CONCLUSIONS
From a legal perspective, the UNCTAD Principles make two important contributions to shaping the international normative order as it concerns sovereign debt. The first is to qualify or limit a sovereign debtor’s obligation to repay the debt in full, where there is a situation of economic necessity. The second is to contribute to the evolution of the odious debt doctrine by establishing the norm that valid sovereign debt obligations are those contracted by publicly interested state officials for purposes of serving the public good. Neither of these contributions depends on the Principles themselves being transformed into a hard law international instrument, such as a treaty, or acquiring the status of custom. Rather, the Principles offer new normative tools for reshaping legal relationships between sovereign debtors and both official and private creditors in the absence of a centralized international institution or tribunal (see Chapter 16, by Anna Gelpen, in this volume). In these brief concluding remarks, I will discuss each of these contributions in turn.

Going back to the 1980s debt crisis, the Grundnorm on the basis of which the various institutions and actors, including the Paris and London Clubs and the IMF, addressed the payment difficulties of sovereigns was that of the sanctity of the obligation to repay the debt in full, principal and interest, regardless of the economic inefficiency of not marking the debt to market, and regardless of social consequences. While sometimes presented as the hard law obligation of pacta sunt servanda (as Michael Waibel points out in Chapter 5 of this volume), pacta sunt servanda applies to treaties, not contractual obligations, and in any case not to obligations to private parties. The Grundnorm of an absolute obligation to repay in full thus could not be upheld on the basis of international law; rather it gained its force from being the norm that the institutional actors in the international community all adhered to in their dealings with creditors and debtors. By the 1990s one started to see cracks in the facade—inventive methods of reducing obligations or discounting them surreptitiously, whether Brady bonds, or debt-for-nature, or debt equity swaps at questionable pricing. Eventually and begrudgingly, international financial institution (IFI) creditors acceded to highly conditional programmes of debt relief for poor, heavily indebted countries.
In fact, the norm of an absolute obligation to repay in full has faced two radical challenges that I believe have shaken confidence in its viability as the Grundnorm for addressing the sovereign debt crisis. The first is the human rights revolution. As Armin von Bogdandy and Matthias Goldmann suggest in Chapter 3 of this volume, as an exercise in public authority, any institutionalized international settlement of a sovereign debt crisis must be tested against the computability of that settlement with the capacity of a debtor state to fulfil its social and economic rights obligations to its own population.

Secondly, as we have seen with Greece, and with the demonstrations in some Latin American countries, how to approach sovereign debt crises is now a matter of intense public contestation and debate. It is no longer a negotiation among a small group of elite actors, governmental and private sector managers, lawyers, and IFI officials, where the broader social consequences are marginalized, and the solutions are regarded as ‘technical’, based on economic formulas for structural adjustment or conditionality. The significance of publicity is also well developed in the Bogdandy and Goldmann essay. (When I was involved many years ago in a Paris Club rescheduling, working for an official creditor, the only Paris Club that had a visible public presence was an adult entertainment facility). Anna Gelpen, in Chapter 16, gives a good flavour of the dominance of a rather closed epistemic community here.

Finally, and perhaps of most significance, there is Argentina’s decision to bypass the traditional institutional framework and impose a unilateral restructuring of its debt on its creditors. If full repayment and the kind of arrangements associated with reconciling full repayment with inability to service debt in the short term were losing their normative legitimacy, Argentina’s experiment has arguably resulted in a great loss of empirical legitimacy. While holdout creditors continue to pursue legal actions against Argentina, sometimes with initial success (but without yet being able to go the full distance in getting their money back), the punishment that was always supposed to be forthcoming if a sovereign debtor challenged the Grundnorm has not been forthcoming. Argentina remains part of the international financial system, the IMF still deals with it, and while the United States has rapped it on the knuckles with some trade measures, this is hardly the same thing as effective community enforcement of a supposed sacred community Grundnorm. I do not wish to be misunderstood: I am not suggesting that what Argentina did was equitable or justified in the particular circumstances of its economic situation. On balance, I think the contrary. I am merely suggesting that Argentina has made an important contribution to shaking confidence in the viability of the received Grundnorm of absolute obligation to repay in full.

