4 Socio-economic rights in sovereign debt restructuring

1 Introduction

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

Interestingly, over the years, there has been growing consensus on the criticality of mainstreaming socio-economic rights into sovereign financing. For instance, following the recent waves of sovereign debt crises (1980-2015) across the world, many scholars and supranational institutions have advocated the adoption of a debt sustainability framework in order to avert or at least minimise the incidents of sovereign debt crises and, consequently, support a sustained implementation of socio-economic rights, especially in developing countries.[1] Several measures and proposals

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

have been advanced for this purpose. The most prominent and far-reaching of these measures include the United Nations General Assembly (UNGA)'s Basic Principles on Sovereign Debt Restructuring Processes (BPSDRP); the UN Commission on Human Rights (UNHRC)'s Guiding Principles on Foreign Debt and Human Rights (GPFDHR); the UN Conference on Trade and Development (UNCTAD)'s Principles for Responsible Sovereign Lending and Borrowing (PRSLB); and the Sovereign Debt Workout Guide (SDWG).[2] In addition, following sustained campaigns by civil society organisations (CSOs), debt reliefs were granted to poor countries largely by official creditors under the Heavily Indebted Poor Countries (HIPC) and the Multilateral Debt Relief (MDR) initiatives in order to reduce excessive debt burdens of eligible sovereign debtors, ensure debt sustainability and support global development initiatives.[3] Indeed, debt sustainability was among the targets of the defunct Millennium Development Goals (MDGs) on global partnership for development which has now been rolled over into the Sustainable Development Goals (SDGs).[4]

Although these initiatives indicate some form of international cooperation, I will argue that they are inadequate as their general normative character reflects the overwhelming influence of international

2 UNGA Basic Principles on Sovereign Debt Restructuring Processes (adopted 10 September 2015), https://www.undocs.org/A/RES/69/319 (accessed 20 May 2018) (UN BPSDR 2015); UNCTAD Sovereign debt workout: Going forward, roadmap and guide (UNCTAD SDWG 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 2011 (adopted 5 July 2012) (GPFDHR 2011), https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-23_en.pdf (accessed 20 May 2018).

3 IMF Multilateral debt relief initiative: Fact sheet (2016), https://www.imf.org/external/np/exr/facts/pdf/mdri.pdf (accessed 13 April 2018). Prominent among the CSOs include Jubilee Debt Campaign; African Forum and Network on Debt and Development (AFRODADD) consisting of CSOs from many African countries; European Network on Debt and Development (EURODAD) consisting of CSOs from European countries; Latin American Network on Debt and Development (LATINDAD) consisting of CSOs from Latin American countries; Committee for the Abolition of Illegitimate Debts (CADTM) (accessed 10 October 2018).

4 UNGA Transforming our world: The 2030 agenda for sustainable development (adopted 25 September 2015) (UNGA SDG 2015). See also D Domeland & H Kharas 'Debt relief and sustainable financing to meet the MDGs' in CA Primo-Braga & D Domeland (eds) *Debt relief and beyond: Lessons learned and challenges ahead* (2019) 117-140; K Raffer 'Sovereign debt overhang, human rights and the MDGs: Legal problem through an economist lens' in JP Bohoslavsky & JL Cernic (eds) *Making sovereign financing and human rights work* (2014) 101; M Sudreau & JP Bohoslavsky 'Sovereign debt governance, legitimacy, and the sustainable development goals: Examining the principles on responsible sovereign lending and borrowing' (2015) 24 *Washington International Law Journal* 613-634.

creditors (that is, what, for lack of a better term, may be called 'creditor-diktat') in the general sovereign debt regime.[5] I will demonstrate the pattern of creditors' control of the sovereign debt regime as seen over many centuries. The existing SDR regimes remain essentially creditor-determined and, consequently, biased against sovereign debtors and their citizens. This simultaneously frustrates international cooperation and efforts by individual sovereign debtors to progressively fulfil the socio-economic rights of their citizens. In fact, despite their individual and collective responsibilities under international human rights law (IHRL), international creditors show little (or no) concern for socio-economic rights of the debtors' citizens. In essence, notwithstanding their laudable objectives and potential, the above-mentioned measures and initiatives fall far short of the requisite international cooperation envisaged by the

5 The term 'creditor-diktat' is a coinage by Prof Raffer (see K Raffer 'Rethinking sovereign debt: Pleading for human rights, rule of law, and economic sense' (2015) 6 *Accounting, Economics and Law* 243-263). However, Raffer uses it in a restrictive sense, ie, in the context of his proposal for a statutory SDR framework. It is conceived here broadly to include creditors' conscious resistance to the emergence of such a framework using real and subtle economic and geopolitical powers. Thus, creditor-diktat and resistance to a fair statutory SDR framework are treated as two sides of the same coin. Creditor-diktat ensures dominance of creditor-interests thereby rendering the existing SDR regimes to lack the necessary elements of fairness and legitimacy (ie, impartiality or neutrality and independence). The principle of sanctity of contractual obligations is often cited as justification. The US's long-held position, eg, is that 'rules [ie bodies or regimes of law] other than human rights law are most relevant to the contractual arrangement between states and lenders'. Quoted in C Lumina 'Sovereign debt and human rights: The UN approach' in Bohovlasky & Cernic (n 4) 258. This narrative is a child of neoclassical economic rationalisation of market primacy which rejects human rights issues as political matters. While calling it the 'debt continuity norm', Lienau summarises the implications thus: 'Sovereign borrowers must repay, regardless of the circumstances of the initial debt contract, the actual use of loan proceeds, or the exigencies of any potential default … If repayment is expected even in such extreme circumstances, then debtors should certainly bear the burden ... By policing the boundaries of the sovereign debt regime – and ensuring that such issues remain marginal – this rule keeps the core flow of capital safe and relatively free of controversy.' See O Lienau *Rethinking sovereign debt: Politics, reputation, and legitimacy in modern finance* (2014) 1-3. Based on this narrative, most explanations for recurring debt crises across the world tend to focus on debtor's behaviour (eg financial imprudence or lack of good faith in SDR negotiations) regardless of exogenous factors and creditors' behaviours. See JE Fisch & CM Gentile 'Vultures or vanguards: The role of litigation in sovereign debt restructuring' (2004) 53 *Emory Law Journal* 1052-1053 (justifying the creditor's neo-classical narrative on the basis of debtor moral hazard as a result of the possibility of 'opportunistic default' by sovereign debtors); P Wautelet 'Vulture funds, creditors and sovereign debtors: How to find a balance?' (2011) 2-56, http://ssrn.com/abstract=1994425 (accessed 23 January 2018) (calling the objection to vulture funds' litigation a 'war on creditors'). However, this narrative subjects the rights of debtors' citizens to an unrestrained market fundamentalism, prioritising creditor interests thereby disempowering debtors' citizens. See C Tan 'Reframing the debate: The HIPC framework and new normative values in the governance of third world debt' (2014) 10 *International Journal of Law in Context* 255.

Universal Declaration of Human Rights (Universal Declaration), the UN Charter and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[6]

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

6 UN Charter 1945 arts 1(3) & 56; ICESCR 1966 arts 2(1), 22 & 23; Universal Declaration art 28; Convention on the Rights of the Child (adopted 1989, entered into force 2 September 1990) art 4; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) arts 4(2) & 32. See also ESCR Committee General Comment 2: Article 22 – international technical assistant measures (1990) paras 4-10.

7 First, 'game theory' works in a situation of imperfect competition, a contest between rational agents in which each tries to outdo the other in order to derive optimal outcome. It focuses on 'the ways in which interacting choices of economic agents produce outcomes with respect to the preferences (utilities) of those agents, where the outcomes in question might have been intended by none of the agent'. A rational agent in such a contest selects outcomes, calculate paths to the outcome and select action from sets of alternatives. See R Don 'Game theory' in E Zalta (ed) *Stanford encyclopaedia of philosophy* (2014), https://plato.stanford.edu/entries/game-theory/ (accessed 11 October 2018); R Pitchford & MLJ Wright 'On the contribution of game theory to the study of sovereign debt and default' (2013) 29 *Oxford Review of Economic Policy* 658-662. The peculiarity of sovereign debt means that in SDR negotiation, either the debtor or the creditor would 'lose'. See DS Kamlani 'The four faces of power in sovereign debt restructuring: Explaining bargaining outcomes between debtor states and private creditors since 1870' PhD thesis, London School of Economics and Political Science, 2008 22-35. Unlike creditors, however, debtors engage in 'a complex cost-benefit calculus involving political and social considerations, not just economic and financial ones'. IT Nishizawa 'Sovereign debt: Lessons from history' 2, https://www.pp.u-tokyo.ac.jp/graspp-old/courses/2014/documents/5123432-20140501-1.pdf (accessed 27 February 2019). It will then mean, using the unity of sovereignty advanced in ch 2, a loss to the debtor would be a loss to its citizens. Thus, if a 'loss' is inevitable and both parties have socio-economic rights responsibilities under ICESCR, then a prioritisation would be necessary. It means, creditor loss would be justified on account of the primacy of socio-economic rights. This is because debt servicing during good times outweighs the cost of SDD. See F Sturzenegger & J Zettelmeyer 'Creditors' loss versus debt relief: Results from a decade of sovereign debt crises' (2007) 5 *Journal of European Economic Association* 343-351. Second, rational choice theory's 'underlying assumption is that individuals engage in purposive, means-ends calculation in order to attain their goals – that is, they select actions so as to maximise their utility'. A Thompson 'Applying rational choice theory to international law: The promise and pitfalls' (2002) 31 *Journal of Legal Studies* 285-306; OA Hathaway 'Between power and principle: An integrated theory of international law' (2005) 72 *University of Chicago Law Review* 469-536, 482-483; JP Bohoslavsky & A Escriba-Folch 'Rational choice and financial complicity with human rights abuses: Policy and legal implications' in Bohovlasky & Cernic (n 4) 15-32. Third, a historical narrative is a qualitative method that uses past events to draw behavioural patterns. It includes 'temporal ordering of events', to make something out of such events in a coherent and plausible manner. It 'reveals and suggests solutions for analytic problems' by linking 'elements of the past, present and future'. See M Sandelowski 'Telling stories: Narrative approaches in

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

The remainder of the chapter is organised as follows: Part 2 will give a brief historical account of SDDs in relation to socio-economic rights; part 3 will examine the place of socio-economic rights in the existing SDR regimes and will show that despite the collective obligation of states to ensure international cooperation for the realisation of socio-economic rights under ICESCR, the existing SDR regimes, in functional terms, undermine the realisation of these rights; part 4 will examine the utility of the principles provided under, for instance, the UNGA's BPSDRP, the

qualitative research' (1991) 23 *Journal of Nursing Scholarship* 161-162. Therefore, since SDR had been a problem in the past, is a problem for the present, and it seems highly likely to be a problem in the future, it makes logical sense to adopt this approach with a focus on creditors.

8 Kamlani, eg, argues that 'structural and compulsory power help to drive the formation and bargaining outcomes of sovereign debt restructuring regimes'. See Kamlani (n 7) 269. Lienau conceives power in the sovereign debt context as something existing 'through shared ideological structures or discourses – ways of thinking and talking about things in a particular community (such as the international financial community). If a given set of norms seems reasonable, plausible, and normal, then any actions that resonate with these expectations will meet with little resistance or comment.' See Lienau (n 5) 17.

9 Using game theory, Kamlani aptly rationalises that 'it is not generally the case that two parties to a debt negotiation can jointly improve their outcomes through cooperation. In fact, any improvement to the outcome of one party will most likely result in an injury to the second. That is because once the decision is taken to negotiate, each party knows that any concession on his part translates into a gain for the opposing side. Also, sovereign debt management is always and everywhere a political phenomenon. This is not only because one party to the negotiation is by definition a state; it is also because creditor country governments have often inserted themselves into the process'. See Kamlani (n 7) 22; Lienau (n 5) 15-17.

10 V Paliouras 'The right to restructure sovereign debt' (2017) 20 *Journal of International Economic Law* 115.

UNHRC's GPFDHR and UNCTAD's PRSLB, and then determine both the 'right' to SDR and the place of socio-economic rights in each of these instruments; and part 5 offers a critique of the creditor priority norm and argues in favour of prioritising socio-economic rights in SDR.

2 Socio-economic rights in the history of sovereign debt defaults

In both theory and practice, SDD and financial crisis are deeply intertwined: SDD often leads to financial crisis, and the reverse is equally true. Financial crisis compromises the payment system and reduces economic activities, thereby affecting debt servicing obligations that often, translates into default.[11] The increasing internationalisation of sovereign debt markets means that there is always the potential for contagion (that is, market shocks in one jurisdiction spreading to another).[12] According to the International Law Association (ILA), 'contagion is the ricocheting of perceived default risk beyond the initial defaulting country'.[13] Illustrative cases would be the Latin American Debt Crisis in the 1980s, the Mexican Debt Crisis in the early 1990s and the Asian Financial Crisis in the late 1990s.[14] There is evidence showing that contagion often impacts the implementation of socio-economic rights-based programmes by the governments of affected states.[15]

11 CM Reinhart & KS Rogoff 'This time is different: A panoramic view of eight centuries of financial crises' National Bureau of Economic Research Working Paper 13882 (2008) 1-123, http://www.nber.org/papers/w13882 (accessed 12 January 2018); A Franklin & D Gale *Understanding financial crisis* (2007) 9-11; S Pepino 'Sovereign risk and financial crisis: The international political economy of the euro area sovereign debt crisis' PhD thesis, London School of Economics and Political Science, 2013 28; L Ureche-Rangau & A Burietz 'One crisis, two crises … The subprime crisis and the European sovereign debt problem' (2013) 35 *Economic Modelling* 35-44; B de Paoli and others 'Output costs of sovereign default' in RW Kolb (ed) *Sovereign debt: From safety to default* (2011) 27-28. Over the past two centuries, SDD episodes were usually preceded by a lending boom mostly caused by deterioration of terms of trade, recession in the capital/credit nations, raising cost of borrowing arising from higher interest rates in credit exporting nations and a crisis in a major sovereign debtor which could have a contagious effect. See F Sturzenegger & J Zettelmeyer *Debt defaults and lessons from a decade of crises* (2007) 6.

12 K Phylaktis & L Xia 'Equity market contagion and co-movement: Industry level evidence' in Kolb (n 11) 371.

13 International Law Association (ILA) *State insolvency: Options for the way forward* (2010) 4.

14 JA Ocampo 'A brief history of sovereign debt resolution and a proposal for a multilateral instrument' in M Guzman and others (eds) *Too little too late: The quest to resolve sovereign debt crises* (2016) 189-205.

15 AI Tamamovic *The impact of the crisis on fundamental rights across member states of the European Union: A comparative analysis* (2015) 42-93, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf (accessed 20 October 2020).

It is worth noting, however, that while SDD is not a recent phenomenon, contagion is a symbolic manifestation of the increasing globalisation of sovereign debt (and, of course, other financial products) markets.[16] SDD has become a recurring phenomenon that is evident across centuries.[17] Its recurrence has not disincentivised creditors from advancing further loans to sovereigns, sometimes even to perpetual, imprudent defaulters.[18]

16 Phylaktis & Xia (n 12). Contagion could occur on account of factors connected to external trade, interbank markets, the financial markets and payment systems. See Franklin & Gale (n 11) 23.

17 M Tomz *Reputation and international cooperation: Sovereign debt across three centuries* (2007) chs 1-3; SD Krasner *Sovereignty: Organised hypocrisy* (1999) ch 5; K Oosterlinck 'Sovereign debt defaults: Insights from history' (2013) 29 *Oxford Review of Economic Policy* 697-714; 'The end of Europe's middle ages: Banking in the middle ages' (1997), http://www.faculty.umb.edu/gary_zabel/Courses/Phil%20281b/Philosophy%20of%20Magic/Dante.%20etc/Philosophers/End/bluedot/banking.html (accessed 23 October 2018) (Banking in Middle Ages).

18 There is a lot of literature on the economic logic of lending to sovereigns (ie why creditors lend to serial defaulters) and of repayment by sovereigns (ie, why sovereigns repay loans despite absence of a sovereign insolvency framework). While there is widespread consensus that creditors lend for the purpose of profit-maximisation and for protection of geo-political interest especially for the official creditors, scholars are divided into at least four groups on the latter: Retribution theorists, reputation theorists, sanction theorists and power theorists. First, the retributionists argue that creditors punish defaulting debtors by denying new loans or charging higher interests, hence it is better for debtors to avoid default. Second, the reputationists argue that sovereign debtors repay because default would tarnish their image/creditworthiness in the debt market and, thus, limit their future access to the markets. See J Eaton & M Gersovitz 'Debt with potential repudiation: Theoretical and empirical analysis' (1981) 48 *Review of Economic Studies* 289-309; T Asonuma 'Serial sovereign default and debt restructurings' IMF Working Paper 16/66 (2016) 7-10. Third, the sanctionists argue that the fear of military or trade sanctions prompt repayment and not reputation as, without the possibility of creditors all over the world uniting and acting collectively to deny the defaulting debtor further loans, re-accessing the market is not a problem for even a serial defaulter. Sanction theory is divided into two sub-categories: debt-military linkage/gun-boat diplomacy (ie, fear of using military force to extract repayment from the defaulting sovereign) and debt-trade linkage (ie, fear of embargo or trade sanctions by way of seizure of goods or withholding short-term import/export credit). According to Tomz, borrowers repay on schedule to protect and enhance their access to future capital. He rejects the sanction and retribution theories as they suffer from collective action problem and, in particular, retribution theory does not even enjoy historical support as creditors always supply capital regardless of default which shows that creditors always 'ignore history'. He categorises borrowers into three classes based on repayment or default preferences: stalwarts (ie, those who repay in both good and bad times), fair-weathers (ie, those who default in bad times only) and lemons (ie, those who default in both good and bad times). He argues that in general 'governments honour commitments when benefits of compliance outweigh the costs of reneging'. See Tomz (n 17) 14-17. However, the reputation theory has also been questioned because history has shown that debtor's reputation is not a determinant of access to the credit market as, in the words of De Paoli and others, empirical studies show that following the emerging market economies (EMEs) debt crises in the 1980s and 1990s, 'EMEs were often able to re-access international capital markets quite

A circle of defaults, somehow, has become normal. Like contagion, this normalised trend, history shows, has implications for the sustained implementation of socio-economic rights-based programmes within states.[19]

Since concerns for socio-economic rights predate the actual juridification of these rights, it is important to briefly explore how these concerns were expressed in the period before the development of a human rights framework in the context of sovereign debt governance. This is because history has shown that, up to the early twentieth century, creditors and their respective home states had almost an unrestrained freedom over the finances of their sovereign debtors even though some of these debts were patently odious or illegitimate (some would say illegal), and can hardly stand the test of modern international law.[20] To explore this historical trend, the history of SDDs in relation to socio-economic rights is divided into two periods, using the adoption of CESCR as our benchmark: pre-1966 and post-1966.

2.1 Pre-1966 sovereign debt defaults and socio-economic rights

History shows that there were little concerns for human welfare or the plights of the poor and the socially, economically-disadvantaged

quickly'. See De Paoli and others (n 11) 27-28. Fourth, Kamlani advances a power-based theory combining both reputation and sanction theories, arguing that, since the two are not mutually exclusive but 'involving distinct causal mechanisms that can be simultaneously operative … we consider sanctions to be a form of compulsory power, and reputation (or access to funding) to be a form of structural power'. See Kamlani (n 7) 30-35. While each of these explanations seems plausible, the power model seems more realistic within our thematic context here as history shows that there is a mixture of both economic and political power at play in sovereign debt relationships. This is because traditional official creditors literally dictate what happens in the international financial system. Bilateral creditors possess both structural power (ie they may influence access to funding as seen in the role the US played during the 2001-2005 crisis in Argentina) and compulsory power (ie they may rally other creditors to deny further funding to debtors, also seen in the 2001-2005 crisis in Argentina). In addition, the US is also the majority shareholder of IMF. For non-official creditors, Kamlani argues, their 'structural and compulsory powers' drive the formation of SDR regimes'. This may partly explain creditor resistance to a statutory SDR framework as explored here. See Kamlani (n 7) 269. Finally, the thesis on the unenforceability of sovereign debt has been questioned in light of the effects of recent sovereign debt litigations. See J Schumacher, C Trebesch & H Enderlein '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).

19 Tamamovic (n 15) 42-93.

20 Tomz (n 17) 6-9; JV Feinerman 'Odious debt, old and new: The legal intellectual history of an idea' (2007) 70 *Law and Contemporary Problems* 193-220, 202-210.

persons before nineteenth century.[21] This is because the subjectivation of individuals under international law was only recognised at a later stage.[22] In other words, individuals were considered subjects of states, not subjects of international law, and this partly explains the frequency of forced receivership and military intervention by home states of private creditors to forcefully enforce claims against sovereign debtors in the past.[23] Notwithstanding this, beginning with the Enlightenment in the eighteenth century and developments thereafter, especially anti-slavery campaigns, and concerns for improved labour standards in the wake of industrialisation across Western Europe the situation began to change.[24] Subsequently, international humanitarian law, human rights and alien protection laws cemented the international status of individuals in more concrete legal terms.[25]

Nevertheless, the values of human life and dignity that animated socio-economic rights were recognised in many states and empires even before nineteenth century, thanks to the influence of the church.[26] However, as will be shown below, the impacts of war-induced debt defaults on these rights were visible in some states as gun-boat diplomacy (military intervention) and excessive economic sanctions were part of the debt collection norm up to the nineteenth and early twentieth centuries.[27] A key debt recovery strategy during this period was the usual control of sovereign debtors' sources of revenue by creditor nations.

2.1.1 Early periods

SDD is as old as the system of international borrowing and lending itself.[28] Instances abound on the debt defaults of sovereigns or quasi-sovereigns

21 WP Quigley 'Five hundred years of English poor laws,1349-1834: Regulating the working and non-working poor' (1996-1997) 30 *Akron Law Review* 73.

22 R Portmann *Legal personality in international law* (2010) 126-172.

23 WMC Weidemaier 'Contracting for state intervention: The origins of sovereign debt arbitration' (2010) 73 *Law and Contemporary Problems* 339.

24 BH Weston 'Human rights' (1984) 6 *Human Rights Quarterly* 259-260.

25 P Gordon *The evolution of international human rights: Visions seen* (2011) 43-78.

26 The poor's protection was ingrained into the law through the influence of the Church. See Quigley (n 21) 73-76.

27 Despite the different economic theories noted in n 18 above, most historians of sovereign debt have shown that through much of history creditor nations use their military powers to force sovereign debtors to repay through invasion, blockade and bombardment, and this militarised debt collection was a 'well-accepted norm of international law as creditors wrote the rules'. See K Mitchener & WMC Weidenmeir 'Super sanctions and sovereign debt repayment' in Kolb (n 11)155-167.

28 Historically, modern sovereign lending started from money changers extending loans

dating back several millennia.[29] The first recorded SDDs in history were those of the Greek city states in the fourth century BC when 10 out of 13 Greek municipalities defaulted on debts owed to Delos Temple.[30] However, during this period, the notions of social welfare and human dignity, perhaps, were unimaginable because different dehumanising and discriminatory treatments such as slavery were common and, indeed, legitimate practices in different empires.[31]

Between the twelfth and fourteenth centuries, rulers of Spain, South Germany and Italy borrowed substantially from private bankers and wealthy families who obtained guarantees for repayment (that is, collaterals) in the form of positive assignment of public revenues.[32] These, however, proved to be terrible guarantees as evident in the continued collapse of private banking houses upon defaults by their respective sovereign debtors.[33] For instance, in 1339 Britain, under the reign of King Edward III, defaulted on its debts leading to both the failure of the creditor (the Baldi banking house of Italy) and, perhaps, the first recorded financial crisis in Europe.[34] Similarly, France defaulted on its debts in 1598.[35] Notwithstanding these defaults, welfare and socio-economic rights concerns, especially in respect of the poor and the weak, were encouraged by the church.[36]

During the Renaissance, secular, liberal ideals began to penetrate into European polities.[37] Consequently, the above-mentioned religious values were dramatically de-emphasised while sovereign borrowing, at the

to merchants in medieval Europe. However, 'the greatest danger to Medieval banking was in granting loans to European monarchs to finance wars. The use of mercenary armies and field artillery increased the costs of mounting military operations. To finance these activities, rulers were often willing to repay loans at extremely high rates of interest sometimes as high as 45 to 60 percent. Yet if they were unable to repay the loans, they simply did not. Most of the bank failures of the late Middle Ages and Renaissance were the result of large loans to rulers who refused to pay their debts. The Bardi and Peruzzi banks suffered greatly when England's monarchs refused to pay for loans acquired to finance the Hundred Years' War.' See Banking in Middle Ages (n 17).

29 According to Nishizawa, during antiquity, European states addressed their debt crises through 'inflations or devaluation'. See Nishizawa (n 7) 2.

30 A Kotze 'Debt, defaults and crises: A historical perspective' (2015) 6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587342 (accessed 24 August 2019).

