6 Conclusion

I have tried to identify the inadequacies of the legal paradigm undergirding the current sovereign debt regime using socio-economic rights philosophy as a guide. From official holdouts of the Russian type to unconventional Chinese sovereign debt practices, the evolutionary capacity of this paradigm has been tested and questioned. I have questioned its robustness to contain creditors' debt profiteering behaviours and argued that it incentivises these behaviours and creates a fundamental, structural imbalance that empowers creditors at the expense of primary beneficiaries of sovereign debt. Prioritising the beneficiaries requires situating socio-economic rights within the sovereign debt regime. This requires a foundational, philosophical paradigm shift from strict private law towards a legal theory that, in a more concrete sense, embraces creditors' socio-economic rights responsibility and accommodates new forms of sovereign debt in a dynamic global society.

This proposition is not unproblematic. The reality is that countries cannot do without borrowing. Indeed, many countries breathe through the nostril of debt as development becomes a common global aspiration for all. However, sovereign borrowing, repayment and enforcement have become deeply problematic. Multiple interests coalesce to increase the complexity of this regime; the governance space has expanded. The sovereign debt regime is one of several evolving global governance regimes that have been struggling to embrace the complex transformative elements brought about by the phenomenon of economic globalisation. Recurring sovereign debt crises over the past couple of decades have exposed the fundamental defects of this regime as competing interests struggle to shape its form and substance to their respective advantage. Without a comprehensive statutory framework or a central coordinating international authority, sovereign debtors, the primary subjects of international law, have been building direct contractual relationships with thousands of private creditors, considered as non-subjects in traditional international law. Added to this 'public-private complex' are the bilateral and multilateral debt relationships with different other official creditors.

Sovereign borrowing, repayment, restructuring and enforcement in these circumstances present complex practical and doctrinal challenges. On the one hand, a sovereign debtor signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) has committed itself to the progressive realisation of socio-economic rights 'to the maximum of its available resources' and, using these available resources as a matter of priority, to meet the minimum core obligation of providing basic education, primary health care, essential food and shelter to its citizens. On the other hand, creditors, not being signatories to ICESCR and grounding their claims on contract, require uninterrupted repayments unless an interruption is anticipated *ex ante* by the contractual documents. In fact, past episodes of sovereign debt crises across the world reveal that even the minimum core obligations suffer tremendously in order to keep the flow of capital to creditors.

Without much explicit guidance from international law, this invariably raises issues of prioritisation, sorting or balancing of conflicting obligations of sovereign debtors during debt crisis. There are dual concerns: the extent to which contractual obligations may be honoured where citizens' rights face the danger of non-realisation; and the limits below which the minimum core obligations cannot be compromised to satisfy obligations owed to creditors. In addressing these dual issues, I adopted a regime-interactional approach to determine the place of socio-economic rights in the sovereign debt regime. Doing this requires, first, determining the extent of creditors' socio-economic rights responsibilities and discerning the place of these rights or their underlying values in sovereign debt adjudication.

I have advanced some key, specific arguments. First, the private law paradigm literally incentivises sovereign debt profiteering, thereby undermining socio-economic rights and their underlying philosophies of human dignity, equality and social justice. The prioritisation of these rights, especially during debt crisis, is crucial. In this situation, contract alone is incapable of justifying the relegation of these rights or their underlying values. Any action or inaction by official or non-official creditors that practically renders socio-economic rights commitments of a state empty may negate these rights and contribute to their non-fulfilment by such indebted state since full realisation of these rights depend not solely on states but on all duty bearers and other factors such as international cooperation. This arguably would include acts of creditor nations or those of their alter egos (for instance, Paris Club, state-owned enterprises, SWFs and buyers of their debts at a discount such as vulture funds) having extraterritorial effects on the realisation of the socio-economic rights of citizens of indebted states. These acts' causal link to the undermining

of socio-economic rights could fit the 'reasonable foreseeability test' as provided by the evolving extraterritoriality principles embodied in the 2011 Maastricht Principles. The extraterritorial test could be extended to cover inadequate regulation of taxpaying private creditors operating within the regulatory jurisdictions of such creditor nations.

A 'regime convergence' trend was observed, for instance, business and human rights (BHR) and the sovereign debt governance regimes have been gradually converging as evident in the substantive contents of both the creditor-initiated and the non-creditor-initiated governance instruments over the past decade or so. Although the non-creditor-based initiatives specifically prioritise socio-economic rights, virtually all the standards (that is, GPBHR, GPFDHR, Guiding Principles on HRIA, PSDRP, PRSLB, IMF's Strengthened Governance Framework based on ICMA's reform of CAC clauses, and IIF Fair Debt Restructuring Principles and Voluntary Principles for Debt Transparency) recognise the need to address sovereign debt-profiteering activities and illegitimate debt contracts.

