.

21 Edmundson (n 12) 121.

22 As above.

23 Singer (n 12) 984. Bentham was quoted as stating that '[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 AK Sen 'Elements of a theory of human rights' (2004) 32 *Philosophy and Public Affairs* 325. See also D Habibi 'Human rights and politicised human rights: A utilitarian critique' (2007) 6 *Journal of Human Rights* 3-35.

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, namely, enforceability and individual autonomy.[25] This theory and its justification have been summarised as follows:

> 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 that 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] He distinguishes between 'special rights' and 'general rights'. The former includes rights arising out of special transactions such as contracts, 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 consists of various types 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 the context and nature of a relationship. The Hohfeldian correlatives, like their opposites, are also four: *duties*, *no-rights*, *disability,* and *liability*.[32] A *claim* imposes a correlative

24 Sen (n 23) 328-330. See also HLA Hart 'Are there natural rights?' (1955) 64 *Philosophical Review* 175 fn 2; M Nussbaum *Creating capabilities: The human development approach* (2011) 69-100.

25 Edmundson (n 12) 121-122.

26 Edmundson (n 12) 122.

27 Hart (n 24) 177.

28 Hart (n 24) 183, 188.

29 Williams (n 3) 16-18; Hohfeld (n 12) 16.

30 Singer (n 12) 975.

31 Hohfeld (n 12) 30.

32 Hohfeld (n 12) 32.

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

33 Singer (n 12) 986.

34 Singer (n 12) 987.

35 Edmundson (n 12) 87-102.

36 Freeman (n 18) 358.

37 Donelly (n 3) 7.

38 Donelly (n 3) 8.

39 As above.

40 As above.

41 As above.

42 'Assertive exercise' means that '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 (n 3) 9-10.

> 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 distinctive 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 differences in terms of conceptions and limitations, the above understandings appear to agree on certain key elements: a *right* is a product of either a private or a public relationship that 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 a relationship need 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. A *right,* in this broad sense, is invoked even more 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, which will be discussed below.

The sovereign debt relationship offers another example. In this relationship, despite the political and financial imbalance, or the 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

43 Donelly (n 3) 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 R Higgins *Problems and processes: International law and how we use it* (1994) 99-100.

may blur the traditional private-public divide in legal relations. Notwithstanding this counterargument, it can hardly be disputed that a sovereign debt relationship establishes a juridical connection that creates a bundle of *rights* as understood in the above context. Perhaps, introducing the 'human' element might help here. We now turn to the term 'human'.

While avoiding the philosophical debate about the 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 European Court of Human Rights (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, therefore, is entitled to seek appropriate redress for a violation of such rights. Consequently, Russia has a legal duty towards the company as a possessor of human rights.[49] However, this broad conception of 'human' raises fundamental issues about the philosophical assumptions and justifications undergirding the concept of *human rights*.

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]

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 the question of

45 M Nussbaum 'Capabilities and human rights' (1997) 66 *Fordham Law Review* 273; CR Beitz *The idea of human rights* (2009) 65-68; JD Ohlin 'Is the concept of the person necessary for human rights?' (2005) 105 *Columbia Law Review* 209.

46 Donelly (n 3) 30.

47 Case of *OAO Neftyanaya Kompaniya Yukos v Russia* Application 14902/04 (31 July 2014), https://www.italaw.com/sites/default/files/case-documents/italaw7752.pdf (accessed 20 July 2018) (*Yukos*).

48 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (amended by Protocol 14, entered into force 14 June 2010) (ECPHRFF 1950).

49 *Yukos* (n 47) paras 18-36.

50 Sen (n 13) 2914; Sen (n 23) 317-319; Nussbaum (n 45) 273-279.

what human rights are, scholars have offered different 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 that insist on universal moral standards applicable across time and space; (c) discourse theories that focus on ethics with multiple argumentation frameworks to support claims for human rights; (d) subaltern perspectives that 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, this book divides 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 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 that 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 called 'juridification'.[58] A striking example would be Kant's treatment

51 MS McDougal & C Lung-chu 'Introduction: Human rights and jurisprudence' (1980-1981) 9 *Hofstra Law Review* 337; Roberts (n 9) 581-586; Posner (n 9) 1758-1801; Beitz (n 45) 94.

52 William (n 3) 174-176. For a critique of the concept of human rights, see M Mutua *Human rights: A political and cultural critique* (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 An example is Cranston (n 12) 1-17.

55 Williams (n 3) 174-176.

56 Cranston (n 12) 13.

57 Troper, eg, was quoted as 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 (n 12) 216.

58 DD Fischer & JS Watson 'The limited utility of international law in the protection of human rights' (1980) 17 *Proceedings of American Society of International Law* 1-6; JS Watson 'Legal theory, efficacy and validity in the development of human rights norms in international law' (1979) *University of Illinois Law Review* 609-614. Compare this strict position with McDougal & Lung-chu (n 51) 337; D'Amato (n 3) 1123-1147.

of rights as 'artefacts of state' that, 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* technically are not the same, Bentham's rejection of *natural rights* sometimes is considered 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 part, 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 (for instance, political and civil rights) over others (for instance, socio-economic rights) 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 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 states:

> [T]hese rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature, such as, for example, that

59 E Fox-Decent & EJ Criddle 'The fiduciary constitution of human rights' (2009) 15 *Legal Theory* 301; Nussbaum (n 45) 273.

60 Quoted in Donelly (n 3) 67; Habibi (n 23) 3-10.

61 Example Tasioulas (n 3) 1-2; Hart (n 24) 175-177. For the utilitarian approach, see Habibi (n 23) 3-35.

62 GL Neuman 'Human rights and constitutional rights: Harmony and dissonance' (2003) 55 *Stanford Law Review* 1863.

63 Invernizzi-Accetti (n 12) 216-217.

64 Rawls was actually reacting to the universalism and cultural relativism debate. See J Rawls *Political liberalism* (1993) 60-71.

65 Rawls (n 64) 69-70.

> 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 Rawls's list appears to be open-ended, it may be argued that this 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. 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]

The naturalists, on the other hand, focus on human nature and the common features and values derived from it.[68] Thus, their conceptions may fit into William's categories (b), (c), (d) and (e) outlined above. Of course, like the non-naturalists, there are different naturalists' conceptions of human rights. Notwithstanding their differences, however, naturalists are commonly influenced by the natural law tradition.[69] 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'.[70] 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.[71]

66 As above.

67 As above.

68 J Donelly 'Human rights as natural rights' (1982) 4 *Human Rights Quarterly* 392; TW Pogge 'How should human rights be conceived?' (1995) 3 *Annual Review of Law and Ethics* 103-120.

69 J Finnis *Natural law and natural rights* (1980) 276; Freeman (n 18) 140, 135.

70 H McCoubrey *The development of naturalist legal theory* (1987) 17.

71 Tasioulas (n 3) 1-7; Beitz (n 45) 71-72.

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 or 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 that predate any subsequent recognition by way of positive legal prescription in documents, that is, 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.[72] Thus conceived, human nature is the source of *human rights*. However, the notion of 'human nature' itself is problematic.

Nevertheless, the naturalists have a relatively broader, all-inclusive approach to human rights. Hence, the majority of them dispel with the enforceability or 'feasibility' and institutionalisation obstacles to the recognition and realisation of any category of human rights.[73] Many naturalists include virtually all manner of 'human rights' in their conceptions because they view the rights as transcendental, everlasting and universal.[74] Their existence and relevance derive from a higher source. Nearly all 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 a deity; some on human needs; some on public reasoning and discourse; and some on human capabilities.[75] A brief illustration of these justificatory variations

72 Sen (n 23) 345-347.

73 As above.

74 Pogge, eg, 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 each government and its officials to ensure that the right to X – whether it exists as a legal right or not – is observed'. See TW Pogge 'The international significance of human rights' (2000) 4 *Journal of Ethics* 49-53.

75 See n 3 above. See also H Breakey 'Positive duties and human rights' (2015) 63 *Political Studies* 1198-1215; Edmundson (n 12) 119; Posner (n 9) 1766-1768; S Besson 'The allocation of anti-poverty rights duties – Our rights, but whose duties?' in KN Schefer (ed) *Poverty and the international economic legal system: Duties to the world's poor* (2013) 408-431.

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.[76] He considers human rights 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'.[77] 'Since', he argues, 'all human beings are, in this sense, equally human, this valuable status is possessed by each in equal measure'.[78] He accepts, however, that human rights are not necessarily timeless.[79]

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.[80] Pogge conceives human rights as purely moral claims on global social institutions that 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.[81] 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 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.[82] Thus conceived, Pogge clearly limits beneficiaries of human rights to only natural persons based on his reading of article 28 of the Universal

76 Tasioulas (n 3) 16.

77 Tasioulas (n 3) 2-3.

78 Tasioulas (n 3) 6.

79 Tasioulas (n 3) 2-5.

80 Pogge (n 74) 45-69. See also S Besson 'The bearers of human rights duties and responsibilities: A quiet revolution' (2015) 32 *Social Philosophy and Policy* 244-268; Besson (n 75) 408-431.

81 Pogge argues that 'a human right to X is tantamount to declaring that every society (and comparable social system) ought to be so organised that all its members enjoy secure access to X'. See Pogge (n 74) 66.

82 Pogge (n 74) 46.

Declaration of Human Rights (Universal Declaration) that, according to him, could be employed using a 'global moral judgment' to impose human rights responsibility on the rich in favour of the poor.[83]

Of course, Pogge's view did not go unchallenged.[84] However, it appears to be in sync with a dignity-based understanding as espoused by Crudden, who advocates a better, judicially-inspired practice of human rights based on the notions of human dignity and *personhood*.[85] In 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?'[86]

The dignity-based explanation seems plausible. This is because most naturalists' explanations arguably are 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'.[87] A human rights claim 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 recognise this fact since 'the state exists for the individual not vice versa'.[88] In this sense, therefore, human dignity may cut across and even outstrip human rights.[89]

Pragmatists outside the naturalists' tradition acknowledge the centrality of human dignity to a proper conception of human rights.[90] For instance, Donelly argues that human rights provide a powerful mechanism

83 Pogge (n 76) 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 fulfilment 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 fulfilment.' See Pogge (n 74) 53-56.

84 W Mitchell 'Notes on Thomas Pogge's human rights and global justice' (2006) 2 *International Public Policy Review* 113-120.

85 McCrudden (n 9) 38-40.

86 J Griffin *On human rights* (2008) 341.

87 McCrudden (n 9) 27.

88 As above.

89 McCrudden (n 9) 40.

90 Donelly (n 3) 29.

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'.[91] In essence, human dignity is the rational basis for human rights. Donelly based his human rights theory upon the idea of human dignity as provided under the Universal Declaration.[92] Using the Universal Declaration as a model, he characterises human rights as equal, inalienable and universal rights.[93] As rights, they empower rights holders to initiate claims challenging institutional actions, traditions, norms or practices and 'to create a world in which they enjoy (the objects of) their rights'.[94] He states:

> [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.[95]

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.[96] The minimalist understanding of human needs may be equated with the attainment and sustenance of human dignity. These include 'that 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'.[97]

91 As above.

92 Donelly (n 3) 26-39.

93 Donelly (n 3) 10.

94 Donelly (n 3) 12.

95 Donelly (n 3) 12-13.

96 KG Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 128.

97 Donelly (n 3) 14 fn 8.

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.[98] This approach links human dignity to a broader conception of development.[99] It is reasoned that a life of dignity requires a set of capability functions (that is, physical, mental, social and financial characteristics).[100] 'A central feature of well-being', writes Sen, 'is the ability to achieve valuable functioning'.[101] These functionings include good health, adequate nourishment, happiness, self-respect, and so forth, all of which may qualify as either 'doings' or 'beings'.[102] These are the 'capability set' that entails a person's freedom to have or achieve well-being. Sen argues that human capabilities are directly relevant to the well-being and freedom of people.[103] In this sense, freedom becomes a constituent of a person's well-being that can be achieved without

98 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 (n 45) 279-288; Nussbaum (n 24) 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 A Sen 'Well-being, agency and freedom: The Dewey lectures 1984' (1985) *Journal of Philosophy* 169-221 (Sen 1985). 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 (n 24) 193; Nussbaum (n 45) 275-276; AK Sen *Inequality re-examined* (1992) 18-40 (Sen 1992); AK Sen 'Human rights and capabilities' (2005) 6 *Journal of Human Development* 151-166 (Sen 2005); R Prendergast 'Development and freedom' (2004) 32 *Journal of Economic Studies* 39-56.