31 Kotze (n 30) 3-5.

32 Kotze (n 30) 6-7.

33 Kotze (n 30) 7.

34 Krasner (n 17) 3-10.

35 Reinhart & Rogoff (n 11) 2-8.

36 Quigley (n 21) 73-76.

37 MD Freeman *Lloyd's introduction to jurisprudence* (2001) 107-110; H Scholl 'The church and the poor in the reformed tradition' (1980) 32 *The Ecumenical Review* 236-238.

same time, was used in financing empire expansion.[38] Indeed, sovereign borrowing became even more exigent after the war-induced reorganisation of the international society expressed in the Treaty of Westphalia, which is widely considered to be the root of the modern system of sovereign states.[39] The new sovereigns were financed through both internal and external sources.[40] Internally, it was through 'revenue for rights', that is, rulers extracted taxes from their propertied subjects in return for some measure of individual rights.[41] Political rights, in particular, were tied to taxation; but welfare and social concerns for the poor were relegated to the domain of the church whose influence was drastically weakened following the reorganisation of the sovereign states under the Westphalian Treaty.[42] In essence, taxation provided the link between states and their subjects. Although critical, taxation, however, was an insufficient source of public financing especially for the defence of sovereign's territories and its subjects. Added to this was the fact that domestic borrowing was insufficient and, upon default, enforcement against the rulers was simply impracticable, perhaps inconceivable.[43]

In essence, rulers must either borrow to finance their security and expansionists' interests or risk paying war indemnity to their conquerors.[44] Owing to these real threats, external borrowing became a viable (sometimes, necessary) option. The development of international capital markets in Amsterdam in the sixteenth century added impetus to sovereign borrowing as it enabled states to obtain long-term loans at

38 J Conklin 'The theory of sovereign debt and Spain under Phillip II' (1998) 106 *Journal of Political Economy* 483-513; D Stasavage 'Cities, constitutions, and sovereign borrowing in Europe, 1274-1785' (2007) 61 *International Organisation* 489-525; KA Rasler & WR Thompson 'Global wars, public debt, and the long cycle' (1983) 35 *World Politics* 489-516.

39 Krasner (n 17) 3-10.

40 In 16th century Spain, eg, the Crown's revenues came principally from four sources: Ordinary rents consisting of 'excise taxes, customs duties, revenues from royal monopolies, pasturage fees'; extraordinary rents consisting of monies requiring permission from 'the Church or the Cortes de Castilla, the representative assembly of the third estate'; revenues from the American colonies; and 'extraordinary expedients' consisting of revenues from 'the seizure of merchants' silver, the sale of offices, and the sale or resale of lands on which the Crown may have had a claim'. See Conklin (n 38) 486.

41 Y Barzel & E Kiser 'Taxation and voting rights in medieval England and France' (2002) 14 *Rationality and Society* 473-507.

42 Krasner (n 17) 3-20.

43 As above.

44 Conklin (n 38) 483-513.

lower interest rates.[45] Following the new 'Dutch-finance' (that is, long-term borrowing) system, Britain, for instance, issued annuities with low borrowing costs in 1688.[46] Unfortunately, this enabled merchant creditors to have some control over fiscal policies through the Parliament.[47] This was because the enforcement conundrum was still a challenge for private creditors unless they could secure some measure of political control over the government.[48] This was perhaps the origin of the creditor-diktat as politicians and state institutions began to favour creditors in government policies. It was observed that 'equitable or not, control of fiscal policy by men who themselves had heavy investments in state debts, was the genius of the Netherland's system of borrowing'.[49]

Therefore, many creditors became parliamentarians and, in 1693, King William of Britain was empowered by an Act of Parliament to borrow for the purpose of financing the Anglo-Franco war.[50] The loan proved to be vital as it contributed to the victory over France. Hence, this was said to be the beginning of 'democratic' parliamentary control over sovereign debts in Western Europe.[51] The logic, however, was that creditors succeeded in using governmental institutions to minimise their risks.[52]

As sovereign borrowing increased, so did SDD. Indeed, it became a normal behaviour for many rulers to simply default and, sometimes, repudiate their debts.[53] Without parliamentary control in other states, creditors had few options in cases of defaults and repudiations. For instance, Spain's King Phillip II was notorious for this and, as a result, he has been described as the 'most spectacular defaulter' of the late sixteenth and early seventeenth centuries as he pushed Spain's finances into perpetual indebtedness.[54] This was because he 'fought wars throughout his reign and borrowed extensively to finance fluctuations in military expenditures'.[55]

45 D Stasavage 'What we can learn from the early history of sovereign debt' (2015), https://conferences.wcfia.harvard.edu/files/peif/files/2_stasavage.pdf (accessed 24 August 2019).

46 Stasavage (n 45) 31.

47 Stasavage (n 45) 33.

48 Stasavage (n 45) 30-36.

49 Attributed to Tracey, quoted in Staasavage (n 45) 26.

50 AL Murphy 'Dealing with uncertainty: Managing personal investment in the early English national debt' (2006) 91 *History* 200-217.

51 Stasavage (n 45) 2-3.

52 Stasavage (n 45) 30-36.

53 Krasner (n 17) 127-140.

54 Conklin (n 38) 483-513.

55 Conklin (n 38) 484.

Defaults by sovereign debtors continued through the eighteenth and nineteenth centuries. For instance, France suspended repayment of some loans and repudiated others in 1797.[56] Furthermore, wars were forcing sovereigns to be either creditors or debtors with little or no concern for the well-being of their poor subjects.[57] The Franco-Prussian war of 1870 to 1871 is a classic example of indebtedness following defeat at war. As a result of this war, France was forced to pay huge indemnity despite Germany being the culpable aggressor as it had no moral justification for the war in the first place.[58]

There was some relative stability after the Napoleonic wars.[59] The stability meant fewer sovereign debts.[60] In addition, industrialisation and dominance over the evolving international trading system brought economic prosperity to Western Europe. However, it also created a global financial power asymmetry among states as, for instance, the successor states to the Ottoman, Spanish and Portuguese empires became dependent on foreign loans from Western European states and private creditors in order to finance their operations.[61] Indeed, private creditors from Western Europe, especially Britain, readily extended loans to these emerging states because it was profitable. Therefore, to guarantee enforcement of the loans, private creditors developed an intimate relationship with their home states' governments and, through this, 'lending was tied to a larger strategic and political objective such as cementing international alliances'.[62] Kamlani aptly describes the logic of private creditor protection during the nineteenth century thus:

> Adherence to the terms of a debt contract was seen as the moral undertaking of a civilised nation. Sovereign default was therefore regarded as an immoral and uncivilised act, a characterisation which allowed for a good deal of

56 Krasner (n 17) 127-140.

57 S Hinrichsen 'Essays on war reparations and sovereign debt: Two hundred years of war debts and default, from the Napoleonic Wars to Iraq' PhD thesis, London School of Economics and Political Science, 2021 24, 26-43.

58 The term 'indemnity' refers to material goods or resources exacted by the victor against defeated parties in war. Paying indemnities was the cost of making war and losing, but did not necessarily signify any moral judgment of the losers. See Hinrichsen (n 57) 23.

59 Krasner (n 17) 127-140.

60 As above.

61 Krasner (n 17) 127-151.

62 Krasner (n 17) 127-130; Weidenmier (n 23) 339. Some scholars questioned the logic of gun-boat enforcement. Eg, Tomz argued that 'detailed historical analysis shows that the apparent relationship between default and militarised action is mostly spurious' although he accepts that 'prior to World War 1 countries that defaulted became targets of military action at a higher rate than countries that paid'. See Tomz (n 17) 127-133.

> interference by creditor governments in the affairs of financially distressed sovereigns. Oftentimes this interference coincided conveniently with the larger geo-strategic objectives of Britain relative to a particular defaulting state or region.[63]

In the Americas, the situation was not entirely different as the US and the new Latin American states became independent sovereign entities determined to build infrastructure and finance their developments.[64] In addition, several US sub-national governments defaulted in the 1800s.[65] Between 1830 and 1860 more than 40 per cent of sovereign debtors, mostly from Latin America, defaulted on their debts.[66] The classic case of a contagious, regional SDD was the Baring Crisis of 1890 that started in Argentina.[67] Argentina held about 60 per cent of all defaulted sovereign debts in the 1890s.[68] However, the contagious effect of the crisis spread to other countries in the region, and creditors (mostly finance houses) collapsed, forcing, for example, the Bank of England to rescue the House of Baring that held the bulk of the Argentine debts.[69]

The above SDD episodes affected operations of the concerned states and, consequently, the states' implementation of welfare-based or anti-poverty laws that, essentially, were not framed in the language of 'rights'.[70] However, in the eighteenth century the struggles for independence in the US were primarily anchored on the ideals of dignity, equality and justice. This influenced the constitutionalisation of concerns for the welfare of the weak and the socially and economically disadvantaged, especially at sub-national levels.[71] Along with the French Declaration of the Rights of Man, this laid the foundation for the international juridification of socio-economic rights.[72]

63 Kamlani (n 7) 265.

64 GD Paolera & AM Taylor 'Sovereign debt in Latin America 1820-1913' NBER Working Paper 18363 (2012) 2, https://www.nber.org/system/files/working_papers/w18363/w18363.pdf (accessed 20 April 2022).

65 WB English 'Understanding the costs of sovereign default: American state debts in the 1840s' (1996) 86 *The American Economic Review* 259-275.

66 Kotze (n 30) 7.

67 Mitchener & Weidemier (n 27) 269-275.

68 Mitchener & Weidemier (n 27) 271.

69 As above.

70 Quigley (n 21) 733.

71 FEL Deale 'The unhappy history of economic rights in the United States and prospect for creation and renewal' (2000) 43 *Howard Law Journal* 284 fn 16. See also WE Forbath 'Constitutional welfare rights: A history, critique and reconstruction' (2001) 69 *Fordham Law Review* 1821-1891.

72 Deale (n 71) 284-287.

In short, between 1500 and 1900 there were over 46 SDD episodes in Europe alone, most of which leading to (or resulting from) conflicts and war indemnities.[73] The devastating consequences of these conflicts on the well-being of citizens of the states involved were atrocious. The influence of private creditors also increased through control of state institutions thereby creating, for lack of a better term, a 'creditors-government romance'.

2.1.2 The World Wars

The first half of the 1900s was marked by two devastating wars in which SDDs were part of the political dynamics.[74] War financing and destructions invariably entail human costs and could plunge the warring parties into excessive debts.[75] In the words of Waldenstr and Frey, 'wars put extraordinary pressures on countries' fiscal balances and may even provoke governments to repudiate their sovereign debt'.[76] For instance, the US's war financing and guarantees to the allied powers forced many of these into excessive indebtedness after World War I.[77] It was puzzling,

73 C Arkolakis 'Debt and default' (February 2014) 10, http://www.econ.yale.edu/~ka265/teaching/UndergradFinance/Spr11/Slides/Lecture%208%20Inernational%20Borrowing%20Lending.pdf (accessed 8 October 2023).

74 See generally E Dabla-Norris (ed) *Debt and entanglements between the wars* (2019); NJ Spykman 'The United States and the Allied debts' (1929) 155-184, https://www.zaoerv.de/01_1929/1_1929_1_a_155_184.pdf (accessed 8 September 2023); R Rathborne 'Making war loans to the Allies' Foreign Affairs (April 1925) 371-398, https://www.foreignaffairs.com/articles/united-states/1925-04-01/making-war-loans-allies (accessed 21 September 2019).

75 A Gibbs 'Who still owes what for the two World Wars?' (2015), https://www.cnbc.com/2015/03/18/who-still-owes-what-for-the-two-world-wars.html (accessed 24 September 2019).

76 D Waldenstr & BS Frey 'How government bonds yields reflect war time events: The case of the Nordic markets' in Kolb (n 11) 279-280; PE Shea 'Financing victory' (2014) 58 *Journal of Conflict Resolution* 771-795.

77 Sturzenegger & Zettelmeyer (n 11) 21-22. Oosterlinck notes that 'the costs of the First World War resulted in a huge inter-allied debt, largely developing the practice of loans from one government to the other. The system devised after the Second World War paved the way for more government lending and radically changed the sovereign debt market. Indeed, for the three decades following the Second World War, most lending to developing countries came from either governments or international institutions such as the World Bank or the International Monetary Fund. As a result, defaults were rare and settlements usually occurred without drawing much attention.' See Oosterlinck (n 17) 699. Wormell recounted the British experience and the pressure to borrow thus: 'There was little disagreement, or even negotiation, about the terms for the advances, which were to provide such fertile soil for misunderstanding and acrimony when it came to the terms for their funding: winning the war was uppermost in the British mind, the need was too pressing and the terms and amounts were obviously superior to anything available in the private markets. Instead, strains in the relationship centred on the use of the advances for three purposes: the maintenance of the sterling exchange

therefore, that even the US, the ultimate financier and guarantor, also defaulted on its debts in the 1930s.[78] The Great Economic Depression (1929-1933) saw almost 50 per cent defaults by sovereigns.[79] Interestingly, the sanctity of debt contracts and, consequently, gun-boat diplomacy and forced receivership were relaxed during this period.[80] SDD was no longer seen as an 'immoral', 'uncivilised' breach as creditors themselves turned into debtors. In the words of Kamlani, 'suddenly, default became less of a moral failing and more the rational policy choice of a government looking to protect the economic well-being of its citizenry'.[81] It was, however, not a complete relaxation as Britain and the US continued to support private creditors by diplomatic representation as well as by not granting loans to sovereigns who defaulted on British and US creditors and by imposing trade sanctions.[82]

Therefore, the 'debt politics' provided no incentive for developing an international debt-restructuring mechanism. The task was left to the League of Nations which made efforts to institutionally address global debt problems.[83] Although the League of Nations' efforts were laudable, they, however, could not prevent the outbreak of another war.[84]

rate; the repayment of British debts to the American private sector incurred before 1 April; and their use for expenditure outside the USA.' See J Wormell *The management of the debt of the united kingdom: 1900-1932* (2002) 243.

78 The narrative that the US has never defaulted on its debt has been shown to be factually incorrect. Eg, in 1814 the US Treasury Secretary, Alexander Dallas, admitted that 'the dividend on the funded debt has not been punctually paid; a large amount of treasury notes has already been dishonoured'. Also, in 1934 the US government (under President Roosevelt) declined to repay treasury bondholders in gold as agreed and this, strictly, amounted to a default (*Perry v United States* 294 US 330 (1935)). See M Phillips 'The not-so-secret history of US default' *Axios Markets* 26 May 2023; S Edwards *American default: The untold story of FDR, the Supreme Court, and the battle over gold* (2018).

79 Tomz (n 17) 2. See also B Eichengreen & R Portes 'Debt and defaults in the 1930s: Causes and consequences' (1986) 30 *European Economic Review* 599-640; B Eichengreen & R Portes 'The interwar debt crisis and its aftermath' (1990) 5 *The World Bank Research Observer* 69-94.

80 CP Enrique 'Paris Club: Intergovernmental relations in debt restructuring' in B Herman, J Antonio Ocampo & S Spiegel (eds) *Overcoming developing country debt crises* (2010) 234.

81 Kamlani (n 7) 265.

82 Sturzenegger & Zettelmeyer (n 11) 20.

83 League of Nations 'Report of the committee for the study of international loan contracts' (1939) 6, http://biblio-archive.unog.ch/Dateien/CouncilMSD/C-145-M-93-1939-II-A_EN.pdf (accessed 20 August 2018). Intense negotiation followed between US and the Allied countries. See Spykman (n 74) 161-181; J Chamber 'Neither a borrower nor a lender be: America attempts to collect its war debts 1922-1934' MA dissertation, East Tennessee State University, 2011 123-137.

84 Enrique notes that after the war the focus was on the question 'at what point was it

SDDs were among the multiple causes of World War II as Germany repudiated all its sovereign debts in 1933.[85] Compared to the first, World War II was even more costly in financial terms and it was more devastating in terms of human costs.[86] Millions of people, mostly civilians, were killed while many survivors sustained long-term impacts in terms of unemployment and lack of access to food, health care and education.[87] The consequences of the war, however, influenced the laying of the foundation of modern sovereign financing. A notable example was the establishment of multilateral official creditors (that is, the International Monetary Fund (IMF) and the World Bank (WB)) and, subsequently, the International Centre for the Settlement of Investment Disputes (ICSID) which, gradually but unofficially, has become a new dispute settlement forum for adjudicating claims against sovereign debtors in the event of either SDD or rejection of proposed SDR terms by hold-out creditors. For instance, following Argentina's default in 2001, over 40 arbitration cases were initiated against Argentina.[88] The aftermath of the war also saw the establishment of a more comprehensive, rule-based international trading system under the General Agreement on Trade and Tariff (GATT).[89] The aftermath of the war saw increased official lending and institution building based on a positivist vision of international law.[90] The entrance of IFIs into the sovereign debt scheme completely changed the dynamics of borrowing and lending but without actually addressing the underlying problem of the past centuries: a vacuum in the SDR framework.[91]

more appropriate for the well-being of the international community to write off the debts rather than collect them? And how much breathing space did the debtors need before resuming total, partial, or any payments at all?' See Enrique (n 80) 234.

85 M Goldmann 'Sovereign debt crises as threats to the peace: Restructuring under Chapter VII of the UN Charter' (2012) 4 *Goettingen Journal of International Law* 153-175; Stasavage (n 45) 489-525; Rasler & Thompson (n 38) 491-507; Eichengreen & Portes (1986) (n 79) 599-640; Eichengreen & Portes (1990) (n 79) 69-94.

86 IMF 'Destruction and reconstruction (1945-1958)', https://www.imf.org/external/np/exr/center/mm/eng/mm_dr_01.htm (accessed 9 November 2023).

87 I Kesternich and others 'The effects of World War II on economic and health outcome' (2014) 96 *Review of Economic Statistics* 103-118.

88 A Reinisch & J Tropper 'The Argentinian crisis arbitrations' in HR Fabri & E Stoppioni (eds) *International investment law: An analysis of the major decisions* (2022) 119-134. While over 150 claims were filed against sovereign debtors before domestic courts over the past three decades, most creditors prefer negotiation over litigation and arbitration. See Schumacher and others (n 18).

89 P van den Bossche *The law and policy of the world trade organisation: Texts, cases and materials*. (2005) 78-86.

90 Oosterlinck (n 17) 699.

91 Raffer (n 5) 254; O Lienau 'The challenge of legitimacy in sovereign debt restructuring' (2016) 57 *Harvard International Law Journal* 153.

Finally, as noted in the previous chapter, the impacts of World War II were instrumental to the adoption of ICESCR in 1966 as the world rediscovered the intrinsic human values earlier advocated and practised by the church and other religions. Enlightenment scholars already provided the theoretical foundation for the Bills of Rights that followed.

In addition to ICESCR, the post-war institutionalisation had succeeded in establishing a positivist international legal system that creditors have been invoking to evade responsibility for socio-economic rights using the public-private divide, 'contractual justice', the principle of *pacta sunt servanda* and the fragmentation argument.[92] The institutionalisation may have eased (or perhaps ended) the pre-war forced receivership and gun-boat diplomacy for sanctioning SDD and the circle of conflicts on account of sovereign debt. However, the enforcement conundrum remained partly because of the positivists' vision of international law as the pre-World War II deployment of arbitration was disrupted.[93]

2.2 Post-1966 SDDs and socio-economic rights

Following the adoption of ICESCR in 1966, state parties committed themselves to the full realisation of socio-economic rights through progressive implementation of programmes and policies.[94] This placed socio-economic rights on the global economic and political agendas. However, international actors have done little to garner the desired international cooperation necessary for the formulation and operationalisation of a fair SDR system. This has negative implications for the realisation of these rights as can be seen from the increasing SDDs and the drastic cuts to socio-economic rights-based programmes since the adoption of ICESCR, even in advanced economies.[95] Indeed, the costs and

92 Tan (n 5) 256.

93 Raffer (n 5) 249-250.

94 ICESCR art 2(1).

95 See, eg, C Mills '"Dead people don't claim": A psychopolitical autopsy of UK's austerity suicides' (2018) 38 *Critical Social Policy* 302-322; J Wills & BTC Warwick 'Contesting austerity: The potentials and pitfalls of socio-economic rights discourse' (2016) 23 *Indiana Journal of Global Legal Studies* 629-664; ME Salomon 'Of austerity, human rights and international institutions' (2015) 21 *European Law Journal* 521-545; SJ Konzelman 'The political economics of austerity' (2014) 38 *Cambridge Journal of Economics* 701-741 (arguing that austerity could be traced back 300 years); Tamamovic (n 15) 95-110; M Themelidou 'Social rights in crisis and the case of health in Greece' (2018) 8 *Journal of Regional Socio-Economic Issues* 8-15; R Swaminatham 'Regulating development: Structural adjustment and the case for national enforcement of economic and social rights' (1998-1999) 37 *Columbia Journal of Transnational Law* 161-214. However, some scholars have questioned the 'freezing, non-responsiveness' of IHRL to the global reality of austerity. See, eg, M Dowell-Jones 'The economics of

impacts of SDDs between 1966 and 2015 significantly surpassed those of the preceding centuries combined, at least, since recorded history began.[96]

2.2.1 Latin American debt crisis

Since the adoption of ICESCR, there was no major SDD episode until the late 1970s when the Latin American debt crisis began to manifest following unprecedented lending by US commercial banks as a result of the excess liquidity brought by the oil boom.[97] The returns plus the underlying private law paradigm incentivised bank lenders to extend loans to developing states. The raising of US interest rates in 1981, higher oil prices and falling commodity prices for export, all combined to push sovereign debtors' interests on loans payable to these banks higher.[98] By 1983, the combined sovereign debts of Latin American countries stood at US $380 billion.[99] Already in 1982, Mexico had defaulted on its US $90 billion debt owed mostly to US banks.[100] This had a contagious effect as Argentina, Bolivia, Brazil and Venezuela immediately followed suit.[101]

Notwithstanding the widespread SDDs, banks responded by rescheduling principal payments and extending further loans (called 'bridge loans') to enable sovereign debtors to continue servicing the interest components of the loans.[102] The real logic was to enable the banks to, first, avoid insolvency and, second, avoid reporting non-performing loans

the austerity crisis: Unpicking some human rights arguments' (2015) 15 *Human Rights Law Review* 193-223.

96 C Trebesch & M Zabel 'The output costs of hard and soft sovereign default' (2016) 2-5, https://www.econstor.eu/bitstream/10419/147397/1/cesifo1_wp6143.pdf (accessed 21 January 2019); Kotze (n 30) 6-8.

97 PJ Power 'Sovereign debt: The rise of the secondary market and its implications for future restructurings' (1996) 64 *Fordham Law Review* 2707.

98 Power (n 97) 2708.

99 Power (n 97) 2707.

100 Power (n 97) 2707 fn 17.

101 Power (n 97) 2708. Also, Buckley rationalises the behavioural pattern that prompted the crisis: '[T]he creditors were prepared to keep extending credit, far beyond reasonable levels, because the absence of a bankruptcy mechanism meant they expected to be repaid by the debtor nations increasing taxes and reducing social services to their people … The debtors were prepared to keep borrowing, far beyond reasonable levels, because of the short time frames of politicians and the need at all costs to avert a recession to be able to win the next election, as well as the effect, in many cases, of bribes paid by creditors to individual politicians and technocrats … The creditor nation governments encouraged this excessive extension of credit because it served their short-term interest in avoiding a recession.' See RP Buckley 'The bankruptcy of nations: An idea whose time has come' (2009) 43 *The International Lawyer* 1193.

102 Power (n 97) 2710.

on their balance sheets.[103] Still, the logic failed and so did several other interventionist policies.[104] It was the Brady Bonds (bond issues named after the then US Treasury Secretary, Nicholas Brady), which exchanged these bank debts for bonds tradable on secondary markets, that eventually resolved this crisis.[105] However, this initiative opened a Pandora's box as, instead of the few bank creditors, thousands of bondholders now became creditors, thereby raising three major problems, as will be examined below: collective action problems; litigations by both hold-out creditors (recalcitrant creditors claiming the original, pre-restructuring values of the debts); and vulture funds (creditors who purchased debts at a giveaway price, yet claim the original, pre-restructuring values of the purchased debts).[106]

For socio-economic rights, these contagious SDD episodes brought to the fore the question of trade off (that is, between continued debt servicing, on the one hand, and SDD on the other). Indeed, a combination of bridge loans, higher interest rates and low commodity prices for exports, meant a huge accumulation of debts that had devastating social and political impacts on the sovereign debtors and their citizens.[107] In addition, the Brady Bonds were conditioned upon IMF conditionalities.[108] This literally chained the sovereign debtors to IMF and the creditors. Powers observes:

> [A]ll parties were thus dependent upon one another: the banks deemed it essential that the debtor countries implement austerity programmes; the debtor countries would not implement austerity programs unless the IMF extended loans; the IMF would not make loans unless the commercial banks extended bridge loans.[109]

Indeed, it was a full circle but, in plain reality, it was a circle for debt accumulation.

103 Power (n 97) 2710-2711.

104 Sturzenegger & Zettelmeyer (n 11) 17.

105 Since the Brady Bonds, SDR involves a 'mixture of interest reduction, principal reduction, and maturity extension'. See Sturzenegger & Zettelmeyer (n 11) 17-18.

106 R Pitchford & MLJ Wright 'Holdouts in sovereign debt restructuring: A theory of negotiation in a weak contractual environment' (2012) 79 *Review of Economic Studies* 812-837; Fisch & Gentile (n 5) 1052-1053.

