FOREWORD
SOVEREIGN DEBT; TOPICAL ISSUES

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The importance of sovereign debt – State indebtedness, even over-indebtedness, is quantitatively significant for the world economy. As of the beginning of 2023, the global public debt amounted to thousands of billions of U.S. dollars.[1] For countries, sovereign debt is often crucial, as a necessary method to fund their policy objectives. The sovereign prerogative of raising taxes to provide States with the necessary resources for their missions often proves insufficient. State borrowing, taken in the broad sense of mobilizing the assets of a third party subject to future repayment, represents another means of financing for countries.

Borrowing is essential to offset the potential gap between the income of the States and the expenses that the fulfillment of their missions entails.[2] Borrowing also provides States with a means of reducing the financial burden on the taxpayers. Thus, as Nicola Jagers explains, "[b]orrowing in times of revenue shortfall and repayment in times of surplus provide for the possibility of smoothing out spending without directly placing the burden on taxpayers."[3] Finally, borrowing via the financial markets also entails the advantages of rapid access to large volumes of liquidity at a lower cost.[4]

Access to credit is, understandably, essential for States. Conversely, the inability to access financial resources can complicate or hinder their missions. Insofar as it is sustainable, sovereign debt appears to be necessary, even more so for developing countries.[5] As the United Nations has long pointed out, the sustainability of sovereign debt is critical.[6] This sustainability should be assessed in terms of the States' capacity to pay off their debt without it being to the detriment of essential services provided to their population.[7]

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[1] *The Economist* website provides a "global debt clock" that computes the total amount of public debts in real-time (see www.economist.com/content/global_debt_clock).

[2] R. KOLB, "The Virtue of Vultures: Distressed Debt Investors in the Sovereign Debt Market", *Journal of Social, Political, and Economic Studies*, 2015, p. 370.

[3] N. JAGERS, "Sovereign Financing and the Human Rights Responsibilities of Private Creditors", in J. BOHOSLAVSKY and J. CERNIC (ed.), *Making Sovereign Financing and Human Rights Work*, Hart Publishing, 2014, p. 181.

[4] C. LEQUESNE-ROTH, « Remédier à l'insolvabilité des États », in C. BRICTEUX and B. FRYDMAN (dir.), *Les défis du droit global*, Bruylant, 2018, p. 152.

[5] The European Parliament emphasizes that access to international financial markets enables developing countries to raise funds with a view to achieving development goals (European Parliament, *Resolution* on enhancing developing countries' debt sustainability, 17 April 2018, 2016/2241(INI), point 2).

[6] See *e.g.*, U.N. General Assembly, *Millennium Declaration*, 8 September 2000, A/RES/55/2.

[7] M. MEGLIANI, "For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries", *Leiden Journal of International Law*, 2018, p. 375.

A hot topic – Given the potential importance of the debt burden, governments must be cautious in contracting it.[8] Caution is essential as it has been demonstrated that economies without access to financial markets generally suffer from increased political unrest.[9] In addition to the deleterious effect on the population, the difficulties that States may encounter with their debt are likely to have significant consequences on their stability and functioning,[10] as the Argentinean situation at the beginning of the century has shown.[11]

The adverse consequences are not only national. The importance of sovereign debts leads us to recognize them as a "matière d'intérêt international" owing to their possible implications for the international community.[12] The problems posed by these debts endanger global economic stability because of their interconnected character and, therefore, the risk of contagion.[13] Sovereign debts have more significant consequences for the global economy since debt crises are recurring, and the difficulties surrounding them are rampant.