99 AK Sen *Development as freedom* (1999) 3-48.

100 According to this approach, the central (though non-exhaustive) human capabilities that 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 (n 45) 279-289; Nussbaum (n 24) 69-100.

101 AK Sen *Commodities and capabilities* (1985) 200.

102 Sen 1992 (n 98) 40.

103 Sen 2005 (n 98) 151-166.

the constraints of 'unfreedoms'.[104] Poverty, for instance, is considered a manifestation of 'unfreedoms' as it reduces life options and exposes one to a life without dignity.[105] Hence, expanding freedoms should be seen as both the means to and the end of development.[106]

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.[107] Using a similar approach, Nussbaum also considers human rights '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'.[108] Although Nussbaum's focus on adult seems restrictive, it is obvious that she acknowledges the centrality of human dignity as critical to the capability approach.[109]

The above variegated perspectives are a direct reflection of the increasing importance of the notion of *human rights* built around the expansive but pre-eminent 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 general consensus on their primacy. Human dignity perhaps is the most compelling reason for this unrivalled position attained by human rights. The respect, value or worth

104 Sen divides freedoms into two categories: well-being freedoms and agency freedoms. The former deal with a person's 'capability to have various functioning vectors and to enjoy the corresponding well-being achievements', while the latter are 'what the person is free to do and achieve in pursuit of whatever goals or values he or she regards as important'. See Sen (n 101) 203-204.

105 Sen (n 99) 88.

106 Sen (n 99) 38.

107 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 (n 23) 340-341; Sen (n 13) 2914.

108 Nussbaum (n 45) 273.

109 Nussbaum (n 24) 70-73.

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 Universal Declaration, 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.'[110]

As noted earlier, we shall build our conception of socio-economic rights in this book on human dignity. Admittedly, this is not entirely free from criticisms, nor is it a fool-proof theoretical premise.[111] However, it arguably is a plausible premise because of the compelling consensus around it.[112] 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 values and cultures on the rest of the world.[113] 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.[114]

110 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 (n 3) 15-18.

111 Roberts, eg, criticises the natural law assumption upon which this premise is based. See Roberts (n 6) 590.

112 N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 19.

113 The literature on this is vast although the debate appears to be dying down. See, eg, Mutua (n 52); S Hopgood *The end times of human rights* (2013) 1-23, 142-165; C Brown 'Universal human rights: A critique' (1997) 1 *International Journal of Human Rights* 41-65; AO Oyekan 'A critique of the distinct theory of human rights in Africa' (2012) 14 *Philosophia Africana* 143-154; A Cistelican 'Which critique of human rights? Evaluating the post-colonialist and the post-althusserian alternatives' (2011) 5 *International Journal of Žižek Studies* 1-11; Freeman (n 3) 493-505.

114 J Morsink *Universal Declaration of Human Rights: Origins, drafting and intent* (1999) 18-54; Beitz (n 45) 73-93; Hansungule (n 17) 1-30; E Fox-Decent 'The authority of human rights' (2017) 67 *University of Toronto Law Journal* 596-622.

2.2 History, classification and legal basis of human rights

Since 1945, the number of human rights treaties has been growing.[115] This raises the question of where the origin of human rights is, that is, what the source of their legal authority is. 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 the situation of socio-economic rights in sovereign debt governance.

2.2.1 Origins

There are multiple, sometimes conflicting, historical accounts about the origin of human rights before 1945.[116] Regardless of this debate, one thing is clear: The struggle for human dignity (some would say human rights) is as old as human society itself.[117] 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.[118] In essence, the concern for human rights predates the establishment of the modern human rights system. However, it is instructive to note that the predecessor to the United Nations (UN), namely, 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 International Labour Organisation (ILO) on labour-related rights.[119] This gap in the legal and institutional mandate of the League of Nations became visible following the horrors perpetrated during World War II and, therefore, was intended to be addressed with the establishment of the UN.[120]

115 By 2014 there were over 250 human rights-based treaties in the world. See J Fomerand *Historical dictionary of human rights* (2014) 1.

116 This book will not delve into the historical details for reason of scope, thereby avoiding the conflicting historical accounts. However, the literature is vast. See, eg, Roberts (n 6) 576; Hansungule (n 17) 1-30; N Roger & S Zaidi *Human rights at the United Nations: The political history of universal justice* (2008) 27-59, 143-176; Morsink (n 114) 37-91; Edmunson (n 12) 3-14; Hopgood (n 113) 1-23.

117 Hansungule (n 17) 1 fn 2.

118 Morsink (n 114) 37-91; Roger & Zaidi (n 116) 43-59.

119 Roger & Zaidi (n 116) 54-57.

120 Morsink (n 114) 37-91.

Today, the UN and its human rights-based 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.[121] The other contributors include states, international courts and tribunals, inter-governmental organisations (IGOs) and non-governmental organisations (NGOs).[122] Importantly, multilateral creditors have also become participants in human rights agenda setting.[123] However, as will be argued in subsequent chapters, the genuineness of their efforts has raised questions because of their persistent objection to being held accountable for human rights violations.[124]

2.2.2 Sources of human rights

Human rights derive their legal basis from the traditional formal and informal sources of IHRL.[125] Thus, like sovereign debtor's obligations under international financial law, human rights responsibilities are provided in these sources. First, regarding convention, there are over 200 human rights-related treaties imposing binding obligations primarily on states.[126] Apart from special treaties addressing specific human rights concerns or constituencies, there are general instruments such as the UN Charter, the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The latter will be examined separately in the next part as it is the legal foundation for analysing socio-economic rights. The essential point here is that all the four instruments (the UN Charter, Universal Declaration, 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 these

121 BG Ramcharan *The law, policy and politics of the UN Human Rights Council* (2015) 13-37, 38-54.

122 Fomerand (n 115) 3.

123 Fomerand (n 115) 5.

124 DD Bradlow & DB Hunter 'Conclusion: The future of international law and international financial institutions' in DD Bradlow & DB Hunter (eds) *International financial institutions and international law* (2010) 387-397; S Eriksen & I de Soysa 'A fate worse than debt? International financial institutions and human rights 1981-2003' (2009) 46 *Journal of Peace Research* 485-503.

125 Fomerand (n 115) 13.

126 Jayawickrama (n 112) 5-7, 20-21; Ramcharan (n 121) 9-32.

rights.[127] The treaties are normative in the sense that their beneficiaries are not the signatories (states) themselves.[128]

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.[129] Although the Universal Declaration in itself is 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.[130] 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'.[131] These 'certain cases', I will argue, may be extended to the sphere of socio-economic rights responsibilities in sovereign debt governance.

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

128 RB Bilder and others 'Disentangling treaty and customary international law' (1987) 81 *Proceedings of the Annual meeting of American Society of International Law* 161.

129 Statute of the International Court of Justice (adopted 26 June 1945, came into effect 24 October 1945) (ICJ Statute) art 38; D'Amato (n 6) 1128-1145 (noting that treaty law is the major repository of rules of customary international law of human rights); ILC *Third report on identification of customary international law* (2015) (ILC Draft on CIL 2015) draft arts 2-13.

130 Eg, in a separate opinion, Ammoun J held that 'although the affirmations of the Declaration [ie Universal Declaration] 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.

131 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.

The notion of human dignity has contributed to the emergence of human rights obligations as *ius cogens* and obligations *erga omnes* because of its compelling moral force and significance in IHRL.[132] These *erga omnes* obligations also point to the interdependence and indivisibility of all classes of rights.[133] On account of this pre-eminent status, third party intervention to protect human rights and claims for reparation by victims of human rights violations can be made at international judicial fora.[134]

Third, the general principles of law applicable in the majority of domestic systems, especially minimum human rights provided under various national constitutions (constitutional rights) or judicially laid down by domestic courts, also provide a source of authority for human rights.[135] 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.[136] Examples are the various General Comments issued by the Committee on Economic, Social and Cultural Rights (ESCR Committee).[137]

In addition, decisions of international courts and tribunals as well as works of reputable scholars and experts could serve secondary purposes

132 *Erga omnes* is an obligation towards all or owed to the international community, while *ius cogens* is a peremptory norm 'accepted and recognised 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 ..] if 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 Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Draft on State Responsibility 2001) arts 33, 42 & 48. In the *Barcelona Traction* case the ICJ held that '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)3 ICJ Reports 32.

133 Ramcharan (n 121) 11-30.

134 *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 (*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 27 June 1981, entered into force 21 October 1986) (African Charter) art 56; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 44; ECPHRFF 1950 art 36; ILC Draft on State Responsibility 2001 arts 33, 42, 48 & 54.

135 Jayawickrama (n 112) 3-23.

136 UN Commission on Human Rights (UNCHR) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (2004).

137 *Palestinian Territory* case 136.

in supporting a human rights proposition.[138] Included among experts are, of course, UN-appointed independent experts or Special Rapporteurs on specific thematic matters, including those on sovereign debt.[139]

With regard to the informal sources, there are hundreds of soft laws and declarations re-affirming all classes of human rights.[140] Some of these soft laws that have direct bearing on the theme of this book include UN General Assembly (UNGA)'s Basic Principles on Sovereign Debt Restructuring Processes; the United Nations Conference on Trade and Development (UNCTAD)'s Sovereign Debt Workout Guide; UNCTAD's Principles on Responsible Sovereign Lending and Borrowing; and the UN Human Rights Council (UNHRC)'s Guiding Principles on Foreign Debt and Human Rights.[141]

2.2.3 Classification

Scholars have advanced different classifications of human rights.[142] However, as noted earlier, owing to historical exigencies and ideological factors, human rights are mainly classified into the following categories: civil and political rights, economic, social and cultural rights and group-based rights.[143] While civil and political rights are rights linked to citizenship

138 ILC Draft on CIL (2015) arts 13 & 14.

139 Formerand (n 115) 8-9.

140 Jayawickrama (n 112) 167 & 170.

141 UNGA Basic principles on sovereign debt restructuring processes (19 September 2015); UNCTAD Sovereign debt workout: Going forward, roadmap and guide (2015); UNCTAD Principles on responsible sovereign lending and borrowing (amended 10 January 2012) (UNCTAD PRSLB 2012); UNHRC Guiding principles on foreign debt and human rights (adopted 5 July 2012) (GPFDHR 2012).

142 IE Koch 'Dichotomies, trichotomies or waves of duties?' (2005) 5 *Human Rights Law Review* 81-103; V Jaichand 'An introduction to economic, social and cultural rights: Overcoming the constraints of categorisation through implementation' in V Jaichand (ed) *An introduction to international human rights law* (2010) 51-71; E Ashford 'The alleged dichotomy between positive and negative rights and duties' in CR Beitz & RE Goodin (eds) *Global basic rights* (2009) 91-112; R Gavison 'On the relationship between civil and political rights, and social and economic rights' in JM Coicaud and others (eds) *Globalisation of human rights* (2003) 23-55; C Scott 'Towards the institutional integration of the core human rights treaties' in I Merali & V Oosterveld (eds) *Giving meaning to economic, social and cultural rights* (2001) 7-38; SP Marks 'The past and future of the separation of human rights into categories' (2009) 24 *Maryland Journal of International Law* 209-243.