107 Power (n 97) 2708-2712.

108 Sturzenegger & Zettelmeyer (n 11) 17-18.

109 Power (n 97) 2712.

2.2.2 SDDs in the 1990s-2000s: African, Asian, and Argentine debt crises

From the 1980s through 1990s, SDDs continued across the world unabated, thereby decelerating the implementation of socio-economic rights-based programmes especially in developing countries.[110] In Africa, for instance, balance of payment difficulties linked to years of unfair trading relationships dating back to colonialism as well as the drying up of sovereign financing from official creditors forced many countries to borrow from Western commercial banks that had more than enough liquid petrodollars in need of recycling as a result of the oil boom.[111] Between 1970 and 1987 alone, the external debt stock of African countries increased from a total of US $8 billion to US $174 billion.[112] By 1990, with increased debt servicing but reduced investment flows into Africa, the total debt burden of African countries was estimated to be around US $220 billion.[113] By 2000, the debt stock stood at US $330 billion.[114] This led to widespread SDDs causing 'general hardship for the weakest section of the population' and the adoption of IMF-induced austerity measures.[115] Naturally, these measures meant drastic spending cuts on social, health and education programmes leading to instability and massive protests in, for instance, Nigeria, Ghana, Sudan and Tunisia.[116] Despite some odious elements (for instance, bribery and corruption) in some of these loans, successive African governments did not resort to repudiation, preferring, instead, to pursue rescheduling with bridge loans extended to continue debt servicing.[117] The result was the accumulation of more debts.

However, the SDD episodes during this period were not confined to Africa. The disintegration of the Soviet Union into 15 sovereign

110 J Baloro 'African responses to the debt crisis: The relevance of public international law' (1990) 23 *Comparative and International Law Journal of Southern Africa* 139; CN Okeke 'The debt burden: An African perspective' (2001) 35 *The International Lawyer* 1489; A Carty 'The Third World debt crisis: Towards new international standards for contraction of public debt' (1986) 19 *Law and Politics in Africa, Asia and Latin America* 402-404.

111 Baloro (n 110) 141-143.

112 JE Green & MS Khan 'The African debt crisis' (1990) 1-5, https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/12010/88201.pdf?sequence=1 (accessed 19 July 2019).

113 Baloro (n 110) 142.

114 AFRODAD 'Africa's external debt: An analysis of the African countries' (2003) 5-6, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/1688/AFRODAD-248538.pdf?sequence=1&isAllowed=y (accessed 19 July 2019).

115 Baloro (n 110) 141.

116 Baloro (n 110) 141-143.

117 Ghana repudiated in 1972 but was forced to cancel the repudiation and continued its debt servicing. See Balaro (n 110) 143-144.

states between 1989 and 1991 raised odious debt concerns and led to multiple SDDs.[118] Russia, as the successor to the Soviet Union, had to negotiate a debt rescheduling of US $60 billion in 1997.[119] In July of the same year, the Asian financial crisis erupted and its contagious effects were devastating, especially in Indonesia and Thailand.[120] Both crises constrained the financial capacities of the concerned states, leading to massive unemployment and tremendous impacts on health, education and welfare programmes.[121] Over 10 million people dropped below the poverty line in just two years.[122] Not surprisingly, the IMF's intervention and its structural economic reform benchmarks, the structural adjustment programmes (SAPs), were widely condemned in light of these negative consequences.[123] Moreover, SAPs were based on IMF's creditor-focused debt sustainability assessments (DSAs).[124]

Because of contagion, the Asian crisis increased the cost of borrowing for many countries.[125] Consequently, at the turn of the Millennium, Argentina, faced with limited options, defaulted on its US $93 billion debt.[126] Drastic government measures, including bank deposit freeze and expropriation-like measures in the public utilities' sector, were imposed.[127]

118 Kotze (n 30) 7.

119 As above.

120 Sturzenegger & Zettelmeyer (n 11) 10. The peculiarity of the Asian Crisis was that it started as a corporate debt crisis and spread to constrain government finances across the region and, in 1999, it extended to Argentina. Buckley identifies the following factors responsible for the crisis: '(i) fixed exchange rates tied to an appreciating US dollar when the currency of the countries' principal competitor, Japan, was depreciating; (ii) weaknesses in the local financial sectors and their prudential regulation so that local banks were able to borrow heavily abroad and re-lend the proceeds domestically without hedging the foreign exchange risks (i.e. relying utterly on the peg of the local currency to the Dollar to hold); (iii) crony capitalism which further eroded the effectiveness of prudential regulation; (iv) excessive capital inflows facilitated by premature liberalization of local financial sectors; and (v) a region-wide loss of confidence'. See Buckley (n 101) 1194.

121 Buckley (n 101) 1194.

122 As above.

123 UNCTAD SDWG 2015 (n 2) 40.

124 UNCTAD SDWG 2015 (n 2) 26 & 40.

125 Buckley (n 101) 1195.

126 A Gelpern 'After Argentina' Institute for International Economics Policy Brief 05(2) (September 2005), https://www.piie.com/sites/default/files/publications/pb/pb05-2.pdf (accessed 20 April 2020); D Mario and others 'The Argentinean debt: History, default and restructuring' in Herman and others (n 80) 179-230; M Mario and others 'Lessons from the Argentine case of debt accumulation, crisis and default' UNCTAD Research Paper (2005), https://vi.unctad.org/debt/debt/m3/documents/Country%20Case% 20Argentina%20%5B1%5D.PDF (accessed 14 June 2018).

127 Mario and others (126) 2-18.

The measures adopted forced the population into mass demonstrations leading to loss of lives and properties and resignation of four successive presidents within a few months.[128] Following protracted negotiations, IMF-induced austerity measures were adopted.[129] Unemployment soared, and social security and pension benefits were negatively affected leading to nationalisation of private pension funds.[130]

Besides the impacts of these measures on the implementation of socio-economic rights, the Argentine SDD opened another Pandora's box: resort by non-official creditors to the investor-state dispute settlement (ISDS) mechanism, as will be examined in the next chapter. It also led to various litigations before domestic courts.[131] These litigations were fuelled by the hold-out and vulture funds phenomena that have become the main obstacles to orderly restructuring. In the litigations involving Argentina, the costs of these actions were very high. The litigations added further demands upon a completely bankrupt treasury. The implication was that they simultaneously constrained Argentina's financial capacity, increased its debt burden, and undermined the fulfilment of socio-economic rights obligations.[132] Indeed, up to 2018, Argentina was battling with the effects of this sovereign debt crisis.[133]

2.2.3 The Eurozone debt crisis

The Eurozone debt crisis was one of the costliest in history as a result of the effects of contagion in the highly-integrated currency union.[134] The

128 Gelpern (n 126) 9.

129 Gelpern (n 126) 8.

130 G Datz 'The inextricable link between sovereign debt and pensions in Argentina 1993-2010' (2012) 54 *Latin American Politics and Society* 110-117.

131 See, eg, *NML Capital Ltd v Republic of Argentina* (2012) 699 F3d 246, 253-254 (2nd Circuit) and the appeal to the US Supreme Court in *Republic of Argentina v NML Capital Ltd* (2014) 189 L Ed 2nd 234 (SC); *EM Ltd v Republic of Argentina* (2007) 473 F3d 463, 481 (2nd Circuit); *Aurelius Capital Partners LP v Republic of Argentina* (2009) 584 F3d 120 (2nd Circuit). In Germany, some cases were also filed. See Joined Cases 2 BvM 1-5/03 & 2 BvM 1-2/06, (2007) 360, 2610 (Germany's Federal Constitutional Court) http://www.bundesverfassungsgericht.de (accessed 9 June 2017).

132 Gelpern (n 126) 9.

133 'Argentina agrees to $50bn loan from IMF amid national protests' *The Guardian* 8 June 2018, https://www.theguardian.com/business/2018/jun/08/argentina-loan-imf-protests-peso (accessed 29 June 2018).

134 VV Acharya and others 'The real effects of the sovereign debt crisis in Europe: Evidence from syndicated loans' (2018) 31 *Review of Financial Studies* 2855-2896, https://pdfs.semanticscholar.org/3010/b4be27d311c0370beabe15f8c13f65559eff.pdf (accessed 29 June 2018); S Miklaszewicz 'Sovereign debt crisis of the eurozone countries' (2016) 7 *Oeconomia Corpanicana* 357-373.

financial crisis that started in the US enveloped the world and deeply penetrated European financial markets, leading to increased market volatility, uncertainty and, consequently, more sovereign risks.[135] In 2010 Greece announced a default, and Ireland, Italy, Portugal and Spain followed suit.[136] Despite efforts by the *Troika* (European Central Bank, European Commission and IMF), Greece defaulted again on its US $138 billion debt in 2012.[137]

The impacts of the crisis on the population of these countries were immense.[138] For instance, in Greece, unemployment jumped from 8 per cent in 2008 to 25 per cent in 2012.[139] In addition, health care and social security for the elderly were neglected as a result of austerity.[140] The people were forced to turn 'to the family and charities to cover basic survival needs – food, shelter and health services'.[141] Indeed, there is empirical evidence showing a correlation between the remarkable increase in suicide rates and the sovereign debt crisis in Greece.[142] The fiscal austerity affected the healthcare system, reduced fertility rates, increased alcoholism and increased divorce rates.[143] There was also a backlash leading to protests, a change of government and a referendum on further austerity, which the people rejected.[144]

135 Kotze (n 30) 8.

136 Kotze (n 30) 16-19. However, some studies showed that the Greek debt crisis started much earlier in 2009. See GP Kauretas 'The Greek debt crisis: Origins and implications' (2015), https://blogs.sl.pt/cloud/file/21d38da7521f27cbd70ea0ecf7a4093a/balcaodacantina/2015/Kouretas.pdf (accessed 20 February 2018).

137 Kotze (n 30) 8.

138 Tamamovic (n 15) 95-110.

139 HD Dellas & GS Tavlas 'The gold standard, the Euro and the origin of Greek sovereign debt crisis' (2013) 33 *CATO Journal* 492.

140 TM Thomson and others 'Structural adjustment programmes adversely affect vulnerable populations: A systematic-narrative review of their effect on child and maternal health' (2017) 38 *Public Health Reviews* 13-35; TH Stubbs & AE Kentikelis 'Conditionality and sovereign debt: An overview of human rights implications' (2018), http://www.kentikelenis.net/uploads/3/1/8/9/31894609/stubbskentikelenis2018-conditionality_and_sovereign_debt.pdf (accessed 14 August 2020).

141 Thomson and others (n 140) 13-15.

142 P Harrison 'Greek debt crisis: Tragic spike in suicide' (2015), https://www.medscape.com/viewarticle/846904 (accessed 25 July 2018).

143 N Antonakakis & A Collins 'The impact of fiscal austerity on suicide: On the empirics of a modern Greek tragedy' (2014) 112 *Social Science and Medicine* 39-50. The situation was almost the same in other countries. See, eg, with respect to Spain, OR Vargas and others 'Human rights and external debt: Case study of Spain' (2016) 396 *Economia Informa* 3-33.

144 Tamamovic (n 15) 95-110.

2.2.4 SDDs, creditor-diktat and socio-economic rights: A reflection

It is important to now contextualise the above historical exploration of episodes of SDDs in relation to the implementation of socio-economic rights-based programmes. First, creditor-diktat started through 'creditors-government romance' supported by the underlying private, contractual paradigm based on the public-private divide. Second, the historical trend shows that the implementation of socio-economic rights, as required by ICESCR, has been reduced to 'a fluctuating obligation' subjected to the vagaries of creditors (for instance, bridge loans) and the volatility of the markets, all of which led to further accumulation of unsustainable sovereign debts. Unarguably, this is unhealthy for the realisation of socio-economic rights. The positivist, creditor-focused fragmentationists may argue that SDD and socio-economic rights belong to different regimes of international law.[145] Thus, like oil and water, the market and socio-economic rights have no meeting points. This argument, however, is hollow because the framers of ICESCR understood the potential consequences of unregulated market behaviours (that often trigger contagion) on the universal, shared humanity expressed by socio-economic rights.[146] The drafters of ICESCR were not unaware of the volatility of the sovereign debt markets at the inception of the Covenant, given what transpired before 1966.[147] In addition, the fragmentation argument seems to lack historical, legal and moral justifications.[148]

Third, sovereign debt cannot be divorced from ICESCR because of the positive correlation between responsible borrowing and meaningful implementation of socio-economic rights.[149] Indeed, the above history

145 As consistently maintained by the US. See S Brooks 'The politics of regulatory design in the sovereign debt restructuring regime' (2019) 25 *Global Governance* 409. However, ILC maintains that 'no legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside it*.' See ILC *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi* (2006) para 193, http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (accessed 13 June 2018).

146 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* 156-229.

147 Alston & Quinn (n 146) 219-220.

148 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) 45-62.

149 Y Li & U Panizza 'The economic rationale for the principles on promoting responsible sovereign lending and borrowing' in C Esposito and others S*overeign financing and*

shows that external debt is primarily aimed at addressing deficits arising from insufficient domestic revenues from tax, internal borrowing and other income-generating investments.[150] It also shows that it was the age-long geopolitical and economic power imbalance and the post-war institutionalisation that led to the establishment of a 'non-system' that supports creditor interests, backed up by the international political and trading systems.[151] To date, questions remain about the fairness of the latter system as countries struggle to deal with balance of payment problems, which usually compound their debt burdens.[152] In other words, unfair trade practices contribute to trade imbalance and, consequently, increased external borrowing to deal with budget deficits. This can hardly support a sustained implementation of programmes for the realisation of socio-economic rights.

Fourth, it is worth noting that concerns for the poor and the socially, economically disadvantaged was not the priority of private creditors during the early history of sovereign debt. However, welfare and anti-poverty concerns for the poor became part of the state laws and policies in medieval Europe because of the overwhelming influence of the church.[153] There was no recognition of any socio-economic rights in the strict sense of the term, but there was a fair understanding of the anti-poverty idea. Unfortunately, when the Westphalia system was introduced, the focus shifted to political rights that were tied to taxation of property owners, although this did not prevent states from making anti-poverty legislation.[154]

Fifth, sovereign borrowing and SDDs increased because of frequent wars up to the time the multilateral official creditors were established. However, some debts were merely imposed as war indemnities that, at the time, were deemed an appropriate price for the defeated party to pay. In addition, private creditors enjoyed significant support from their home states because of the enforcement problem.[155] Thus, if states, on the basis

international law: The UNCTAD principles on responsible sovereign lending and borrowing (2013) 17-20.

150 Li & Panizza (n 149) 17.

151 Lienau (n 5) 15-17.

152 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' (9 August 2010) 5-9, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/478/85/PDF/N1047885.pdf?OpenElement (accessed 23 October 2023).

153 Quigley (n 21) 73-76.

154 Quigley (n 21) 73-83.

155 Enrique (n 80) 231-233 (noting the invasion and bombing of the Mexican harbour of Veracruz by gunboats of Great Britain, France, and Spain on 31 October 1861,

of their connections with their citizens, deemed it necessary to intervene on behalf of their private creditors using gun-boat diplomacy and forced receivership as methods of debt collection, then, it would seem plausible to argue for the reverse situation in modern international law, that is, home states of private creditors should shoulder responsibility for the latter's direct or indirect violation of socio-economic rights especially because of a stronger tax connection today.[156] States derive benefits from taxes paid by their private creditors.[157] Indeed, the payment of tax is a core feature of citizenship which is the main justification for the principle of diplomatic protection. 'Whoever illtreats a citizen', Vattel famously wrote, 'indirectly injures the state, which must protect that citizen'.[158] An injury to a national is considered an injury to the state.[159] For private funds, incorporation in the home state or any 'permanent and close connection' with the state would suffice.[160] Although this doctrine is now considered 'redundant' in the face of significant developments in the areas of protection of foreign investments and human rights,[161] it is still a powerful legal instrument that could support our argument for holding home states of non-official creditors responsible for socio-economic rights violations.

The attribution of socio-economic rights responsibility to home states of private creditors using diplomatic espousal might be controversial. It might be countered, for instance, that it would amount to imposing responsibility on the home state without regard to any fault element. This raises a fundamental question regarding the nature of this responsibility.

following the Mexican government's suspension of foreign debt service payments on 17 July 1861).

156 Enrique notes: '[D]uring the nineteenth and early twentieth centuries, ad hoc associations of private holders of foreign government bonds customarily formed themselves for negotiating with debtor governments when payment difficulties arose. Occasionally the bondholders' governments assisted, even employing "gunboat diplomacy" to enforce compliance with contractual obligations. The doctrine on which governments acted on behalf of private creditors in collecting payments on foreign sovereign debt was called "diplomatic protection", the idea behind which is that governments might come to the aid of their citizens at their request, when they had not, or not fully, been paid. The ultimate remedy was dispatching gunboats to collect on the debt, as by capturing and operating the debtor's customs house.' See Enrique (n 80) 232.

157 Of course, some private creditors were incorporated in so-called tax havens.

158 J Dugard 'Articles on diplomatic protection' United Nations Audiovisual Library of International Law (2013), https://legal.un.org/avl/pdf/ha/adp/adp_e.pdf (accessed 11 October 2023).

159 *Mavrommatis Palestine Concessions (Greece v UK)* (1924) PCIJ Reports 1924 Ser A (No 2) 12.

160 *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (1970) ICJ Reports 3 42.

161 Dugard (n 158) 1-3.

It also raises a question of causation. Some scholars have advanced a normative, tort-based standard of responsibility (duty of care, reasonable man, and foreseeability of harm, and so forth, tests) to address the causation concern in respect of debt repayment.[162] Barry proposes an 'irresponsible conduct principle' which entails holding creditors partly 'outcome responsible' for imprudently advancing loans to excessively indebted sovereigns leading to human rights underfulfilment.[163] Using the tort-based fault principles, he argues that it would not be plausible for debtors and their citizens to solely bear the burden of debt repayment where the borrower was neither imprudent nor negligent and could not have foreseen or controlled the variables arising from the global financial environment.[164]

However, this tort-based proposal for creditor 'outcome responsibility' reinforces the private law paradigm. Like contract, it is purely private in nature. It arguably does not align with the character of the state in sovereign debt. On the contrary, the socio-economic rights responsibility of home states of private creditors being advocated here, by nature, is within the human rights responsibility matrix that is treaty-inspired and, arguably, demands higher standards than that envisaged under tort of negligence.

Finally, although there is evidence of SDDs across centuries affecting both developed and developing countries, there is also evidence suggesting that creditor nations do not generally support a statutory legal framework to resolve claims arising from SDDs preferring, instead, to use *ad hoc* contractual arrangements and extra-legal means (geopolitical power and economic sanctions) to enforce debts upon default.[165] This, it will be shown in the next part, has remained a major obstacle to the development of a fair SDR regime. This is counterproductive to a sustained fulfilment of socio-economic rights obligations under ICESCR. In a sense, it indicates a lack of international cooperation, hence, the recurring SDDs. International cooperation is critical in this regard especially because of the contagious effects of SDDs which, as shown above, might lead to a forceful, extra-constitutional change of government.[166] Like war, instability in a polity

162 C Barry 'Human rights conditionality in sovereign debt relief' in T Pogge (ed) *Freedom from poverty as human rights: Theory and politics* (2010) 237-271; K Raffer 'International financial institutions and financial accountability' (2004) 18 *Ethics and International Affairs* 61-78; K Raffer 'Risks of lending and liability of lenders' (2007) 21 *Ethics and International Affairs* 85-106.

163 Barry (n 162) 251.

164 Barry (n 162) 243-244.

165 Michener & Weidenmeir (n 27) 155.

166 Y Bertoncini 'Debt crisis, sovereignty crisis' *Tribune* 28 September 2011 2, https://institutdelors.eu/wp-content/uploads/2020/08/debtcrisissovereigntycrisis_notreeurope_nov2011_02-1.pdf (accessed 20 September 2023).

almost always derails the implementation of programmes designed for the realisation of socio-economic rights. This is because the rights are not just any public goods, they are sensitive public goods that form part of the state's essential interests too.[167] Unfortunately, creditors have been tenaciously resisting any cooperation for a legal framework, partly using the positivists' fragmentation, sanctity of contracts and debtor moral hazard arguments as justifications.[168] This argument will be elaborated in the next part.

3 Socio-economic rights in SDR

The above history of SDDs shows that defaults are sometimes forced upon sovereign debtors by exogenous factors, hence, a timely, fair, efficient and effective restructuring might avert SDD and its potentially contagious effects.[169] It is worth recalling that, partly because of the juridical character of the parties and the purpose of the relationship, sovereign debt creates rights and duties under two regimes: treaty and contract.[170] Thus, SDD may amount to a violation of treaty or contractual obligations.[171] The

167 M Goldmann 'Human rights and sovereign debt workout' in Bohovlasky & Cernic (n 4) 98-99.

168 Tan notes that this narrative 'localises the problem of sovereign indebtedness and legitimises the image of the debtor state as an inefficient, if not irresponsible, trustee of domestic resources, thereby sanctioning the rehabilitative interventions of the international community. Debtor states are required to demonstrate prudence in the use of the aforementioned public funds through reductions in fiscal expenditure and deflationary monetary policies in attempts to reduce debt ceilings and continue servicing external debt.' See Tan (n 5) 255-256.

169 Enrique recounts the 1980s debt crises in this exogenous sense thus: '[T]he crisis was triggered by the following developments: first, the precipitous rise in interest rates to unprecedented levels after 1979 and the associated swings in exchange rates, as developed countries sought to roll back inflation; second, the sharp slackening of import demand in developed countries resulting from the steep and then prolonged recession that started in 1980; third, the collapse of primary commodity prices, including oil, beginning in 1980; fourth, the rapid increase in the relative prices of imported manufactured goods, which together with the fall in export prices entailed a deterioration of developing countries' terms of trade; and last but not least, the growing wave of protectionism that characterized foreign economic policy in the 1980s in developed market economy countries.' See Enrique (n 80) 244.

170 M Waibel 'Opening Pandora's box: Sovereign bonds in international arbitration' (2007) 101 *American Journal of International Law* 733; E Norton 'International investment arbitration and the European debt crisis' (2012) 13 *Chicago Journal of International Law* 302-306; RD Thrasher & KP Gallagher 'Mission creep: The emerging role of international investment agreements in sovereign debt restructuring' Boston University Centre for Finance, Law and Policy Working Paper 003 (2016) 2-6.

171 *Geovanni Alemanni v Republic of Argentina (*2014) IIC 666 (ICSID) (reference here is to the ICSID electronic report) para 320. It was held that it is not open to the claimants to use '[this] arbitration as a means for vindicating their contractual rights as "bondholders", but only such rights (and the associated remedies) as they can properly lay claim to as "investors" under the BIT'.

above history, however, shows that the enforcement of creditor claims upon default has always been a problem and, often, politicised. Indeed, the erstwhile gun-boat diplomacy and forced receivership methods of enforcement cannot work in a relatively more 'civilised' post-war international order. Notwithstanding these challenges, creditors have generally not been supportive of a fair statutory framework on SDR. It suggests that creditors prefer to rely on a 'non-system' to protect their interests.

To date, there is no universal statutory framework on SDR setting out principles and procedures for sovereign bankruptcy, thereby leaving creditors and debtors to sort themselves out, sometimes through self-help.[172] Without a bankruptcy mechanism, economic incentives come into play. These often influence the parties' respective courses of action. Naturally, a debtor would prefer a debt moratorium, a debt relief or cancellation, or even repudiation (that is, as far as the so-called 'rogue debtors' are concerned) while creditors would struggle to avoid loss. However, the diversity of creditors means that coordination problems are highly likely to arise in the restructuring processes. The holding out of such processes is also highly likely. In other words, the absence of a bankruptcy mechanism creates a vacuum with its attendant disorder and conflicting interests. This part will argue that the logic behind this simply is to ensure continuous creditor-diktat using the contractual philosophy. It is also evidence of a lack of international cooperation. In this atmosphere of chaos and under this strict notion of contractual philosophy, debtors (and perhaps their citizens) have little solace.

Therefore, sovereign debtors might be left with the following options where SDD becomes imminent: bail-out plus IMF-induced austerity measures, especially in a currency union; 'mutually'-acceptable restructuring with IMF-induced austerity; unilateral take-it-or-leave-it restructuring; unilateral repudiation; or a continuing debt service on creditors' terms.[173] Although mutually-acceptable restructuring appears to be the responsible thing to do (that is, in order to re-build confidence and quickly regain access to the debt market), the negatives of austerity on socio-economic rights, the power imbalance and questions around the fairness and legitimacy of such an option literally leave debtors in

172 As far back as 1986, UNCTAD noted that 'the lack of a well-articulated, impartial framework for resolving international debt problems creates a considerable danger … that international debtors will suffer the worst of both possible worlds … being judged de facto bankrupt … largely without the benefits of receiving the financial relief and financial reorganisation that would accompany a de jure bankruptcy'. See UNCTAD *Trade and development report* (1986) 141.

173 UNCTAD SDWG 2015 (n 2) 40-48.

a dilemma.[174] In addition, international law remains unclear about this with much of the regime founded on voluntary practices and non-binding standards tightly controlled by creditors. The question then, for the present purpose, is: What should a sovereign debtor in default do to ensure a sustained implementation of programmes designed to progressively realise socio-economic rights of its citizens, especially in a contagious SDD situation? In addressing this question, an attempt will be made to examine the existing frameworks for debt restructuring and determine the place of socio-economic rights therein.

3.1 SDR frameworks

Today, SDRs reflect the nature of the loans and types of creditors (that is, official creditors or non-official bank creditors or bondholders, as the case may be).[175] Hybrid creditors (for instance, official bond-holders and Chinese non-concessional loans) struggle to fit into the current SDR frameworks. These frameworks, thus, are not uniform. Each consists of disparate, *ad hoc* institutional processes designed to renegotiate terms of loans in the event of imminent or actual default.[176] In addition, they are voluntary. However, it will be shown that there is a common thread running through all these regimes, which is creditor-diktat. In other words, they are all controlled, driven, and determined by creditor interests that, as argued earlier, suitably fits into the game and rational choice theoretical premises.[177] Fundamentally, all the restructuring frameworks are rooted in, and reinforce, the private, contractual governance arrangement as the dominant paradigm for the sovereign debt regime.

