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Introduction

The Fundamental Principles of International Law – An Enduring Ideal?

Jorge E. Viñuales

I AN INAUSPICIOUS ANNIVERSARY

The year 2020 marks the seventy-fifth anniversary of the establishment of the United Nations Organisation, the cornerstone of the post-war international order, and the fiftieth anniversary of the 1970 Friendly Relations Declaration,[1] which provided the canonical formulation of seven foundational principles of international law. Yet, the current international context seems largely inauspicious for genuine celebration. Although the world order engineered by the victorious powers after the Second World War has faced daunting challenges in the past,[2] what is particularly disquieting about the present situation is that the challenges come, to a significant extent, from the main proponent and guarantor of the post-war rules-based international order, the United States, in the absence of any comparable stabilising forces. Whether it is the inward reflexes and blame game of major countries in reacting to a global pandemic,[3] or the use of force by Russia for the annexation of Crimea[4] or its interference in electoral processes in the United States, France, Italy and the UK,[5] or the trade war triggered by the United States against China and the EU,[6] or its withdrawal from the Paris Agreement on Climate Change,[7] or China's defiance of the basic rules of the law of the sea to assert its power within a 'nine dash' line in the South China

[1] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970), Annex [Friendly Relations Declaration].

[2] See KJ Holsti, *Peace and War: Armed Conflicts and International Order, 1648–1989* (Cambridge University Press, 1991), ch 11 (describing the complexification of war and listing fifty-eight conflicts which occurred in the forty years after the adoption of the UN Charter); JJ Mearsheimer, 'Back to the Future: Instability in Europe after the Cold War' (1990) 15 *International Security* 5; JL Gaddis, 'International Relations Theory and the End of the Cold War' (1992–93) 17 *International Security* 5; S Huntington, 'The Clash of Civilizations?' (1993) 73(3) *Foreign Affairs* 22; G Lundestad, *East, West, North, South: Major Developments in International Relations since 1945* (5th edn, Sage, 2005).

[3] See I Bremmer, 'China and America's Blame Game Over COVID-19 Hurts Everyone', *Time Magazine* (26 March 2020).

[4] For two accounts see T Grant, 'Annexation of Crimea' (2015) 109 *American Journal of International Law* 68; A Grigas, *Beyond Crimea: The New Russian Empire* (Yale University Press, 2016).

[5] See E Brattberg and T Maurer, 'Russian Election Interference: Europe's Counter to Fake News and Cyber Attacks', Carnegie Endowment for International Peace, 23 May 2018; B Sander, 'Democracy under Influence: Paradigms of State Responsibility for Cyber Influence Operations in Elections' (2019) 18 *Chinese Journal of International Law* 1.

[6] See J Weiler, 'Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System', *EJIL: Talk!*, 25 July 2018.

[7] See L Rajamani, 'Reflections on the US withdrawal from the Paris Climate Change Agreement', *EJIL: Talk!*, 5 June 2017.

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Sea,[8] all these cases go beyond mere controversy over the applicability of a principle to a given situation and constitute open defiance of the letter and/or spirit of the very principles that have served, since 1945, as the normative standards determining the lawfulness of international action.

From a legal standpoint, the diversity and complexity of the issues is daunting. What is the meaning of sovereignty in a world where in a few months a localised viral outbreak can become a global pandemic paralysing the world,[9] or of human rights in a context where even in wealthy countries inequality is laid bare by the blatant differences in access to medical treatment?[10] Is interference with presidential elections or with the Brexit referendum through private companies manipulating social media a violation of the classical principles of non-intervention or of sovereign equality?[11] Is a group with an identifiable cultural tradition (such as indigenous peoples in Brazil or first nations in the United States or Quebec in Canada or, still, Catalonia in Spain) entitled to exercise self-determination and become an independent State, even beyond a decolonisation context?[12] Is cyberwarfare or international terrorism or the poisoning of Russian ex-agents in the territory of the UK a prohibited use of force or a violation of non-intervention or of sovereign equality?[13] Is a restrictive migration policy leaving migrant boats adrift in the Mediterranean without help, preventing them from docking and even restricting the possibility for civil society organisations to offer help consistent with the (extraterritorial) obligation to protect human rights?[14] Are the unilateral sanctions imposed by Saudi Arabia, Bahrain, the United Arab Emirates and Egypt against Qatar a violation of the principles of non-intervention, sovereign equality or human rights?[15] Is the abandonment by the Egyptian government of its claims over two islands in favour of Saudi Arabia in disregard of the collective rights enshrined in the Egyptian Constitution a violation of the right of self-determination of the Egyptian people?[16] Is the market restructuring required by international financial institutions as a condition for a loan to a developing country or the austerity required by European institutions as a condition for financial assistance to Greece[17] or, still, the focus of the International Criminal Court on African States consistent with the principle of non-intervention?[18] Is the triggering of a trade war against specific countries or regional organisations consistent with the principles underlying non-discrimination in trade relations?[19] Is the manipulation of currency exchanges to gain a competitive trade advantage consistent with the principles governing international monetary

[8] See D Guilfoyle, 'The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?' (2018) 8 *Asian Journal of International Law* 51.