Second, as a consequence of this trend, socio-economic rights responsibilities of both official and non-official creditors are becoming inseparable from those of the sovereign debtors under ICESCR. This could be supported by established and evolving principles of international law: sovereignty, obligation for international cooperation under ICESCR, and different responsibilities in BHR instruments, especially those in GPBHR and GPFDHR. In particular, it is reinforced by the 'sovereignty' element which, first, influences the fiduciary relationship between citizens and their government and, second, reconfigures the ownership of 'debt resources' to recognise debtors' full discretion over both the 'initial' and 'repayment' resources. The principle of sovereignty over resources extends to 'repayment resources'. This effectively questioned the widely-held view that debtor's repayment resources' transforms into creditors' property once repayment becomes due. Thus, once a sovereign debt relationship is formed, the 'debt resources' become available for, among others, the fulfilment of the debtor's socio-economic rights obligations under ICESCR.

In addition, history shows the enduring collaboration between non-official and official creditors. The first of such collaborations was the 'creditor-government romance' which began during the medieval period. This collaboration manifested itself through gun-boat diplomacy and forced receivership in nineteenth and early twentieth centuries. Apart from enforcing war-related debts, creditor nations further imposed economic sanctions on sovereign debtors to recover debts owed to their private creditors. This initially involved controlling debtor's sources of revenues

but, subsequently, with the evolution of the 'rule of law civilisation', extended to cover the espousal of claims before international adjudicatory institutions. This collaboration is still visible today with even a stronger tax connection between non-official creditors and their home states. It was contended that based on this connection, it might not be implausible to impose a joint minimum responsibility to respect socio-economic rights of debtor's citizens on both private creditors and their home government. The Maastricht Principles seem to have advanced this position.

The second collaboration is seen in the bridge loan option that often compounds debtors' debt burdens. This is done mainly to satisfy bank creditors' reporting obligations under their home state's laws. Interestingly, creditors usually deny responsibility where problems emerge, ignoring the fact that lending to highly-indebted, irresponsible, rogue borrowers could amount to irresponsible lending.

The third collaboration involves IFIs, EU, IIF and the G20 illustrated during the Eurozone crisis and COVID-19-induced global recession and the ensuing chaos that especially negatively affected individuals who were radically disadvantaged by the global financial system. Despite the impacts of these and other crises on global financial stability and development, both official and non-official creditors continuously resist statutory reforms to address the underlying problem of lack of framework for sovereign bankruptcy. The advantage of creditor priority offered by this 'non-system' arguably incentivised creditors' resistance to a statutory framework. The implications of this resistance include an inability to effectively address sovereign debt profiteering by hold-out creditors and vulture funds.

A third major argument advanced here is that the creditor-biased perspectives of the sovereign debt regime do not enjoy much support from general international law. Indeed, the much-cited principle of *pacta sunt servanda* under customary international law and the Vienna Convention on the Law of Treaties recognises a party's right to suspend its obligation on the basis of either impossibility of performance or a radical change of circumstances. This could support arguments for payment standstill. Other principles of general international law, which could serve a similar purpose, include a suspension of obligations pursuant to CIL and treaty defences of necessity, especially where continued debt servicing would jeopardise the debtor's vital essential interests conceived here to include sustained implementation of socio-economic rights-based programmes. A contractual obligation that imperils these interests could endanger the lives and dignity of citizens. In addition, the overarching principle of maintaining global peace under the United Nations Charter could offer a

breathing space to sovereign debtors during debt crisis, especially a highly-contagious one. Based on these principles, it seems plausible to accord priority to socio-economic rights considerations over creditor interests during debt crisis. As both creditors and debtors have socio-economic rights responsibilities, there is no justification to prioritise creditors' contractual rights when doing so would render the citizen's rights empty and unfulfilled.

My fourth argument, flowing from the previous point and the convergence thesis, is that creditors' socio-economic rights responsibilities would be meaningless without an express recognition of payment standstill during debt crisis (that is, suspension of debt service). This is because the realisation of socio-economic rights might be endangered by, for instance, the activities of hold-out creditors and vulture funds that often undermine efforts towards a return to debt sustainability and smooth restructuring. Importantly, an implied standstill entails prioritisation of socio-economic rights obligations during debt crisis.

A fifth major argument advanced in support of the convergence alluded to above was that as creditors continue to cherry pick from different regimes to enforce their claims, sovereign debt adjudications have increasingly been traversing different legal regimes previously thought to be incompatible with sovereign debt regime, on account of the problematic public-private divide. This could be seen in the employment of investment arbitration and human rights courts for the adjudication of sovereign debt claims. The diametrically-opposed dispositions of these tribunals do not align with the core objective of legal ordering, that is, establishing a structured order driven by jurisprudential certainty or predictability, protection of juridical rights and effectiveness of available remedies. This could be seen in the incoherent approaches of arbitral tribunals to socio-economic rights-related defences and necessity defence to debt-related claims.