174 UNCTAD SDWG 2015 (n 2) 3-4.

175 Enrique (n 80) 233.

176 UNCTAD SDWG 2015 (n 2) 3-4. Ocampo & Stiglitz note that 'all these mechanisms … have the problem that they offer dissimilar treatments to different debtors and different creditors'. See Ocampo & Stiglitz 'Forward' in Herman and others (n 80) vi. Herman describes SDR regimes as the 'informal imperfect coordination of the debtor and its creditors, usually by the IMF under the guidance of the Group of 7 major industrialised countries'. See B Herman 'Why the Code of Conduct for resolving sovereign debt crisis falls short' in Herman and others (n 80) 389-424.

177 Thompson (n 7) S285.

3.1.1 Socio-economic rights and restructuring of official loans

A historical approach will be adopted here to demonstrate the pattern of creditor influence over the sovereign debt regime using the private, contractual governance framework.

SDR regime in the first half of the twentieth century

In the first half of the twentieth century, the SDR process took the form of bilateral agreements between debtors and creditor states.[178] After World War I, the ensuing economic depression raised fundamental questions about the capacity of Germany to pay war reparation as well as the capacity of the allied powers to repay the inter-allied war debts owed to US.[179] For instance, Britain renegotiated debts owed to the US with the latter accepting a repayment plan extending up to 62 years.[180] Indeed, after World War II, SDR agreements took into account 'the debtor government's perspective and *its ability to repay debt and still maintain economic growth*'.[181] For instance, the Anglo-American Financial Agreement of 1946 allowed Britain the option 'to postpone payments in response to given conditions'.[182] Thus, sovereign debtors enjoyed some reasonable concession during this period as restructuring agreements usually assumed the form of bilateral understandings. This further supports the argument advanced above on the positive correlation between sovereign debt and ICESCR. The promise of the latter can be fulfilled through sustainable, responsible borrowing and lending within a fairly balanced global economic architecture defined by common global concerns. Private ordered systems protect private interests with multiple, competing incentives that can undermine common, collective, universal interests of humanity as embodied in human rights treaties. Treaty-based restructuring framework would align more with the character of SDD, that is, a state-based inaction requiring a state-based response.

The Paris Club

The Cold War ideological contest significantly impacted the system of sovereign lending and borrowing; it affected the official bilateral approach

178 Raffer (n 5) 248-249; B Eichengreen & R Portes 'Dealing with debt: The 1930s and the 1980s' (1989) NBER Paper 2867 12-13.

179 Enrique (n 80) 234.

180 Enrique (n 80) 235.

181 As above (emphasis in original).

182 As above.

to SDR and led to the establishment of the Paris Club in 1956.[183] Today, Paris Club perhaps is 'the only specialised *intergovernmental* forum for debt restructuring of countries in debt crisis'.[184] It is a group of creditor nations, mostly countries of the Organisation for Economic Cooperation and Development (OECD), formed essentially to protect their interests.[185] Housed in the French Treasury Department, Paris Club first met in 1956 to restructure Argentina's debt and, between then and 2014, it had renegotiated sovereign debts in excess of $365 billion.[186]

The SDR process developed by the Club is entirely a matter of practice without any legal basis or structure.[187] It seems that a constitutive arrangement might constrain interest of its members. Without it, creditors' interests are guaranteed more protection as 'creditors set the terms, mostly in accordance with predefined standards'.[188] Notwithstanding the absence of any constitutive basis, it has, over the years, developed some operational procedures, guidelines and principles.[189] First, in line with creditor interests, Paris Club conceives sovereign debt as a purely contractual, commercial undertaking, despite the fact that the history of sovereign debt and the character of the parties involved suggest a mixture of both public and private elements.[190] In other words, the Club's practice revolves around the undergirding philosophy implicit in the idea of contract that should not accommodate matters of public interests such as socio-economic rights.[191] Thus, a sovereign debtor facing SDD and in need of restructuring debts it owed to members of the Club must accept and operate within the same pure contractual philosophy. Consequently, Paris Club does not

183 Enrique (n 80) 235-236. See also CP Enrique 'The Paris Club: The emerging of a multilateral forum for debt restructuring', https://unctad.org/meetings/en/Presentation/gds_sd_2015-02-03-05_CosioPascal_en.pdf (accessed 16 June 2018); A Rieffel 'The role of the Paris Club in managing debt problems' Princeton University Essays in International Finance (1985) 1-38, https://ies.princeton.edu/pdf/E161.pdf (accessed 16 June 2018); K Hudes 'Coordination of Paris and London Clubs' reschedulings' (1985) 17 *New York University Journal of International Law and Politics* 553-571.

184 Enrique (n 80) 231 (emphasis in original).

185 Rieffel (n 183) 1-32; Enrique (n 80) 231-232; UNCTAD SDWG 2015 (n 2) 32.

186 H Schier *Towards a reorganisation system for sovereign debt: An international law perspective* (2014) 83-84.

187 Schier (n 186) 83.

188 UNCTAD SDWG 2015 (n 2) 41.

189 Paris Club 'The six principles', http://www.clubdeparis.org/en/communications/page/the-six-principles (accessed 14 July 2018).

190 Paris Club (n 189) Principle 1.

191 As above.

restructure multilateral and non-official debts as, strictly, members of the Club have no privity of contracts regarding such loans.[192]

Second, a sovereign debtor's request for restructuring will be assessed based on whether or not the default is imminent. This is determined using IMF's assessment of the debtor's present expenditure and incomes.[193] Third, a meeting is arranged with representatives of the Club's members, IMF (as observer), UNCTAD (as observer) and the sovereign debtor. Upon presentation by the latter, the Club would make a proposal that may be accepted or rejected by the debtor. If rejected, another proposal would be made until a final agreement is reached.[194] In other words, creditors make the 'offer' and therefore determine the terms for the acceptance of such offer. This, arguably, is not in the liberal spirit of freedom of contract. The resulting agreement, theoretically, is merely political in nature, not legal, in the sense that it is not binding on the parties.[195] In functional terms, however, it is binding.

Paris Club's cardinal operational principles are as follows: It ensures consensus in decision making and solidarity of members in the implementation of every resulting restructuring agreement; adopts a case-by-case approach; imposes IMF-designed debt relief conditionalities on the debtor; insists on comparability of treatment (that is, a debtor must seek similar treatment from other non-Paris Club creditors); and equitable burden sharing among members, that is, any resulting debt relief shall reflect each creditor's exposure to the debt under consideration.[196]

However, apart from the unfair treatment of some debtors (for instance, Chile in 1972 and Cuba in 1982), the emergence of new creditor nations in the Middle East and the Brazil, Russia, India and South Africa (BRICS) nations is challenging the current relevance of Paris Club.[197] In fact, some

192 Enrique (n 80) 231.

193 Schier (n 186) 83-84.

194 Enrique (n 80) 241-248.

195 Enrique (n 80) 241.

196 Tan (n 5) 252; Enrique (n 80) 241; Schier (n 186) 83-85.

197 ILA (n 13) 12. UNCTAD notes: '[N]ew sovereign creditors with considerable weight include China, Brazil, Venezuela, and Taiwan, Province of China, along with several oil-rich states from the Middle East. The Paris Club has invited some of these new lenders to become members of the Club, but they have not joined. The Paris Club has attempted to establish its restructurings as a standard for other bilateral creditors through the "comparability of treatment" clause contained in its Agreed Minutes. The clause obliges the debtor state to seek restructurings from other creditors on terms that are comparable to the concessions of the Paris Club. However, non-members of the Paris Club are reluctant to follow the terms set by the Paris Club. Some of these

of these nations have refused to join the Club despite invitations.[198] China, the largest official creditor, is not a member of Paris Club.

Interestingly, both the 'new' (Middle-Eastern countries and BRICS) and 'old' (traditional members of Paris Club) creditor nations are state parties to ICESCR with the exception of the US which only signed but is yet to ratify the Covenant.[199] The implication is that, as state parties, they all have individual and collective obligations not to frustrate a sovereign debtor's fulfilment of its socio-economic rights responsibilities.[200] Even state parties that sign the treaty (for instance, the US) are required to refrain from acts capable of defeating its objects and purpose under article 18 of Vienna Convention on the Law of Treaties (VCLT).

In addition, the political nature of the Paris Club restructuring agreement does not, by any stretch, affect members' obligations to ensure international cooperation under ICESCR, especially in supporting the development of a legal framework for a fair, balanced SDR.[201] Arguably, it is only through cooperation that states can recognise and deal with the exogenous factors contributing to recurring episodes of SDD and prioritise the imperative for a sustained implementation of socio-economic rights-based programmes in debtor countries facing imminent SDDs. It might be countered that the Club's process is part of the 'international cooperation' envisaged under ICESCR. However, Paris Club's short-term, continuous rescheduling accompanied by IMF-designed debt relief conditionalities and austerity measures does not align with this obligation, thereby raising doubt about the 'mutuality' and legitimacy of the whole Paris Club arrangement.

Importantly, members of the Club have at least negative socio-economic rights obligations (that is, to respect and protect) which are not confined to their respective jurisdictions.[202] As noted earlier, ICESCR does

creditors have so far cancelled significant amounts of debt bilaterally at their own pace.' See UNCTAD SDWG 2015 (n 2) 32-34.

198 UNCTAD SDWG 2015 (n 2) 32.

199 South Africa is also a 'late-comer'. It ratified ICESCR on 18 January 2015. See ESCR-Net 'Government of South Africa ratifies CESCR', www.escr-net.org/news (accessed 14 July 2018).

200 APM 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* 7. See discussion on this in part 4 of ch 3.

201 Tan (n 5) 255-256.

202 Coomans (n 200) 5.

not have a jurisdictional delimitation.[203] Indeed, the extraterritoriality principle examined in chapter 3 might be invoked to further support this proposition because of the proven impacts of SDDs (especially the austerity-bound SDR) on the progressive realisation of socio-economic rights.[204] It might be countered that Paris Club's recognition of the imperative for restructuring sovereign debts in the face of imminent default seems like a realistic balance to prevent a debtor from bankruptcy and allow it to continue providing essential services, including sustained implementation of socio-economic rights-based programmes.[205] Also, since 1988, Paris Club has relaxed its terms and has included debt reliefs to debtors in its debt restructuring.[206] It is seen as a flexible forum.

However, Paris Club restructuring terms are largely determined by creditors. As for flexibility, it may be argued that the increasing competition being faced by members of the Club as credit-exporters might explain the relaxation of the terms. In addition, the impacts of conditionalities and resulting IMF-induced austerity measures on socio-economic rights do not, in functional terms, support this counter argument or the late (perhaps pressurised) acceptance of debt relief, as shown below.[207]

203 As above.

204 Coomans (n 200) 7. See also S Michalowsky 'Sovereign debt and social rights – Legal reflections on a difficult relationship' (2008) 8 *Human Rights Law Review* 35-68.

205 Some scholars have argued that the Paris Club supports development. See, eg, G Cheng and others 'Official debt restructurings and development' (2018) 2-26, https://www.dallasfed.org/~/media/documents/institute/wpapers/2018/0339.pdf (accessed 13 February 2019); G Cheng and others 'From debt collection to debt provision: 60 years of official debt restructurings through the Paris Club' 2-12, https://www.esm.europa.eu/sites/default/files/wp20.pdf (accessed 13 February 2019).

206 At the G7 Summit in Naples (1994) members of Paris Club admitted that they 'had previously demanded too much debt servicing by many of the poorest countries'. See Enrique (n 80) 245-248; Tan (n 5) 256. There are five different Paris Club debt relief approaches: the 'classic terms' approach, which does not recognise debt relief; the 'Houston terms' approach, which offers longer repayment periods on development assistance to lower-middle income countries; the 'Naples terms' approach, which allows debt cancellation of up to 50-67 per cent but is only opened to IDA members; the 'Cologne terms' which allows up to 90 per cent debt cancellation for HIPC eligible countries; and the 'Evian' approach which allows debt cancellation for non-HIPC eligible countries on flexible terms. See MA Weiss 'The Paris Club and international debt relief' (2013) 1-4, https://fas.org/sgp/crs/misc/RS21482.pdf (accessed 13 February 2018).

207 Lumina (n 5) 255-254. Edwards argues: '[O]n some grounds, and especially in terms of the turnarounds of the current accounts, the results have been quite impressive. The costs, however, have been high. Not only did real income decline, but real wages declined in most countries, and unemployment soared. There is little doubt that this is not a sustainable adjustment path ... A sustained increase in the indebted countries exports, which is, of course, a prerequisite for a long-term solution to the crisis, will not only require an efficient tradable sector and a "realistic" real exchange rate but,

Multilateral debt reliefs: Heavily-indebted poor countries and multilateral debt relief initiatives

Before 1996, multilateral official debts had to be serviced at all costs as the creditors were (and still are) treated as 'preferred' or 'senior creditors'.[208] Debt relief was out of the equation. Creditor nations used the contractual philosophy and moral hazard arguments to insist on repayment of multilateral loans. This, it was hoped, would avoid fiscal irresponsibility on the part of sovereign debtors.[209] However, in September 1996, IMF and the World Bank approved a debt relief programme targeting heavily-indebted poor countries (HIPCs).[210] Regional development banks (RDBs) were also part of the programme. Thus, it was a coordinated action by multilateral organisations and governments to address the excessive debt burdens of these countries.[211] Although an *ad hoc* multilateral initiative, it became a key feature of contemporary SDR that built upon the initial Paris Club debt relief initiatives.[212] It also included 6 per cent non-official debts.[213] This, arguably, reflects the continuing collaboration between multilateral creditors and other creditors to, first, protect their common interests and, second, respond to the unsustainable debt burdens of poor countries following a barrage of criticisms of their lending policies anchored on strict interpretation of sovereign debt as a pure contractual, commercial undertaking.[214]

To qualify for a debt relief (called 'decision point') under the HIPC initiative, a country must show the following: Eligibility to borrow from the International Development Association (IDA); evidence of economic reforms under the supervision of IMF and World Bank; and evidence of

more important, that the current protectionist trend in the industrial countries and in particular in the United States be reversed … Asking the highly indebted developing countries to pay their debts and at the same time impeding their exports from reaching the industrialised markets is not only unfair, but also politically unwise.' See S Edwards 'Structural adjustment policies in highly indebted countries' in J Sach (ed) *Developing country debt and economic performance* (1987) 200-202.

208 Enrique (n 80) 248; UNCTAD SDWG 2015 (n 2) 32.

209 Kamlani (n 7) 267.

210 Enrique (n 80) 248.

211 IMF 'Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): Statistical update', https://www.imf.org/external/np/pp/eng/2016/031516.pdf (accessed 20 July 2018).

212 Tan (n 5) 251 fn 6.

213 MLJ Wright 'Restructuring sovereign debts with private sector creditors: Theory and practice' in CP Braga & G Vincellette (eds) *Sovereign debt and the financial crisis: Will this time be different?* (2010) 297.

214 Tan (n 5) 256-258.

unsustainable debt (assessed in a creditor-focused way – as the net present value of a country's debts to its exports and present value of debt service to exports) which cannot be addressed through Paris Club restructuring.[215] This tied the initiative to Paris Club. The 'completion point' of irrevocable debt relief depends upon progress in economic reforms and the adoption of the Poverty Reduction and Strategy Papers (PRSP) that replaced the much-criticised SAP.[216] Thus, the HIPC initiative was managed by IMF and World Bank's IDA.

In 1999, following initial success and mounting criticisms by civil society organisations (CSOs) about the inadequacy of the debt relief, the G7 pushed for an enhanced HIPC initiative (HIPC II) to cover more sovereign debtors.[217] HIPC II expanded the debt relief net by relaxing the eligibility criteria.

In 2005, IMF along with IDA and the African Development Bank (AfDB) adopted the multilateral debt relief (MDR) initiative to cancel 100 per cent debt claims against countries with less than US $380 per capita income or those that reached the irrevocable debt relief stage (completion point) under HIPC II.[218] The debtor must show commitment and the debt must be owed to IMF at the end of 2004.[219] MDR terminated in 2015 but the balance of the fund was transferred to the Catastrophe Containment and Relief Trust designed by IMF to 'provide exceptional assistance to its poorest members hit by major public health disasters that could spread rapidly across borders'.[220] This was later extended to cover the Coronavirus debt relief initiative following the global pandemic that ravaged economies forcing many countries to default on their debts.[221]

215 As above. UNCTAD notes that the IMF's Debt Sustainability Assessments (DSAs) face a number of challenges as they '(a) necessarily involve projections about expected growth and other macro-economic figures that are difficult to predict; (b) have at times focused on new money rather than on debt restructuring; (c) have at times been based on weak empirical assumptions'. See UNCTAD SDWG 2015 (n 2) 26.

216 IMF Poverty Reduction Strategy Papers [PRSP]: A factsheet (2009), https://www.imf.org/external/np/exr/facts/pdf/prgf.pdf (accessed 20 July 2018). However, the PRSP has also been criticised. See Lumina (n 5) 253 fn 10.

217 Enrique (n 80) 249.

218 This was done in support of efforts to meet the MDGs' targets. See IMF (n 211) 1.

219 IMF (n 211) 1.

220 IMF (n 211) 1 fn 1.

221 IMF 'COVID-19 financial assistance and debt service relief' (March 2022), https://www.imf.org/en/Topics/imf-and-covid19/COVID-Lending-Tracker (accessed 20 December 2022).

In the wake of the COVID-19 pandemic, the G-20 bilateral official creditors adopted the Debt Service Suspension Initiative (DSSI) suspending debt service payments for 73 eligible indebted low-income countries to enable them to redirect freed-up resources towards addressing the socio-economic impacts of the pandemic.[222] This temporary initiative ended in December 2021.

At an Extraordinary G-20 Finance Ministers and Central Bank Governors' meeting in November 2020, G20 and Paris Club bilateral creditors agreed to provide a case-by-case debt treatments to DSSI eligible sovereign debtors under the Common Framework for Debt Treatments beyond DSSI (Common Framework) which will be based on IMF-World Bank Debt Sustainability Analysis. Under this Framework, G20 and Paris Club countries agreed to ensure fair burden sharing among all bilateral creditors. However, they agreed that, in principle, debt treatment under the Common Framework excludes debt write-off or cancellation.[223]

The advantage of these initiatives for socio-economic rights is that they linked 'debt relief to poverty reduction in an explicit way.'[224] This, in a sense, shows some responsibility, albeit a voluntary, moral one, towards the populations of the indebted states.

However, although the HIPC initiative may have had positive impacts on the debt burdens of eligible states, there is still no conclusive, empirical evidence that it reduced poverty and improved citizens' welfare and livelihood through sustained access to health care, education, and food.[225] There is no matrix to measure its exact positive impacts on the realisation of socio-economic rights. HIPC's operational framework suggests that the central objective was not really to support the fulfilment of these rights. It may be argued that perhaps the objectives were to, first, keep the eligible countries within the traditional creditors' controlled-international economic system and, second, help them to achieve IMF-

222 Under the DSSI, over US $12 billion in debt service payment was suspended and, although private creditors were invited to participate, only one private creditor participated in the initiative. See IMF 'Questions and answers on sovereign debt issues' (8 April 2021), https://www.imf.org/en/About/FAQ/sovereign-debt#DSSI (accessed 14 October 2023); World Bank 'Debt Service Suspension Initiative' (10 March 2022), https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative (accessed 3 October 2023).

223 IMF (n 222).

224 Enrique (n 80) 249.

225 D Sharp 'The significance of human rights for the debt of countries in transition' in Bohovlasky & Cernic (n 4) 51.

defined 'sustainable debt' in order to resume normal debt service.[226] This is evident in the tightly-controlled structural reforms on spending as dictated by creditors.[227] The HIPCs also got no fresh start as a result of these initiatives.[228]

226 Tan (n 5) 258.

227 The UN Independent Expert on foreign debt and human rights notes that '[t]he gains from debt relief are often diluted by other factors, including conditions attached to debt relief and the lack of competitiveness of developing countries in an unequal global trading environment. High debt repayments and the conditions attached to debt relief and new loans – which typically limit public spending (even at the expense of funding essential public services, such as education and health care), promote economic liberalisation (including privatisation of public enterprises, investment deregulation and the introduction of user fees for access to public services) and prioritize debt service over fulfilment of basic needs – have not only exacerbated poverty, they have also had a particularly severe impact on access to education and health care in developing countries. For example, in 2004, the IMF condition that Zambia should freeze public sector wages resulted in the Government's failure to address the massive shortage of teachers through the recruitment of 9 000 newly qualified teachers. Similarly, a 2006 study by the United Nations Development Programme (UNDP) International Poverty Centre, which examined the effect of debt relief on "fiscal space" in Zambia, found that "the net fiscal gain from debt relief had been marginal because of the external policy conditionalities linked to the relief and associated ODA". Thus, even after receiving debt cancellation, Zambia will still not be able to significantly scale-up public spending or investment owing to the continuing demands for "excessively tight fiscal and monetary policies in its IMF loan arrangements. Debt relief conditions limit investment in education and health in many low-income countries. Indeed, A recent World Bank report notes: "[M]ost policy advice given to poor countries over the last several decades – including by the World Bank – has emphasised the advantages of participating in the global economy. But global markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries. These rules are the outcome of complex negotiating processes in which developing countries have less voice"' (citing World Bank *World Development Report: Equity and development* 2006). 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 – Cephas Luminas (A/HRC/11/10) (3 April 2009) paras 24-27, https://digitallibrary.un.org/record/652669?ln=en (accessed 20 October 2023).

228 It has been observed that the Initiative did not give the countries a 'fresh start', noting thus: 'The system for restructuring the official loans of developing countries was also biased towards the creditors, as it did not as a general rule provide sufficient debt relief to countries to renew sustainable growth and avoid the need for them to go back to the negotiating table … The debt of the HIPCs has been a special case, subject to considerable and prolonged civil society pressure that succeeded in increasing the amount of relief accorded. Today the debt workout processes for these countries have essentially been merged into the foreign aid regimes of their donors … Henceforth, the financial relationships of these debtors are to be governed by donor-recipient partnerships. This notwithstanding, the International Monetary Fund (IMF) and the World Bank estimated in August 2008 that thirteen of the twenty-three HIPCs that had exited from the program still had either "moderate" or "high" risks of debt distress … and this was before the global economic downturn gathered its awful momentum.' See B Herman and others 'Conclusion' in Herman and others (n 80) 490-491.

More importantly, the terrible financial conditions of the eligible sovereign debtors had already devalued such debts and, to avoid reporting loss in the public accounting of creditor governments, debt relief became a viable option.[229] This, in turn, were reported as official development assistance (ODA).[230] In other words, debt relief was treated as ODA. Thus, either the latter or the former did not, in plain reality, exist. This is because ODA was originally designed to support poor countries' development efforts but not through debt reliefs. Not surprisingly, creditor nations' foreign aid agencies now handle the bilateral 'debts restructuring' with indebted countries.[231] Enrique quite aptly sums up this, often ignored, rationalisation of debt relief by official creditors thus:

> An important reason for official creditors to want to swap out of the foreign loan repayment obligations of their poorest debtors is that by any realistic assessment, the 'value' of the debt had substantially fallen due to the deterioration of the debtor's financial situation; i.e., the actual present value of the expected flow of debt servicing was less than the face value, and reducing the stock of debt is the most realistic solution. This notwithstanding, when the debt is partially cancelled the accounting procedures in the creditor governments require that reduction in the value of the asset concerned be balanced by an offsetting item. That item is a transfer from the budget, in order to avoid recording a loss. The budget transfer, in these cases, is typically earmarked as 'official development assistance' (ODA) or is effectively coming from the ODA budget. This is why creditor countries insist on counting debt relief as ODA. It is worthwhile to note that this mechanism absorbs ODA that could otherwise have been used for a real transfer of resources to HIPCs.[232]

Carrying out debt relief through ODA leaves much to be desired as the two are (or ought to be), theoretically at least, different; ODA is derived from an entirely different international commitment.[233] The OECD-Development Assistant Committee's rationalisation is that without counting debt relief as ODA, its members (30 creditor nations as of 2020) might opt

229 Enrique (n 80) 250.

230 As above.

231 Herman and others (n 228) 490.

232 Enrique (n 80) 249. Enrique further notes that 'it will be necessary for creditors to … provide HIPCs' exports access to domestic markets without trade barriers, and to provide incentives to the private sector for investing in HIPCs. The HIPC Initiative requires, in other words, not only a coordinated official bilateral and multilateral creditor effort vis-à-vis the external debt of the poor countries, but coordination by essentially the same players over other financial and trade policies as well.' See Enrique (n 80) 250-251.

233 GPFDHR recognises that 'financing from debt relief must neither replace official development assistance nor be considered as such'. See GPFDHR 2012 (n 2) para 57.

to lend more rather than offer reliefs on existing debts. This approach, however, seems like a convenient way of avoiding debt relief by way of restructuring or debt forgiveness. Indeed, ODA itself has been shown to constrain the sustained implementation of socio-economic rights in the heavily-indebted states as it feeds the corrupt in many of these countries.[234]

In addition, creditor nations consider private, contractual governance as the ideal framework to deal with issues arising from debt default. Therefore, it is plausible to argue that such *ad hoc* debt relief initiatives were not out of the creditors' sense of socio-economic rights responsibility; they were simply business decisions that reflect creditors' predominant commercial approach to sovereign debt. This is confirmed by UNHRC independent expert on foreign debt and human rights, Cephas Luminas, that debt reliefs 'are fraught with many problems including lengthy conditionality', creditor dominance, narrow conception of debt sustainability, exclusion of more deserving countries and assessment by IFIs themselves showing that benefiting countries were at risk of relapsing back to unsustainable debt.[235]

Therefore, although multilateral debt relief initiatives could temporarily support the implementation of socio-economic rights-based programmes, the plain reality, however, is that the initiatives tend to have a 'creditor logic' behind them and this only fuels the power imbalance in sovereign debt governance.[236] The reliefs were not really about anti-

234 Christian Aid 'The new global debt crisis' (2019), https://www.christianaid.org.uk/sites/default/files/2019-05/The-new-global-debt-crisis-report-May2019_1.pdf (accessed 9 August 2019).