143 C Puta-Chekwe & N Flood 'From division to integration: Economic, social and cultural rights as basic rights' in I Merali I & V Oosterveld (eds) *Giving meaning to economic, social and cultural rights* (2001) 39-51; MF Tinta 'Justiciability of economic, social and cultural rights in the Inter-American system of protection of human rights: Beyond traditional paradigms and notions' (2007) 29 *Human Rights Quarterly* 431-459; DJ Whelan *Indivisible human rights: A history* (2010) 112-135.

status, democracy, political participation, equality and administration of justice as provided for under the Universal Declaration and ICCPR, economic, social and cultural rights are mainly social and subsistence or welfare-based rights provided for under the Universal Declaration and ICESCR.[144]

Many non-naturalists have prioritised civil and political rights because, they claim, these rights are more amenable to institutionalisation and enforceability. Civil and political rights are widely characterised as negative rights as opposed to the so-called positive rights that are considered lacking elements of enforceability. However, 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.[145] Legal developments over the past decades appear to favour non-prioritisation.[146] The Universal Declaration, 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.[147] In both theory and practice, this prioritisation does not really hold substance.[148] Indeed, the strict negative-positive divide has been shown to

144 Beitz lists the categories as follows:
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.
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.
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.
Economic and social rights include adequate standard of living; choice of employment; protection against unemployment; 'just and favourable remuneration'; the right to join trade unions; 'reasonable limitation of working hours'; free elementary education; social security; and the 'highest attainable standard of physical and mental health'.
Rights of communities including self-determination and protection of minority cultures. See Beitz 2001 (n 3) 271.

145 See, eg, UNGA *Indivisibility and interdependence of economic, social, cultural, civil and political rights* (1989); and Whelan (n 143) 9 (calling this 'organic unity').

146 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 & Others* (1980) AIR SC 1622; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 20.

147 Universal Declaration Preamble; ICCPR Preamble & art 1; ICESCR Preamble & art 1.

148 International Commission of Jurists 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 37 *Review of International Commission of Jurists* 43-55 (LP 1987) para 6. See also Mutua (n 52)

be chimeric as both civil and political rights and economic, social and cultural rights require duty bearers' positive actions and negative restraints to be effectively enjoyed.[149] 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. This means that a single conduct may simultaneously amount to violations of different categories of rights. This has been recognised by the International Court of Justice (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 Palestinians in the area.[150]

It is also tenuous to argue that only civil and political rights are human rights.[151] Prioritisation on account of enforcement and institutionalisation cannot be sustained especially in light of case law development in national, regional and international human rights practice.[152] It is submitted that even before this development, prioritisation had neither legal nor logical foundation; it was more of a political rationalisation emerging from the ideological struggle of the Cold War era.[153] Indeed, de-emphasising economic, social and cultural rights even betrays the positivist insistence on juridification because the rights have been duly provided for under ICESCR. Not surprisingly, some have argued that de-emphasising or rejecting economic, social and cultural rights is in pursuance of neoliberal policies pushed forward by IFIs and multinational corporations (MNCs), leading to the withdrawal of governments from public services by way of increased deregulation and privatisation of such services.[154]

143-146; P O'Connell 'The death of socio-economic rights' (2011) 74 *Modern Law Review* 532-554; M Langford 'Introduction' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 3-4; Sen (n 23) 345-347.

149 Pogge (n 74) 64-65; Stark (n 11) 79 fn 9. See also *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 (n 6) 1764-1765.

150 *Palestinian Territory* case para 106.

151 Cranston (n 12) 13. Compare Higgins (n 44) 99-100.

152 See cases referred to in n 146 above.

153 P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 219-220.

154 O'Connell (n 148) 536-537.

3 Socio-economic rights in context

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

3.1 Why socio-economic rights?

The interdependence and indivisibility of all human rights indicates the significance of human dignity as a 'human rights unifier'. Because of this, our exclusive focus on just a sub-category of human rights might be questioned. However, notwithstanding their shared theoretical and historical heritage, focusing on economic and social rights (that is, on socio-economic rights rather than on civil and political rights, group rights or cultural rights) here is based on 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.[155] This is not to suggest that civil and political rights, 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 Greece, for example, demonstrate that civil and political rights can be used as potent instruments by citizens to express or ventilate their grievances by way of protests (sometimes leading to change of government), referenda and, sometimes, invoking the judicial process to make certain claims.[156] This, clearly, is a further evidence of the indivisibility of civil and political rights and economic, social and cultural rights, because asserting or exercising the latter requires the former and *vice versa*.[157] However, the exercise and manifestations of civil and political rights in these instances were, in reality, triggered by underlying social and economic conditions brought about by the sovereign debt crises in these countries.[158] In other words,

155 C Barry 'Human rights conditionality in sovereign debt relief' in T Pogge (ed) *Freedom from poverty as a human right: Theory and politics* (2010) 237-238.

156 AI Tamamovic *The impact of the crisis on fundamental rights across member states of the European Union: A comparative analysis* (2015) 95-110. See also *Mamatas & Others v Greece* ECtHR (Applications 63066/14, 64297/14 and 66106/14) (20 July 2012); 'Argentina agrees to $50bn loan from IMF amid national protests' *The Guardian* (London) 8 June 2018, https://www.theguardian.com/business/2018/jun/08/argentina-loan-imf-protests-peso (accessed 29 June 2018).

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

158 Tamamovic (n 156) 29.

civil and political rights, in and of themselves, are not directly affected by sovereign debt crisis in the sense that socio-economic rights are.[159] Indeed, civil and political rights may be exercised without much hinderance even during such crisis. They are not the exact triggers but rather instruments employed to express dissatisfaction with social and economic conditions brought about by the crisis, conditions that 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.[160] These, however, are mostly not concerned with sovereign debt crisis. Water and land rights are, of course, socio-economic rights as they involve means of livelihood, but their violations in these contexts followed specific activities connected to or arising from, for example, infrastructural development projects. In addition, while violations of civil and political rights, 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 programmes from a multitude 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.[161]

159 Studies have shown the support some 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 crises arising from genuine sovereign debt. See, eg, JP Bohoslavsky & A Escriba-Folch 'Rational choice and financial complicity with human rights abuses: Policy and legal implications' in Bohoslavsky & Černič (n 2) 17-32; D Sharp 'The significance of human rights for the debt of countries in transition' in Bohoslavsky & Černič (n 2) 52-59.

160 *Gabcikovo-Nagymaros Project (Hungary v Czechoslovakia)* (1997) ICJ Report 7 (*Gabcikovo* case); *Case concerning pulp mills on the River Uruguay (Argentina v Uruguay)* (2010) ICJ Reports 14 (*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.

161 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 (eg 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 C Beitz 'Protection against poverty in the practice of human rights' in T Pogge (ed) *Freedom from poverty as a human right: Theory and politics* (2010) 6. See also T Pogge 'Severe poverty as a human rights violation' in T Pogge (ed) *Freedom from poverty as a human right: Who owes what to the very poor?* (2007) 15 (arguing that 'policies that foreseeably and avoidably produce life-threatening poverty' could amount to human rights violations). Chapman divides violations into three: '(1) violations resulting

In essence, sovereign debt crisis as conceived here affects mostly socio-economic rights that largely depend on these institutional policies or lack thereof.[162]

The third reason, also relating to the first, is that, in the wake of the 2008 global financial crisis, the ESCR Committee had issued guidelines in the form of a letter to state parties recasting and reinterpreting their obligations in situations of economic and financial crises.[163] This indicates the distinctive vulnerability and fluidity of socio-economic rights in comparison with civil and political rights and cultural rights.[164] By such guidelines, compliance with obligations under 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.[165] The essential point is that, by their nature, socio-economic rights are quite pliable in a crisis situation, while civil and political rights and cultural rights are comparably not.

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 AR Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 37.

162 B Warwick 'Socio-economic rights during crisis: A changed approach to non-retrogression' (2016) 65 *International and Comparative Law Quarterly* 249-265; D Bilchitz 'Socio-economic rights, economic crisis and legal doctrine' (2014) 12 *International Journal of Constitutional Law* 710-739 (Bilchitz 2014(a)); X Contiades & A Fotiadou 'Socio-economic rights, economic crisis and legal doctrine: A reply to David Bilchitz' (2014) 12 *International Journal of Constitutional Law* 740-746; D Bilchitz 'Socio-economic rights, economic crisis and legal doctrine: A rejoinder to Xenophon Contiades and Alkmene Fotiadou' (2014) 12 *International Journal of Constitutional Law* 747-750 (Bilchitz 2014(b)); DA Desiertor 'Calibrating human rights and investment in economic emergencies: Prospects of treaty and valuation defenses' (2012) 9 *Manchester Journal of International Economic Law* 162-185.

163 Letter dated 16 May 2012 by the Chairperson of the ESCR Committee to state parties (UN reference CESCR/48th/SP/MAB/SW) partly 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 realises that some adjustments in the implementation of some Covenant rights are at times inevitable.'

164 I Saiz 'Rights in recession? Challenges for economic and social rights enforcement in times of crisis' (2009) 1 *Journal of Human Rights Practice* 277-293, 279-280.

165 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 ESCR Committee General Comment 3: Nature of States Parties Obligations (art 2 para 1 of the Covenant) (General Comment 3) para 12. Thus, the letter of 16 May 2012 has been severely criticised. See Warwick (n 162) 250.

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 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.[166] 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 ESCR Committee.[167]

Finally, although all human rights are founded on the pre-eminent 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.[168] In fact, there is an emerging jurisprudence in some jurisdictions indicating the practical meaninglessness of human life without these rights.[169] 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 order.[170] Indeed, it has been argued that 'economic and social rights are more central to the international ideological

166 D Logie & M Rowson 'Poverty and health: Debt relief could help achieve human rights objectives' (1998) 3 *Health and Human Rights* 82-97.

167 A UN Special Rapporteur once observed that '[o]f the five major groupings of internationally recognised human rights (civil, political, economic, social and cultural), that of cultural rights receives by far the least amount of serious attention'. See UNHRC Final report of Special Rapporteur to the Sub-Commission on prevention of discrimination and protection of minorities (reprinted in S Leckie & A Gallagher (eds) *Economic, social, and cultural rights: A legal resource guide* (2006) 501) para 197; General Comment 3 para 10.

168 According to Sheu: '[R]ights are basic if enjoyment of them is essential to the enjoyment of all other rights.' See H Shue *Basic rights* (1996) 19.

169 South African and Indian judiciaries have done remarkable work in this area. See, eg, 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.

170 The defunct MDGs and the SDGs are examples. See UN World Conference on Human Rights: Vienna Declaration and Programme of Action (adopted 25 June 1993); UN Monterrey consensus of the International Conference on Financing for Development: A final text of agreements and commitments (adopted 22 March 2002); UNGA Millennium Declaration (adopted 18 September 2000); UNGA Transforming our world: The 2030 agenda for sustainable development (adopted 25 September 2015).

disagreement of the last century and to the international agreement … for this century'.[171]

3.2 Character and scope of socio-economic rights

A combination of two main ideas shapes our approach to socio-economic rights here: human dignity (which entails human worth, equality and freedom) and human life (which entails personal security, survival and basic needs).[172] While the latter emphasises the 'material interests or resources required for basic functioning' of human beings, the former goes beyond survival to emphasise human worth which defines equality and permeates the entire IHRL, as shown above.[173] A combination of these ideas would therefore translate into a broader notion of socio-economic rights that, as will be argued subsequently, reflects the overarching ideal of distributive justice in sovereign debt governance. This could be seen in nearly all human rights instruments.[174] In fact, the notion of indivisibility of human rights is largely anchored on the inseparability of these core ideals.[175]

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 Universal Declaration and ICESCR and reflected in or reinforced by CIL, general principles, judicial decisions and soft laws.[176] 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.[177] 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'.[178]

171 Young (n 96) 119.

172 Young (n 96) 128-133.

173 Young (n 96) 128.

174 Ramcharan (n 121) 9-32.

175 Tinta (n 143) 431-459.

176 J Waldron 'Socio-economic rights and theories of justice' in T Pogge (ed) *Freedom from poverty as a human right: Theory and politics* (2010) 23; Warwick (n 162) 249 fn 4; Bilchitz 2014(a) (n 162) 719; Alston & Quinn (n 153) 229.