If on the one hand, this received Grundnorm is no longer credible, it is hard to imagine the institutional frameworks that deal with sovereign debt crises, or the actors within them, operating effectively without some kind of normative framework or principle in the shadow of which negotiations are conducted, directly and indirectly, across the public/private divide. Institutions cannot easily operate with unbounded struggle and contestation of the applicable norms; such struggle creates enormous transaction costs and uncertainty, and interferes with the functionalist
mission of getting out of crisis and re-establishing confidence in the debt markets. And here is exactly where the UNCTAD Principles move in to fill the gap.

It is arguable that Principles 9 and 15 taken together can constitute the basis of a new Grundnorm. Principle 9 indicates that while: 'A sovereign debt contract is a binding obligation and should be honored. Exceptional cases nonetheless can arise. A state of economic necessity can prevent the borrower's full and/or timely repayment.' The reference to the prevention of 'full' and not just 'timely' repayment indicates the departure of Principle 9 from the old Grundnorm. It implies a legitimate claim not just to debt rescheduling (the time frame of repayment) but to relief from the obligation of paying the obligation in full. This is elaborated in Principle 15, which refers to the notion that 'the restructuring should be proportional to the sovereign's need and all stakeholders (including citizens) should share an equitable burden of adjustment and/or losses' (emphasis added). The requirement that creditors share the burden equitably by taking some 'losses' represents a clear departure from the received and now tattered Grundnorm of absolute obligation to repay in full. As noted, under that Grundnorm, any debt restructuring would entail the debtor fully compensating the creditor for the transaction costs of rescheduling (fees) and for the extension in the time of repayment (interest).

The significance of Principles 9 and 15 in the establishment of a new Grundnorm is somewhat blunted or obscured in my view by looking at the concept of necessity in Principle 9 as simply echoing or repeating the notion of 'necessity' in the ILC Articles on State Responsibility. To the extent that a state's obligation to repay in full is an obligation under international law (more problematic than is often assumed, as mentioned) it may be limited by 'necessity' within the meaning of Article 25 of the ILC Articles on State Responsibility. Unlike Michael Waelbel, I think there are important differences in the concept of 'necessity' from customary international law codified in the ILC Articles and the principles expressed in UNCTAD Principles 9 and 15. First of all, Article 25 only allows for the suspension or delay (not elimination) of secondary obligations-state responsibility. It provides no basis for the limitation or modification of the underlying primary obligation. Thus Article 27 states that the invocation of Article 25 is 'without prejudice to: (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) The question of compensation for any material loss caused by the act in question'. The difference between this understanding of 'necessity' and those in Principles 9 and 15 is considerable. Principle 9 suggests that economic necessity could prevent 'full' repayment, which, as noted, means that it could legitimately entail altering the underlying primary obligation, and not just a suspension of the performance of the obligation during a defined period of a 'state of necessity'. Secondly, Article 27(b) of the ILC Articles clearly indicates that it is the state that is invoking 'necessity' that must, afterwards, based on general principles of state responsibility, pay in full the costs of its suspension of the performance of its obligation during the period of 'necessity', while UNCTAD Principle 15 provides for equitable sharing of burdens, including 'losses'. Thus, I find it impossible to agree with Waelbel's suggestion that 'as worded, the UNCTAD Principles ... do not increase the scope of the defence of
necessity, but defer to the strict limits of the defence in general international law'. Further, Principle 9 indicates that a state of necessity may be a circumstance giving rise to a legal defence before a 'competent judicial authority', i.e. regardless of whether there is an interstate dispute. This extends the role of 'necessity' beyond the context of state responsibility in public international law, to a principle that may affect rights and obligations under private law.