As Barry Eichengreen notes, "crises have always been with us and always will be".[14] Crisis episodes come in waves and are generally linked to economic cycles of expansion and recession.[15] While sovereign debt turmoil mostly plagues poor and middle-income countries, it is not limited to them. The example of the eurozone crisis and the situation in Greece illustrate that sovereign debt turmoil has become a widespread problem.[16]

There is concern that many sovereign debts will cause difficulties in the future[17]. The endemic nature of sovereign debt suggests that new crisis episodes will occur. For example, the Coronavirus pandemic caused governments to borrow money to finance measures to control the disease and its consequences. Moreover, the pandemic reduced other sources of revenue. As the United Nations

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8 This prudence is all the more justified, since future generations will bear the burden of repayment due to the continuity of the debt. Regarding this principle, which calls for caution while borrowing, Lee Buchheit points out that "[p]rudence will be reflected in the motivation for the borrowing." The author explains that "[s]ome purposes are more defensible, in an intergenerational sense, than others: borrowing to build or refurbish infrastructure; defending the state against an external military threat; and so forth." Lee Buchheit adds that "[o]thers are less so: financing current government expenses as a more politically palatable alternative to taxing the voting public is an obvious example." (L. Buchheit, "Sovereign Debt in the Light of Eternity", in L. Buchheit and R. Lastra (ed.), *Sovereign Debt Management*, Oxford University Press, 2014, p. 465).

9 R. Gelos, R. Sahay, and G. Sandleris, "Sovereign Borrowing by Developing Countries: What Determines Market Access?", I.M.F. Working Paper WP/04/221, 2004, p. 4.

10 T. Samples, "Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law", *Northwestern Journal of International Law and Business*, 2014, p. 51.

11 On the Argentinean crisis, see notably, M. Guzman, "An analysis of Argentina's 2001 default resolution", CIGI Papers, n° 110, October 2016.

12 D. Carreau and C. Kleiner, « Dettes d'État », *Répertoire de droit international*, 2019, n° 13.

13 M. Jewett, "Approaches to Sovereign Debt Resolution: Recent Developments", *Banking and Finance Law Review*, 2015, p. 311.

14 B. Eichengreen, *Financial Crises and What to Do About Them*, Oxford University Press, 2002, p. 4.

15 R. Rahman, "The sovereign stress situation", in E. Bruno (ed.), *Sovereign Debt and Debt Restructuring – Legal, Financial, and Regulatory Aspects*, Globe Law and Business, 2013, p. 11.

16 T. Samples, "Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law", *op. cit.*, p. 52.

17 See D. Brautigam, "The Developing World's Coming Debt Crisis", *Foreign Affairs*, 20 February 2023, <https://www.foreignaffairs.com/china/developing-worlds-coming-debt-crisis>.

Department of Economic and Social Affairs noted, "[c]ountries are faced with additional spending needs to finance the immediate health response, provide support to households and firms, and invest in the recovery once the pandemic is under control"; "[a]t the same time, revenues are collapsing, particularly for commodity exporters and tourism and other service-dependent countries."[18] The recent Covid-19 pandemic and the subsequent explosion of sovereign debt raise concerns that newer and more complex crisis episodes will occur.

A lack of rules – All countries, not just poor ones, incur debts to finance themselves. Since no international law provides a framework or imposes restrictions,[19] excessive government debt is a recurrent feature of States' public finances, whether developed or developing.[20]

Additionally, the absence of a framework for resolving the difficulties surrounding sovereign debt is regrettable. Indeed, States do not benefit from any established bankruptcy mechanisms. When they face problems honoring their debts, sovereign States often try to restructure them to reduce their burden by modifying the terms of the debt securities.[21] Restructuring aims at ensuring the sustainability of sovereign debts.[22] The complexity of restructuring processes, where success depends on the will of all the involved stakeholders, stems essentially from the absence of an institutionalized mechanism to guide them.[23] However, the restructuring arrangements that debtor States can find with their creditors are essential for the proper functioning of the sovereign debt market,[24] along with being crucial for global economic development.[25]

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[18] See Department of Economic and Social Affairs, "Covid-19 and sovereign debt", 14 May 2020, <www.un.org/development/desa/dpad/publication/un-desa-policy-brief-72-covid-19-and-sovereign-debt/>.