[9] See J Gibney, 'The Coronavirus Won't Kill Globalization', *Bloomberg Opinion* (22 March 2020).

[10] See Human Rights Watch, 'US: Address Impact of Covid-19 on Poor: Virus Outbreak Highlights Structural Inequalities' (19 March 2020).

[11] See Sander (n 5).

[12] See N Cornago, 'Beyond Self-Determination: Norms Contestation, Constituent Diplomacies and the Co-Production of Sovereignty' (2017) 6 *Global Constitutionalism* 327.

[13] See GP Corn and R Taylor, 'Sovereignty in the Age of Cyber' (2017) 111 *AJIL Unbound* 207.

[14] See M Martin, 'Prioritising Border Control over Human Lives: Violations of the Rights of Migrants and Refugees at Sea', Euro-Mediterranean Human Rights Network Policy Brief (June 2014).

[15] See A Hofer, 'Sanctioning Qatar Continued: The United Arab Emirates Is Brought before the ICJ', *EJIL: Talk!*, 22 June 2018.

[16] See G Le Moli, 'The President of The Republic et al. v. Ali Ayyoub et al.' (2019) 113 *American Journal of International Law* 4.

[17] See V Paliouras, 'The Right to Restructure Sovereign Debt' (2017) 20 *Journal of International Economic Law* 115.

[18] See KJ Heller, 'Radical Complementarity' (2016) 14 *Journal of International Criminal Justice* 637; C de Vos, S Kendall and C Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015).

[19] See Ch Bown and D Irwin, 'Trump's Assault on the Global Trading System: And Why Decoupling from China Will Change Everything' (September/October 2019) 98(5) *Foreign Affairs*.

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or trade relations?[20] Is the ability of foreign investors to challenge public policy measures in the countries where they operate before ad hoc arbitration tribunals composed of private individuals consistent with the sovereign prerogatives of States, human rights or the prevention of environmental harm?[21] Is the failure to achieve complete nuclear disarmament[22] or to raise the level of ambition in mitigating climate change[23] a violation of the duty to co-operate?

One could multiply the examples, but the main underlying point is similar: in the present political context, the foundational principles of the international legal order face daunting challenges, some of which could be existential. Such challenges are of various orders. In some cases, such as the threats arising from the digital revolution or from massive environmental degradation, it is the unanticipated character of the threats or of their scale that challenges the ability of one or more principles to frame them. In other cases, such as the attempted secession of minorities, currency manipulation or trade wars, the nature of the threat was anticipated but the formulation of the relevant principles either left the matter unsettled or did not anticipate other related shortcomings in the implementation machinery (e.g. the deadlock in the appointment of World Trade Organization (WTO) Appellate Body members). Yet in other cases, such as the forceful assertion of territorial claims on the basis of legally unrecognised arguments or blatant violations of the principle of non-refoulement, the actions are clearly unlawful and the main challenge comes precisely from the open defiance of well-established principles.

This is the general context in which, together with the distinguished contributors who kindly accepted my invitation to join this project, we decided to re-examine the past, present and possible futures of the fundamental principles on which the international legal order is based. Seven of them are expressly stated in the Friendly Relations Declaration. Others, such as protection of human rights; the duty to co-operate in the economic, social and cultural fields; or the non-appropriation of Outer Space are mentioned in an embryonic form in the preamble of the Declaration or as part of one of the seven principles. And others, such as prevention of environmental harm or the principles of international humanitarian law, are not referred to in the wording of the Declaration but may be considered as a necessary implication or a subsequent extension of it.

However, it would be inaccurate to conclude from these observations that the Friendly Relations Declaration contains, in condensed manner, 'all' the fundamental principles of international law. As discussed in the contributions in this volume,[24] the Declaration is best seen as the culmination of a period in which the principles of the UN Charter were reappropriated by a now much more diverse international community of States, a community that, over time, had been expanded from Christian States, over to 'civilised' States and, in 1945, to all 'peace-loving' countries,[25] including a large number of 'New Nations'.[26] By contrast, matters of

[20] See RW Staiger and AO Sykes, '"Currency Manipulation" and World Trade' (2010) 9 *World Trade Review* 583.

[21] See JE Viñuales, 'Sovereignty in Foreign Investment Law' in Z Douglas, J Pauwelyn and JE Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press, 2014), ch 11.