177 L Valentini 'Dignity and human rights: A reconceptualisation' (2017) 37 *Oxford Journal of Legal Studies* 862.

178 J Wills & B Warwick 'Contesting austerity: The potentials and pitfalls of socio-

The standard is for every person to have 'a minimally adequate level of civic status and standard of living'.[179] This is measured by the following: the level of protection of persons from all forms of mistreatment 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 beings have'.[180] While recognising this standard in the context of sovereign debt governance, Barry adopts a broader approach:

> [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*.[181]

Socio-economic rights consist of two broad sub-categories of rights: economic and social. Although the two are inseparable, they obviously are not the same.[182] 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.[183] 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 with corresponding legal implications.[184] For example, because of the centrality of property rights, especially in the context of foreign investment and the constitutionalisation project in IEL, 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.[185]

economic rights discourse' (2016) 23 *Indiana Journal of Global Legal Studies* 631.

179 Barry (n 155) 238.

180 As above.

181 As above.

182 Stark (n 11) 92. See also T Daintith 'The constitutional protection of economic rights' (2004) 2 *International Journal of Constitutional Law* 56-90; J Lichtenberg 'Are there any basic rights?' in CR Beitz & RE Goodin (eds) *Global basic rights* (2009) 71-91.

183 Stark (n 11) 92.

184 See, eg, Daintith (n 182) 57; Langford (n 148) 3.

185 E Petersmann 'Human rights, international economic law and constitutional justice' (2008) 19 *European Journal of International Law* 769-798.

This approach, it is submitted, is misleading. A property right certainly is 'economic' in a possessive, wealth-creating and profit-making sense. However, its possessor's assertive exercise is largely activated in the event of interference with his lawful, objective enjoyment. Thus, its enjoyment invariably requires some restraint from others.[186] This means that it has predominantly negative elements. Arguably, in a strict IHRL context, a property right is defined and guaranteed as a civil and political right and not as a socio-economic right, hence its predominant presence in international investment law (IIL).[187]

On the other hand, economic rights in the 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 under ICESCR.[188] 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.[189] Each of these rights could be described as a socio-economic 'gap filler', not 'gap enhancer'. This means that their targets are persons openly exposed to socio-economic inequality and deprivations; those deprived of the minimum standards of dignity as a result of either internal or external factors, especially government policies and programmes or policies of both government and non-governmental actors either within

186 JE Alvarez 'The human right of property' (2018) 72 *University of Miami Law Review* 580-705.

187 Universal Declaration art 17. Property rights are covered in neither ICCPR nor in ICESCR. In fact, during the drafting of ICESCR this issue led to a major debate. See Whelan (n 145) 93-96. However, it may be found in regional human rights instruments and national constitutions as a CPR. See, eg, Protocol to ECPHRFF 1950 art 1; African Charter art 14; 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.

188 Eg, ICESCR 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).

189 ICESCR 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 Africa, 1996 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 secs 16 & 17.

or outside the state. In this sense, socio-economic rights might be called 'basic and well-being' rights.[190]

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 then are the immediate targets? Simply put, they are the socially and economically-disadvantaged members of society. This is because ensuring equitable and balanced socio-economic coexistence is the underlying objective of these rights.[191] Economic and social rights in fact are considered anti-poverty rights because their primary aim is to address poverty and its root causes and manifestations.[192] 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 relationships.[193] Indeed, justice could be said to be their *raison d'être*.[194] 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'.[195] However, whether Waldron's theory fits into the 'justice' of sovereign debt governance, as advanced in the previous chapter, will become clearer in our 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 that, almost always, are limited in supply.[196] This argument may further be strengthened by the fact that in most states, resource allocation falls within executive prerogative which, by necessary implication, entails legislative and judicial self-restraint.[197] The doctrine of

190 Shue (n 168) 19; KN Schefer 'Poverty, obligations and the international economic legal system: What are our duties to the global poor?' in Schefer (n 14) 3-15.

191 Bilchitz 2014(a) (n 162) 712; LP 1987 (n 148) para 14; Schefer (n 190) 3-15.

192 Spagnoli calls them the 'right not to be poor'. See F Spagnoli 'The horizontal priority of economic rights' in U Udombana & O Besirevic (eds) *Rethinking socio-economic rights in an insecure world* (2006) 21-34; M Deveaux 'The global poor as agents of justice' (2015) 12 *Journal of Moral Philosophy* 125-150; Schefer (n 190) 3-15.

193 International Commission of Jurists 'Maastricht guidelines on violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 691 (Maastricht Guidelines) paras 20-21; Whelan (n 143) 157-75.

194 Waldron (n 176) 21-26.

195 Waldron (n 176) 39.

196 As above.

197 *Grootboom* case.

state sovereignty also limits external interference on matters of internal resource distribution.[198]

However, Waldron's theory answers this counterargument. With insights from Nozick's and Rawls's theories of justice respectively, he offers some theoretical justifications for these rights. He notes that 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 society.[199] This means that 'there needs to be some sorting, balancing and prioritisation among these demands [but it] does not follow that one subset of the demands (socio-economic rights) must be abandoned in advance as impossible'.[200] 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 socio-economic rights: property entitlements must work round them and no such entitlements are recognised if they are incompatible with these rights.[201]

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. 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

198 Eg, art 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 part 3.3.4.1 below, this has limited application in the area of human rights. See M Milanovic *Extraterritorial application of human rights treaties: Laws, principles and policy* (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 (*DRC v Uganda* case); *Palestinian Territory* case para 26.

199 Waldron (n 176) 46.

200 Waldron (n 176) 28.

201 Waldron (n 176) 31.

justice and socio-economic rights is superficial.[202] This might become clearer in the context of the extraterritorial 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 worth emphasising 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 pronounced than the negative ones.[203] However, like in the case of civil and political rights, 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 enforceable rights.[204] 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 have further cemented their status as enforceable rights binding on duty bearers.[205] An area of legal practice known as socio-economic rights litigation has emerged as a result.[206]

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 situations of economic crises.[207] As important as these points might be, they, however, do not affect the normative content nor the character of such rights as socio-

202 ILO *The report of the World Commission on the Social Dimension of Globalisation* (2004) paras 20-45.

203 Bilchitz 2014(a) (n 162) 714.

204 Ashford (n 142) 112; Hassoun (n 142) 23-44; Gavison (n 142) 23-55. Compare with D Hartley *Welfare rights and social policy* (2014) xv.

205 Protocol to ICESCR. See the cases in nn 146 & 169 above and the popular case of *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 44-47.

206 TJ Mellish 'Rethinking the "less as more" thesis: Supranational litigation of economic, social, and cultural rights in the Americas' (2006) 39 *New York University Journal of International Law and Politics* 171-343; M Langford 'Domestic adjudication and economic, social and cultural rights: A socio-legal review' (2009) 6 *International Journal on Human Rights* 91-111.

207 Young (n 96) 126.

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 the ESCR Committee, 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, programmes and actions for the purpose of discharging their obligations under ICESCR.[208]

As will be elaborated below, the so-called 'minimum core' obligation has been set as a threshold. It is the basic obligation under ICESCR that 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 (that is, inter-rights prioritisation). To be sure, the minimum core runs through specific socio-economic rights such as rights to food, water and health care. Second, it helps those deserving of assistance and, thus, seeks to narrow the inequality gap. The theoretical support for this could be found in Rawls's difference principle that entails designing or reforming legal rules in a manner that favours the worst-off group.[209] Rawls'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'.[210]

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 their dignity and, arguably, their 'real person'. This could be relevant to the sorting, balancing and prioritisation of the multiple interests during sovereign debt crisis.

208 General Comment 3 para 10.

209 Waldron (n 176) 29. Indeed, Rawls'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 J Rawls *A theory of justice* (1999) 52-56. This also raises question of moral responsibility. See Waldron (n 176) 39-40.

210 Rawls (n 209) 206-207. Interestingly, Rawls's 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 (n 209) 206-207.

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 (including creditors) under ICESCR.

3.3 The rights holders

The rights holders are citizens of respective state parties to ICESCR. Indeed, as part of their international commitments, many state parties have constitutionalised socio-economic rights.[211] However, the degree of entitlements for 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 cause individuals to require social and welfare supports.[212] They are those 'radically disadvantaged'. Consequently, only natural persons are beneficiaries. In addition, the ESCR Committee has recognised situations where non-citizens could also be entitled to claim these rights in the spirit of non-discrimination.[213]

Therefore, upon fulfilling conditions for admissibility, rights holders may enforce their socio-economic rights at the appropriate forum/institution.[214] Thus, rights holders may claim socio-economic rights at national, regional and international levels depending on the legal instrument, enforcement mechanisms and the prescribed procedures. 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. Apart from filing claims in specialised human rights courts, NGOs can now file *amicus curiae* submissions especially before investment arbitration tribunals.[215]

3.4 Duty bearers and their obligations

From the brief historical account above, it is clear that ICESCR was conceived as part of the universal legal response to the horrors, dehumanisation and undignified treatments meted out to individuals by

211 See references to national constitutions in n 189 above.

212 Jaichand (n 142) 56.

213 ICESCR arts 2(2) and 2(3).

214 See, eg, UNGA 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 (2006).

215 ICSID Convention 1965 art 44; ICSID Arbitration Rules (amended rules and regulations) of 10 April 2006 Rule 37(2).

states during World War II.[216] In addition, the indignity of poverty was a major concern for the framers of the post-war socio-economic rights framework.[217] Understandably, therefore, ICESCR and other human rights-based treaties were designed to primarily address the propensity of states to indulge in similar practices of violating the rights of their citizens, hence the primary duty bearers are the states.[218] This reflects the prevailing state-centric character of international law. However, developments in the past few decades have shown that states no longer are the exclusive violators of socio-economic rights, hence the gradual recognition of additional duty bearers as evidenced by a few global initiatives, such as GPBHR and GPFDHR, combined with a progressive reading of ICESCR.[219] In other words, the focus is now shifting away from the violator to the violation.[220]

3.4.1 Sovereigns as duty bearers: Creditors and debtors

In the context of sovereign debt governance, both sovereign lenders and sovereign borrowers that are signatories to ICESCR are bound by its provisions. Bilateral official creditors clearly fit into the compass of duty bearers under ICESCR. Because socio-economic rights obligations essentially are not jurisdictionally circumscribed (that is, territorially delimited) under ICESCR, it might be appropriate to divide these obligations broadly into the traditional/territorial and extra-territorial obligations.[221] In substance, these obligations are the same, the distinction

216 Morsink (n 114) 88-91.

217 Morsink (n 114) 36-38.

218 Besson (n 80) 244-268; TG Weiss and others (eds) *The responsibility to protect: Supplementary volume to the report of the International Commission on Intervention and State Sovereignty* (2001) 144.

219 Equal Rights Trust *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* (2014) 84; P Muchlinski 'Human rights and multinational: Is there a problem?' (2001) 77 *International Affairs* 31-47; A De Man & M Bello 'Prioritising socio-economic rights in sovereign debt governance: The obligations of private creditors' (2021) 46 *Journal of Juridical Science* 57.

220 D Bilchitz 'Corporations and the limits of state-based models for protecting fundamental rights in international law' (2016) 23 *Indiana Journal of Global Legal Studies* 156.

221 On the extraterritoriality of human rights, see, eg, *DRC v Uganda* case (n 198) and the *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 prêparatoires* of the Covenant confirm the Committee's interpretation … These show that, in adopting the wording chosen, the drafters of the Covenant did not intend

being that the extra-territorial obligations are shared obligations that reflect the increasing interdependence brought about by globalisation and the imperative for international cooperation in the realm of socio-economic rights.[222] A clear example of this are the defunct Millennium Development Goals (MDGs) and the subsequent Sustainable Development Goals (SDGs) (even though both frameworks aimed at addressing socio-economic needs rather than rights *per se*).