It is submitted that although tribunalising sovereign debt disputes could address some of the governance problems in the sovereign debt regime, it has its limits. First, the nature of sovereign debt precludes the exclusivity of the private law paradigm. A multiplicity of interests and the inherent public character of debt crisis makes this unsuitable. Second, as creditors continue to expand their debt recovery options to investment arbitration, the question of legitimacy of investment regime rears its head. The ICSID is a World Bank-established institution and despite the professional competence of its arbitrators, it cannot ward off creditor-biased concerns from respondent sovereign debtors. In other words, genuine neutrality of ICSID arbitration is a real concern. It can be seen as a creditor

institution. Indebted countries have always been the respondents in ICSID tribunals; hence the allegation of bias cannot be avoided. Although the gradual recognition of socio-economic rights-based counterclaims seems promising, this alone cannot cure the perceived neutrality deficit.

1 Prioritising socio-economic rights

Despite all the arguments advanced here, it must be admitted, however, that to specifically prioritise socio-economic rights or even fully mainstream these rights or their underlying values into a radically-transformed sovereign debt regime would require addressing several doctrinal and practical hurdles. The main hurdles identified are the following:

1.2 The public-private divide

The first major hurdle, of course, is the age-long public-private divide. This divide arguably feeds the narratives of the strict private, contractual governance framework even though, as argued here, it is a fictitious wall constructed by neoliberal legal theorists to advance the doctrinaire elements of market fundamentalism and its penchant for governance by self-regulation. Unfortunately, this divide has been defended, if not protected, by the major creditor nations that, clearly, benefit from the existing inequitable global economic governance architecture, despite many of them having made commitments under ICESCR. They persistently reject any multilateral treaty on SDR. They tenaciously push the 'sanctity of contract' argument which, even without a bankruptcy regime in international law, views debt default strictly as an actionable act. This is behind the logic of the 'regaining market access' argument that clearly prioritises debtor's repayment obligations to creditors above debtor's obligations to its citizens. It is the same doctrine that, arguably, supports illegitimate debts and the illicit financial flow, especially from mostly heavily-indebted countries to the financial institutions in the creditor nations, despite several UN declarations and resolutions against these problems.

Therefore, this public-private divide has produced doctrinal implications each of which, in and of itself, constitutes an obstacle to prioritisation of socio-economic rights and their underlying values in SDR.

1.3 Conceptual vacuum

The public-private divide, as a consequence, creates a conceptual vacuum in sovereign debt governance scholarship. There is no universally acceptable

conceptual framework that would allow a seamless interaction between socio-economic rights jurisprudence and the sovereign debt regime. Although international tribunals have been making some inroads in this regard, scholars are sharply polarised, that is, between those supporting a public (statutory) ordering framework and those supporting the private ordering paradigm to the exclusion of the former. Both, however, as argued earlier, missed the normative hybridity and the public-private mix inherent in this regime. Nevertheless, this scholarly polarisation makes the emergence of a universal conceptual framework a difficult endeavour. Without an agreed doctrinal consensus on the appropriate governance framework, it might be difficult for socio-economic rights considerations to be taken into account in the resolution of sovereign debt crisis.

1.4 State-centrism

This age-long doctrine equally is a consequence of the public-private divide and could be seen in both international human rights law (IHRL) and the sovereign debt regime. In the latter, official creditors insist on debt continuity against sovereign debtors regardless of any legality or legitimacy concerns surrounding the contracting of such debt; hence, Paris Club and the IMF deal only with indebted states. In the same vein, IHRL emphasises state-centrism as states are the primary duty bearers of human rights obligations; hence, as seen here, private creditors often justify their objection to socio-economic rights responsibilities on this basis.

Added to this is the persistent refusal of IFIs to become parties to ICESCR even as they can easily do so as distinct entities without necessarily affecting the separate, individual obligations of their members under the Covenant. Finally, state-centrism might theoretically counteract the 'unity of sovereignty' argument that accommodates the place of debtor's citizens through the fiduciary linkage with their government. This is because, under the dominant state-centric human rights accountability system, citizens are pitched against their own state for the purpose of human rights protection rather than as 'partners'.

1.5 Public-private divide and human rights

Underlying the public-private divide is the notion that such divide primarily exists in order to protect human rights, that is, protecting the private domain and all the freedoms it entails from the potential arbitrariness of public power. This, it must be admitted, is an important value defining

the human rights movement although it loses its appeal or persuasiveness outside the territorial state.

1.6 Disorder in adjudicatory jurisprudence and institutional illegitimacy

As a consequence of the theoretical polarisation between public and private law scholars, the scope of sovereign debt adjudication crosses the public and the private realms, national and international domains. This creates a chameleon-like jurisprudential chaos incapable of bringing coherence, predictability and order into the sovereign debt regime. It incentivises the culture of 'forum cherry-picking' or forum shopping, especially by hold-out bondholders and vulture funds. Indeed, some of the adjudicatory institutions were employed in a manner akin to a fishing expedition as, for instance, ICSID had never, before the Argentine debt crisis, been consciously considered an adjudicatory institution for the enforcement of sovereign debt claims. Besides being a creation of a creditor institution (World Bank), its pro-investor/creditor disposition has raised serious legitimacy concerns prompting many countries to withdraw from the ICSID Convention.