[22] See G Nystuen, S Casey-Maslen and A Golden Bersagel (eds), *Nuclear Weapons under International Law* (Cambridge University Press, 2014).

[23] See R Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92 *International Affairs* 1107.

[24] See the chapter by L-A Duvic-Paoli and JE Viñuales in this volume.

[25] See BVA Röling, *International Law in an Expanded World* (Brug-Djambatan, 1960).

[26] See D Kay, 'The Politics of Decolonization: The New Nations and the United Nations Political Process' (1967) 21 *International Organization* 786.

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environmental protection, the formulation of which was only starting in the early 1970s, were excluded from the Declaration, both in its actual wording and in its spirit, which gave pre-eminence to self-determination and sovereign equality, with the attendant implications for the exploitation of natural resources. It may be useful to recall a resolution, entitled 'Development and Environment', which was adopted on the initiative of Brazil, one year after the adoption of the Friendly Relations Declaration and less than a year before the Stockholm Declaration on the Human Environment,[27] and whose last paragraph 'reiterate[d] the primacy of independent economic and social development as the main and paramount objective of international co-operation, in the interests of the welfare of mankind and of peace and world security'.[28] Developing countries expressed great reluctance for any interference with development for the sake of preventing pollution. They only accepted this idea later, in the process triggered by the 1992 Rio Conference on Environment and Development and still ongoing today.

Yet, far from superseded, the principles formulated in the Friendly Relations Declaration, suitably complemented by some other instruments expressing principles not fully fleshed out in 1970, remain the main synthesis so far achieved on the foundations of the rules-based international order. It is from this perspective that the re-examination undertaken in this volume must be understood. Such re-examination is, however, only a part of a wider project, with a wider goal, which I would like to introduce briefly before explaining the place of this volume within it.

II AN ENDURING IDEAL?

'Love is so short, and forgetting is so long', wrote Chilean poet Pablo Neruda in one of his most memorable works.[29] This fact of life, however discomforting to those who face it, harbours some hope when applied to ideals and possibly to their expression through principles.

An intriguing study of how the collective memory of 'cultural objects' – the continued and shared attention to events and people – evolves over time[30] suggests that this process follows two different phases. Once attention to a cultural object has reached its peak, there is first a rapid and steep decline but, at some point, the slope becomes less and less steep and settles in a slow and gentle declining trajectory over a period of decades. This trajectory, which the authors of the study apply to objects as diverse as academic papers (in physics), songs, films and even celebrity, is explained by the different nature of the phenomena driving attention. The surge in attention to a cultural object and the subsequent sudden decline is driven by 'communicative memory', namely contemporary human interactions (direct 'word of mouth' communication of information among contemporaries). This driver of collective memory is powerful but short-lived. Instead, the slower and gentler decline in attention of the second phase is driven by 'cultural memory' – that is, the recording of information through a range of means or, in other words, the penetration of the cultural object in more stable written or physical supports and cultural strata.

[27] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc A/CONF.48/14/Rev.1, 2 et seq.

[28] Development and Environment, UNGA Res 2849 (XXVI) (20 December 1971), para 11.

[29] 'Es tan corto el amor, y es tan largo el olvido', poema 20, *Veinte poemas de amor y una canción desesperada* (Editorial Nacimiento, 1924). I borrow the analogy with Neruda's writings from the editorial 'How We Forget' (2018) 564 *Nature* 162. The references in this section follow those provided in this editorial, which first sparked my interest in the dynamics and processes of collective memory decay.

[30] C Candia et al, 'The Universal Decay of Collective Memory and Attention' (2019) 3 *Nature Human Behaviour* 82–91.

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This trajectory of collective memory decay is largely but not universally applicable to all cultural objects.

Whether an extrapolation to the realm of 'normative events' is permitted is a matter that would require sustained attention and possibly a methodology similar to that employed by the authors of the study. Yet, a tentative parallel between those cultural objects and 'normative events', such as a statement of principles, is heuristically useful. It provides an intuitive explanation of how certain subjects, topics or questions attract high levels of attention in international legal circles for a short period of time and then slowly fade away, their subsequent existence being dictated by the extent to which they have been recorded in more stable supports, such as writings, textbooks, curricula, areas of practice in governmental, non-governmental and private institutions, and the like. It also signals a curious and unexpected manner of bringing together historical, including critical, and positivistic accounts of international law as complementing accounts of collective memory decay, the former revisiting the 'genealogy' of the first phase (communicative memory) and the latter focusing on the consolidation of the second phase (cultural memory). This basic observation defines the broad contours of the research programme within which this volume was conceived, which I will further explain below. For present purposes, such a tentative extrapolation of the dynamics of collective memory to the 'normative event' represented by the negotiation and adoption of the Friendly Relations Declaration may explain the notable loss of interest regarding this instrument since the 1970s and our (international lawyers) role, as architects, vehicles and agents in this process.