235 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 – An assessment of the human rights impact of international debt relief initiatives (A/HRC/23/37) (11 June 2013) paras 33-52, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/146/24/PDF/G1314624.pdf?OpenElement (accessed 13 October 2013); UNHRC 2009 (n 227) 26-27. The UNHRC Independent Expert (at 9 fn 9) quoted a World Bank report (World Development Report 2006) stating thus: '[M]ost policy advice given to poor countries over the last several decades – including by the World Bank – has emphasised the advantages of participating in the global economy. But global markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries. These rules are the outcome of complex negotiating processes in which developing countries have less voice.' In addition, a UNHRC resolution acknowledged that the debt relief initiatives were 'not intended to offer a comprehensive solution to the long-term debt burden'. See UNHRC Resolution 20/10 on the effects of foreign debt on human rights (adopted 18 July 2012) para 9, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/162/01/PDF/G1216201.pdf?OpenElement (accessed 9 August 2018).

236 UNHRC notes that before the initiatives the total debts stood at US $172 billion and

poverty commitments.[237] HIPC, MDR and ODA are high-sounding initiatives that, without a genuine legal commitment, would mean little for the sustained implementation of socio-economic rights, but would mean a lot for continuing debt service to creditors. IFIs' resistance to obligations under ICESCR reinforces this claim. From this angle, therefore, official SDR regimes might not be socio-economic rights-friendly in terms of objectives, implementation, and impacts.[238] Arguably, the 'mutuality' and, consequently, legitimacy of this type of SDR regime, therefore, are open to criticisms.

3.1.2 Frameworks for restructuring non-official loans

History has shown that non-official creditors have been fiercely opposed to any non-contractual framework for SDR.[239] Bringing them within the ambit of international human rights law has been problematic as they have consistently opposed socio-economic rights responsibility except as a

decreased marginally to US $147,9 billion in 2010, it but 'it was projected to rise to US $163,3 billion in 2011 and US $178 billion in 2012 largely as a consequence of new loans taken out to mitigate the impacts of the global financial crisis'. See UNHRC Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the full enjoyment of all human rights (A/HRC/20/23) (10 April 2011) paras 2-6, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/128/80/PDF/G1212880.pdf?OpenElement (accessed 24 April 2018).

237 Indeed, in 2016 alone global debt (public and private) reached an all-time high of $164 trillion (225% of global GDP). The policies (eg quantitative easing) implemented by the advanced economies after the 2008 Financial Crisis forced investors to withdraw their investments from developing countries thereby compounding these countries' socio-economic situations. In 2022, global public debt was over US $91 trillion (92% of GDP) and is projected to increase in the coming years. See IMF '2023 global debt monitor' (September 2023).

238 Some scholars argue that these initiatives may reduce incentives to implement economic reforms, reduce output and consequently impact the policy space. Rainhart & Trebesch found that '"kicking the can down the road" via cash flow relief and debt rescheduling does not facilitate economic recovery in debtor states'. See CM Rainhart & C Trebesch 'Sovereign debt relief and its aftermaths' (2016) 14 *Journal of the European Economic Association* 247. Others argue that these initiatives may support socio-economic rights. See M Ferry & M Raffinot 'Curse or blessing? Has the impact of debt relief lived up to expectations? A review of the effects of the multilateral debt relief initiatives for low-income countries' Institute de Recherche pour Development Research Paper (2018) 1-3.

239 Their resistance could be seen in early 2000 when they rejected a proposed SDR mechanism preferring, instead, the soft law and contractual solutions. See Tan (n 5) 255 fn 12; D Skeel & M Gulati 'Has the financial world arrived at a collective action clause consensus?' (2003) 38 *Economic and Political Weekly* 3245.

voluntary standard without any legal teeth because their primary (perhaps only) objective is profit-maximisation.[240]

The London Club

Like Paris Club, the London Club has no constitutive basis as it is an informal forum for bank creditors that meets to restructure debts and protect members' common interests.[241] Its operational framework, therefore, is entirely a matter of practice.[242] It is an *ad hoc*, voluntary forum that started in 1976 in order to facilitate and coordinate the restructuring of bank creditors' loans with distressed sovereign debtors on a case-by-case basis.[243] It operates through a bank advisory committee that consists of representatives of banks that are more exposed to a SDD, sometimes with the support of IMF.[244] The extent of powers exercised by bank creditors could be seen during the restructuring of Latin American debts in the 1980s in which they secured guarantees not just for the sovereign debts they held but also the corporate debts.[245] Despite their relatively limited number, there is a growing problem of hold-outs especially instigated by smaller banks, hence, in the 2012 Greek debt restructuring, private banks were represented by the Institute of International Finance (IIF).[246]

As shown while examining the Latin American debt crises, these creditors often pile up more debts on sovereign debtors through 'bridge loan' rescheduling in their bid to avoid non-performing loans while complying with regulatory reporting requirements.[247] Bank creditors often work with IMF to offer 'short leash' (repeated) reschedulings.[248] They would equally not readily accept any socio-economic rights obligation.[249]

240 Tan (n 5) 255.

241 BW Semkow 'Syndicating and rescheduling international financial transactions: A survey of the legal issues encountered by commercial banks' (1984) 18 *International Lawyer* 920.

242 Hudes (n 183) 559.

243 ILA (n 13) 13.

244 UNCTAD SDWG 2015 (n 2) 33.

245 Buckley notes that 'the largest banks had engineered the socialisation of irrecoverable debts owed by private sector borrowers and the IMF facilitated, and at times directed, the process'. See Buckley (n 100) 1193.

246 UNCTAD SDWG 2015 (n 2) 33.

247 Power (n 97) 2708-2712.

248 Enrique (n 80) 244.

249 In the Equator Principles on Responsible Investments, however, investment banks declare that that 'they will not provide loans to projects where the borrower will not or is unable to comply with our respective social and environmental policies and procedures that implement the Equator Principles'. See Equator principles (revised June

Indeed, members of this Club, as NSAs, use their commercial orientation to resist any attempt to develop a binding legal framework that would require them to take into account their debtors' socio-economic rights obligations in their dealings.[250] The dominant narrative is that they are not bound by ICESCR as they are not parties to it and, by nature, are incapable of being parties.[251]

However, as argued earlier, this argument is no longer sustainable in light of the extraterritoriality principle and the Ruggie framework on human rights obligations of businesses.[252] The general negative obligations (that is, to respect and protect these rights) are binding on them.[253] Indeed, their home countries could be held accountable for socio-economic rights violations using the tax-connection and/or failure of proper regulatory oversight.[254] They may equally be held directly accountable, especially where they are complicit in violating socio-economic rights through, for instance, bridge loans or extending irresponsible, illegitimate loans to a corrupt regime or engaging in corrupt practices to procure such loans.[255] Since international law recognises their rights as creditors, it seems

2013) Preamble, https://equator-principles.com./wp-content/uploads/2017/03/equator_principles_III.pdf (accessed 20 July 2019). See also UNEP Principles of responsible investment, https://www.unpri.org/pri/about-the-pri (accessed 20 July 2019); G 20 'Operational guidelines for sustainable financing', https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/world/G7-G20/G20-Documents/g20-operational-guidelines-for-sustainable-financing.pdf?__blob=publicationFile&v=1 (accessed 9 July 2019).

250 International Chamber of Commerce 'Views on business and human rights' (2008), https://cdn.iccwbo.org/content/uploads/sites/3/2008/12/ICC-views-on-business-and-human-rights.pdf (accessed 20 July 2019).

251 JH Knox 'The Ruggie rules: Applying human rights law to corporations', http://ssrn.com/abstract=1916664 (accessed 23 January 2018).

252 Guiding Principles on Business and Human Rights: Implementing the UN's Protect, Respect and Remedy' Framework (12 March 2011) (GPBHR); UN Economic and Social Council's Sub-Commission on the Promotion and Protection of Human Rights Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (26 August 2003); OECD Guidelines for Multinational Enterprises 2000, http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 20 August 2018); UN Global Compact, www.unglobalcompact.org (accessed 20 August 2018); International Labour Organisation Tripartite Declaration of Principle on Multinational Enterprises and Social Policy (amended 2022) para 8.

253 JL Cernic 'Sovereign financing and corporate responsibility for economic and social rights' in Bohoslavsky & Cernic (n 4) 152-156.

254 FN Lone 'Extraterritorial human rights violations and irresponsible sovereign financing' in Bohovlasky & Cernic (n 4) 235-248.

255 UNCTAD PRSLB 2012 (n 2) 9 explanation 2.

implausible to pick and choose the aspect of the law that should bind them.[256]

Bondholders committee system

The most difficult, costly, and time-consuming restructuring usually involves bondholders who are usually spread across different states.[257] Here, bondholder committees often arrange, coordinate, and renegotiate series of debts mostly using supermajority of bondholders as a threshold.[258] This may take the form of a rescheduling or haircut or both.[259] However, a number of problems affect the effectiveness of this form of restructuring. First, because of the unmanageable number of bondholders, there almost always is a collective action problem despite the formation of bondholder committees.[260] Even among the multitude of bondholders, there are variations as, often, there are series of bonds issued with different terms thereby raising an aggregation problem. Second, there are frequent hold-outs (minority bondholders resisting any resulting debt restructuring) litigation, mostly filed in domestic courts, to reclaim the full value of their debt notwithstanding the sovereign debtor's predicament of struggling to address the ensuing debt crisis.[261] Third, and as a consequence of the potential benefits of the hold-out problem, a new industry of vulture fund litigation has emerged.[262] As already mentioned, vultures funds purchase distressed debts at a giveaway price and then engage in fierce litigation to reclaim the full value of the original debts.[263] The traditional contractual

256 DJ Bederman 'Creditors' claims in international law' (2000) 34 *The International Lawyer* 235-254.

257 Wright notes: '[T]hroughout history, defaults on debt owed to private sector creditors, such as commercial banks and bondholders, have taken almost a decade, on average, to conclude. Recent research has also found that private creditors lose, on average, 40 percent of the value of their claim, and debtor countries exit default as or more highly indebted than when they entered default.' See Wright (n 213) 295.

258 J Dey 'Collective action clauses sovereign bondholders cornered' (2009) 15 *Law and Business Review of the Americas* 485-529; R Quarles 'Harding cats: Collective action clause in sovereign debt restructuring: The genesis of the project to change market practice in 2001 through 2003' (2010) 74 *Law and Contemporary Problems* 29-38.

259 Sturzenegger & Zettelmeyer (n 11) 349.

260 Quarles (n 258) 29-38.

261 Pitchford & Wright (n 106) 812-837.

262 Blackman & Mukhi have argued that 'modern sovereign debt litigation was born from the rise of the secondary debt market and the attendant opportunities for arbitrage, which, in turn, gave life to an industry of professional suers of foreign states'. See JI Blackman & R Mukhi 'The evolution of modern sovereign debt litigation: Vultures, alter egos, and other legal fauna' (2010) 73 *Law and Contemporary Problems* 49-50.

263 In 2013 it was estimated that 19 HIPCs were targeted by vulture funds following the HIPC debt relief initiative. See UNHRC 2013 (n 234) para 49. See also UNHRC Report

philosophy drives this industry as vultures continuously harass sovereign debtors, sometimes attaching valuable assets belonging to the debtor or its state-owned companies.[264] All these may have serious consequences on the socio-economic rights of the debtor's citizens.[265]

Therefore, a new 'strengthened' contractual framework has been developed to, in particular, tackle the coordination (that is, collective action and aggregation) and hold-out problems.[266] This involves making or inserting, *ex ante*, contractual provisions in the form of *pari passu* and aggregated collective action clauses (CACs) for a smooth, mutually-acceptable debt restructuring. The clauses, called enhanced contractual provisions, allow rescheduling and haircuts as agreed by supermajority bondholders.[267] Since 2014, the enhanced clauses have featured in most bond issuances.[268] In fact, since the Latin American debt crisis (resolved

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 – Vulture funds (A/HRC/14/21) (29 April 2010) paras 27-36, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/131/56/PDF/G1013156.pdf?OpenElement (accessed 20 October 2023).

264 M Guzman & JE Stiglitz 'A soft law mechanism for sovereign debt restructuring based on the UN Principles' (2016) 3, https://library.fes.de/pdf-files/iez/12873.pdf (accessed 15 June 2018).

265 However, influenced by the dominant creditor narrative, Fisch & Gentile point out that there are benefits attached to the culture of vultures and holdouts thus: '[H]oldout creditors, by refusing to participate in restructurings of sovereign debt, serve as a check on opportunistic defaults and onerous restructuring terms. Moreover, the prospect of holdout by minority creditors may limit collusive behaviour among the majority of the creditors. Holdout creditors, particularly vulture funds, also promote the functioning of the international capital markets. For example, by reducing the likelihood of opportunistic defaults, holdout creditors increase capital flows to sovereign debtors. Holdout creditors also provide value independent of the restructuring process by increasing liquidity in the market for sovereign debt, especially distressed debt.' See Fisch & Gentile (n 5) 1051. See also Waulet (n 5) 3-5; L Wozny 'National anti-vulture fund's legislation: Belgium's turn' 2017 2 *Columbia Business Law Review* 726-736.

266 IMF *Strengthening the contractual framework to address collective action problems in sovereign debt restructuring* (2016), https://www.imf.org/external/np/pp/eng/2014/090214.pdf (accessed 2 May 2019). Under the sponsorship of the US Treasury Department, the ICMA developed the standard collective action and *pari passu* clauses. See ICMA 'Collective action and pari passu clauses for the terms and conditions of sovereign notes' (2015), https://www.icmagroup.org/resources/Sovereign-Debt-Information/Downloads/ICMA%20Standard%20CACs%20Pari%20Passu%20and%20Creditor%20Engagement%20Provisions%20-%20May%202015.pdf (accessed 2 May 2019). See also Voluntary Principles on Debt Transparency, https://www.iif.com/Portals/0/Files/Principles%20for%20Debt%20Transparency.pdf (IIF 2019) (accessed 9 July 2021); Principles for stable capital flows and fair debt restructuring (IIF 2013).

267 IMF Strengthening the contractual framework (n 266).

268 IMF 'Fourth Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts' (21 March 2019), https://www.imf.org/

through Brady Bonds) there has been a growing employment of different contractual mechanisms to address debt restructuring gaps. Today, the enhanced contractual clauses may be described as the standard practice in sovereign bonds issuance in capital markets across the world as the US Treasury Department and the European Union (EU) favour it.[269]

The enhanced contractual framework fits into the traditional narrative of strict interpretation of sovereign debt as a pure commercial undertaking. Hence, although it might address problems of aggregation and hold-outs, it does not take into account any concerns bordering on public policy or essential interests as can be seen from endless attachments of sovereign debtors' assets.[270] In other words, it may not address the vulture fund problem.[271] Indeed, as vulture funds' 'rights' are founded on contract, this framework is likely to fuel attacks on debtor's assets. Studies have found that vulture funds' activities negatively affect the sustained implementation of socio-economic rights-based programmes.[272] Thus,

en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671 (accessed 14 September 2023).

269 Since 2013, CAC and aggregation clauses are now mandatory in Eurobond issue. See, eg, Treaty Establishing the European Stability Mechanism (ESM) (2012) art 12(3) (which mandates the use of CACs for all Euro area government securities issued after 1 January 2013).

270 See, eg, International Tribunal for the Law of the Sea (ITLOS) *The 'ARA LIBERTAD' (Argentina v Ghana) Case Order* (15 December 2012), http://www.worldcourts.com/itlos/eng/decisions/2012.12.15_Argentina_v_Ghana.pdf (accessed 15 July 2019). Some of the popular cases filed by vulture funds include *FG Hemisphere v Democratic Republic of Congo* (2011) 637 F 3d 373 (claimant received over $200 million judgment); *Donegal International v Zambia* (2007) *Lloyd Report* 397 (claimant received a $15 million judgment); *Kesington International v Congo Republic* (2008) *Weekly Law Report* 1144 (claimant received $118 million judgment);*Allied Bank International v Banco Credito Agricola de Cartago* (1985) 757 F2d.516; *CIBC Bank and Trust Co v Banco Central do Brasil* (1995) 886 F Supp 1105; *Dart v Brazil* 1995 886F Supp 1105; *Elliott Associates L P v Republic of Panama* (1997) 975 F Supp 332; *NML Capital Ltd v Republic of Argentina* 2013 WL 4487563 (2nd Circuit); *Elliot Associates LP v Banco de la Nacion* (1998) 12 F Supp 2d 328, https://law.justia.com/cases/federal/district-courts/FSupp2/12/328/2499011/ (accessed 15 July 2019).

271 Pitchford & Wright (n 106) 812-837.

272 UNHRC 2010 (n 263) paras 32-36. In addition, by a Resolution, rejected by Czech Republic, Germany, Japan, UK and US, the UNHRC resolved thus: '1. Condemns the activities of vulture funds for the direct negative effect that the debt repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil their human rights obligations, particularly economic, social and cultural rights and the right to development; 2. Reaffirms … that the activities of vulture funds highlight some of the problems in the global financial system and are indicative of the unjust nature of the current system.' See UNHRC Resolution 27/30 (adopted 26 September 2014) (UNHRC Resolution 27/30), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/180/99/PDF/G1418099.pdf?OpenElement (accessed 20 July 2019).

the framework, arguably, is unjust to the population and may further widen the global socio-economic inequality gap.[273] It may be argued that, notwithstanding the benefits of the freedom of contract philosophy in a purely private arrangement, any regime that is oblivious of socio-economic rights' obligations of states and of other actors cannot be said to be a fair regime.[274] It does not reflect the 'justice of sovereign debt governance' as espoused earlier. The Ruggie framework, it would be recalled, affirms the negative obligations of businesses to respect and protect socio-economic rights.[275] In addition, the obligation to refrain from complicity in violating socio-economic rights is 'character-blind', that is, it applies to all, including to vulture funds purchasing distressed, undervalued debts.

Unfortunately, while many sovereign debtors have been pushing for a statutory SDR framework, most private creditors have been resisting this move with support from their home states.[276] The cause of this divide is the problematic foundation of the sovereign debt regime which allows excessive creditor discretion using the narrow prism of private law. While some creditor nations have made domestic efforts to outlaw vulture fund activities including litigation, the same countries continuously resist global efforts towards addressing the same problem.[277] This implicitly supports

273 A Pettifor 'Debt cancellation, lender responsibility and poor countries empowerment' (2000) 27 *Review of African Political Economy* 138-144.

274 C Barry & L Tomitova 'Fairness in sovereign debt' (2006) 72 *Social Research* 649-694.

275 GPBHR 2011 (n 252) para 11.

276 Eg, the IIF, which represents the interests of private creditors, rejects any framework that would 'severely undermine creditor property rights and market confidence'. See IIF 'Views on the way forward for strengthening the framework for debt restructuring' (2014) 4, https://www.iif.com/news/capital-markets-and-emerging-markets-policy/iif-special-committee-financialcrisis-prevention (accessed 18 July 2018).

277 Eg, Czech Republic, Germany, Japan, UK and US voted against UNHRC Resolution 27/30 that, among others, expressed 'concern about the voluntary nature of international debt relief schemes, which has created opportunities for vulture funds to acquire defaulted sovereign debt at vastly reduced prices and then seek repayment of the full value of the debt through litigation, seizure of assets or political pressure ... [and] the fact that vulture funds, through litigation and other means, oblige indebted countries to divert financial resources saved from debt cancellation and diminish the impact of, or dilute the potential gains from, debt relief for these countries, thereby undermining the capacity of Governments to guarantee the full enjoyment of human rights of the population'. See UNHRC Resolution 27/30 (23 September 2014), https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/169/11/PDF/G1416911.pdf?OpenElement (accessed 13 January 2019). Similarly, the US and Japan voted against resolutions for the repatriation of illicit funds while UK, Germany and France abstained. The resolutions also expressed 'serious concern … that … the substantial amounts lost to illicit financial flows … could help the efforts of developing countries to mobilise domestic resources for poverty alleviation, development and realisation of human rights, and to reduce their dependence on external financing, which can lead to the erosion of ownership of national development agendas'. See UNHRC

the opportunistic behaviours of vulture funds arbitrations and might be a ground to hold private creditors and their home states responsible for obstructing the sustained implementation of socio-economic rights-based programmes in debtor nations. In other words, home states of bondholders could be held accountable for the direct and indirect impacts of the activities of 'their vultures' on the basis of tax connection, place of registration or centre of main interests. As indicated above, history shows that private creditors and their home states conveniently collaborated to enforce their private debts, sometimes by gun-boat diplomacy and forced receivership on the basis of the moral sanctity of contracts. A 'collaboration' to ensure adherence to universally accepted standards of law and morality (socio-economic rights), arguably, would be more fitting in this respect.

Therefore, based on the conception of sovereign debt governance advanced in chapter 2, it may be argued that definitive bonds and other contractual documents setting out terms and conditions of sovereign loans must not ignore the minimum obligations to protect and respect socio-economic rights.[278] Ignoring these obligations would put the legality and legitimacy of such agreements into question.[279] It seems implausible (perhaps unconscionable) for one to claim rights under international law but deny obligations under the same law on the basis of commercial exigencies, absence of legal framework and positivists' fragmentation thesis. This argument will be elaborated hereunder using principles of general international law.

3.1.3 'Official bondholders' and Chinese creditors

The *Law Debenture* case and China's 'unconventional' sovereign lending practices have challenged the traditional SDR categories. China's resource-for-infrastructure credits are usually 'official' in nature but extended on commercial terms. They have elicited criticisms as China has been

(25th session A/HRC/25/L.14) Resolution 25/9 (21 March 2014), https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/122/41/PDF/G1412241.pdf?OpenElement (accessed 25 October 2023); UNHRC (28th session A/HRC/RES/28/5) Resolution 28/5 (10 April 2015), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/074/71/PDF/G1507471.pdf?OpenElement (accessed 25 June 2021).

278 N Jagers 'Sovereign financing and human rights responsibilities of private creditors' in Bohovlasky & Cernic (n 4)179.

279 UNCTAD SDWG 2015 (n 2) 40-42; O Lienau 'The challenge of legitimacy in sovereign debt restructuring' (2016) 57 *Harvard International Law Journal* 177-186.

accused of asset seizure upon default by sovereign debtors.[280] Chinese loans contain the so-called 'no-Paris Club' clause that prohibits collective restructuring.

Chinese debt restructuring practice seems to be evolving in the light of China's growing influence in the sovereign debt landscape. China's approach has been to treat each restructuring on a 'case-by-case' basis.[281] This comes mainly in the form of repayment deferrals, suspension of interest payments, refinancing and debt cancellation depending, of course, on the nature and terms of the loan. China hardly cancels 'commercial debts' to avoid creating a moral hazard situation or opening a floodgate of restructuring requests from its several sovereign debtors. It usually cancels zero-interest loans.[282] For instance, in 2022 China's international development agency and Export-Import Bank cancelled 23 interest-free loans for 17 African countries.[283] The development agency suspended debt repayment amounting to over US $1 billion and signed deferral agreements with over 20 sovereign debtors under the COVID-19 Debt Service Suspension Initiative.[284]

In 2021, however, China expressed preference for a multilateral approach under the Common Framework for Debt Treatments beyond the DSSI.[285] This means that IMF and the World Bank would also share the burden as against the standard practice in which these institutions do not usually take haircuts. The US and EU opposed this approach as they claim that it would amount to providing bailout for China as the largest bilateral creditor.[286] For BRI infrastructure loans, it is claimed that China 'bails out' developing countries facing imminent default on these loans to prevent

280 Sri Lankan's leasing of Hambantota Port for 99 years to China Merchant Port Ltd for US $1,12 billion is often cited as an example of Chinese 'debt trap'. See M Abi-Habib 'How China got Sri Lanka to cough up a port' *New York Times* 25 June 2018, https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html (accessed 11 October 2023). However, the port lease was unrelated to the debt owed to China EXIM Bank, hence there was no debt-equity-swap. See D Brautigam & M Rithmir 'The Chinese debt trap is a myth' *The Atlantic* 6 February 2021; U Moramudali 'The Hambantota port deal: Myths and realities' *The Diplomat* 1 January 2020.

281 J Cash 'What is China's position for restructuring debt owed by poor nations?' *Reuters* 22 July 2023, https://www.reuters.com/sustainability/what-is-chinas-position-restructuring-debt-owed-by-poor-nations-2023-06-22/ (accessed 10 October 2023).

282 J Hwang & O Moses 'China's interest-free loans to Africa: Uses and cancellation', https://www.bu.edu/gdp/files/2022/09/GCI_PB_015_FIN.pdf (accessed 10 October 2023).

283 Hwang & Moses (n 282).

284 IMF (n 222); WB (n 222).

285 Cash (n 281).

286 As above.

the collapse of Chinese lenders for the project; it provides extension of payment terms and injection of new money to distressed debtors while scaling down its lending to avoid domestic debt distress itself.[287]

As for 'official bondholders', the Russia-Ukraine debt dispute provides an insight. Russia, ahead of instituting the claims in *Law Debenture* case, wanted IMF to treat its Ukraine bonds as 'official loans'. Although IMF agreed to treat these bonds as 'official' to enable the parties reach a bilateral agreement on Ukraine's debt restructuring proposal, it had to change its lending in arrears policy that allows it to lend in arrears only to countries owing non-official creditors.[288] IMF's objective was to prevent a minority sovereign lender from acting as a hold-out creditor. It nevertheless raises concerns about IMF's policy inconsistency in debt crisis resolution.