Traditional obligations

Implementation of the commitments under 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 cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of

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 that refer to jurisdictional delimitations in the application of the regional human right treaty. See *Victor Saldano v Argentina* (1999) IACHR Report 20-21; *Coard & Others v US* (1999) IACHR Report 37. In general, though, socio-economic rights under ICESCR are not delimited territorially. In the words of Shutter and others, '[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 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 OD Shutter and others 'Commentary to Maastricht Principles on extraterritorial obligations of states in the area of economic, social and cultural rights' (2012) 34 *Human Rights Quarterly* 1092.

222 Shutter and others observe that 'the territorial and extraterritorial obligations of a state are separate. Irrespective of whether economic, social, and cultural rights have been fully realised for persons located in its own territory, a state could still be said to have positive obligations to fulfil 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 realisation of rights'. See Shutter and others (n 221) 1103, 1150.

the rights recognised in the covenant by all appropriate means including adoption of legislative measures'.[223]

The ESCR Committee has officially interpreted this provision identifying a few obligations for states parties, including the 'minimum core' obligation.[224] Accordingly, every state party shall take steps towards progressively realising socio-economic rights provided under ICESCR. *Taking steps* is an immediate, absolute obligation, but *progressive realisation* entails a gradual, resource-determined implementation without adopting regressive measures that could hamper the implementation process designed to fully realise these rights.[225] The achievement of the minimum core obligations is also an immediate obligation.

State parties assume three forms of obligations: *to respect*, *to protect* and *to fulfil* socio-economic rights of their citizens (the 'triple obligations').[226] An obligation could be either positive or negative: *to protect* and *to respect* are negative while *to fulfil* is positive.[227] For instance, a state's obligation *to protect* socio-economic rights entails ensuring non-interference by the state or by any third party with an individual's enjoyment of, say, their already possessed (or accessed) food, water, health care and housing.[228] 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.[229] They are obligations rooted in CIL corresponding, in most cases, to states' municipal norms and, therefore, are considered fundamentals of IHRL.[230] These negative obligations are universal, in the sense that they may be extended to subjects other than states without much difficulty. The focus is not on the character of the violator but on the violation.

223 ICESCR art 2(1).

224 General Comment 3 paras 1-14; LP 1987 paras 16-34.

225 General Comment 3 para 9.

226 Shue couched them as duties 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'. See Shue (n 168) 160. In *SERAC* the African Commission held that 'both 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* (n 207) 44; Jayawickrama (n 112) 57-59; A Eide 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 35-51.

227 Bilchitz 2014(a) (n 162) 714.

228 As above.

229 Ramcharan (n 121) 234-235.

230 Ramcharan (n 121) 17, 100-121.

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 basic necessities.[231] It consists of three obligations: to facilitate, to promote and to provide.[232] These too depend on the contexts and circumstances. For instance, in situations of emergency, the rights holders would be entitled to even direct food hand-outs.[233]

It is worth noting that the margin of discretion implied by 'to the maximum of available resources' (MAR) has been constrained by the requirement of satisfying the minimum core obligation.[234] This is a minimum legal baseline designed to ensure the taking of 'deliberate, concrete and targeted steps' towards progressive realisation of the rights, and to measure possible retrogression from such mandatory measures or steps.[235]

In addition, by using the conjunctive word 'and' after 'individually' in the above-quoted provision, it may be argued that the minimum core obligation does not anticipate a sole performance of responsibility by a state as it requires 'international cooperation'.[236] A sovereign debt relationship, thus, could indirectly 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 ICESCR or its national constitution or both.[237] Similarly, activities of the International Monetary Fund (IMF), the World Bank (WB) and regional development banks (RDBs) could form part of this 'international cooperation'.[238]

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.[239] This is a reason-giving standard.[240] Under the Maastricht Guideline for

231 LP 1987 para 14.

232 OHCHR Facts sheet 34 para 18.

233 ESCR Committee General Comment 12 (article 11) (adopted 12 May 1999) para 13.

234 General Comment 3 paras 10-12.

235 General Comment 3 para 9.

236 LP 1987 (n 148) paras 29-34; General Comment 3 paras 13-14.

237 SB Kaplan & K Thomson 'The political economy of sovereign borrowing: Explaining the policy choices of highly indebted governments' (2014) 1-5.

238 LP 1987 (n 148) paras 94-96 & 100-103.

239 LP 1987 (n 148) paras 71-72; VCLT 1969 art 60(3).

240 Beitz (n 161) 6.

the Violations of Economic, Social and Cultural Rights (Maastricht Guideline) a state would be in violation where it fails to satisfy its minimum core obligations or it fails to protect, respect and fulfil its citizens' socio-economic rights, or where it indulges in discriminatory practices which entrench inequality.[241] Importantly, by the Maastricht Guideline's interpretation, 'entering into bilateral or multilateral agreements with other states, international organisations or multinational corporations' that disregard obligations under ICESCR would also constitute a violation.[242] 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 traffic 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.

3.5 Extraterritorial socio-economic rights obligations: The Maastricht Principles

In addition to the above, both creditor and debtor states have extraterritorial obligations to respect, protect and fulfil socio-economic rights. In 2011 the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles 2011) was adopted by UN experts and human rights specialists across the world to elaborate on socio-economic rights obligations.[243] Building on the Limburg Principles 1987 and Maastricht Guidelines, the Maastricht Principles were adopted largely to give further clarity to the nature of states' obligations because of the realisation that rights holders' socio-economic rights to a large extent now depend upon the extraterritorial acts and omissions of both states and NSAs.[244] In other words, because of the impacts of globalisation, especially the impacts of the activities of multinational corporations (MNCs) on the realisation of human rights, states' socio-economic rights obligations are now said to have

241 Maastricht Guidelines (n 193) paras 6-15.

242 Maastricht Guidelines (n 193) para 15(j).

243 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights (adopted 28 September 2011) (Maastricht Principles 2011).

244 Maastricht Principles 2011 (n 243) Preamble.

an extraterritorial reach.[245] This is an exception to the traditional, territorialised nature of human rights obligations.[246] 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 extraterritorially.[247] 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'.[248]

The Maastricht Principles consist of 44 main principles defining and elaborating on the nature and extent of these extraterritorial obligations.[249] It reiterates the cardinal principles of IHRL concerning the pre-eminence of human dignity, equality, indivisibility, participation, transparency and accountability, as provided under general and specific human rights treaties and declarations.[250]

There are three main principles directly relevant here: the extent of the extraterritoriality principle; states' sphere of influence and responsibility to hold NSAs accountable for violations of socio-economic rights; and international cooperation as an extraterritorial obligation.[251]

3.5.1 Extraterritoriality principle: Nature and extent

While emphasising the territorial obligations under ICESCR, the Maastricht Principles provide that states have extraterritorial obligations to respect, protect and fulfil, among others, socio-economic rights of rights holders.[252] The extraterritorial 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

245 M Milanovic *Enforcement of human rights* (2013) 67; R McCorquodale & P Simons 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 *Modern Law Review* 598-625.

246 See, however, Restatement (Third) of the Foreign Relations Law of the United States 1987 sec 402(2).

247 Maastricht Principles 2011 (n 243) Principle 8.

248 T Altwicker 'Transnationalising rights: International human rights law in cross-border contexts' (2018) 29 *European Journal of International Law* 581-606; F Coomans 'The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights in the work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 5.

249 Maastricht Principles 2011 (n 243).

250 Maastricht Principles 2011 (n 243) Principles 1-7.

251 Maastricht Principles 2011 (n 243) Principles 8, 9, 12 & 28.

252 Maastricht Principles 2011 (n 243) Principle 4.

Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realise human rights universally.[253]

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.[254] Both, however, operate concurrently, that is, they are not mutually exclusive. The extraterritorial 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 provide 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's 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 realise economic, social, and cultural rights extraterritorially, in accordance with international law.[255]

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.[256] The causal link could be an act or omission by the official of the state that took (or is taking) place outside the state, or arising from the effects of a state's policies that are reasonably (not remotely) foreseeable.[257] This could cover lending policies or practices of creditor nations or those of their agencies

253 Maastricht Principles 2011 (n 243) Principle 8.

254 Shutter and others (n 221) 1097.

255 Maastricht Principles 2011 (n 243) Principle 9.

256 Shutter and others (n 221) 1106-1108.

257 In respect of CPRs, the Human Rights Committee notes that 'a state party may be responsible for extraterritorial 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 decision in *Munaf v Romania* Communication 1539/2006 (adopted 30 July 2009) para 14.

(for instance, aid agencies) responsible for sovereign lending or their *alta egos* responsible for debt restructuring. It would arguably cover the Paris Club, state-owned banks or funds such as sovereign wealth funds as they embody the intrinsic sovereign character of the states and usually act 'governmentally'.

It would also, arguably, include creditor nations' acts of selling or assigning their rights under a sovereign debt contract to vulture funds at a discount with constructive knowledge of the vulture's intention to recover the full, original value of such debt using both conventional and unconventional means.[258] Directly impairing the capacity of a sovereign debtor to fulfil its obligations under ICESCR will also engage a creditor nation's extraterritorial obligations.[259] The extraterritoriality principle arguably 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 examined hereunder.[260]

3.5.2 Sphere of influence and states' extra-territorial obligations

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.[261] This becomes necessary where such a state is the origin of a private creditor's act that violated (or is violating) socio-economic rights.[262] It may also arise from a legal connection, for instance, on the basis of citizenship/nationality or place of registration, domicile, centre of main interest or business operation or any reasonable link between the state and such creditor.[263] Importantly, in view of the increasing cooperation between states and NSAs (including businesses), the Maastricht Principles 2011 provide that the socio-economic rights

258 As seen in the following cases: *Donegal International v Zambia* (2007) 1 Lloyd's Report 397 (claimant got a $15 million judgment) (*Donegal* case); *Allied Bank International v Banco Credito Agricola de Cartago* (1985) 757 F2d 516 (2nd Circuit).

259 Maastricht Principles 2011 (n 243) Principles 20-21.

260 FZ Lone 'Extraterritorial human rights violations and irresponsible sovereign financing' in Bohovlasky & Černič (n 2) 233-249.

261 Maastricht Principles 2011 (n 243) Principles 23-24.

262 Maastricht Principles 2011 (n 243) Principle 12.

263 Maastricht Principles 2011 (n 243) Principle 25. This has basis in CIL. Eg, 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'. See *SS Lotus (France v Turkey)* (1928) PCIJ No 10 (*SS Lotus* case) 18-19.

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 that 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.[264]

Although the Maastricht Principles are not meant to apply to businesses, the above recognises the increasing complicity between businesses and their home states that, sometimes, might impact negatively on the enjoyment of socio-economic rights.[265] Indeed, sovereign creditor/sovereign debtor-private creditor complicity is already visible in the area of sovereign financing.[266] It seems that in such a situation attributing socio-economic rights responsibilities would be less complicated. This is supported by the public international law principles on state responsibility.[267] 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 also apply here.[268] HRIA is a due diligence standard linked to the precautionary principle under environmental law.[269] 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

264 Maastricht Principles 2011 (n 243) Principle 12.

265 Maastricht Principles 2011 (n 243) Principle 43.

266 Bohoslavsky & Escriba-Folch (n 159) 15-32; Lone (n 260) 233.

267 *Nicaragua* case 115; UN ILC Draft Principles on State Responsibility 2001 arts 5 & 8.

268 The Maastricht Principles 2011 provide 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 (n 243) Principle 14. See also UNHRC Guiding principles on human rights impact assessments of trade and investment agreements (adopted 19 December 2011).