1.7 The causality question

Another major hurdle is that of establishing a causal connection between creditors' lending activities and their violation or undermining of socio-economic rights arising from a particular sovereign debt crisis. Fixing responsibility where it rightly belongs is one of the core ideas shaping the concept of justice. For instance, moral culpability for a legal wrong is often viewed as a compelling ground for liability. However, this is a complex issue in sovereign debt relationships, not least because the loans' positives might actually outweigh the negatives. In other words, the presence or absence of the loan must be linked to the enjoyment or deterioration of socio-economic rights conditions of the citizens. Even in the event of official intervention by IFIs, the lending programme and its conditionalities might actually advance the enjoyment of socio-economic rights in the long run but could deteriorate the situation in the short term. Importantly, exogenous factors affecting the values of debts in global capital markets might make it difficult to identify a 'culpable creditor' for the purpose of fixing responsibility.

Furthermore, the question of causality invariably raises the issue of appropriate remedy, that is, the nature, quantum and form of remedy to address any creditor actions undermining socio-economic rights and the

identity of the specific parties entitled to such remedies. This is because a wrong without a remedy, strictly, is a legal misnomer.

1.8 Rights holders as creditors: Pension funds and SWFs

Ironically, the credit space has been expanding to the extent that socio-economic rights holders below the level of radical disadvantage actually could indirectly become creditors, thereby questioning any predetermined positionality about who is or is not a creditor. Two examples might illustrate this irony. First, among the array of private creditors are usually pension funds of retirees, the latter looking for a promising and secured retirement. These pensioners could fall within the vulnerable group protected by socio-economic rights. In some bankruptcy regimes (for instance, USA) priority is given to this group in bankruptcy pay-out situations. However, this is not the case in the sovereign debt governance regime.

The other 'unusual creditors' are SWFs. Although they usually function as distinct private entities, SWFs represent and often invest funds on behalf of socio-economic rights holders (citizens), some of whom might be below radical disadvantage. They are state-owned investment vehicles. Through the SWFs, new creditor nations (that is, Brazil, Russia, India and South Africa (BRICS) and Middle-Eastern states) have been changing the debtor-creditor dynamics of the sovereign debt regime.

1.9 Other hurdles

Apart from the above, there are a host of other hurdles to the mainstreaming of socio-economic rights into sovereign debt governance. First, the complex interrelationship between trade, investment and finance and their implications on global poverty and socio-economic rights obligations under ICESCR raise additional problem areas in need of holistic integration, that is, beyond only socio-economic rights and sovereign debt. Second, creditors essentially are in business for profit and, like many businesses, their lending activities are usually influenced by this legitimate objective. Thus, the incentive factor is a major practical obstacle. Third, the reality of structural economic and political powers as seen in the control of IFIs by traditional creditor nations is another problem. Finally, the lack of normative content to the notion of 'international cooperation' under ICESCR is also a challenge.

2 A proposition from legal theory

In view of the above challenges and the main arguments presented here, a paradigm shift away from private, contractual framework but not to its

opposite (public) is important. The following recommendations might help:

2.1 Sovereign debt governance as a 'modified' global law

A radical re-invention of the legal foundation of the sovereign debt regime in the image of global law is advocated here. This is because most of the challenges connected to the fictitious public-private divide can be conveniently addressed when the sovereign debt regime is re-imagined and treated as a specie of global law, reflecting the transformative character of norm creation, application and enforcement in a complex atmosphere created by economic globalisation. Transnational legal theories have, it would be recalled, advanced certain normative core features informing this evolving body of law. While not endorsing the entire characterisation of normative ordering as advanced by transnational legal theories, three core features of their perspective of global law are relevant for the present purpose. First, the age-long doctrinal binaries such as public-private divide have little or no role in global norm creation, application and enforcement processes. Second, the diversity of legal sources opens up the legalisation space to embrace both legal and social (that is, strictly non-legal) norms as effective factors influencing behaviours of actors. Third, the authority deficit does not necessarily entail the absence of norms, thereby avoiding the statists' constructions of the positivists and realists in favour of a functional, more nuanced, sociologically-inspired network of governance spaces cutting across local, national, regional, and international communities with diverse, multiplicity of interests and stakeholders. Interestingly, global law recognises the paradox of contract that allows non-contractual acts and institutions (for instance, arbitration) to emanate out of contract. For the present purposes, the important modification, however, is to recognise the limit of contract in the sovereign debt crises and related problems. Contractual reforms cannot address problems that intrinsically are public in nature.