Therefore, Chinese and Russian restructuring practices and proposals reinforce our position that the traditional categories and SDR principles under the private law paradigm are hardly fit-for-purpose in this emerging, dynamic and complex sovereign debt market.

3.2 Socio-economic rights in SDR: Perspectives from general international law

Because of the predominant creditor-based narrative of sovereign debt as a purely private, commercial undertaking which, as argued above, manifests extensive creditor-diktat, the above SDR frameworks do not specifically accommodate socio-economic rights concerns or any third-party interests (including those of debtors' citizens) except on a voluntary, temporary debt relief basis. This appears to enjoy the support of the dominant state-centric vision of international law through the fundamental principle of *pacta sunt servanda*.[289] The voluntary nature of the above frameworks means that debtors remain completely unprotected against creditors in the event of default and, thus, their citizens' socio-economic rights are

287 J Kynge 'Has China's Belt and Road Initiative been a success?' *Financial Times* 30 October 2023, https://www.ft.com/video/bc00595a-1198-4417-88cc-ea4bd07bf583 (accessed 20 December 2023); T Nishizawa 'China's double-edged debt trap' *East Asia Forum* 19 September 2023, https://www.eastasiaforum.org/2023/09/19/chinas-double-edged-debt-trap/ (accessed 11 October 2023).

288 K Hughes 'IMF rule change keeps Ukraine support; Russia complains' *Reuters* 8 December 2015, https://www.reuters.com/article/idUSKBN0TR2FE/ (accessed 20 December 2023); K Hughes 'IMF to mull lending rule change preserving Ukraine lifeline' *Reuters* 29 October 2015.

289 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 – JP Bohoslavsky (A/70/275) (4 August 2015) para 35.

vulnerable, openly exposed to the danger of such lack of protection. Legal and legitimacy issues therefore come into play here.[290]

This creditor-rationalised narrative, however, is contestable in light of the above history and extant principles of general international law dealing with necessity, 'essential interests' in economic relations and the primacy of socio-economic rights as demonstrated earlier. It will now be shown that the primacy of socio-economic rights as well as the impacts of the recurring cases of SDDs on these rights and on global peace and security are compelling enough to question this traditional, creditor-based narrative.

3.2.1 Socio-economic rights, pacta sunt servanda and SDDs

There is no doubt that a sovereign debtor is bound by its commitments to repay and service its debts to creditors in the spirit of the fundamental CIL principle of *pacta sunt servanda* as expressed in the VCLT.[291] This principle applies with similar force in both official and non-official loans.[292] However, it is not an absolute rule, hence there are exceptions. The first is the fact that both customary international law and VCLT (the treaty on treaties) recognise a party's right to temporarily suspend its international obligation on the basis of supervening impossibility affecting continued performance of obligations under the original agreement.[293] On the basis of the above historical account, it may be argued that SDDs, especially those caused by exogenous factors and regional or global market contagion and financial crisis, almost always tend to render continued debt servicing simply impossible and, indeed, unconscionable. Although neither CIL nor VCLT regards this as a 'right' to SDR, using the broad conception of the term 'right' and the Hohfeldian formula examined in the previous chapter, it may be argued that this qualifies as a 'right' emanating from the peculiar nature of the sovereign debt relationship. The COVID-19 pandemic, for instance, could qualify as a 'supervening impossibility' covering both official and non-official loans, hence the suspension of debt servicing obligations during the pandemic was more than a voluntary moral obligation.

290 Sudreau & Bohoslavsky (n 4) 619.

291 Vienna Convention on the Law of Treaties (VCLT) 1969 arts 26 & 27.

292 VCLT 1969 art 3.

293 VCLT 1969 art 61. The UN independent expert on foreign debt and human rights (Prof JP Bohoslavsky) argues that human rights are part of the built-in limitations on the principle of *pacta sunt servanda* principle in the sovereign debt context. See Report of the Independent expert on the effects of foreign debt on the enjoyment of human rights particularly economic, social, and cultural rights, Juan Pablo Bohoslavsky – A/70/275 (15 August 2015) paras 35-41.

Second, both CIL and VCLT allow a temporary suspension of obligation on the basis of the principle of *rec sic stantibus* where circumstances radically 'transform the extent of obligations still to be performed' under an agreement.[294] It may be argued that SDDs, especially those caused by exogenous factors, pandemic-induced economic crisis and global or regional contagion of debt markets, can fittingly constitute such circumstances as they, the above history has confirmed, tend to radically transform the extent of the unperformed obligations. Notwithstanding the impacts of the official SDR regime on socio-economic rights, official bilateral creditors do in practice acknowledge the impracticality of continued performance in the face of economic crises probably because most states have experienced SDD in their histories.[295] It may also be argued that although Paris Club is strictly not a recognised subject of international law (that is, having no constitutive basis) the consensus-based practices of individual members of the Club and IFIs on the impracticality of continued debt servicing may qualify as a norm that could qualify as a 'right' to SDR under CIL.[296] The declaration that the decision of Paris Club is non-binding presumably seeks to eliminate the evolution of an *opinio juris* component of such CIL rule. However, *opinio juris* is not determined by written declarations alone; it is a psychological element revealing a sense of legal obligation deducible from conducts, including, but not limited to, a declaration by a state.[297] Over the years, members of the Club, both collectively and individually, have expressed a sense of commitment to address sovereign debt crisis. In addition, Paris Club's decisions directly affect persons other than the primary parties to the debt relationship. The problem, perhaps, would be the extent of such right to SDR and the fact that it is largely creditor-determined. The implication, however, would be to recognise a debt moratorium for the sovereign debtor in distress.

For multilateral creditors, the suspension of payment might be problematic because of their so-called 'preferred creditor' or 'senior creditor' status.[298] However, they are now generally seen as part of the CIL

294 VCLT 1969 art 62.

295 Kotze (n 30) 5-8.

296 Paliouras (n 10) 115-136.

297 *North Sea Continental Shelf* case (1969) ICJ Report 74-75. See also PH Verdier & E Voeten 'Precedent, compliance and change in customary international law' (2014) 108 *American Journal of International Law* 390-391; AR Ferriera and others 'Formation and evidence of customary international law' (2013) *UFRGs Model United Nations Journal* 190-191.

298 Raffer describes this as an 'illegal preference' which is the same as 'vulture behaviour', while Guzman & Stiglitz recommend that 'it could be justifiable to give seniority status to creditors that lend into arrears, helping the distressed debtor to continue the provision of essential services or to run countercyclical macro-economic policies at the

law-making process and their recent roles in SDR schemes, including debt reliefs, might support the proposition for a debt moratorium.[299] Indeed, in practice, they tend to spearhead debt relief initiatives.

The challenge would be with respect to non-official creditors. First, both banks and bondholders might reject any 'right' to SDR on the ground that, being private creditors, the loan agreement is not a treaty.[300] This might hold substance with respect to the initial loan agreement. However, it is not as straightforward as it may seem with respect to restructuring deals (subsequent agreements or re-negotiations) in which creditor nations, private creditors and IFIs have reached a common 'understanding'. It is arguable whether this 'understanding' would have the binding effect of a 'treaty' within the contemplation of VCLT.[301] A recent example would be the G-20 COVID-19 DSSI and the Common Framework in which only one private creditor participated. In addition, 'creditor collaboration' to renegotiate the terms of loan agreements occurred during the Greek debt crisis.[302] International law would hardly accept such interpretation because a treaty, of course, is an agreement between states, not between states and private entities. It is common to involve official (bilateral and multilateral) creditors in restructuring negotiations with the sovereign debtor. An agreement between these parties may qualify as 'treaty' where minimum legal ingredients are met. Both actions and character of the parties would be relevant.

Second, because loan agreements are presented as contract between equal legal entities in the spirit of the dominant creditor narrative, bank creditors may be justified in offering restructuring proposals by way of another agreement which, in practice, may involve extending bridge loans to debtors. This would enable the banks to report such debts as serviceable loans, thereby piling up more debt burden on the debtor. Hold-out bondholders and vulture funds may also be justified in pursuing litigation as a settlement strategy.

time they are most needed'. See Raffer (n 5); Guzman & Stiglitz (n 264) 6; S Steinkamp & F Westerman 'The role of creditor seniority in Europe's sovereign debt crisis' (2014) 29 *Economic Policy* 495-552.

299 ILC Third report on identification of customary international law (2015) (ILC Draft on CIL 2015) art 4(2).

300 SA Silard 'International law and the conditions of order in international finance: Lessons of the debt crisis' (1989) 23 *The International Lawyer* 968 fn 20.

301 VCLT 1969 art 3.

302 I Kostaki 'Greece's creditors reach deal on debt relief measures' (2018), https://www.neweurope.eu/article/greeces-creditors-reach-deal-debt-relief-measures/ (accessed 20 July 2019).

However, these are creditors' options derived through analogy with principles obtained or applicable in many domestic corporate insolvency regimes. Using the same analogy, a bankrupt in these domestic systems is afforded some form of protection especially by way of debt moratorium. This does not fit the creditor-diktat narrative, hence, the voluntariness of the existing SDR frameworks.

In addition, as argued earlier, all non-official creditors have socio-economic rights obligations and their respective home countries equally have extraterritorial obligations under ICESCR.[303] Therefore, any behaviour that, directly or indirectly, dilutes or dis-effectuates these obligations, could concurrently undermine the rights of debtor's citizens as provided under ICESCR.

Third, and more importantly, VCLT, the UN Charter, ICESCR, the Universal Declaration, and other relevant treaties and UN declarations recognise that international actors (including non-official creditors as NSAs), whether in economic relations or not, must in all circumstances abide by, and always consider, the principle of international law on the 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[304] Thus, it is submitted that, putting a state in an 'either or situation', that is, where it must decide between continuing debt service (which, by necessary implication, would mean cutting costs on welfare programmes through austerity) and continued implementation of socio-economic rights, would amount to a total disregard for this fundamental obligation, thereby rendering any resulting SDR illegitimate (if not illegal).[305] Indeed, as argued in the previous chapter, socio-economic rights have assumed the status of *jus cogens* and *erga omnes* obligations because of their overwhelming acceptability across the world.[306] Therefore, excluding their application on the basis of commercial exigencies would do violence to the nature of these obligations.

303 GPBHR 2011 (n 252) para 11; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) para 18; Jagers (n 278) 188-195; JL Cernic 'Sovereign financing and corporate responsibility for economic and social rights' in Bohoslavsky & Cernic (n 4) 142-156.

304 VCLT 1969 Preamble.

305 Guzman & Stiglitz (n 264) 7 (noting that 'any debt restructuring that resulted in the country violating its constitution or the UN Declaration of Human Rights would also lack legitimacy').

306 Jagers (n 278) 188-195.

3.2.2 Socio-economic rights, defence of necessity and SDDs

Another possible angle to look at the suspension of debt servicing and, consequently, to stay creditor actions (that is, especially hold-out and vulture funds' litigations) under general international law is by invoking the principle of necessity using socio-economic rights as a debtor's 'essential interests'.[307] The recent codification of necessity defence in ILC Draft on State Responsibility (and its endorsement by the International Court of Justice (ICJ)) gives credence to this proposition.[308] Under this Draft, a state may plead necessity where it is facing a grave and imminent peril; it may avoid or suspend its international financial obligations in order to protect an essential interest that is facing a grave, imminent danger beyond its control and there is no other way to avert such danger beside such suspension.[309] Arguably, in the face of an imminent SDD, a sustained implementation of socio-economic rights-based programmes may fit into these criteria. Raffer has argued, for instance, that 'human rights and human dignity enjoy unconditional preference over *pacta sunt servanda* [hence] no one must be forced to fulfil contracts if that causes inhuman distress, endangers life or health or violates dignity'.[310] In other words, there is a financial necessity defence rooted in general CIL that might be

307 The 2001 ILC Draft provides thus: '1. Necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act: (a) is the only way for the state to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a state as a ground for precluding wrongfulness, if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the state has contributed to the situation of necessity.' See ILC Draft Articles on the International Responsibility of States (2001) art 25.

308 Although not a treaty, ILC's drafts are accepted as authoritative statements of law. See *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (1997) ICJ Reports 7 para 51 (holding that 'the Court considers … that the state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation').

309 In the 1980 draft, the Special Rapporteur set out the CIL conditions thus: '[T]he threat to such an essential interest of the state must be extremely grave, representing a present danger to the threatened interest … and its occurrence must be entirely beyond the control of the state whose interest is threatened … The adoption by a state of conduct not in conformity with an international obligation … must truly be the only means available to it for averting the extremely grave and imminent peril which it fears; in other words, it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations. In addition, the conduct in question must be clearly indispensable in its totality, and not only in part, in order to preserve the essential interest which is threatened.' See ILC 'Eighth report on state responsibility' (1980) 1 *Yearbook of the International Law Commission* paras 8-14.

310 Raffer (n 4) 108.

invoked to ward off hold-out and vulture fund problems by showing the implications of continuing debt servicing on the realisation of these rights and on peace and security of the state.[311] A sovereign debtor cannot solely be blamed for contagion following a global or regional financial crisis and other exogenous phenomena.

Thus, international law already recognises a suspension of debt obligation where payment would jeopardise vital, essential state services.[312] Although this argument may not be uncontroversial, it can hardly be contested that socio-economic rights are vital, essential needs that require sustained funding by the state for any meaningful realisation. It is not a matter of 'either/or'.[313] Indeed, the measures adopted by Iceland (that is, continuing the implementation of welfare programmes) during its debt crisis indicate the practicality of this approach.[314] COVID-19 debt relief initiatives further reinforce this position. In addition, it can hardly be contested that hold-outs and vulture funds constitute existential threats to sovereign debtors and their citizens.[315]

3.2.3 Socio-economic rights, global peace and SDDs

Flowing from the last point, a final argument to support the suspension of a sovereign debtor's debt service in recognition of the cost of SDDs on the realisation of socio-economic rights is from the perspective of the overarching objective of maintaining global peace and security under UN Charter.[316] As the above history showed, SDDs are not just threats to the realisation of socio-economic rights as essential interests of the state, but might qualify as clear threats to global peace as evident in World War II, Argentina's debt crisis, Euro debt crisis and previous circles of

311 O Sykes 'Economic necessity in international law' (2015) 109 *AJIL Unbound* 296-323; A Alvarez-Jimenez 'Advancing doctrine through devil's advocacy: A response to Allan O Sykes' (2015) 109 *AJIL Unbound* 175-180; A van Aaken 'On the necessity of necessity measures: A response to Allan O Sykes' (2015) 109 *AJIL Unbound* 181-186.

312 *Société Commercial de Belgique (*1939) PCIJ Series 160. International trade law recognises a similar principle (see GATT arts XXI, XX and XIX).

313 A Reinisch & C Binder 'Debt and state of necessity' in Bohovlasky & Cernic (n 4) 115-128.

314 S Benediktsdotirr and others 'The rise, fall, and resurrection of Iceland: A post-mortem analysis of the 2008 financial crisis' (2018) *Brookings Papers on Economic Activity* 191-308.

315 See Preamble to UNHRC Resolution 27/30 (26 September 2014) (n 277).

316 UN Charter 1945 art 39.

destructions, deaths and debt defaults.[317] In the words of Goldman, peace in a positive sense includes 'enjoyment of basic socio-economic rights'.[318]

The politics in the UN Security Council (UNSC) might pose a challenge in this regard, especially as creditor nations that control such Council continuously resist a fair statutory SDR framework.[319] Nonetheless, a sustained implementation of socio-economic rights obligations by state parties to ICESCR would be a sure recipe for global peace, further deepening and sustaining international peace and security.[320] The powers of UNSC permanent members as bilateral creditors and their direct influence over the governance policies of both IFIs and debtor nations might support this proposition given the impacts of poverty on global security.[321] The feasibility of this proposition, however, is the problem as UNSC is dominated by creditor states.

Although the above arguments support the recognition (or perhaps existence) of a 'right' to SDR based on the primacy of socio-economic rights that would entail a suspension of debt service obligations under general international law, it should be admitted that the arguments might also indirectly reinforce the creditor-diktat imbedded in the existing sovereign debt regime. In seeking to situate socio-economic rights of debtors' citizens within the apparently flawed and disorganised creditor-biased governance regime, the arguments might ostensibly give a nodding legitimacy to the said regime. However, this may not necessarily be correct. The existing regime does not qualify as a 'system'. It is often described as a 'non-system'.

In summary, the above arguments have exposed the deep-seated legitimacy issues surrounding the existing SDR frameworks fuelled by creditor-diktat, while showing that, using public international law, a counter-narrative can be produced to challenge the dominant, creditor-biased narrative.[322] It would enable a suspension of debt service only for

317 M Goldmann 'Sovereign debt crises as threats to the peace: Restructuring under Chapter VII of the UN Charter' (2012) 4 *Goettingen Journal of International Law* 153-175.

318 Goldmann (n 317) 154.

319 Eg, UNHRC Resolution 27/30 (n 277).

320 A Loubert 'Sovereign debt threatens the union: The genesis of a federation' (2012) 8 *European Constitutional Law Review* 442-455.

321 Goldmann (n 317) 168-175.

322 Sudreau & Bohoslavsky argue that 'a basic – but important – objective is to acknowledge an outcome orientation governing sovereign debt contracting, which requires that sovereign actions (such as borrowing and lending) be in citizens' interest. This idea is based on a notion of sovereignty intrinsically linked to human rights and the *erga omnes*

a sustained implementation of socio-economic rights in the spirit of the public-private mix of sovereign debt governance as conceptualised earlier.[323] It may qualify as a 'general principle of law' because most domestic insolvency systems recognise reliefs for debtors during bankruptcy.[324]

Not recognising the 'right' to SDR during debt crisis could amount to disregarding the primacy of socio-economic rights and, with recurring SDDs across the world, it would be a triple loss (that is, for the world, debtor and its citizens) but less so (or no loss) for creditors.[325] It entails balancing imperatives to preserve the 'justice' of sovereign debt. The 'right' to SDR, therefore, should be seen as a component of a sustained implementation of socio-economic rights obligations within the sovereign debt regime. This is because, in the absence of a fair statutory framework for SDR, recurring SDD would make the fulfilment of ICESCR obligations unsustainable, subjecting the rights to the vagaries of creditors and poorly-regulated markets. Finally, it is worth noting that the argument does not, in any way, advocate a repudiation of debt commitments; it only suggests a suspension of obligation to enable the debtors 'cool off' from the debt crisis and ensure priority is given to the implementation of socio-economic rights as essential interests of the state.[326]

4 Socio-economic rights in SDR: Roles of the UN and its agencies

In light of the history of recurring SDDs and the flawed, disorganised SDR regimes highlighted above, it would be appropriate to examine the efforts of the UN and its agencies on these issues in relation to socio-economic rights. Interestingly, since the Latin American debt crisis, the UN and its agencies have become key players in the quest to develop a rights-based SDR regime. However, despite their laudable efforts, this has not materialised. Even a fair non-rights-based statutory SDR regime devoid of creditor-diktat has not yet emerged. It is now appropriate to

(rights or obligations owed towards all) effect of human rights obligations so that the impact of sovereign debt over states' capacities to promote and protect human rights is not something (legally) unfamiliar to lenders.' See Sudreau & Bohoslavsk (n 4) 624.

323 *Gabcikovo-Nagymaros* case (n 308) para 101, holding that 'as soon as the state of necessity ceases, the duty to comply with treaty obligations revives'.

324 Raffer (n 5).

325 Creditors of course usually record loss following SDR but their gains before SDD often outweigh their subsequent loss while citizens' loss might be 'life-changing' or even 'life-ending'. See Sturzenegger & Zettelmeyer (n 11) 349.

326 Paliouras (n 10) 115-136.

examine some of the major instruments and measures adopted so far by UN.

4.1 UNGA, 'right' to SDR and socio-economic rights

The UNGA has adopted measures, mostly in the form of declarations and resolutions, having direct bearing on or connections to socio-economic rights and SDR.[327] Indeed, it advances the debate by recognising the 'right' to SDR as argued above but through its resolutions and guiding principles only.[328]

4.1.1 Socio-economic rights in UNGA's BPSDRP 2015

The primacy of human rights, the numerical strength of highly-indebted countries at UNGA and the persistent pressure from CSOs helped to firmly place issues of human rights and debt relief (which, somehow, moderate the strict private law paradigm) on the UNGA reforms agenda.[329] Since the early 1970s, UNGA has become a platform for interrogating the dominant creditor-infused narrative of sovereign debt.[330] There is general consensus among its members that the 'current non-system for sovereign debt restructuring remains fraught with perverse incentives, which in turn lead to destructive and inequitable outcomes'.[331] Consequently, by Resolution 69/319, UNGA adopted BPSDRP in September 2015.[332] This was not, however, without the traditional resistance from the most influential creditor nations whose jurisdictions, literally, constitute the hub for obstructive activities by non-official creditors (for instance, litigation by hold-outs and vulture funds). The US, Britain, Germany, Canada and Japan have become persistent objectors.[333]

327 See, eg, n 1 above. See also UNGA Declaration on the right to development (adopted 4 December 1986).

328 Paliouras (n 10) 115-136; Lumina (n 5) 251-268.

329 See n 3 above.

330 UNGA Declaration on the establishment of a new international economic order (adopted 1 May 1974).

331 Guzman & Stiglitz (n 264) 1.

332 Basic Principles on Sovereign Debt Restructuring Processes (UNGA Resolution 69/319 of 10 September 2015), https://digitallibrary.un.org/record/820120?ln=en (accessed 27 September 2023).

333 Out of the 176 member states that voted on the Resolution 'Towards the establishment of a multilateral legal framework on sovereign debt restructuring' (UNGA Resolution 68/304 of 9 September 2014), 124 voted in favour, 41 abstained, and 11 voted against. The group of countries that abstained or voted against the Resolution were mostly creditor nations. A year later, out of the 183 countries that voted on UNGA Resolution 69/319 adopting BPSDRP, 136 countries voted in favour, 41 abstained, and six countries voted against. The latter group included the US and the UK, the

BPSDRP essentially consists of nine principles mostly reflected in or founded on CIL, treaties and general principles found in many domestic insolvency laws. These are a 'right' to SDR (anchored on the overarching principle of sovereignty); good faith; transparency; impartiality; equitable treatment of creditors; sovereign immunity; legitimacy; sustainability; and majority restructuring.[334] Using the fundamental principle of sovereignty which, as illustrated in chapter 2, undergirds and permeates nearly all aspects of international law, BPSDR recognises a debtor's 'right' to SDR.[335] This means that the decision to restructure belongs exclusively to the sovereign debtor but, once such decision has been made, there must be a transparent, impartial and good faith negotiation (that is, excluding self-help) between the debtor and its creditors to ensure a return to debt sustainability.[336] This is in the spirit of the principle of sovereignty.[337] Equitable treatment of creditors and majority treatment are imbedded into this 'right' while sovereign immunity limits the effects of foreign laws on sovereign debtors.[338] BPSDR, therefore, requires that an SDR process be based on the rule of law and should 'promote sustained and inclusive economic growth … minimising economic and social costs, guaranteeing the stability of the international financial system and respecting human rights'.[339] It also outlaws hold-outs.[340]

However, although it seeks to minimise the impacts of activities of hold-outs and vultures, BPSDRP ostensibly endorses the contractual philosophy, perhaps in the spirit of ensuring a fair balance between debtors and creditors to enjoy a broad acceptance across the world. The implication is that jurisdictions whose jurisprudence is built around the strict private law paradigm philosophy of sanctity of contract can hardly relegate the

two major jurisdictions for sovereign debt issuances by emerging economies and for vulture funds litigations. Others were Canada, Germany, Israel and Japan. The UN BPSDR 2015 followed the outcome of the work of the Ad Hoc Committee established under Resolution 69/247. See UNGA Resolution 69/319 on BPSDRP (n 332). For the pattern of resistance to sovereign debt governance reforms in the past, see the UN Commission on Human Rights Commission on Human Rights Resolution 2004/18 on Effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights (E/CN.4/RES/2004/18) (16 April 2004), https://www.refworld.org/docid/43f3135f0.html (accessed 11 November 2023).