[19] R. BISMUTH, « L'émergence d'un "ordre public de la dette souveraine" pour et par le contrat d'emprunt souverain ? Quelques réflexions inspirées par une actualité très mouvementée », *Annuaire français de droit international*, 2012, p. 492. As the author notes, the only existing rules relate to the balance of public finances or to budgetary discipline (see, for example, the 1992 Maastricht Treaty imposing a limit of 60% for the ratio of government debt to gross domestic product at market prices). See also soft law instruments such as the principles on promoting responsible sovereign lending and borrowing identified by the UNCTAD (United Nations Conference on Trade and Development, *Principles on Promoting Responsible Sovereign Lending and Borrowing*, 10 January 2012).

[20] D. CARREAU and C. KLEINER, « Dettes d'État », *op. cit.*, n^{os} 1 and 13 ; G. PAVLIDIS, « Vers une nouvelle génération de clauses dans les contrats d'émission d'obligations souveraines », *Revue internationale des services financiers*, 2019, p. 102.

[21] J. BURRESS, "Sovereign Disobedience: The Role of U.S. Courts in Curtailing the Proliferation of Sovereign Default", *Indiana International and Comparative Law Review*, 2015, pp. 271-272. Alterations often affect the maturity of the debt by lengthening it, its interest rate by lowering it, or its amount by reducing it (M. VERNENGO, "Argentina, Vulture Funds, and The American Justice System", *Challenge*, 2014, p. 52). For an example in the Greek case, see P. WAUTELET, "The Greek debt restructuring and property rights – A Greek tragedy for investors?", in *Liber amicorum Marc Bossuyt*, Intersentia, 2013, p. 904.

[22] M. RIEGNER, "Legal Frameworks and General Principles for Indicators in Sovereign Debt Restructuring", *The Yale Journal of International Law*, 2016, p. 160.

[23] In some cases, collective action clauses are included in sovereign debt contracts permitting the terms of a restructuring accepted by a majority of creditors to be imposed on all the creditors (on these C.A.C., see Group of Ten, "Report of the G-10 Working Group on Contractual Clauses", 26 September 2002, <https://www.bis.org/publ/gten08.pdf\1\2>.

[24] S. SCHWARCZ, "Sovereign Debt Restructuring and English Governing Law", *Brooklyn Journal of Corporate, Financial and Commercial Law*, 2017, p. 93.

[25] See *e.g.*, J. BOHOSLAVSKY and M. GOLDMANN, "An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law", *The Yale Journal of International Law*, 2016, p. 15.

In their paper examining restructurings between 1950 and 2010, Udaibir S. Das *et al.* recorded more than six hundred restructuring cases in ninety-five countries, indicating that "[s]overeign debt restructurings have been a pervasive phenomenon."[26] As Stephen Kim Park and Tim R. Samples note, "[s]overeign debt markets operate in a legal and regulatory void, largely free from direct regulatory or legal authority."[27] Regarding this flaw, Joseph E. Stiglitz and Martin Guzman indicate that the absence of a rule of law regulating debt restructurings can lead to chaos.[28] While establishing an international mechanism for restructuring sovereign debts has long been imagined to remedy the absence of a bankruptcy system for States, the International Monetary Fund's attempt to set up a *Sovereign Debt Restructuring Mechanism* in 2002 was undoubtedly the most prominent.[29] Although setting up a binding global mechanism has not been possible to date, some more modest progress was made. Thus, we can highlight the various proposals made by the United Nations to define a framework for restructurings, most notably the General Assembly Resolution n° A/RES/69/319 on the Fundamental Principles of Sovereign Debt Restructuring Operations.

A wide range of questions – Due to its significant consequences, sovereign indebtedness has long triggered discussion. Hence, the 53rd volume of *L'Observateur des Nations Unies*, published by the Association Française pour les Nations Unies of Aix-en-Provence, is dedicated to sovereign debt. To pinpoint a few of them, the questions these debts raise relate to the distinctiveness of States as debtors, the legal status of sovereign debt, the economic relevance of the debt, the political consideration justifying borrowing, sovereign default, the importance of debt sustainability, the advisability of restructurings, the institutionalization of a restructuring mechanism, the collective action clauses and the *pari passu* clause, the profiteering in indebtedness, the concept of odious debt, etc.