The advantage of this 'modified' global law approach is its adaptive flexibility to embrace the legal complexities brought by financial globalisation. While not rejecting this phenomenon, some insights from the values undergirding socio-economic rights (that is, equality, social justice and other anti-poverty philosophies) can give it more legitimacy. It can address most of the doctrinal hurdles imposed by the statists' fixated approach to legal theory. First, it will address the governance and conceptual vacuums created by the public-private divide as it is not rooted in these competing legal paradigms. The scholarly polarisation might also disappear. It offers a better conceptual framework that aligns with the character of sovereign debt that is not intrinsically incompatible with

human rights, especially socio-economic rights considerations in sovereign debt contracting, debt servicing, restructuring and enforcement of debt claims. This clearly exposes the limits of, and contradictions within, the private, contractual governance paradigm with its narratives of 'regaining market access' through prioritisation of creditor repayments, maintaining the preferred creditor status of IFIs and the logic of spontaneous order and market self-regulation.

Second, the claim that the public-private divide enables human rights protection holds little substance because global law is not territorially circumscribed; accountability for human rights violations may be extracted even outside the territorial boundaries as seen in the decisions of the International Court of Justice (ICJ), the International Criminal Court (ICC), UN treaty and non-treaty human rights institutions and various regional human rights institutions. In fact, over the past couple of decades, this divide has ironically encouraged corporate greed, human rights violations and other corporate wrongs, including sovereign debt profiteering. Although this might require further exploration, it is sufficient to remember that the existing BHR governance framework (that is, the Ruggie framework) is in line with the global law approach. Admittedly, the framework's underlying theoretical assumption for corporate human rights accountability is the circuitous indirect accountability approach which is a product of state-centrism. Nevertheless, the BHR framework underscores the accountability gap and governance inadequacies brought by state centrism in IHRL and the need for more efforts towards ensuring full corporate accountability. Therefore, global law can hold both official and non-official creditors responsible for their actions which undermined the fulfilment of socio-economic rights with further refinement and development of BHR regime without the public-private divide thwarting this development.

Third, the jurisprudential incoherence as well as jurisdictional overlap and uncertainties occasioned by the public-private bifurcation might disappear or, in the absence of a regime-based adjudicating forum, at least be minimised in SDAs. Fourth, global law embraces regime interactions rather than regime collisions. This would capture the triangular links between trade, investment and finance and their impacts on the realisation of socio-economic rights.

Finally, the widely-held view that creditors' property rights would automatically crystallise upon default is also a narrative of the private, contractual governance paradigm that needs to be critically rethought and discarded. This is because it completely ignores the peculiarities of sovereign debt, treating it the same way as a private, localised debt. This,

as argued above, contravenes the uncontestable principle of permanent sovereignty over resources, including financial resources that, although originally aimed at protecting natural resources, can apply with equal force to 'sovereign debt resources' because of their inextricable link to the former as citizens' resources. Citizens are the rights holders and the ideal beneficiaries of sovereign debt. This 'resource' character of sovereign debt can remove the private property narrative and it could place such 'resources' within the province of socio-economic rights as 'available resources' under ICESCR.

It must be admitted, however, that our proposition here raises an important question: To what extent can the socio-economic rights responsibilities of creditors be practically enforced in a globalised society governed by a modified global law, without the support of state-based mechanisms? This cannot be addressed here: It is a question for further inquiry.

2.2 Statutory proposals

Apart from the above implications arising from the proposed paradigm shift to re-imagine, reconceptualise sovereign debt governance, there are statutory-based reforms that may be considered. To ensure the prioritisation of socio-economic rights in SDR and to adequately mainstream these rights into the sovereign debt regime, certain 'statutory steps' can be taken either by way of a binding legal instrument or an incremental soft law development process. These include the following:

2.2.1 Incremental approach for SDR

This entails specifically embedding socio-economic rights considerations into the sovereign debt crisis resolution framework through gradual but conscious development of soft law instruments. Over the years, UNCTAD and UN have embraced this reform method as seen in the Principles for Responsible Sovereign Lending and Borrowing, the Guiding Principles on Foreign Debt and Human Rights and the Basic Principles on Sovereign Debt Restructuring Processes. These instruments, however, were inadequate as they could not adequately address sovereign debt profiteering (for instance, litigation by hold-out creditors and vulture funds), debt secrecy and incidents of excessively unsustainable debts. GPFDHR's wordiness makes it clumsy. Although amenable to amendment, its lack of creditor buy-in means a more concise but specific instrument incorporating socio-economic rights considerations may not be a bad idea.

This seems better than a hard law, treaty approach. The latter approach can directly mainstream socio-economic rights into the sovereign debt regime. Because of the resistance by creditors, as seen in the past, a comprehensive treaty on SDR may not realistically materialise in the near future. Nevertheless, a specific treaty by debtor nations might instigate further actions especially because of the changing character of sovereign debt whereby erstwhile debtors have been turning into creditors. In other words, indebted nations championing such a treaty to expressly prioritise socio-economic rights considerations in SDR, and address legitimacy and debt profiteering problems today may become creditors tomorrow.