269 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 22; *Pulp Mills* case (n 160) 204.

impact of activities financed by loans when significant adverse human rights impacts are expected.[270]

3.5.3 International cooperation as an extraterritorial obligation

International cooperation ordinarily entails cooperation between two or more states.[271] 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 these rights accountable for their actions.[272] 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.[273] The Maastricht Principles also require each state to contribute to the fulfilment of socio-economic rights extraterritorially commensurate with its economic capacity, resources and international influence.[274] According to Shutter and others, this means that 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.'[275]

In addition, a state has a 'good faith' obligation to give and request international assistance to fulfil its socio-economic rights obligations.[276] In discharging 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.[277]

270 UNHRC Guiding principles on human rights impact assessments for economic reform policies (adopted 21 March 2019) (HRIA 2019) Principle 5.

271 Shutter and others note 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 individualised regime of legal responsibility in the event of a breach of those obligations'. See Shutter and others (n 221) 1152.

272 Maastricht Principles 2011 (n 243) Principles 27-30.

273 Maastricht Principles 2011 (n 243) Principle 29.

274 Maastricht Principles 2011 (n 243) Principle 31.

275 Shutter and others (n 221) 1153.

276 Maastricht Principles 2011 (n 243) Principle 33-35.

277 Maastricht Principles 2011 (n 243) Principle 32.

However, the Maastricht Principles 2011 focus almost exclusively on states' obligations and, in its objectives and substance, it was deeply influenced by the state-centric approach to international human rights. Although it may 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. It requires home states of creditors to toughen regulation, but the challenge would be with respect to extraterritorial bondholders who, often registered in tax havens, might be difficult to pin down to a particular state for the purpose of concrete regulation and accountability.

3.6 Obligations of other duty bearers

In 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 may be extended to legal entities other than states.[278] However, this only operates in the shadow of the state-centric model of circuitously imputing human rights responsibility to NSAs. Nevertheless, there is growing consensus that the responsibility for human rights protection rests on 'everyone'.[279] Therefore, it may 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.

3.6.1 International organisations

Like their member states, inter-governmental organisations (IGOs) are active international subjects and there is little doubt that they at least bear the negative obligation *to respect* socio-economic rights.[280] In the context of socio-economic rights in sovereign debt 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.[281] The European Court of

278 Global Citizenship Commission *The Universal Declaration of Human Rights in the 21st century: A living document in a changing world* (2016) 73-78.

279 Besson (n 75) 408-430. See also VCLT 1969 arts 3 & 5.

280 *WHO* case (n 131) 89-90; *Case Concerning Reparation for Injuries suffered in the Service of the UN* (1949) ICJ Report 174 (*Reparation for Injuries* case).

281 The IMF and World Bank declined to participate in the debate leading up to the adoption of ICESCR because, in the words of the IMF, 'the limits set on our activities by our Articles of Agreement do not appear to cover this field of work'. This attitude

Justice, for instance, has held that the European Commission cannot escape human rights responsibilities arising from sovereign debt crisis.[282] IGOs have a peculiar responsibility of cooperation as well.[283] The ESCR Committee may make recommendations regarding technical assistance to the UN or its specialised agencies, and IMF and WB.[284]

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 fiscal reforms and market fundamentalism. However, as will be examined subsequently, these adjustment measures to address debt burdens must be socio-economic rights sensitive.[285] This appears to be a gradual shift away from the unrestrained, market-based approach of the past.

Generally, in the context of IGOs, IFIs could be seen both as duty bearers and as standard setters. First, as standard setters, their practices have contributed to shaping socio-economic rights jurisprudence.[286] The effects of SAPs on socio-economic rights were among the major triggers for the adoption of GPFDHR. They also recognise environmental and social considerations in their lending activities. However, in the sovereign debt regime, IFIs generally support the contractual governance framework.[287] The Enhanced Contractual Framework 2014 was issued by IMF.

In addition, IGOs could support ICESCR in monitoring compliance as required by the ESCR Committee.[288] In practice, some IFIs now include human rights-related prescriptions (for instance, poverty reduction strategies necessary for IMF-concessional financing) as part of the

has changed as its activities expanded. See F Gianviti 'Economic, social and cultural rights and the International Monetary Fund' (2002) 10-30, https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf (accessed 13 November 2023). See also International Bank for Reconstruction and Development Articles of Agreement (27 December 1944) art VII sec 2; IMF Articles of Agreement (22 July 1944) art IX sec 2.

282 Joined Cases C-8 P to C-10/15 P, *Ledra Advertising Ltd v Commission* 57 (ECLI/EU/C/2016/701), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-8/15%20P (accessed 2 October 2018).

283 General Comment 3 paras 13-14.

284 ICESCR art 22.

285 ESCR Committee International Technical Assistance Measure (Article 22) General Comment 2 (adopted 2 February 1990) paras 2 & 9.

286 ILC Draft on CIL art 4(2).

287 IMF 'Strengthening the contractual framework to address collective action problems in sovereign debt restructuring' (2014), https://www.imf.org/external/np/pp/eng/2014/090214.pdf (accessed 2 May 2019).

288 General Comment 3 paras 13-14.

conditionalities for certain loan facilities.[289] As noted earlier, they could be part of the 'international cooperation' envisaged by ICESCR to support the realisation of socio-economic rights.[290] IFIs 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'.[291]

The problem, however, is that they could violate or hinder the realisation of socio-economic rights. Thus, as 'violators', the role of IFIs may come by way of irresponsible lending, or by 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 these measures.[292] In these situations, IFIs could thus undermine the realisation of socio-economic rights.[293] Undermining socio-economic rights may also come by way of the usual policy conditionalities (stabilisation, liberalisation, deregulation and privatisation) prescribing cuts to funding of welfare and social programmes that are designed or aimed primarily at progressively realising socio-economic rights under ICESCR.[294] It is curious that IFIs would prescribe conditionalities relating to human rights (for instance, poverty reduction strategy papers, governance, anti-corruption and rule of law reforms) knowing that their traditional conditionalities could undermine socio-economic rights. Arguably, this

289 IMF Reform of the Fund's policy on Poverty Reduction Strategies in Fund's engagement with low-income countries – proposals' (July 2015) 11-60, https://www.imf.org/external/np/pp/eng/2015/052615.pdf (accessed 13 October 2023). In general, IMF conditionalities, originally designed to safeguard IMF resources to guarantee loan repayment and restore macro-economic stability in member states, now includes poverty reduction objective in certain programmes (eg Extended Credit Facility and Policy Support Instrument) for low-income countries. It has changed from the hitherto exclusive focus on neoliberal policy prescriptions covering, in general, structural benchmarks (improving tax administration, fiscal transparency, anti-corruption and rule of law and governance of state-owned enterprises), prior measures (fiscal revenue, governance reforms, banking sector reforms, etc), quantitative performance criteria linked to macro-economic variables (eg ceiling on external debt, public sector external arrears, public sector guarantees, etc) and indicative targets (eg ceiling on government wage bill, ceiling on government borrowing from central bank, etc). See IMF 'Factsheet: IMF Conditionality', www.imf.org/en/About/Factsheets/Sheets/2023/IMF-Conditionality (accessed 19 September 2023).

290 ICESCR art 2(1).

291 Maastricht Guidelines para 32.

292 Barry (n 155) 254.

293 CN Radavoi 'Indirect responsibility in development lending: Do multilateral banks have an obligation to monitor project loans?' (2018) 53 *Texas International Law Journal* 1-22; T Stubbs & A Kentikelenis 'Conditionality and sovereign debt: An overview of human rights implications' in I Bantekas & C Luminas (eds) *Sovereign debt and human rights* (2018) 359.

294 Barry (n 155) 241.

appears like another way of prioritisation of civil and political rights. The Maastricht Guideline expressly recognises that IFIs often mount pressure on resource-constrained states in the latter's decision making on loans. 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'.[295]

Despite this acknowledgment, however, the Maastricht Guideline adopts the traditional state-centric approach to international human rights responsibility by imputing only 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.[296] Nevertheless, the Maastricht Guideline 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.[297] As bodies of states established to, among others, support international cooperation for development, IFIs have an obligation not to undermine the realisation of socio-economic rights.[298] Connected to this, the Tilburg Guiding Principles on World Bank, IMF and Human Rights 2002 expressly provide 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'.[299]

Not surprisingly, the Maastricht Principles 2011 attempt to fill the vacuum in the Maastricht Guideline by explicitly recognising the human rights responsibility of IGOs.[300] However, it can be argued that soft laws alone can hardly fill the human rights accountability gap with respect to IFIs' operations and policies.[301] Unfortunately, IFIs are yet to become signatories to ICESCR.

295 Maastricht Guidelines 1998 (n 193) para 19.

296 Maastricht Guidelines 1998 (n 193) para 16.

297 Global Citizenship Commission (n 278) 74.

298 UN Charter 1945 arts 55 & 56; General Comment 3 paras 13 & 14; Formerand (n 115) 5-6.

299 Tilburg guiding principles on World Bank, IMF and human rights (adopted April 2002) Principle 5.

300 Maastricht Principles 2011 (243) Principle 16.

301 G Bianco & F Fontanelli 'Enhancing the IMF's compliance with human rights: The issue of accountability' in Bohovlasky & Černič (n 2) 213-232.

3.6.2 Private creditors

Like IGOs, private creditors have also 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.[302] Some scholars have argued that these creditors also have obligations to protect and fulfil socio-economic rights.[303] In this context, private creditors include banks, investment companies and fund managers (private and public), especially vulture funds and other purchasers of sovereign bonds on the secondary markets. In the area of human rights in general, businesses are now being treated as duty bearers following a somewhat tendentious soft law development process.[304] Apart from this, businesses are increasingly becoming violators of socio-economic rights, sometimes in complicity with states and, therefore, could be held accountable especially using the domestic legal system.[305] At the regional and international levels, there has been some form of resistance.[306] This is because, by the positivists' state-centric vision of IHRL, NSAs are only indirectly responsible as they are seen as secondary bearers of responsibility. For instance, although it recognises the expanding influence of NSAs, the Maastricht Guideline only holds the states accountable for a lack of due diligence or for their failure to extract accountability from NSAs that are guilty of violating socio-economic rights.[307]

302 ESCR Committee General Comment 24: State obligations under the international covenant on economic, social and cultural rights in the context of business activities (2017); ESCR Committee Statement on the obligations of states parties regarding the corporate sector and economic, social and cultural rights (ICESCR Corporate Sector 2011) para 1; UNHRC Guiding principles on business and human rights: Implementing the United Nations 'protect, respect and remedy framework (adopted 21 March 2011) (GPBHR 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 14 August 2018).

303 LJ Černič 'Sovereign financing and corporate responsibility for economic and social rights' in Bohoslavsky & Černič (n 2) 154-155; De Man & Bello (n 219) 75

304 UN Economic and Social Council 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 20 April 2019).

305 LC Backer 'Shaping a global law for business enterprises: Framing principles and the promise of comprehensive treaty on business and human rights' (2017) 42 *North Carolina Journal of International Law* 417.

306 D Kinley & J Tadaki 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' (2004) 44 *Virginia Journal of International Law* 933-935.

307 ICESCR Corporate Sector 2011 (n 302) paras 5 & 7; Maastricht Guidelines 1998 (n 193) para 18.

This circuitous imputability approach has been severely criticised.[308] 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, so far, has 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 private creditors' socio-economic rights responsibilities.

3.7 United Nations and corporate human rights responsibility: A tug of war?

3.7.1 Filling the corporate human rights accountability gap

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 in relation to the activities of NSAs in general. In addition, there are several soft law instruments that reiterate the human rights responsibilities of businesses.[309] Indeed, 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).[310] 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: resistance by MNCs through their home states and, as highlighted above, the positivists' theoretical resistance on the ground of state-centrism and the persistent divide between law and ethics.[311] The 'pull and push' has become a routine. The resistance, arguably, has deepened the corporate

308 Bilchitz (n 220) 143-170.

309 See, eg, UN Global Compact *The Ten Principles of the Global Compact* (31 January 1999), https://www.unglobalcompact.org/what-is-gc/mission/principles (accessed 12 February 2018); OECD Guidelines for Multinational Enterprises (adopted 25 May 2011), http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 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 12 February 2018). Of course, there are some hard laws that, to some extent, seek to close the CHRR gap. See, eg, UN Convention against Corruption (entered into force 14 December 2005); UN International Convention on the Suppression and Punishment of the Crime of Apartheid (entered into force 18 July 1976).