334 UN BPSDR 2015 (n 2) Principles 1-9.

335 UN BPSDR 2015 (n 2) Principles 1-4.

336 As above.

337 Paliouras (n 10) 121.

338 UN BPSDR 2015 (n 2) Principles 5-6.

339 UN BPSDR 2015 (n 2) Principles 7-8.

340 UN BPSDR 2015 (n 2) Principle 9.

latter to prioritise any socio-economic rights concerns of debtor countries. For instance, Guzman and Stiglitz, while reviewing the potential impacts of a popular US court's decision against Argentina brought by hold-out creditors, argued that had majority bondholders followed the examples of the hold-outs that sued, then 'Argentina would have been in limbo, neither being able to repay nor to restructure its debts without inflicting unconscionable pain on its citizens – and even with such pain, repaying on its debt would not have been possible.'[341]

In addition, as a product of soft law instrument, BPSDRPs' effectiveness would depend on uniform domestication by countries which, to be realistic, is highly unlikely. Indeed, even the few countries (UK, Belgium and the UK's self-governing dependencies of Isle of Man and Jersey) that limit the recoverable amount by vultures through legislation had constitutional litigations to contend with.[342]

4.1.2 Socio-economic rights and sustainable debt in SDGs Agenda 2030

Apart from the focus on food, water, free basic education and health care, the defunct MDGs set targets for achieving sustainable debt for poor countries under the goal on global partnership for development.[343] This was to be done through official debt reliefs, specifically HIPC and MDR initiatives as well as the bilateral ODAs.[344] However, apart from

341 Guzman & Stiglitz (n 264) 5.

342 In 2016 a popular vulture fund (NML Capital) sued the Belgian government over its legislation limiting vulture fund activities (ie limiting recoverable sums to the amount used in purchasing the junk bonds only). On 31 May 2018 the Belgium Constitutional Court dismissed the vulture's action. See EURODAD 'Debt justice prevailed at the Belgian Constitutional Court: Vulture funds law survives challenge by NML Capital' (2018), http://www.cadtm.org/Debt-justice-prevails-at-the-Belgian-Constitutional-Court-Vulture-funds-law (accessed 23 August 2018). See also UK's Debt Relief (Developing Countries) Act 2010. As noted earlier, notwithstanding the general condemnation, some scholars consider the positive roles of vultures as 'market-enforcers, liquidity-providers, and information-providers'. This is a creditor-diktat narrative. Wozny, eg, argues that 'vulture funds do make markets more efficient. If the advantages of vulture funds are significant enough, national legislative action that broadly bans vulture funds may be costly … [V]ulture funds create numerous *ex ante* benefits. First, they provide incentives for corporations and sovereign states to promote more efficient capital structures. Second, they serve as a moral hazard counterbalance. Third, they provide liquidity on the secondary distressed debt market. And fourth, they serve as information-providers. These functions are highly valuable and result in a more efficient market.' See Wozny (n 265) 726-736.

343 Raffer (n 4) 101-113.

344 Indeed, IMF has declared that the MDR Initiative was in fulfilment of the commitment towards realising the MDGs. See IMF (n 211) 1. The indicators for Targets 8B (addressing the special needs of the less-developed countries) and 8D (dealing with developing countries' debt problems to enable them to achieve debt sustainability) were

the inadequacies of these initiatives as argued above, the notion of 'debt sustainability' under MDGs was as conceived and operationalised by IMF and World Bank with almost an exclusive focus on creditor claims, that is, a debtor's capacity to continue debt service and its economic prospects.[345] It, arguably, was a narrow notion built on creditor-diktat. Therefore, without, among others, cooperation for a balanced SDR framework, MDG 8 (global partnership for development) became a distant dream.[346] Ironically, in 2011 IMF and World Bank observed that only few poor countries were on track to meet this Goal.[347]

Ensuring sustainable debt through global partnership for development was one of the unfinished or unfulfilled agendas of MDGs that were rolled over to the new 2030 Agenda for Sustainable Development in 2015.[348] This Agenda recognises the dilemma facing sovereign debtors and the broader implications of unsustainable debt on their drive towards sustainable development.[349] Like their predecessors, one of the central objectives of SDGs is to comprehensively support and guide efforts towards a

ODA and debt sustainability respectively. See UN Millennium Declaration (2000).

345 Guzman & Stiglitz (n 264) 7 (noting 'standard approaches, such as that followed by the IMF, have generally ignored this broader perspective, as attention has been focused mostly on formal financial claimants'). See also Raffer (n 4) 101; Sudreu & Boholavsky (n 4) 619; J Giffith & G Brunswikc 'IMF conditionality: Still undermining healthcare and social protection?', https://eurodad.org/IMF-conditionality-undermining-healthcare (accessed 20 August 2019).

346 Although there were improvements brought about by debt relief initiatives as ODA increased from 2000 to 2015, it does not change the creditor-logic imbedded in the various ODA programmes that substitute debt relief with ODA. Indeed, studies have shown that general progress in the aspects of the MDGs were not solely attributable to the MDGs but largely to the remarkable growth witnessed in China and India. See A de Man 'Right-based approaches to development and the post-2015 development goals: A critical assessment' LLD thesis, University of the Free State, 2017 71-94.

347 IMF (n 211) para 5.

348 This is now Goal 17 and is broadly called 'partnership to achieve all the goals'. According to the UN, the SDGs are interconnected and are 'the blueprint to achieve a better and more sustainable future for all'. These interconnected goals are: no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible production and consumption; climate action; life below water; life on land; peace, justice and strong institutions; and partnership for the goals. See UN Sustainable Development knowledge platform, https://sustainabledevelopment.un.org/ (accessed 20 August 2018).

349 Sustainable development means 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. See World Commission on Environment and Development (WCED) *Our common future* (1987) ch 2 para1.

sustained implementation of socio-economic rights of debtor countries.[350] Invariably, therefore, they replicate the targets of specific socio-economic rights covered under the MDGs.[351] Unlike the latter, however, one of the targets of SDGs is to 'assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and address the external debt of highly indebted poor countries to reduce debt distress'.[352]

However, the SDGs adopted the same creditor-focused conception of 'debt sustainability' as MDGs.[353] In addition, like the latter, the SDGs are mere objectives devoid of legal teeth, reflecting the creditor nations' continuous preference for non-binding commitments in this area. Moreover, SDGs' notion of international cooperation, under a global partnership for development, does not align with the one envisaged by ICESCR. Hence, with the polarisation in UNGA on sovereign debt issues, it seems highly unlikely that the nonbinding commitments under SDGs would make any difference. This might dampen the renewed hope that greeted SDGs, but in functional terms and within the context of sovereign debt regime, it seems like doing the same thing all over again. Thus, SDGs might suffer the same fate as MDGs in the area of achieving sustainable debt by poor countries.[354]

4.2 Socio-economic rights in UNHRC's GPFDHR

Arising from the extensive studies and reports by UNHRC's Special Rapporteurs and independent experts on the impacts of SAPs, illicit financial flows and sovereign debts on the realisation of human rights, UNHRC adopted the GPFDHR.[355] This, perhaps, is the most far-reaching instrument so far with specific, extensive provisions on SDR and socio-economic rights.[356] It seeks to complement UN's GPBHR (that is, the

350 UNGA Transforming our world: The 2030 Agenda for Sustainable Development (UNGA Resolution A/RES/70/1 adopted 29 September 2015) (21 October 2015), https://www.un.org/en/development/desa/population/migration/general assembly/docs/globalcompact/A_RES_70_1_E.pdf (accessed 20 August 2023).

351 UN SDG 2020 (n 350) Goals 1-8 that seek to fulfil the MDG gaps. See De man (n 346) 171.

352 UN SDG 2020 (n 350) Goal 17 Target 17.4.

353 Sudreu & Boholavsky (n 4) 619; Guzman & Stiglitz (n 264) 7.

354 De man (n 346) 105.

355 GPFDHR was adopted following years of extensive studies by the UNHCR on the effects of sovereign debt on human rights. See Lumina (n 4) 260-268.

356 UNHRC Report of the Independent Expert on Foreign Debt and Human Rights: Guiding Principles on Foreign Debt and Human Rights (2011) para 17, https://

Ruggie framework) and UNCTAD's PRSLB and to assist parties to sovereign debt contracts in balancing their contractual obligations with their obligations to respect, protect and fulfil, among others, socio-economic rights.[357]

It reaffirms the individual and collective responsibilities of all debtors and creditors to 'respect, protect and fulfil human rights' so that their lending and borrowing activities, especially the negotiation and implementation of loan agreements, debt servicing, restructuring and provision of debt reliefs 'do not derogate from these obligations'.[358] Accordingly, non-official creditors have 'a duty to refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of human rights'.[359] Interestingly, its approach to debt sustainability differs markedly from the creditor-based notion of capacity to resume debt service and projection for economic growth.[360] It imposes obligations on creditors to carry out human rights impact assessments (HRIAs).[361] Both debtors and creditors have a shared responsibility to prevent and resolve unsustainable debt and their mutual accountability is a precondition for ensuring an equitable global financial system.[362]

On SDR, GPFDHR recognises that contractual terms must be honoured but circumstances making the debt unpayable may warrant changes to original obligations.[363] Hence, restructuring must not compromise a debtor's obligation to fulfil its socio-economic rights commitments.[364] Debt relief must also not compromise fulfilment of socio-economic rights obligations and should be distinguished from

www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-23_en.pdf (accessed 20 July 2019).

357 GPFDHR 2011 (n 2) paras 1 & 2.

358 GPFDHR 2011 (n 2) para 6.

359 GPFDHR 2011 (n 2) para 9.

360 GPFDHR 2011 (n 2) paras 65-66.

361 GPFDHR 2011 (n 2) paras 10-14 & 40. It defines HRIA as 'a systematic process, undertaken by an independent body with the full and informed participation of affected communities, based on the normative framework for international human rights law, which aims to measure the impact of an activity or project on the realisation of human rights'. In addition, UNHRC has developed Guidelines on HRIA. See UNHRC Guiding principles on human rights impact assessments of economic reforms (2019) paras 2-15, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/443/52/PDF/G1844352.pdf?OpenElement (accessed 28 August 2019).

362 GPFDHR 2011 (n 2) paras 23-24.

363 GPFDHR 2011 (n 2) para 52.

364 GPFDHR 2011 (n 2) para 53.

ODA.[365] In addition, a change of circumstances might warrant a debt moratorium covering 'principal, interests, commissions and penalties'.[366] Loan contracts should restrict sale of debts on secondary markets without prior consent of the sovereign debtor, and creditors should avoid selling to notorious holdouts and vultures.[367] Loans should not be conditioned on privatisation, investment, deregulation, trade and financial sector liberalisation thereby rejecting SAPs, PRSPs and conditionalities.[368] BITs must also align with socio-economic rights obligations of debtors.[369] It also affirms the sovereignty of debtors in the following words:

> Creditor states and the international financial institutions must not take advantage of an economic, financial or external debt-related crisis as an opportunity to push for structural reforms in debtor states, however useful such reforms might be perceived to be in the long term. Such reforms should be initiated, formulated and implemented by the debtor states themselves.[370]

Finally, it recommends the establishment of an independent, impartial SDR mechanism to fairly resolve sovereign debt disputes and determine the illegitimacy or odiousness of debts based on creditors' prior knowledge of lack of citizens' consent and absence of benefit to them.[371]

From the above, there is no doubt that GPFDHR explicitly prioritises socio-economic rights in SDR and proposes a fairly balanced restructuring regime. This is a remarkable progress in situating these rights within SDR. However, despite its prioritisation of socio-economic rights, it has noticeable shortcomings. First, it ostensibly ignores the foundational document which provided for these rights in a concrete legal term (that is, ICESCR). Beside a fleeting reference to UN Charter and article 28 of the Universal Declaration, it does not at all mention ICESCR. This omission might reinforce the creditor-diktat narrative as the GPBHR's authority and legitimacy is now plainly reduced to a mere voluntary code, even though most of the principles were derived from international law.

365 GPFDHR 2011 (n 2) paras 55-57.

366 GPFDHR 2011 (n 2) para 58.

367 GPFDHR 2011 (n 2) paras 61-62.

368 GPFDHR 2011 (n 2) para 77.

369 As above.

370 GPFDHR 2011 (n 2) para 80.

371 GPFDHR 2011 (n 2) paras 84-86.

Second, despite sovereign debt's historical link with the unfairness of the trading system, GPFDHR does not clearly address this connection.[372] Third, it sacrifices precision in its attempt to be comprehensive. For instance, it treats all creditors (official and non-official) the same despite their distinct peculiarities, nor does it recognise the complexities presented by hybrid creditors like official bondholders. In addition, there are no well-defined criteria to measure or define what amounts to responsible lending or borrowing. It fails to acknowledge that blacklisting notorious vultures would do little to prevent the emergence of new ones given the successes recorded by the notorious ones. Fourth, although it recognises the growing trend of redefining investment to include debt instruments, it fails, even remotely, to acknowledge the legitimacy crises surrounding investment treaty arbitration and its tendency to frustrate any mutually agreed SDR. This, therefore, seems to be an endorsement of the investment arbitration regime despite the rejection of same by many countries.[373]

4.3 Socio-economic rights in UNCTAD's evolving SDR framework

Apart from its observatory involvement in Paris Club, UNCTAD has been at the forefront of generating consensus-based principles on SDR since the Latin American debt crisis. It has, so far, developed three major SDR instruments.

4.3.1 SDR Code of Conduct 1980

Following the sustained pressure for the establishment of a New International Economic Order (NIEO) which started in the 1970s, UNCTAD spearheaded the drafting and adoption of a 'code of conduct' setting out guidelines for SDR in 1980.[374] The Code contains guidelines that emerged through consensus of both creditor and debtor nations.[375] It defined the circumstances that may warrant approaching Paris Club

372 The only relevant reference is para 71 which requires that debtors and creditors should consider contingent liabilities from export credits in making decision. This is curious because the independent expert had submitted a detailed report on the nexus between sovereign debt and trade. See UNHCR 2010 (n 152) paras 5-7.

373 Eg, Venezuela and Bolivia have withdrawn from the ICSID Convention on allegations of investor bias and there are moves by some countries to do the same. See LE Trackman 'ICSID under siege' (2012) 45 *Cornell International Law Journal* 603-665. There are over 150 signatories to the Convention. For the contracting parties, see ICSID 'List of Contracting States and other signatories of the Convention', https://icsid.worldbank.org/about/member-states/database-of-member-states (accessed 2 September 2018).

374 Enrique (n 80) 241.

375 As above.

for restructuring. One of these is imminent or actual SDD.[376] Although the code recognised this imperative, it, however, only dealt with bilateral official loans disregarding private bondholders. It was also a mere voluntary code. Indeed, it gave legitimacy to the Paris Club which, until relatively recently, does not recognise any concerns for socio-economic rights of debtors' citizens. Therefore, it was not a surprise that subsequent developments, including the explosive growth of nonofficial creditors after the 1980s and the recent emergence of new creditor nations, pushed the code into total irrelevance.

4.3.2 Socio-economic rights and SDR under PRSLB 2012

In the wake of the Eurozone debt crisis, UNCTAD came up with a much more robust set of SDR principles in the form of the PRSLB.[377] This perhaps is the most prominent intervention by UNCTAD so far. It generates immense academic interests because of its novel provisions which generally reflect the growing interests on the matter.[378] The PRSLB broadly consists of 15 principles couched in the forms of duties of both creditors and debtors with explanatory notes on, and implications of, each principle to guide practitioners. For instance, the creditors have the following responsibilities: to recognise that 'government officials involved in sovereign lending and borrowing transactions are responsible for protecting public interest (to the state and its citizens for which they are acting as agents)' (principle 1); to enable debtors to make an informed decision (principle 2); to determine due authorisation of the loan under debtor's laws (principle 3); to make a realistic assessment of debtor's repayment capacity (principle 4); to cooperate in enforcing UN sanctions against any debtor (principle 6); and to behave in good faith to ensure efficient SDR so that hold-outs do not turn into 'abusive creditors' (principle 7).[379]

On the other hand, the government of a sovereign debtor has the following responsibilities: to protect the interests of its citizens in loan contracts (principle 8); to establish and follow a transparent legal framework for borrowing, as tax payers would ultimately be responsible for repayment of such debt (principle 10); to make full and universal

376 As above.

377 PRSLB 2012 (n 2).

378 S Blankenburg & RK Wrigh 'Preface' (2016) 41 *Yale Journal of International Law* 1-8; JP Bohoslavsky and others 'Emerging customary law in sovereign debt governance?' (2014) 9 *Capital Markets Law Journal* 55-72; and the collection of essays in Esposito and others (n 149).

379 PRSLB 2012 (n 2) Principle 7.

disclosure (including to its citizens) of the terms and conditions of any loan (principle 11); to ensure adequate audit, monitoring, management and sustainability of debts (principle 13); and to avoid overborrowing by weighing the costs and benefits of any loan to ensure that it has 'a prospective social return at least equal to the likely interest rate.'[380]

PRSLB further provides that in the face of debt crisis or where SDD becomes unavoidable, the debtor's 'first responsibility' is to communicate to its creditors to reach a mutually-acceptable restructuring agreement while respecting 'seniority of debts' and its citizens 'should share an equitable burden of adjustment and/or losses'.[381] It provides that sovereign debt contract is binding although 'economic necessity can prevent the borrower's full and/or timely repayment.'[382] Creditor corruption in the borrowing process and violations of UNSC's sanctions might avail a debtor in the event of sovereign debt claims.[383] Finally, debtors have a responsibility to carry out an *ex ante* investigation to determine the 'financial, operational, civil, social, cultural and environmental implications' of project financing.[384]

Although very concise (and less wordy than GPFDHR), PRSLB's simplistic approach reduced sovereign debt governance to dualised duties of creditors and debtors only. Despite these duties, it does not specifically recognise socio-economic rights responsibilities of the parties. Moreover, its explanatory implications reveal the creditor-diktat spirit undergirding it and this might affect its legitimacy and acceptability. For instance, citing examples of IMF's special data dissemination standards under the principle on full disclosure raises conflict of interests and legitimacy concerns because even UNCTAD itself recognises that 'in reality, no creditor can play an independent role in a debt workout'.[385] In particular, PRSLB's implicit reference to shifting debt burdens to the future generations might also go against the important principle of sustainable development.[386] Its conception of debt sustainability is also very narrow and creditor-

380 PRSLB 2012 (n 2) Principle 14.

381 PRSLB 2012 (n 2) Principle 15.

382 PRSLB 2012 (n 2) Principle 9.

383 PRSLB 2012 (n 2) Principle 9.

384 PRSLB 2012 (n 2) Principle 12.

385 UNCTAD SDWG 2015 (n 2) 27.

386 See WCED (n 349). Implication 1 of Principle 8 of the PRSLB states that '[s]overeign debts that are contracted by governments bind the continuing legal entity of the state, including its future administrations and future generations of its citizens. The government officials who authorise and execute such borrowings therefore carry responsibilities vis-à-vis the people who must ultimately repay the money.'

focused.[387] Although it acknowledges the importance of HRIA in sovereign financing, it does not recognise any shared responsibility in this regard. In other words, it seems to squarely place the HRIA burden on the debtor. In addition, it does not contemplate any likely negative effects of loans advanced by bondholders besides its brief reference to the so-called 'abusive creditors' (hold-outs and vultures). It does not define what amounts to abusive, or even responsible, sovereign lending and borrowing.

4.3.3 Socio-economic rights and SDR under SDWG 2015

While recognising the fragmented, inefficient and disorganised SDR regimes, UNCTAD advanced the following five major principles to guide debtors and creditors in SDR in its 2015 SDWG: legitimacy; impartiality; transparency; good faith; and debt sustainability.[388] Legitimacy entails acceptability of the workout on the basis, for instance, of its legal source (including alignment with human rights) and processes (including ownership by the citizens, inclusiveness of actors, predictability of results and legal review by an impartial tribunal).[389] Impartiality is a general principle consisting of independence of actors, institutions and information.[390] Transparency entails exercise of public authority to make data open (for instance, on debt sustainability, institutions and processes).[391] The principle of good faith entails legitimate expectations of parties with respect to substantive fairness and procedural equality, standstill on payments, duty to negotiate and rejection of abusive creditors.[392]

Finally and, more importantly, debt sustainability under SDWG means that sovereign debt 'can be serviced without impairing the social and economic development of society'.[393] Thus, while avoiding the narrow creditor-focused conception in PRSLB, it categorises sustainability into two types: narrow debt sustainability, which focuses on a debtor's financial position with probable projections for return to debt service; and 'full debt sustainability', which focuses on citizens' well-being, economic and social sustainability because SDR 'must not lead to violations of economic or

387 EURODAD 'Civil society position on the IMF and World Bank debt sustainability framework review' (2016), https://eurodad.org/files/pdf/5a7c224a7e99c.pdf (accessed 20 June 2018).

388 UNCTAD SDWG 2015 (n 2) para 19.

389 UNCTAD SDWG 2015 (n 2) para 20.

390 UNCTAD SDWG 2015 (n 2) para 21.

391 UNCTAD SDWG 2015 (n 2) para 22.

392 UNCTAD SDWG 2015 (n 2) para 23.

393 UNCTAD SDWG 2015 (n 2) para 24.

social rights'.[394] However, despite this lofty improvement on PRSBL, it can be observed that SDWG, being a guide, is less authoritative compared to the former.

5 Sovereign debt, maximum available resources and progressive realisation of socio-economic rights

According to the creditor-diktat narrative, debtor's continuing debt service must be part of any restructuring package as it is necessary for regaining market access and returning to debt sustainability.[395] It would be recalled that reputation theorists rationalise the enforcement and repayment of sovereign debt on this basis.[396] It means that, regardless of the gravity of a debt crisis, creditors' right to repayment must be prioritised because it is for the 'good' of the debtor in the long-run. Without repayment, a debtor will be shut out of the debt market, and this might negatively affect the fulfilment of even the minimum core obligations. Thus, it is framed as a beneficial practice for the debtor. While criticising such norm, Lienau observes that the 'debt continuity norm' controls the current sovereign debt regime as it 'keeps the core flow of capital safe and relatively free of controversy'.[397] Indeed, the above instruments and SDR processes have implicitly accepted the 'exigency' of repayment during debt crisis as part of the 'norms' of SDR. The current practice largely reflects this. This 'norm' was widely employed during the Latin American debt crisis, the African debt crisis, the Asian debt crisis and the Eurozone debt crisis.

However, the creditor priority norm lacks a concrete legal basis in international law. Unfortunately, some countries have now constitutionalised it within their domestic legal systems. For instance, in response to Eurozone debt crisis, Spain's 2011 constitutional amendment provides that '[l]oans to meet payment on the interest and capital of the state's public debt shall always be deemed to be included in budget expenditure and their payment shall have *absolute priority*'.[398] In Greece, a legislative measure was adopted providing that in order to maintain fiscal stability, it is necessary to ensure 'servicing of the public debt at a

394 As above.

395 See the instruments in n 266 including IMF's *Strengthening the contractual framework*.

396 Tomz (n 17) 3-15.

397 Lienau (n 5) 1-3.

398 Sec 135(3) Constitution of the Kingdom of Spain (as amended 2011).

priority'.[399] This formally gives priority to debt servicing. Consequently, loan facility agreements arising from recent Greek SDR imposed conditions requiring that 'the money from these loans was to be used exclusively for the repayment of debts to the country's creditors, as opposed to meeting domestic needs, such as the payment of salaries and pensions'.[400] In addition, structural reforms and austerity measures were imposed as preconditions for Greece to regain market access and attain debt sustainability.[401] Thus, creditors' interests take precedence. In the words of the Greek Truth Committee on Public Debt '[t]he use of the bailout money is strictly dictated by the creditors, and so, it is revealing that less than 10% of these funds have been destined to the government's current expenditure'.[402] The bailout programme also disproportionately affected the vulnerable groups.[403]

In the case of Argentina, hold-out creditors' lawsuits literally barred the country from the financial markets and constituted huge strains on its finances and socio-economic rights obligations.[404]

However, constitutionalising the creditor priority norm suggests an intention to ousts conflicting international obligations including ICESCR-based obligations. Nevertheless, critically juxtaposing this creditor priority norm with a debtor's socio-economic rights obligations also presents a fundamental jurisprudential question of prioritisation of competing demands which, arguably, the sovereign debt regime has left almost unaddressed. This, in the context of debt crisis, is an issue of distributive justice because of the apparent resource constraints that usually confront

399 Law 2362/1995, art 1A (as amended April 10, 2012). Gulati and others quoted Worstell arguing, before the COVID-19 pandemic, thus: 'These are harsher terms than the British Empire ever imposed, even backed up by gunboats and the Royal Navy … An "all good efforts" commitment to debt repayment is usually enough but an absolute one is simply unheard of. It does, quite literally, say that if there's an outbreak of plague that sweeps through the country (or any other disaster you might like to think of) then Greece has to repay the debts before offering health care to its own citizens at a time of national disaster.' See M Gulati and others 'When governments promise to prioritise public debt: Do markets care?' *Duke Law School Public Law and Legal Theory Series* (13 April 2019) 2 fn 2, https://ssrn.com/abstract=3371492 (accessed 20 December 2022).

400 I Bantekas 'Exceptional recognition of governments and political parties in respect of sovereign loans: The Greek case' (2013) 82 *Nordic Journal of International Law* 318.

401 Principles for stable capital flow (2013) 9-10.

402 Greek Truth Committee on Public Debt Preliminary report (2015) 3, https://auditoriacidada.org.br/wp-content/uploads/2014/06/Report-Greek-Truth-Committee.pdf (accessed 20 June 2019) (Greek Truth Committee 2015).

403 Greek Truth Committee (n 402) 38-41.

404 AC Porzecanski 'Human rights and sovereign debt in the context of property' (2017) 3-34, https://ssrn.com/abstract=2961289 (accessed 14 June 2019).

a distressed debtor. It requires simultaneously fulfilling obligations owed to multiple constituencies including socio-economic rights holders. As examined in the previous chapter, by their nature, socio-economic rights obligations of a sovereign debtor under ICESCR depend upon resource availability and their realisation must be achieved progressively.[405] The question is whether sovereign debt is an 'available resource' for the purpose of the obligation to progressively realise these rights 'to the maximum of its available resources'.