2.2.2 BHR approach

This is a more realistic option than both the incremental and SDR treaty approaches because of the almost universal appeal enjoyed by human rights and the near consensus that greeted the formulation and adoption of GPBHR. Since 2014, the UN Human Rights Council has been working towards developing a concrete, legally-binding instrument on BHR. This may or may not materialise, especially with the vociferous opposition by some countries. Nonetheless, a binding BHR instrument may be employed to address some of the problematics of sovereign debt governance, especially through direct imposition of socio-economic rights responsibilities on private creditors.

This may be done as part of a broader duty to respect the socio-economic rights of debtors' citizens, which requires duty bearers to refrain from compromising the realisation of these rights. It can be extended to cover already-existing legal principles with a human rights flavour in at least four ways. The first is to extend non-official creditors' duty to respect socio-economic rights to a compulsory recognition of a debt moratorium or standstill for debtors during debt crisis. This would offer temporary protection to a distressed sovereign debtor to enable it to focus on dealing with the impacts of default on the economy and its citizens, which could entail prioritising the socio-economic rights obligations of the debtor. Indeed, a temporary space afforded to the debtor akin to bankruptcy protection can end or minimise the negatives arising from creditors' activities. Interestingly, the idea of bankruptcy protection is a common feature of many domestic insolvency systems and, therefore, may qualify as a general principle of international law. However, this proposition gives the principle a human rights flavour worthy of incorporation into a binding BHR instrument. It entails affording debtors the opportunities for economic recovery by non-official creditors, which should be part of the latter's separate and collective responsibility to respect socio-economic rights.

Second, private creditors' responsibility to respect the socio-economic rights of debtor's citizens can be extended in a more concrete way to cover their due diligence obligations through, for instance, conducting an impartial human rights impact assessment (HRIA) of their credit activities. Borrowed from the principle of environmental impact assessment (EIA), HRIA is a systematic process of measuring the potential impacts of a project or proposed project on human rights. Unlike EIA, however, HRIA is rooted in the philosophies of IHRL. There is less controversy on this obligation as it has already been captured under GPBHR, GPFDHR, OECD Guidelines on MNCs and the Guiding Principle on HRIA 2019. These standards require non-official creditors to respect socio-economic rights by carrying out human rights due diligence and not to put their debtors in a situation that would compromise the full realisation of these rights. It should be a two-way due diligence to be conducted by both creditors and sovereign debtors.

Thus, giving this principle a binding flavour might enhance socio-economic rights protection. It must be admitted, however, that the downside of this proposition is that the obligation may not be relevant to bondholders.

Third, by imposing a standstill obligation to respect a debtor's right to restructure its debt, all creditors should be obligated to participate and cooperate in the proposed SDR. This should be seen as part of creditors' responsibility to respect. Non-participation might indicate creditors' intention to initiate a holdout litigation that often prolong a return to debt sustainability. These obligations are also reflected in some domestic bankruptcy regimes and, therefore, could qualify as general principles applicable to sovereign debt relationships. Cooperation in SDR is not the same as compelling creditors to accept debt-restructuring terms. However, as part of the responsibility to respect, non-official creditors' cooperation to mutually agree on SDR means that they refrain from taking any disruptive actions. It also requires recognising the resource-constraints being faced by the debtor and the imperative to prioritise its expenditures in a way that will preserve its internal order, critical security interests and continued existence.

Fourth, creditors' duty of full disclosure of the terms and conditions of the loan contract or restructuring should also be framed as part of their duty to respect socio-economic rights. Such disclosure should be to the whole world in light of the experience of GFC and the continuous complicity of non-official creditors with repressive regimes. Framing the disclosure standard as a human rights obligation will support the global efforts to tackle illicit financial flows, address the problem of secret debts

and will help to sanitise the global financial system. This can strengthen global economic governance and address issues of entrenched inequality. Fundamentally, it can give the citizens of debtor countries more say in financial transactions affecting their well-being.

Finally, this evolving treaty framework can address all other grey areas with respect to creditors' socio-economic rights responsibilities in sovereign debt governance, such as the following: the degree of creditor's fault to trigger liability; causality; defining what amounts to 'undermining' of socio-economic rights; clear definition of the 'radically-disadvantaged group' and the nature, quantum and form of remedies that such group may be entitled to; and the role of exogenous factors, origin or source of any debt crisis in fixing liability. In particular, the problem of causality needs to be addressed. The reasonable foreseeability test embodied in the Maastricht Principles needs further refinement.

It is submitted that the above propositions are more likely to disincentivise sovereign debt profiteering and minimise hold-out arbitration. The private paradigm encourages creditors to exploit sovereign debtors and deprive their citizens from enjoying socio-economic rights.