310 BHR seeks to hold businesses accountable for both direct and indirect violations of human rights. See MA Santoro 'Business and human rights in historical perspective' 1-7, http://ssrn.com/abstract=2631107 (accessed 12 February 2018).

311 Bilchitz (n 220) 143-170.

human rights responsibility (CHRR) governance and accountability vacuum. Since the 1970s, the UN has been struggling to fill this vacuum.[312]

The first attempt, initiated by the UN Economic and Social Council (ECOSOC), only produced a draft Code of Conducts for MNCs that, unsurprisingly, faded into oblivion.[313] However, it was not a totally failed initiative as it led to the establishment of the UN Commission on Transnational Corporations (UNCTC) in 1974.[314]

The second attempt to fill this accountability gap, initiated by the UN Secretary-General, produced the UN Global Compact (UNGC).[315] With over 10 000 companies across 145 countries as participants, UNGC has been applauded as the most inclusive global corporate social responsibility (CSR) initiative in history.[316] It focuses on entrenching a human rights culture by corporations through the adoption of ten core principles relating to anti-corruption and respect for human rights, labour and environmental standards.[317]

However, 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 that, ineluctably, widens the human rights accountability gap.[318] Human rights activists have rejected UNGC as it belittles the essential humanising agenda propelling their movements.[319] 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 UN as the latter avoids confronting state-centrism, adhering, instead, to inflexible

312 Bilchitz (n 220) 143-170. See also LC Backer 'On the evolution of the United Nations "protect-respect-remedy project": The state, the corporation and human rights in a global governance context' (2011) 9 *Santa Clara Journal of International Law* 37-80.

313 P Feeney 'Business and human rights: The struggle for accountability in the UN and the future direction of the advocacy agenda' (2009) 6 *International Journal on Human Rights* 161-175.

314 OA Jacob 'Global commerce and human rights: Towards an African legal framework for corporate human rights responsibility and accountability' PhD thesis, University of the Witwatersrand, 2015 152-167.

315 'UNGC Strategy 2014-2016', https://www.unglobalcompact.org/about (accessed 8 August 2019).

316 S Deva 'Global compact: A critique of UN's public-private partnership for promoting corporate citizenship' (2006) 34 *Syracus Journal of International Law and Commerce* 107-151.

317 A Rasche 'A necessary supplement: What the UN Global Compact is and is not' (2009) 48 *Business & Society* 517-520.

318 Deva (n 316) 144-149.

319 Jacob (n 314) 152-155.

traditional doctrines that have become nonresponsive to the realities of systematic corporate human rights violations.[320] Furthermore, from a conceptual point of view, UNGC appears to have confused CSR with CHRR.[321]

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 in 2003 launched a new initiative under the rubric UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (Norms).[322] By taking a direct responsibility approach, the Norms sought to address the CHRR accountability gap through public international law, that is, by imposing three broad legal responsibilities on businesses, namely, the duty to implement human rights, the duty to refuse benefits arising from human rights violation and the duty to use their influence to protect human rights.[323] In a repeated scenario, playing like a tug of war, the human rights community hailed the Norms while MNCs, the business community and the traditional creditor states vehemently rejected it.[324] The latter group won the war as the Norms died unceremoniously.[325] In fact, creditor nations felt that this document directly 'threatened both sovereignty and current international law'.[326] The war was far from over though.

3.7.2 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 the Norms but, not surprisingly, one of the major architects of UNGC (John Ruggie) as the Secretary-General's Special Representative on Business and Human Rights (SGSR).[327] The SGSR recognised that MNCs have 'global reach and capacity … of acting

320 Jacob (n 314) 155.

321 MA Santoro 'Business and human rights in historical perspective' (2015) 1-9, http://ssrn.com/abstract=2631107 (accessed 12 February 2018).

322 ECOSOC Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (26 August 2003) (ECOSOC Commentary) para 3.

323 ECOSOC Commentary (n 322) paras 5-12.

324 Jacob (n 314) 152-155.

325 As above.

326 Backer (n 312) 45-46.

327 As above. In fact, at the commencement of his task, Ruggie rejected the Norm. See UNHRC Interim report of the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2006) (SGSR Interim Report 2006) para 60.

at a pace and scale that neither governments nor international agencies can match'.[328] In 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.[329] This, according to the SGSR, is because states and businesses occupy distinct regulatory spaces which makes a uniform approach to CHRR impossible.[330] 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.[331] 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.[332]

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.[333] The Ruggie Framework was then operationalised and adopted by the UNHRC in 2011 as the GPBHR.[334] A Working Group was then established to 'promote the effective and comprehensive dissemination and implementation of the Guiding Principles.'[335] Furthermore, UNHRC, following GPBHR, has

328 SGSR Interim Report 2006 paras 14-16.

329 SGSR Interim Report 2006 para 70. Backer supports this 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 (n 312) 57.

330 SGSR Interim Report 2006 paras 5-30.

331 UNHRC 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 (2007) para 6; UNHRC 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 (2010) (SGSR Report 2010).

332 JG Ruggie 'Global governance and "new governance theory": Lessons from business and human rights' (2014) 20 *Global Governance* 5.

333 UNHRC 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 (2008).

334 UNHRC Guiding Principles on business and human rights – implementing the United Nations Protect, Respect and Remedy Framework 2011, https://digitallibrary.un.org/record/720245?ln=en (GPBHR 2011).

335 UNHRC Resolution A/HRC/RES/17/4 of 6 July 2011. See also UNGA '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

initiated a process for the adoption of a binding legal instrument on BHR.[336]

Reflecting the Ruggie Framework's three pillars, 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.[337] First, the duty to protect is relatively straightforward as it is rooted in IHRL. It consists of preventing violations 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'.[338] For instance, in the context of socio-economic rights, it extends to the traditional triple duties examined above, that is, states' obligations to protect, respect and fulfil the socio-economic rights of their citizens. This implies taking appropriate legislative and policy steps within the maximum available resources to progressively realise these rights.[339] It also implies preventing violations by a third party or, in the event of such violation, providing or enabling a victim to have prompt, accessible remedies. However, GPBHR is unclear about extraterritoriality of this duty although the SGSR recognises that 'there is a good policy reason' for that.[340]

Second, the corporate responsibility to respect is the baseline responsibility of 'doing no harm' in addition to compliance with national laws.[341] It supplements a state's duty to *protect* although it is independent of the latter.[342] Under this principle, companies have a responsibility to carry out a HRIA as part of their due diligence obligation to 'take reasonable

human rights', https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/216 (accessed on 2 July 2019); UNHRC 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 (2017), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement (accessed 2 July 2019).

336 UNHRC Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (2014) (UNHRC Elaboration 2014).

337 GPBHR 2011 (n 334) Principles 1-13; SGSR Report 2010 (n 331) para 19.

338 GPBHR 2011 (n 334) Principle 1.

339 GPBHR 2011 (n 334) Principles 8-15.

340 Backer (n 312) 45-60. See also OHCHR 'An interpretative guide to corporate responsibility to respect human rights' (2012) para 2, http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (accessed 21 July 2018).

341 Backer (n 312) 59.

342 Backer (n 312) 45-60.

steps' to ensure that they are 'aware of, prevent and address' adverse human rights impacts of their operations.[343] A company must avoid potential and actual adverse impacts of its operation on human rights.[344] The elements of 'adverse impacts' and 'reasonable steps' circumscribe the due diligence obligation as alternatives to element of 'sphere of influence' that would require some level of impact, proximity and control.[345] Thus, GPBHR gives expression to the notion of sphere of influence as examined earlier.

In addition, the responsibility to *respect* extends to avoiding both direct and indirect involvement or complicity in human rights abuse.[346] 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 [but 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'.[347]

Finally, both states and businesses share the responsibility to provide effective remedies to victims of human rights violation.[348] These remedies may be state-based, non-state-based, judicial, non-judicial, financial, or non-financial compensation, restitution, rehabilitation or even apology.[349]

Although each of the protect-respect-remedy principles are separate, they are to be pursued or implemented together.[350] This approach has been widely hailed as an innovative milestone.[351] It has been incorporated into other BHR soft law instruments.[352] It is also significant because of the multi-layered governance approach it adopted, which seems to be the preferred approach for the evolving global governance regimes.

343 GPBHR 2011 (n 334) Principles 11-12.

344 UNHRC SGSR Report: 'Clarifying the concepts of "sphere of influence" and "complicity"' (2008) para 25, https://www.refworld.org/docid/484d1fe12.html (SGSR Report on Sphere of Influence).

345 SGSR Report on Sphere of Influence (n 344) paras 5-25.

346 SGSR Report on Sphere of Influence (n 344) para 30.

347 SRSG Report 2010 (n 331) para 55; SRSG Report 2008 (n 333) paras 46-48.

348 GPBHR 2011 (n 336) Principles 25-31.

349 SRSG Report 2010 (n 331).

350 SRSG Report 2010 (n 331) para 2.

351 Backer (n 312) 50, 68.

352 Backer (n 305).

However, the tug of war continues as activists rejected GPBHR because it fails to effectively close the corporate human rights accountability gap.[353] This is not surprising because, by its nature, GPBHR does not impose legally-binding obligations on 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'.[354] Furthermore, monitoring compliance or implementation is already proving difficult. This, it can be argued, may not be unconnected to the fact that GPBHR focuses more on the actors and not their actions. Arguably, focusing on the violator rather than the violation would, invariably, miss 'the violated' (that is, rights holders/citizens).

Advancing corporate human rights responsibility through soft law has become the norm. 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. In addition, GPBHR's alternative to 'sphere of influence' (that is, taking reasonable steps to prevent adverse impacts), although quite plausible, is a departure from the 'principled pragmatism' that animated GPBHR as it seems highly theoretical. The elements of 'influence', 'control', 'proximity' and 'complicity', arguably, seem more pragmatic and could ensure better adherence by businesses of their responsibility to *respect* human rights, linking the actor and the victim through a chain of causation. Indeed, GPBHR's standard does not properly handle the negative activities of extraterritorial investors such as vulture funds registered in tax havens. As the next chapter will demonstrate, the activities of these investors tend to have direct effects on states' responsibilities to protect, to respect and to fulfil the socio-economic rights of their citizens under ICESCR.

353 D Bilchitz 'Do corporations have positive fundamental rights obligations?' (2010) 57 *Theoria* 1-35.

354 Bilchitz argues thus: 'What is unclear is why we should follow an indirect route at all for recognising that all agents are bound by fundamental rights. If the goal of rights-protection is to ensure the realisation of rights, and multiple actors can impact upon such rights, why then not simply recognise that all actors who have the capacity to affect their realisation 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 (n 220) 152.

It must be acknowledged, however, that the robust debate that GPBHR generated before, during and after its adoption, has contributed in moving the CHRR governance agenda forward. It was as a result of this that an intergovernmental working group was established to come up with a draft treaty on BHR, although the feasibility of this endeavour seems doubtful.[355] 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.[356] The latter, arguably, would amount to an irresponsible lending practice.[357] This point will be elaborated later.

3.7.3 Private creditors and GPBHR

GPBHR clearly applies to nonofficial creditors as businesses. It is not peculiar to any industry or sector. This perhaps limits its reach as there are industry peculiarities that might require a special approach. Ruggie himself recognises this fact.[358] UNHRC also recognises this fact by its adoption of GPFDHR in the same year as GPBHR.[359] However, it is important to draw the connection between the two here. The independent expert who drafted GPFDHR sees it as a 'complement' to GPBHR.[360] This means that GPBHR provides a general framework covering all businesses, while GPFDHR 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 that there would be little or no room for conflict. In the unlikely event of conflict between the two, GPFDHR will prevail as it is specific to sovereign financing.