While we have explained the importance of sovereign debts, deplored the lack of rules governing them, and pointed out various issues they raise, it is clear that law can help answer many difficulties associated with these debts. For this reason, we decided to dedicate this volume to sovereign debt. Although our perspective is essentially legal, it is important to keep in mind that law cannot be the answer for everything and that sovereign debts also calls for, among other things, economic and political considerations and solutions. Indeed, as Michèle Grégoire notes, "[l]a dette souveraine est un rond-point, où viennent s'enrouler les sciences politiques, les sciences économiques et les sciences juridiques."[30]

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[26] U. Das, M. Papaioannou, and C. Trebesch, "Sovereign Debt Restructurings 1950 – 2010: Literature Survey, Data, and Stylized Facts", I.M.F. Working Paper WP/12/203, 2012, p. 5.

[27] S. Park and T. Samples, "Towards Sovereign Equity", *Stanford Journal of Law, Business, and Finance*, 2016, p. 242.

[28] J. Stiglitz and M. Guzman, "A Rule of Law For Sovereign Debt", 26 June 2015, <www.socialeurope.eu/a-rule-of-law-for-sovereign-debt>.

[29] A. Krueger, "A New Approach to Sovereign Debt Restructurings", International Monetary Fund, April 2002.

[30] M. Grégoire, « Banque et souveraineté : une pièce en trois actes », in *Liber amicorum Martine Delierneux*, Larcier, 2018, p. 286.

The topics addressed in this volume – The variety of the contributions published in this issue of *L'Observateur des Nations Unies* attests to the richness of the sovereign debt debate. Moreover, the expertise of the authors who honored us with a piece testifies, if it were still necessary, to the richness and complexity of the questions raised by sovereign debt.

In their article "Sovereign Powers and Debt Crisis Management", Mads Andenas and Astrid Iversen focus on the failures of the legal framework governing sovereign debt crisis resolution and the explanations proffered for these failures. Exploring the interaction of public and private law in this legal framework, the authors reject the arguments for status quo. They argue for a comprehensive and coordinated regulation to resolve debt crises, encompassing public and private law tools. According to Mads Andenas and Astrid Iversen, the emergence of such an approach is in the interest of both debtor States and their creditors.

Luca Boggio's paper entitled "'Good' or 'Bad' Sovereign Debts: New Issues for Creditors and New Distinctions for Regulators after the Covid-19 Pandemic Era?" is addressed at understanding if and how the distinction between "good debts" and "bad debts" could be relevant for sovereign loans in the international financial markets. The author analyzes UNCTAD's *Principles on Promoting Responsible Sovereign Lending and Borrowing* and UNGA's *Basic Principles on Sovereign Debt Restructuring Processes* and considers their influence on the distinction between good and bad debts. Luca Boggio also discusses the impact that the state of necessity generated by the Covid-19 pandemic may have had on the perception of what would be a good debt and what would not.

The contribution titled "Ten Years After the European Crisis: Arbitrating Sovereign Debt" of Ioannis Glinavos starts from the Greek crisis to assess how financial investors can use the protections in investment treaties to insure against the risk of sovereign defaults. The author analyzes the consequences of private decision making versus State imposition in the context of a debt settlement. Eventually, Ioannis Glinavos considers what bondholders can seek to achieve through investment tribunals and outlines State defenses to possible actions.

Maria Rosaria Mauro looks into the sustainability of sovereign debts in her work entitled "Sustainability and Justice in the Governance of Sovereign Crisis: Is a More Balanced Approach Possible?" The author assesses the possible diffusion of a new model in the governance of sovereign debt crises, which considers the impact of these crises on the protection of economic and social rights, as well as the affirmation of new principles in this field aimed at ensuring greater sustainability and justice in relations between sovereign debtors and creditors.