2.2.3 The bilateral investment treaty (BIT) approach

Sovereign debtors can avoid being entangled in ICSID-based investment arbitration with the attendant consequences of this measure on their socio-economic rights obligation by either withdrawing from the ICSID Convention or expressly excluding sovereign debt from the jurisdiction of ICSID tribunals. The latter seems to be the better option. South Africa, for instance, has expressly excluded investment treaty arbitration in its 2015 Protection of Investment Act, although this law includes debt instruments in its definition of 'investment' under section 2. Alternatively, socio-economic rights-based defences or other jurisdiction-limiting considerations (socio-economic rights safeguards) might be inserted by sovereign debtors into their respective BITs to protect them and their citizens from sovereign debt-profiteering activities. The *jus cogens* status of human rights can be restated in the BIT. It can also reduce the standard of proving the necessity defence in the unlikely event of SDA.

In dealings with official creditors, the debtor can also insist on similar safeguards drawing attention to the obligations of the official sector to the realisation of socio-economic rights. IFIs need to realise the benefits of signing ICESCR. This can enhance their image and legitimacy. Emerging bilateral official creditors (China, Russia, and so forth) are signatories to ICESCR and are therefore bound by their socio-economic rights

commitments. The peculiar features of loans extended to sovereign debtors by agencies of these official creditors have questioned the relevance of the private, contractual paradigm.

2.2.4 Rethinking global economic governance

The global economic system needs to be reformed in line with the broader ideals of socio-economic rights. Conceptualising sovereign debt governance along the line of global law alone, admittedly, cannot sufficiently address the institutionalised inequities and injustice manifested in the exercise of structural powers in the global economic system as seen, for instance, in the sovereign debt regime. First, although IFIs and the informal groupings of creditor nations have been dictating the direction of the system, it seems that it has become increasingly difficult for them to escape accountability issues in so far as their actions negatively affect the poor and the fulfilment of socio-economic rights obligations. However, the best way to ensure full accountability of IFIs in this respect is by them becoming signatories to ICESCR.

Second, the preferred creditor status needs to be dropped regardless of the values of seniority of debts because it normally creates an intercreditor inequity. It also creates a moral hazard problem. This is because, as the Greek debt crisis showed, IFIs are not immune from reckless behaviours. Third, ICSID arbitration needs to focus on typical investment disputes because adjudicating sovereign debt claims by ICSID tribunals creates a perception of partiality, as perceived sympathy towards creditors resembles a situation where an institution established by a creditor adjudicates the dispute involving a fellow creditor.

2.2.5 Reforms through contracts

Although one rejects the strengthening of the private, contractual governance framework as unsuitable for the sovereign debt regime, one also recognises that contemporary sovereign debt financing is initiated largely through contract negotiation, hence the proposition to drive the paradigm shift using modified global law. The growing trend of issuing gross domestic product (GDP)-linked bonds in sovereign financing is a good practice that could significantly minimise recurring debt crisis and dilute the efficacy of the private law paradigm while, at the same time, hedging against endogenous and exogenous economic risks.

In addition, at the contracting stage, it may not be out of place for a debtor to insist on inserting socio-economic rights safeguards into the contract. Although creditors' financial powers and debtor's desperation

at such time might hinder the insertion of these safeguards, debtors' desperation is an exaggerated creditor narrative because creditors are equally desperate for profitable investments. Therefore, these safeguards may be employed to link sovereign debt contract with the debtor's socio-economic rights obligations under ICESCR. This will greatly narrow the governance gap with regard to non-official creditors' socio-economic rights obligations as it will have the effect of explicitly incorporating human rights requirements into sovereign debt contracts.

3 Re-imagining sovereign debt governance

The answer to the foundational problem in sovereign debt governance lies in unveiling the logic and theoretical basis of the dichotomy between sovereign financing and human rights. The two camps are currently engaging in *dialogue de sourds*. The reason is because the proposals advanced to make these two to work have been based mainly on a philosophical foundation that embraces and justifies the public-private dichotomy in sovereign debt. Today's development imperatives demand a radical re-imagining of this foundation.

There is no doubt that the language of sovereign borrowing and lending has been intrinsically embedded into the development discourse. Borrowing is widely considered an important tool for development. Unfortunately, this advantage of borrowing has given rise to an international lending industry whose greed and insatiable quest for profit have been compromising the developmental objectives of indebted countries using age-long (if not obsolete) legal and economic doctrines with little or no developmental concerns or elements and, therefore, have been questioned and discredited in terms of currency, responsiveness and relevance. Through its established architecture and supporting doctrines and narratives, the industry encourages excessive, unsustainable borrowing while, at the same time, rejecting statutory reform proposals designed to regulate it. Irresponsible lending is viewed as a business decision unconcerned with public interest despite its catastrophic effects on global financial stability and its developmental implications. Market self-regulation has become the creditors' preferred approach to address the apparent inadequacies and other governance gaps visible in the sovereign debt regime. Self-regulation finds doctrinal support in the private law paradigm that views debt as an essential private, commercial endeavour to be governed exclusively by parties' contract. Accordingly, it is against the liberal philosophy to interfere with the so-called natural, spontaneous rule of law function of the market. The public-private divide sustains this paradigm and its narratives. Unfortunately, legal theory is rarely employed in the sovereign debt literature, hence this divide is seen as natural.