The other contribution of the UNCTAD Principles that I would like to emphasize concerns odious or illegitimate debt. The Principles articulate a set of standards that is very helpful to assessing claims that debt is odious or illegitimate. This relates to the notion that if the lender was aware of these features, they may be held accountable and perhaps even lose the entitlement to full repayment. First of all, the Principles, in their implications, identify conduct that is 'wrongful': 'Any attempt by a lender to suborn a government official to breach [their duty to the State and its citizens for which they act] (Principle 1) and 'any form of self-interest or peculation on the part of government officials involved in the borrowing' (Principle 8). These standards, which relate to existing norms concerning corruption, may be helpful in applying illegality or public policy defences against debt obligations, and may also be useful in guiding audits of sovereign debt, especially in a transitional context. The broader notion that 'when they contract debt obligations, [governments] have a responsibility to protect the interests of their citizens' carries with it, logically, the possibility of some remedy when this obligation is breached, although the remedy itself is not explicitly stated in the UNCTAD Principles. However, the Principles also emphasize that 'Lenders should recognize that government officials involved in sovereign lending and borrowing transactions are responsible for protecting the public interest' (Principle 1) and this raises the issue of whether there is breach of lender responsibility where the lender is aware that the officials are in violation of their duty to protect the public interest. Consider Principle 3: 'Lenders have a responsibility to determine, to the best of their ability, whether the financing has been appropriately authorized' which implies 'that the government officials are authorized under applicable law to enter into the transaction'. The question is whether officials could ever be truly 'authorized' by the state or its citizens to enter into transactions that do not protect the public interest; thus, Principle 3 needs to be read together with Principle 1 on Agency. The approach of the UNCTAD Principles would seem to push in the direction of defining an odious regime as one where, habitually or generally, the acting officials of the regime fail to protect the public interest. This seems to converge with the evolving concept of human security in international legal and policy discourse, and the related notion of Responsibility to Protect (R2P). As Xiuli Han illustrates, in Chapter 12 of this volume, claims concerning 'odious' debt are arising more and more, especially in transitional contexts (recently, Tunisia and Libya), and the Principles can operate as standards that help make more concrete and coherent

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related international law doctrines, as well as structuring negotiations with official and private creditors after political transition.

This brings me back to the theme of how to conceive of the Principles in terms of international law. In our work on ‘Beyond Compliance’, 2 Teitel and I question the adequacy of the vocabulary of ‘compliance’ or enforcement or implementation in accounting for the way in which international legal normativity has effects in the world. We point out that sometimes ‘soft law’ can have stronger and wider normative effects than hard law. We need, without any prejudice in favour of hard law, to understand why a certain kind of legal material is able to gain a significant normative effect. What is the underlying nature of legitimacy that makes it possible for the material to have certain particular normative effects rather than fewer or less or different normative effects. So that is an abstract statement. Concretely here, I think what it means is that we have to be imaginative: for example why couldn’t sovereign borrowers simply include the principles in the contract, to say that this debt contract shall be interpreted and applied in accordance with the UNCTAD Principles on Responsible Sovereign Lending and Borrowing. Once you get a few sovereign borrowers who are doing that, you may start a trend. This is norm entrepreneurship. The Principles are clearly intended to relate to and affect legal norms even if they are explicitly stated not, as such, to constitute a change to international law; they are full of legal categories and notions, such as agency, due diligence, collective action, and so forth. Even with respect to Argentina alone, there are many claims going through the investment regime that relate to sovereign debt and it would greatly surprise me if one or more arbitrators over the next two years, trying to grasp how to apply a very general standard in an investment treaty, like the standard of fair and equitable treatment, would want to grab off the shelf any useful international standards relevant to the area of sovereign debt, in order to apply the very broad treaty provisions in question in the sovereign debt context. So I think these Principles have a bright future and they may be more effective than new hard law initiatives in normatively shaping an area of international controversy where, as noted, the actors are multiple and diffuse (from private corporations to domestic courts to international arbitrators and IFIs) and the institutional context is highly fragmented.