Importantly, there are additional industry frameworks developed by, among others, the non-official creditors themselves. Prominent among

355 UNHRC Elaboration 2014 (n 336).

356 N Jagers 'Sovereign financing and human rights responsibilities of private creditors' in Bohoslavsky & Černič (n 2) 188-198.

357 Lone (n 260) 233-249.

358 SRSG Report 2006 (n 327) 29.

359 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 GPFDHR in the next chapter.

360 UNHCR '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, particularly economic, social and cultural rights – Cephas Lumina' (10 April 2011) para 17, https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-23_en.pdf (accessed 20 October 2023).

these is the Equator Principle (EP).[361] This 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 EP predates GPBHR, it seems to have recognised some of the principles provided in the latter, which suggests influence of financiers in producing GPBHR.[362] However, it will not be examined here because it is a self-regulatory, industry inspired standard with credibility deficit. In fact, it has been observed that despite the adoption of 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'.[363]

The Institute of International Finance (IIF) adopted the Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets (Principles for Capital Flow) and the Voluntary Principles for Debt Transparency 2019 to, among others, address debt secrecy.[364] This is also below the standard set by the Ruggie Framework. Finally, the UNEP initiated the Principles of Responsible Investment (PRI) aimed at incorporating environmental, social and governance (ESG) issues into private investment and risk management decisions.[365] Like EP, these standards completely suit the interests of private creditors without consideration to socio-economic rights concerns as candidates for responsible investments.

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

361 Equator Principle III 2017, http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf (accessed 10 May 2019).

362 EP 2017 (n 361) Preamble & Principle 2.

363 JP Bohoslavsky & J Černič 'Placing human rights at the centre of sovereign financing' in Bohoslavsky & Černič (n 2) 4.

364 IIF Voluntary Principles on Debt Transparency (2019), https://www.iif.com/Portals/0/Files/Principles%20for%20Debt%20Transparency.pdf (accessed 9 July 2019).

365 United Nations Environment Programme (UNEP) Principles for responsible investment (2006), http://www.unpri.org/about-pri/the-six-principles.html (accessed 20 April 2019); UNEP PRI Spotlight on responsible investment in private debt (2019), www.unpri.org/private-debt//spotlight-on-responsible-investment-in-private-debt/4048.article (accessed 10 May 2019).

4 Socio-economic rights and sovereign debt governance

It is important to recall that the stakeholder approach to sovereign debt governance advanced in the previous chapter places socio-economic rights holders at the centre of sovereign debt discourse. Building on the above discussions, this part will now cement the linkage by identifying the major areas of intersection between socio-economic rights and the broader sovereign debt regime that 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.[366] 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 (that is, national 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 creditors at international courts and tribunals.[367] These will be elaborated and critically examined in the subsequent chapters but, for present purposes,

366 G Marceau 'Introductory note: Trade and poverty' in Schefer (n 14) 41-47; T Cottier 'Poverty, redistribution, and international trade regulation' in Schefer (n 14) 48-65; RP Buckley 'The direct contribution of the international financial system to global poverty' in Schefer (n 14) 278-290; C Tan 'Life, debt, and human rights: Contextualising the international regime for sovereign debt relief' in Schefer (n 14) 307-334; M Krajewski 'Investment guarantees and international obligations to reduce poverty: A human rights perspective' in Schefer (n 14) 189-210.

367 A Reinisch & C Binder 'Debt and state of necessity' in Bohovlasky & Černič (n 2) 115-128.

it is important to briefly examine these intersections to guide subsequent discussions.

4.1 Socio-economic rights and international finance

Many 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 such as vulture funds. While the responsibilities of the former are relatively clear, those of non-official creditors, especially those having extraterritorial character, are not. Indeed, the application of the evolving principles of BHR on non-official creditors, especially bondholders, might seem awkward as these creditors may not have physical presence in the debtor country. In the same vein, determining the impacts of their activities or policies on the realisation of socio-economic rights would be daunting.[368]

Notwithstanding this complexity, however, evidence abounds on the negative impacts of the activities of creditors on the realisation of socio-economic rights in different countries, specifically by way of prioritising debt servicing obligations over socio-economic rights commitments, presumably to enable the indebted state regain access to the international debt markets.[369] With the evolution of BHR principles as examined above, it can, thus, be argued that non-official creditors that 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.[370]

Another relevant issue of interest is the effect of policy lending conditionalities on socio-economic rights.[371] Using the 'legitimate expectation' principle, it may 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.[372] This will be clearer in the

368 This will be examined in detail in ch 5.

369 See reports of UNHCR independent experts on effects of foreign debt on human rights (2008-2019). See also Buckley (n 366) 278-290; Tan (n 366) 307-334.

370 Lone (n 260) 233-248; Jagers (n 356) 179-197.

371 Details of these will be discussed in ch 5.

372 PM Dupuy 'Unification rather than fragmentation of international law? The case of international investment law and human rights law' in PM Dupuy and others (eds) *Human rights in international investment law and arbitration* (2009) 55; *Suez & Others v Argentina* 2010 IIC 443 (ICSID) para 203.

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

4.2 Socio-economic rights and international investment law

The intersection between socio-economic rights and investment law 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 ICSID tribunals to reclaim the full value of their principal and interests. This reflects the dynamic character of IIL. The espousal (state-state) of claims in the area of investment law is now out of fashion. The predominant recourse mechanism now is the ISDS. However, as the analysis in chapter 5 will show, apart from the legitimacy crisis surrounding ITA, submitting sovereign debt claims to investment arbitration raises fundamental conflict of interest concerns.[373] A successful claim also has the potential to subdue socio-economic rights obligations despite the imperative to prioritise the latter as discussed above.[374] 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 objective. In essence, both investor rights

373 This will be discussed further in ch 5. For now, it is sufficient to point out that ICSID was originally designed as part of the architecture of the Bretton Words institutions to support investment flow.

374 Eg, vulture fund litigation and judgment enforcement measures have been shown to frustrate functioning of government activities including implementation of welfare programmes. See UNHRC 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, particularly economic, social and cultural rights, Cephas Lumina (29 April 2010) paras 1-36, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/131/56/PDF/G1013156.pdf?OpenElement (accessed 10 October 2023). An empirical study has found that sovereign debt litigation affects debtors' access to credit markets, undermines international trade, and delays resolution of debt crisis. See J Schumacher and others 'Sovereign defaults in court' (24 February 2018) 1-45, https://www.bancaditalia.it/pubblicazioni/altri-atti-seminari/2014/paper-schumacher.pdf (accessed 20 October 2023).

and human rights have substantial similarities as they seek to address the propensity of states to abuse their powers.[375] As far back as 1956, Amador had argued that the principles for the protection of properties of aliens (national treatment and standard of justice) be subsumed under IHRL.[376] However, whether these standards have any bearing on the realisation of socio-economic rights would depend on relevant facts and contexts.

An in-flow of foreign investments into a state could have a positive correlation with the realisation of socio-economic rights.[377] This is because, with the right policies and measures in place, the effective protection of property rights could spur economic growth and contribute towards the full realisation of these rights. Although bilateral investment agreements (that 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 inflow of investments for economic growth and development of the states concerned.[378] Investment agreements have dual objectives: the protection of investors and economic development of the host state, which necessarily includes improved welfare, and the protection of human rights.[379] Therefore, both socio-economic rights and IIL share this developmental objective. Historically, both fields 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.[380]

Laws relating to international finance and development also enable a sovereign borrower to bring in resources through loans 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

375 Dupuy (n 372) 49-53.

376 ILC 'Report by Garcia Amador on State responsibility' (1956) para 156.

377 M Dimpsey 'Foreign direct investment and the alleviation of poverty: Is investment arbitration falling short of its goals?' in Schefer (n 4) 159-176.

378 Dimpsey (n 377) 161-165.

379 Y Radi 'The "human nature" of international investment law' (Grotius Centre Working Paper 2013) 7.

380 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 (n 372) 61.

directly or indirectly to the well-being of 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.

Finally, by its dynamic economic nature, IEL (and, by extension, sovereign debt regime) is an aspect of international law that cannot avoid socio-economic rights concerns. Through its 'humanistic' and individualistic elements, IHRL could penetrate any aspect of the law in which the well-being of individuals may be at stake.[381] Thus, socio-economic rights' main objective of ensuring the well-being of individuals easily connects with laws relating to international finance and investments as key aspects of global law. This, arguably, could be a confirmation of their primacy in the international legal system.[382] Interestingly, IEL's focus is on the prosperity of the state and, by necessary implication, its citizens.

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.[383] Even the ECrtHR had assumed jurisdiction on matters related to sovereign debt default.[384] 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.'[385]

In essence, recourse to human rights treaties is part of the ideal of justice in international law.[386] 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 creditor interests. The notion of justice is meant to serve both citizens and actors in the international

381 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 … Instability, unforeseeable risks and prejudice – interestingly, all targets of IEL rules when experienced by market participants – are also results of being poor.' See Schefer (n 190) 13-14.

382 Shue (n 168) 19.

383 M Waibel *Sovereign defaults before international courts and tribunals* (2011) 5-20.

384 *Mamatas & Others v Greece* 2012 ECtHR Applications 63066/14, 64297/14 and 66106/14 (20 July 2012).

385 VCLT 1969 Preamble & art 31.

386 *Awas Tingni v Nicaragua* 2001 IACHR 9; *SERAC v Nigeria* (n 207).

economic system.[387] It is on account of this that Petersmann describes citizens as the 'democratic owners' of international law.[388] 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.[389] 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, legitimising and validating a sovereign debt relationship.[390] 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 tribunals have been unofficially turned into dispute resolution institutions in the current sovereign debt regime, it seems that sovereign respondents could employ the provisions of article 42 of the ICSID Convention to introduce defences founded on socio-economic rights.[391] This could enable peoples' rights embodied in the respondent state's constitution to be considered by ICSID tribunals. The growing employment of the *amicus curiae* submissions in investment arbitration might also help in this respect. In the words of Petersmann, 'the 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'.[392]

5 Conclusion

From the foregoing discussions, it is submitted that shifting the focus from the violator to the violation, from the actor to the action, arguably is in tandem with the primacy of socio-economic rights, the imperative for international justice and the reality of economic globalisation. The

387 E Petersmann 'Theories of justice, human rights, and the constitution of international markets' (2003) 39 *Loyola LAL Review* 440.

388 EU Petersmann 'Introduction and summary' in EU Petersmann (ed) *Human rights in international law and arbitration* (2009) 36.

389 *Siemens AG v Argentina* 2007 IIC 227 para 81; *SGS Societe Generale de Surveillance SA v the Philippines* 2005 ICSID Rep 518 para 116.

390 O Suttle 'Debt, default, and two liberal theories of justice' (2016) 17 *German Law Journal* 799.

391 Art 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'.

392 Petersmann (n 388) 42.

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. 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 seek to address socio-economic inequality and to guarantee the well-being of rights holders. It is important to carry out this measurement in the context of the sovereign debt restructuring regime.

However, it must be admitted that despite the recognition of creditors' obligations under IHRL, there are still fundamental hurdles linked to the dominant state-centric doctrine that 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. 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 although, at the level of the UN, the Optional Protocol to ICESCR has been adopted. A second challenge relates to the proof 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 victims 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 growing consensus about the significance of socio-economic rights as dignity-enhancing rights binding on all classes of creditors. 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 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 in creditor actions linked to sovereign debt crisis. 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. 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 that, arguably, undermines the full realisation of socio-economic rights under IHRL, thereby belittling the essential humanity of the rights holders. It seems that positivists' vision of international law undermines the individual on the altar of doctrines. However, the plain reality is that it is unwittingly undermining the progressive development of international law itself. This is because there is general consensus that international law needs to keep pace with the increasing challenges presented by economic globalisation. One of these challenges is the way in which 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.