Mauro Megliani's paper "The Odious Debt Doctrine: Formalizing Values" inquires into the present status of the odious debt doctrine. It suggests that the doctrine expresses a fundamental value of the international community and that this value is reasonably worthy of protection under the umbrella of transnational public policy. However, according to the author, this protection presupposes that the value expressed by the doctrine is clearly qualifiable as a fundamental value of the international community. In this context, his paper argues that this qualification may be achieved under a declaration of principles of the U.N. General Assembly,

an advisory opinion of the International Court of Justice, or a recommendation of the U.N. Security Council.

In their article "Preventing Debt Crises", Rodrigo Olivares-Caminal and Paola Subacchi point out that ex-post intervention when a debt crisis is already underway is often the default option for many governments and multilateral institutions, whereas priority should be given to preventive measures that assess whether there is a real need to incur new debt. Moreover, they argue that it is important to improve transparency in sovereign borrowing. According to the authors, the focus should be on the ex-ante measures such as greater transparency, proper debt management, and accountability.

In his "From Global to National" contribution, Christoph G. Paulus notes that the time is definitely ripe for establishing a legal instrument to provide a framework for restructuring sovereign debts and that solutions on the global level are warranted. However, the author observes that previous experiences remind us that this is obviously too ambitious. Consequently, Christoph G. Paulus explains why it is crucial to refer back to national legislation. He then presents and describes a new model which can be adopted by more or less any country with a certain economic and political power.

The title of Georgios Pavlidis' contribution is "Empêcher une tempête parfaite sur les marchés de la dette souveraine : des outils innovants pour la prévention et la résolution des crises de dette". In his piece, the author notes that what he calls "a perfect storm" is brewing in sovereign debt markets and thus recommends strengthening the toolbox for the prevention and resolution of debt crises. In particular, he notes that coordinated action involving all sovereign debtors, international financial institutions, market participants, and other stakeholders is needed. Georgios Pavlidis argues that innovative sovereign debt instruments, debt relief mechanisms, and collective action clauses with aggregation features should be key elements of such coordinated action.

In his paper "African Region Handling the Responsibility of the African Sovereign Debts: Burgeoning Initiatives and Legal Challenges Ahead", Faasseome Maxime Somda focuses on the legal challenges stemming from the current legal framework regulating African sovereign debt restructuring. The author shows that these challenges are still to be addressed by African initiatives, by pointing to the African reform project on credit rating agencies' actions in Africa, as an exemplar.

Mamoud Zani's work deals with "La CNUCED et l'accord mondial sur la dette pour les pays en développement". In his paper, he examines the scope and limitations of the *Global Debt Deal* for developing countries devised by the U.N. Conference on Trade and Development to alleviate the debt burden. The author then studies the debt management and analysis system established by the Conference, presenting its purposes, benefits, and financing arrangements.

In a different register from the first contributions published in this volume, the last four pieces address topics related to sovereign debt from a specific standpoint.

Olivier Creplet studies the relationship between the State and the market in his text. With his "Finances publiques et contrôle juridique de la monnaie : à la recherche du temps perdu, dans les volutes du rapport État-marché", the author addresses more particularly the relationship between public finance and the legal control of money.

Jean-François Boudet's work deals with what he calls the "dette génocidaire" following the genocide of the Tutsi in Rwanda. He questions the political qualification of this debt as well as the legal consequences that would result from it. Eventually, the author analyzes the relevance of the cancellation of this debt that encumbers Rwanda.

In his article on the ring-fencing of public debt, Freddy Leprodhomme studies this mechanism by questioning its legal coherence. Exposing the difficulties in identifying coherent criteria for this type of mechanism, the author first notes that the nature of public debt ring-fencing is indeterminate. Then, he explains the effects that this ring-fencing would produce.

Emilia Cornelia Stoica and Liviu Radu compare sovereign debt and public debt. The authors distinguish between these two notions and then study the latter's evolution.

Finally, the last pages of the 53rd volume of *L'Observateur des Nations Unies* are dedicated to two themes different from that of sovereign debt. They include Tiphaine Demaria's contribution analyzing the judgment rendered by the International Court of Justice on February 9, 2022, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case and Habib Badjinri Touré's article on the protection of children against sexual violence in times of armed conflict.