However, this approach justifies creditors' disruptive litigation upon debt default, frustrates debt restructuring efforts and sustains the culture of sovereign debt profiteering especially by vulture funds. Rather than address the governance problems, the exclusive contractual self-regulatory 'reform' approach only compounds them leading to accumulation of unsustainable debts and a vicious circle of recurring debt crises that almost always affect the most radically disadvantaged in society. In 2018 alone, the global sovereign debt stocks reached an unprecedented level of US $66 trillion, signalling a looming debt crisis. The situation became worse during the COVID-19 pandemic. The poor are almost always at the receiving end. Interestingly, global financial stability is today widely considered a public good, yet IFIs and creditor nations driving this financial system have continuously supported the private law paradigm. In the same vein, unofficial creditors have consistently resisted moves towards statutory reforms. Unfortunately, multiple regimes interaction is not contemplated by the private law paradigm.

Therefore, in critiquing the private law paradigm and its underlying philosophies, this book has advocated a paradigm shift towards a modified global law that re-imagines sovereign debt and reconceptualises sovereign debt governance in a manner that prioritises socio-economic rights considerations in the resolution of sovereign debt crisis without necessarily negating creditors' rights. The only exception, perhaps, would be in cases where such debts are tainted by apparent illegalities and illegitimacy. Admittedly, this is not an uncontroversial proposition. However, once the public-private wall is deconstructed, the interests of the ideal beneficiaries of sovereign debt would no longer be considered as extraneous to sovereign debt relationships.

Over the years, citizens' socio-economic rights and their underlying values, arguably, have struggled under the intense pressure of economic globalisation and neoliberal market fundamentalism. In fact, the minimum core obligations of respective state parties to ICESCR have been losing their functional significance as sovereign debt crises continuously jeopardise or undermine its fulfilment. Unfortunately, the global economic power structure further compounds the situation with both official and non-official creditors having a significant leverage over indebted countries.

In this context, contemporary transnational legal theories embrace, rather than reject, the complexities of economic globalisation. Global governance regimes can interact through broad conceptualisation of 'legalisation' to embrace what is now called 'global law' and its flexible constituents of legal ordering. In this sense, both BHR and sovereign debt regimes can interact fully without much doctrinal hurdles. It is in

this interaction that the prioritisation of socio-economic rights and their underlying philosophies is anchored here. The evolving BHR regime supports the imposition of socio-economic rights responsibilities on non-official creditors, while ICESCR contemplates similar, even wider, responsibilities for official creditors who are eligible to be signatories. In the light of the shortcomings of the dominant private law paradigm, it is submitted that the peculiarity of sovereign debt needs to be factored into any governance framework. Sovereign debt essentially is a debt with a public-private mix, a hybridity of norms and a multiplicity of interests beyond the two-sided creditor-debtor matrix. The multiplicity of interests requires a balancing or prioritisation of competing debtor obligations in the event of crisis. Therefore, it is plausible to, first, link the question of legality of sovereign debt to the fiduciary relationship between citizens and their government and, second, accommodate the citizens within a multi-stakeholder approach to sovereign debt governance.

In functional terms, a regime that affects citizens, especially those radically disadvantaged in society, in both direct and indirect ways, cannot be self-contained under the guise of contract. The creeping effects of the investment treaty regime into the sovereign debt regime ironically exposed the paradox of self-containment. The sovereign debt regime cannot be a stand-alone regime. It has complex linkages with international trade, development, investment and finance regimes. These regimes tend to limit sovereign debtors' policy spaces. Hence, the inequities of these regimes have found expression in the sovereign debt regime. Conditionalities accompanying loans from IFIs further constrain policy spaces, limit sovereignty, and derogate from or at least undermine the socio-economic rights obligations of debtors. This is not limited to IFIs. The structure of the existing global economic governance system leaves much to be desired. It has continuously entrenched inequality within and between nations. It has continuously relegated the poor and the vulnerable.

However, debt contracting, servicing and enforcement need not be incompatible with pre-existing socio-economic rights commitments of sovereign debtors. Citizens are at the heart of both commitments. Sovereign debt governance needs to adequately align with these obligations in a holistic, human rights-sensitive manner that recognises creditor socio-economic rights responsibilities. After all, debt is about development, and development is about ensuring social justice and equality for all especially those radically disadvantaged.