Because of the asymmetric performance characterising sovereign debt obligations, it may be appropriate to distinguish between the 'initial loan resources' and the 'debt repayment resources'. While the former undoubtedly is an 'available resource' suitable for deployment into the progressive realisation of socio-economic rights, it is not clear how the latter can be deployed for the same purpose because they are resources set aside, usually through budgetary provisions, for debt repayment. The predominant view is to treat the 'debt repayment resources' as *prima facie* creditors' rights and, therefore, outside the scope of 'maximum available resources' of the debtor.[406] In other words, resources set aside for debt repayment are, *ipso facto,* not 'available resources' as they belong to the creditors and therefore cannot, strictly, be used for the fulfilment of socio-economic rights of debtor's citizens. By this view, there are no competing obligations on such resources to begin with.[407] Toolz, for instance, has argued, in the context of bilateral official debt, that 'with repayment overdue, the resources now arguably belong to the creditor rather than to the debtor state … [and] to require rescheduling or alleviation of debt would be tantamount to requiring a temporary transfer of resources from the creditor states to the debtor states'.[408] Michalowsky also maintains that it will amount to

> an unjustified forced transfer of resources from the North to the South … [because] if social rights obligations can be invoked against the fulfilment of repayment obligations, it is in fact the foreign creditor who is forced to assume the bill for the protection of the social rights of the people of the debtor state, despite not being under any such obligations.[409]

405 ICESCR art 2(1).

406 J Tooze 'Aligning states' economic policies with human rights obligations: The CESCR's quest for consistency' (2002) 2 *Human Rights Law Review* 232-233; S Michalowski 'Sovereign debt and social rights – Legal reflections on a difficult relationship' (2008) 8 *Human Rights Law Review* 35-68.

407 Porzecanski (n 404) 2-34.

408 Tooze (n 406) 250.

409 Michalowski (n 406) 47-50.

Although this view seems plausible, arguably, it is flawed from both normative and theoretical points of view. First, the notion of 'ownership' ascribed to the 'repayment resources' may be theoretically contested.[410] Time must be factored into the analysis. In general, lending involves transfer and re-transfer of capital over a period of time such that the owner, without complete alienation, 'gives away his capital without retaining anything'.[411] By nature, capital 'is transferred from the lender to the borrower and at the end of the agreed period it is immediately retransferred from the borrower to the lender'.[412] The interest is a consequence of title to possession, the fruit of the capital.[413] The ownership in this context is private, but the notion of 'sovereignty', as examined in chapter 2, arguably makes the ownership of the capital different from typical ownership in ordinary private lending. This is because sovereignty over resources is a core principle of international law which, arguably, extends to the 'repayment resources'.[414]

410 There are, eg, opposing conceptions of 'ownership' from capitalist and Marxist perspectives. In general, though, 'property' is a dynamic, changing concept that sometimes outgrows the underlying norms that established its functions in the society. Renner observes, eg, that by overcoming feudal restrictions, capitalism 'ordained that everybody shall peacefully enjoy and keep his own … [but] peaceful enjoyment of one's own object becomes … title to surplus value, distributing the whole of the social product as profit, interest and rent among an idle class, and limiting the working class to the mere necessities of existence and procreation. In the end it [capital] reverses all its original functions'. He maintains thus: 'The owner has now no longer even detention of his property; it is deposited at some bank, and whether he is a labourer or a working capitalist, the owner cannot dispose of his own … All property is conferred by the law, by the conscious exercise of the power of society … Property is a matter of private law … But contemporary property, capital as the object of property, though *de jure* private, has in fact ceased altogether to be private. No longer does the owner make use of property in a technical way … property in its technical aspect has been completely estranged from the owner. The Roman civil lawyer believes that *dominus rei suaelegem dicit*. As far as ownership of capital is concerned, this pronouncement is no longer true: it is society that disposes of capital and prescribes the laws for its use … Public law has for a long time recognised that where the whole of society is in principle concerned with an object, it can no longer be treated as a matter that is merely private.' See K Renner *Institutions of private property and their functions* (1946) 292-300.

411 Renner (n 410) 140.

412 As above.

413 Renner (n 410) 140-141.

414 The principle of permanent sovereignty over resources is well settled. See United Nations Declaration on the establishment of a new international economic order (adopted 1 May 1974); United Nations Charter of economic rights and duties of states (adopted 12 December 1974); United Nations General Assembly Resolution 626 (VII) (21 December 1952); UN General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (14 December 1962; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) *ICJ Reports* 168 paras 243-246.

The principle of permanent sovereignty over natural resources (PSNR), recognised in several UN declarations and resolutions, evolved to guarantee sustainable path for economic development for developing countries and is intrinsically linked to the cardinal principle of economic self-determination. Although originally intended to protect and assert state ownership over 'natural resources', it is submitted that the principle can apply with equal force to all 'resources' within the context of 'maximum available resources' under ICESCR. 'Resources' for the purpose of progressive realisation of socio-economic rights include natural, human, and financial resources. Therefore, the 'ownership' embedded in the PSNR principle extends to all resources. This means that the resources set aside for debt repayment have a unique ownership feature as they are clothed with sovereignty element. Once there is no actual retransfer, the debtor bears ownership of such resources. Therefore, the repayment resources, it is respectfully submitted, are part and parcel of sovereignty of the debtor over its resources. They should not be treated as creditors' resources. Doing so would change the notion of 'ownership' of resources in the sovereign context and could have implication on the settled principle PSNR.

Admittedly, both the 'initial' and 'repayment' resources are intrinsically connected, one giving rise to the other but, once lent, the sovereign debtor becomes the 'owner' of these resources. In other words, in the spirit of sovereignty, the debtor has the discretion to put the resources to its use. The right to SDR gives a concrete expression to this view. This reasoning holds even in cases of bridge loans. It also holds in the case of IFIs' intervention by way of bailout as seen in the Greek bailout.[415] Although IMF has succeeded in institutionalising the creditor-priority norm in the repayment of its facilities, this does not have any explicit legal backing in international law.[416] In addition, most of the 'repayment resources' normally emanate from the debtor's taxpayers. Taxpayers substantially repay both official and non-official loans. It therefore is absurd to view such resources as creditors' resources. This is supported by the sovereignty element in SDR as recognised in several UN declarations and resolutions, including the UN BPSDRP.

Therefore, even when repayment becomes due, the 'ownership' does not automatically pass to the creditor, perhaps until a judicial pronouncement to that effect is made. This judicial intervention is undoubtedly a public

415 Greek Truth Committee (n 402) 3.

416 S Schadler 'The IMF's preferred creditor status: Does it still make sense after the Euro Crisis?' Centre for International Governance and Innovation Policy Brief (2014) 2-10; JM Rutsel-Silvestre 'Preferred creditor status under international law: The case of the International Monetary Fund' (1990) 39 *International and Comparative Law Quarterly* 801-826.

law function, thereby creating a theoretical gap in the argument in favour of a private, contractual governance paradigm which animates creditor claims over the 'repayment resources'.[417]

In summary, the 'resources' set aside for debt repayment strictly belong to the sovereign debtor regardless of whether such repayment is due. Thus, in the event of sovereign debt crisis, there are bound to be competing demands on the entire state resources, including those set aside for debt repayment purposes. Unfortunately, creditor-priority norm in SDR and the conditions normally attached to debt reliefs and new loans tend to constrain debtors' financial capacity to progressively invest in socio-economic rights-based programmes. For instance, while noting Zambia's reduced attention to education and health care between 2004 and 2006, the UN Independent Expert on Foreign Debt found that high debt servicing costs, conditionalities attached to debt reliefs and new loans and prioritising debt repayments 'over basic needs' have exacerbated poverty and prevented employment of thousands of desperately needed public school teachers.[418]

Second, this view implicitly assumed that outright repudiation is the only way to guarantee the continued fulfilment of socio-economic rights during debt crisis, thereby ignoring the value of debt moratorium. Third, the view is obviously influenced by the creditor-diktat narrative that conceived the relationship as a strictly two-sided creditor-debtor matrix under which the debtor's obligations are purely contractual owed to the creditors only. As argued earlier, it is a mistake to treat sovereign debt as purely and exclusively a two-sided affair because of its expansive and multi-stakeholder character especially the millions of citizens who, ideally, are the true beneficiaries of such debt. Fourth, this view is oblivious of the fact that official (especially bilateral) lenders may have extraterritorial socio-economic rights obligations and that private creditors have a minimum socio-economic rights responsibility to respect these rights. In addition, credit extension has undergone significant transformation with SWFs and erstwhile debtor nations now becoming influential creditors.

It may therefore be argued that the creditor priority norm, even without an explicit international legal basis, could have a negative effect on the financial capacity of sovereign debtors to progressively fulfil their socio-economic rights obligations under ICESCR. Constitutionalising this norm by debtors does not amount to deprioritising socio-economic rights which

417 P Zumbansen 'The law of society: Governance through contract' (2007) 14 *Indiana Journal of Global Legal Studies* 191-233.

418 UNHRC 2010 (n 263) 24-25.

enjoy constitutional status in many countries. Debt servicing commitment cannot relegate debtors' socio-economic rights responsibilities. Sovereigns borrow ideally to support the wellbeing of their citizens. According to Rassmussen:

> The needs of a state's citizens are actually part of the reason why sovereign borrowing is justified in the first instance. Part of the classical reasons for allowing the state to consume future assets today is that it allows nations to buffer their citizens from economic shock. When a country is in a downturn, it can borrow against good times. Such borrowing both lessens the current burden on its citizens and hastens the return of economic health.[419]

In fact, sovereign debts are usually 'guaranteed' by the taxing powers of the state. Advancing such loans would make more resources available to the state but repayment of same during sovereign debt crisis renders the notion of 'resource availability' for the purpose of maximum available resources obligation empty. PSNS cannot be ignored in the context of debt servicing during debt crisis.

However, even in the absence of a debt crisis, a state is bound to face competing demands as 'a society in which there are no conflicting demands … is a society beyond justice'.[420] Debt crisis increases the intensity of such competing demands. Thus, as noted in the previous chapter, Waldron conceives socio-economic rights as part of the theory of justice. They are 'rights calculated to ensure that those in a society who are materially radically disadvantaged are, if possible, raised by collective provision above the level of radical disadvantage'.[421] Fundamentally, due to resource constraints, socio-economic rights are 'inherently budgetary' as they consist of rights that 'compete with one another and with other demands for funding' in society.[422] 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'.[423] 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

419 R Rasmussen 'Integrating a theory of the state into sovereign debt restructuring' Vanderbilt University Law School Working Paper 04-16 (2004) 18-19.

420 J Waldron 'Socio-economic rights and theories of justice' in Pogge (n 162) 21-49.

421 Waldron (n 420) 39.

422 Waldron (n 420) 46.

423 Waldron (n 420) 28.

> 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.[424]

It may be argued that Waldron's 'level of radical disadvantage' aligns with the minimum core threshold as recognised in different theories and instruments relating to socio-economic rights.[425] It consists of the basic minimum requirements for human survival and well-being. These include social safety nets required to be incorporated in any development-based projects including lending transactions.[426] Its main concern is the availability of the material bases for human well-being.

Therefore, prioritising socio-economic rights in the face of sovereign debt crisis would invariably unsettle the creditor priority norm. This might be justified on account of the former's explicit legal basis and the latter's lack thereof under international law. It might also be justified on account of the negative impacts of the creditor prioritisation norm on the progressive realisation of socio-economic rights as seen in Zambia, Greece and Argentina. Debt repayment in the face of debt crisis may render the minimum core obligations nugatory. The 'right to restructure' debt recognises the significance of PSNR in debt repayment. This can also be linked to the indebted countries' obligation to deploy their 'maximum available resources' towards the progressive realisation of socio-economic rights. Prioritising socio-economic rights does not entail repudiation of the sovereign debt obligation; it only entails an imposition of debt moratorium until repayment capacity is regained and debt sustainability achieved.

6 Vulture funds litigations and socio-economic rights

One of the inadequacies of the private law paradigm in sovereign debt governance is that it provides the theoretical justification and foundation for debt-profiteering activities, especially vulture funds litigations using domestic legal systems.[427] Several cases have shown how purchasers

424 Waldron (n 420) 31.

425 K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113-175; P Dieterlen 'Taking economic and social rights seriously: A way to fight against poverty' in Pogge (n 162)161-178.

426 Tooze defines 'social safety nets' as 'a net of basic social protection for the most vulnerable groups in the debtor state'. See Tooze (n 406) 239.

427 *FG Hemisphere v Democratic Republic of Congo* 2011 637 F 3d 373 (claimant received over $200 million judgment); *Donegal International v Zambia* (2007) *Lloyd Report* 397

of distressed sovereign debts have turned a development-inspired phenomenon into a purely private profit-making venture with, in some cases, over 1 000 per cent returns on investment.[428] These professional suers usually win their claims because of the compelling power of contracts.[429] Today the dominant governing laws are those of New York and London and the contracts usually exclude sovereign immunity. It is believed that these contractual provisions offer protection for creditors and guarantee more stability and certainty in the sovereign debt market.

However, far from protecting creditors, these contractual provisions have created an uncertain, chaotic debt market that enables unbridled arbitrage using the courts to hold sovereign debtors liable while simultaneously undermining their other international commitments and domestic constitutional obligations and budgetary limitations. While there is growing consensus limiting the application of *pacta sunt servanda* in the context of sovereign insolvency,[430] decisions of domestic courts over the past decades have reinforced the private law paradigm and implicitly ignored socio-economic rights concerns that usually accompany sovereign insolvency. Unfortunately, as the next chapter will demonstrate, this domestic judicial attitude has gradually infiltrated international adjudication of sovereign debt claims, thereby giving some modicum of legitimacy to hold-out and vulture funds' debt profiteering activities under international law.

A few cases will illustrate the implications of this judicial attitude of domestic courts on the fulfilment of socio-economic rights obligations of sovereign debtors. In *NML Capital v Argentina*[431] the plaintiff purchased New York law-governed bonds at a time when Argentina was in deep economic recession that led to its historic debt defaults. They purchased Argentina's defaulted debts with a principal face value of US $172 153 000 at a steep

(claimant received a $15 million judgment); *Kesington International v Congo Republic* (2008) *Weekly Law Report* 1144 (claimant received $118 million judgment).

428 See cases in n 427.

429 See African Legal Support Facility 'Vulture funds in the sovereign debt context' (2016), https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/ (accessed 28 June 2018).

430 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 – JP Bohoslavsky' A/70/275 (4 August 2015) paras 35-36, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/243/41/PDF/N1524341.pdf?OpenElement (accessed 10 October 2023).

431 *NML Capital Ltd v Republic of Argentina* (2d Cir 26 October 2012) (Nos 12-105(L); *Republic of Argentina v NML Capital Ltd* 573 US 134 (2014) (where the US Supreme Court by majority decision upheld waiver of sovereign immunity).

discount but sought to recover 1,380 per cent of what it invested plus interest and penalties,[432] instituting 11 actions for summary judgments in New York. NML got judgments but it was unable to enforce them. Hence, it began hunting for assets within the US and across the world to satisfy the judgment debt. It was owed around US $2,5 billion (then equivalent to almost 1 per cent of Argentina's gross domestic product (GDP)).

In its efforts to enforce the judgments, NML Capital approached the US Court seeking for an injunction restraining Argentina from making payments to the exchange bondholders (those who accepted the exchange offer) arguing that Argentina's debt restructuring enabled the debtor to be in default indefinitely and to prioritise payment to one class of bondholders (exchange bondholders) over other classes of bondholders (that is, hold-outs such as NML Capital) contrary to the *pari passu* clause which requires that Argentina's payment obligations must at all times rank at least equally with all its other creditors. Argentina argued that the *pari passu* clause is a boilerplate that has customarily been part of standard practice in sovereign debt contracts and, therefore, was not meant as a special protection to any class of bondholders.

The Court granted the injunction and held that whenever Argentina pays any amount due under the terms of the restructuring, it must also pay the plaintiffs 'the same fraction of the amount due them (the "rateable payment")'. This was upheld by the US Court of Appeal for the Second Circuit. Many scholars have criticised this novel injunctive relief in favour of NML Capital as it amounted to undermining Argentina's right to restructure its debts in line with standard practice.[433]

NML Capital aggressively pursued Argentina's assets in UK, Europe and Africa.[434] For instance, in *NML Capital v Argentina*[435] it sought the enforcement of judgments against Argentina, and the UK Supreme Court upheld the waiver of sovereign immunity in respect of commercial

432 M Warren 'Argentina wants to pay debts with cash and bonds' *USA Today* 30 March 2013, https://www.usatoday.com/story/money/business/2013/03/30/argentina-offers-to-pay-debts-with-cash--bonds/2038349/ (accessed 12 October 2023).

433 WMC Weidemaier 'Sovereign debt after *NML v Argentina*', http://ssrn.com/abstract=2199655; J Jrada 'Closing the book on Argentina's sovereign debt default: The second circuit's decision and its ramifications for sovereign debt restructuring in the Eurozone' (2012-2013) 32 *Review of Banking and Financial Law* 222.

434 *The 'ARA LIBERTAD' (Argentina v Ghana)* Case Order (15 December 2012), http://www.worldcourts.com/itlos/eng/decisions/2012.12.15_Argentina_v_Ghana.pdf (accessed 15 October 2023).

435 *NML Capital Ltd v Republic of Argentina* (2011) UKSC 31 (UK Supreme Court upheld waiver of immunity).

undertakings of a sovereign. Furthermore, in the ITLO case of *ARA Libertad*, NML Capital sought enforcement of judgments in Ghana by way of seizure of Argentina's navy vessel, the ARA Libertad.

The case of *Donegal International Ltd v Republic of Zambia* presents the classic model of sovereign debt profiteering. In 1979 Zambia obtained an official credit of US $15 million from Romania for the purchase of agricultural equipment. Following Zambia's default in 1985, the parties agreed to reschedule the debt, and in 1992 a 40 per cent debt reduction was agreed. Relations between the parties degenerated as Zambia was unable to repay as agreed. Aware of the potential eligibility of Zambia to the HIPC debt relief, Donegal approached and persuaded Romania to assign the debt. Romania assigned the debt to Donegal at the cost of US $3,2 million. The Zambian government agreed to pay Donegal US $14 million in instalment as full settlement of the debt. However, the Zambian government later stopped payment having discovered some discrepancies including elements of corruption in the settlement agreement. Donegal therefore sued the Zambian government to recover the debt in the UK. Despite raising some questions about the plaintiff's evidence, the Court entered a US $15 million (over 300 per cent returns) judgment against Zambia.

Finally, in *Elliot LP v Banco de la Nacion*[436] Elliot LP, a self-acclaimed activist investor, purchased Peru's New York law-governed working capital debt worth US $20,7 million (in principal amount) from two international banks at the discounted price of US $11,4 million. It sued to recover the full value of the debt, but the District Court held that 'Elliot purchased the Peruvian debt with intent and purpose to sue contrary to Section 489 of New York Judiciary Law (prohibiting champerty and maintenance) which renders unenforceable "assignments taken for the purpose, or motive, of stirring up litigation and profiting thereby"'.[437] However, on appeal it was held that 'the acquisition of a debt with intent to bring suit against the debtor is not a violation of the statute where the primary purpose of the suit is the collection of the debt acquired'.[438] The Court held that the primary purpose of the acquisition was to be paid in full and this is considered a 'legitimate business purpose' (turning a profit) while recovery by judicial process was only a 'contingent purpose'. On a policy ground, the Court reasoned that enforcing debt contracts and voluntary participation in debt restructuring are in the best interests of both the US and, in the long term,

436 *Elliot Associates LP v Banco de la Nacion* 2000 WL 1449862.

437 *Elliot* case (n 436) 369.

438 *Elliot* case (n 436) 372.

indebted countries because of additional borrowing risks and costs.[439] The Court feared the 'perverse result' of sovereign debtors willingly refusing to honour their debt obligations without litigation.[440]

The above and similar decisions have reinforced the dominant private law paradigm, thereby strengthening creditors' position while increasing the cost of debt default for the debtors.[441] Two-thirds of the over 150 cases filed against sovereign debtors between 1976 and 2010 were instituted by distressed debt funds that typically employ aggressive legal strategies, including attachment of debtors' assets across the world.[442] Vulture funds litigation not only is an obstacle to debt restructuring, but also an obstacle to sovereign financing as a whole. It is conditioned upon a philosophy that sees sovereign debt through the narrow prism of private law regardless of the apparent limitations. It does not see sovereign borrowing as a development-driven activity; it is visualised through the lens of creditors, that is, as a purely commercial undertaking.

The implication of the above cases on socio-economic rights obligations of indebted states is that, apart from the political and economic instability that usually attends frustration of debt restructuring, vulture funds litigations could impose uncontemplated, extra-budgetary costs on sovereign debtors thereby undermining their maximum available resources obligation.[443] Debtors must use their limited (or unavailable – during crisis) resources to fight off these litigations or to satisfy judgment debts. These litigations have enabled creditors to encircle debtors' assets and resources across the world while forcing a diversion of resources away from socio-economic rights-related areas.

Some governments have attempted to outlaw sovereign debt profiteering by vulture funds. For instance, the UK and Belgium have enacted statutes for this purpose. Under the UK's Debt Relief (Developing Countries) Act 2010, 'qualifying debts' are protected from profiteering activities of vulture funds.[444] However, the Act is country-specific rather than activity-specific. Also, debts incurred for the procurement of goods and services as well as arbitral awards, including ICSID awards, have been exempted from

439 *Elliot* case (n 436) 380.

440 *Elliot* case (n 436) 381.

441 Schumacher and others (n 18).

442 Schumacher and others (n 18) 2-5.

443 A Blyberg & H Hofbauer 'The Use of maximum available resources' (2014) 4, https://internationalbudget.org/wp-content/uploads/Maximum-Available-Resources-booklet.pdf.

444 Debt Relief (Developing Countries) Act 2010 secs 1, 2, 3 & 4.

the protection of the Act.[445] The US has no similar legislation although attempts were made in the past to outlaw debt profiteering by vulture funds. Recently, New York legislators have introduced a Bill to outlaw trading in distressed debts for profits.[446]

7 Conclusion

The foregoing analysis demonstrated the dominant creditor-based, private law paradigm permeating virtually all the existing SDR frameworks, thereby raising serious legitimacy concerns. It interrogated this narrative using history and principles rooted in international law and argued that this narrative could be displaced by sovereign debtors' 'right' to SDR based on the primacy of socio-economic rights and the principles of necessity, global peace, contagion and exogenously-induced fundamental change of circumstances. This was supported by the evolving UN-driven measures designed to, among others, mainstream socio-economic rights and related concerns into sovereign debt governance. However, the division occasioned by the sensitivity of this matter, as argued, could be seen in the character and contents of these new initiatives and their endorsement of the investment arbitration regime. In addition, following criticisms against the dominant debt sustainability framework, IMF issued another guide in 2018.[447] This, however, is not sufficient to address the legitimacy concerns. Finally, the chapter criticised the creditor priority norm and argued for the prioritisation of socio-economic rights in SDR.

Therefore, throughout history, concerns for socio-economic rights have remained tendentious; even more so within the sovereign debt regime that is fuelled by opportunistic creditor behaviours anchored on a common, self-interested but, arguably, questionable narrative that completely relegates the 'human' implicitly embedded in global sovereign financing. The citizens ought to be at the centre of modern sovereign debt. The regime cannot have an inkling of legitimacy where it, directly or indirectly, relegates the citizens and undermines efforts to protect citizens' socio-economic rights, safeguard their essential humanity and dignity or uplift their welfare. The imbalance, unfairness and chaos inherent in the existing disorganised and non-system SDR regime reflects the dictates and interests of creditors.

445 Debt Relief (Developing Countries) Act secs 2 & 7.

446 R Bernal 'New York democrats push bills to stop sovereign debt vulture funds' *The Hill* 5 March 2023, https://thehill.com/homenews/3986681-new-york-democrats-push-bills-to-stop-sovereign-debt-vulture-funds/ (accessed 20 October 2023).

447 IMF 'Guidance note on debt sustainability' (2018), http://www.imf.org/en/Publications/Policy-Papers/Issues/2018/02/14/pp122617guidance-note-on-lic-dsf (accessed 23 September 2020).

It must be admitted, of course, that mainstreaming socio-economic rights into sovereign debt restructuring processes in a concrete way would not, without more, lead to the progressive realisation of these rights, nor would it automatically address the legitimacy concerns facing this regime. It must not be assumed that sovereign debtors would automatically and always prioritise their socio-economic rights obligations in all cases and at all times. Budgetary constraints are real considerations. Internal governance frameworks, policies and processes must also prioritise socio-economic rights. Even with this prioritisation, government decisions, policy choices and corruption could undermine the realisation socio-economic rights.

The deep involvement of IFIs in virtually all SDR processes raises conflicts of interest and partiality concerns that impeach the legitimacy of the restructuring frameworks. IFIs cannot be unbiased in an SDR system in which they are creditors.

Although the evolving non-binding instruments are steps in the right direction, these may achieve little in addressing the long-held narrative that, arguably, lacks support in international law. In fact, these instruments appear to have reproduced principles rooted in international and domestic laws and, by implication, the so-called 'right' to SDR may not be a new innovation after all. Although there is growing consensus on the need to mainstream socio-economic rights into the sovereign debt regime through recognition of the status of the citizens, it seems that the influence of creditors and their positivist vision of international law might frustrate this consensus from crystallising into a balanced SDR framework. The persistent refusal to move away from the private governance framework has the effect of incentivising abusive creditors' conducts and derailing efforts towards the realisation of socio-economic rights. It is not in the spirit of international cooperation as envisaged by the UN Charter, ICESCR, the Universal Declaration and SDGs. In essence, the disorder in sovereign debt restructuring is deepened by self-interest and, consequently, the regime is begging for legitimacy and some modicum of the rule of law. It would be interesting to see how the courts and international tribunals, presumably the vanguards of the rule of law, view this in the light of, arguably, the unquestionable primacy of socio-economic rights. This will be the theme of the next chapter.