The process leading to the adoption of the Friendly Relations Declaration attracted, quite understandably, substantial attention in the 1960s[31] and the 1970s.[32] In 1972, two sets of Hague

[31] See eg JN Hazard, 'The Sixth Committee and New Law' (1963) 57 *American Journal of International Law* 604–13; LT Lee, 'The Mexico City Conference of the United Nations Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation among States' (1965) 14 *International & Comparative Law Quarterly* 1296–310; M Decleva, 'Le dichiarazioni di principi delle Nazioni unite' [1965] *Annuario di Diritto Internazionale* 63–79; M Nawaz et al (eds), *The Legal Principles Governing Friendly Relations and Co-Operation among States in the Spirit of the United Nations Charter* (Sijthoff, 1966); E McWhinney, 'The "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Cooperation among States' (1966) 60 *American Journal of International Law* 1–33; O Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (Manchester University Press, 1966) 46 et seq; W Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1966); P-H Houben, 'Principles of International Law Concerning Friendly Relations and Co-Operation among States' (1967) 61 *American Journal of International Law* 703–36; R Bierzanek, 'Legal Principles of Peaceful Co-Existence and Their Codification' (1966–67) 1 *Polish Yearbook of International Law* 17–44; V Pechota, 'Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN' (1967–68) 37/38 *Hague Yearbook of International Law (formerly AAA)*; S Bastid, 'Observations sur une "étape" dans le développement progressif et la codification des principes du droit international' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (IUHEI/Faculté de Droit de l'Université de Genève, 1968) 132–45; M Virally, 'Le Rôle des "principes" dans le développement du droit international' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (IUHEI/Faculté de Droit de l'Université de Genève, 1968) 531–54.

[32] See eg R Higgins, 'The United Nations and Law-Making: The Political Organs' (1970) *ASIL Proceedings* 37–48; P Raton, 'Travaux de la Commission juridique de l'Assemblée générale des Nations Unies (XXVe session)' (1970) 16 *Annuaire français de droit international* 514–51; K Obradovic, 'Quelques réflexions sur le projet de Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats' (1970) *Jugoslovenska revija za medjunarodno parvo* 2–3; R Rosenstock, 'The Declaration of Principles of International Law concerning Friendly Relations: a Survey' (1971) 65 *American Journal of International Law* 713–35; K Kolesnik, 'Tuzmuhamedov, Deklaracija principov mirnogo sosuäcestvovanüa' (1971) 6 *Sovetskoe gosudarstvo i parvo*; M Sahovic, *Principles of International Law Concerning Friendly Relations and Co-Operation* (Oceana, 1972); B zu Dohna, *Die Grundprinzipien des Völkerrechts über die freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten* (Duncker & Humblot, 1973); JA Frowein, 'Freundschaft und Zusammenarbeit unter den Staaten. Die UN-resolution über freundschaftliche Beziehungen als Ausdruck wichtiger Strömungen im heutigen Völkerrecht' (1973) 28 *Europa-Archiv* 70–76; I Sinclair, 'Principles of International Law Concerning Friendly

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Lectures were devoted to the principles of the Declaration in the same year and volume,[33] which is highly exceptional. The works published during this period were, in most cases, authored by those who, in a senior or junior capacity, were involved in the Special Committee which drafted the Declaration. This observation would render plausible the hypothesis of a rise in interest in the Declaration not only as a result of the stakes underlying the process but also of the amplification provided by the interplay of communicative memory – that is, the very exchanges and debates within the international law community (academic and diplomatic) of those years. Thereafter, attention declined, first steeply and then following a slower and gentler declining trajectory,[34] interrupted by some major restatements of the value of the Declaration, mainly the reliance of the International Court of Justice (ICJ) in its 1986 judgment in the *Nicaragua* case[35] and, of course, the new dawn offered by the demise of the Soviet Union and the end of the Cold War.[36] Since then, the Friendly Relations Declaration has largely dropped out of sight, almost gone missing, from the writings and teachings of the current generation of international law scholars, even from textbooks,[37] with the notable exception of the debate over the 'constitutionalisation' of international law.[38] Most principles have received individually significant

Relations and Co-Operation among States' in M Nawaz (ed), *Essays on International Law in Honour of Krishna Rao* (Sijthoff, 1975) 107–40.

[33] See G Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations' (1972) 137 *Recueil des Cours* 419–742 (subsequently revised as: G Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Sijthoff, 1979)); M Sahovic, 'Codification des principes du droit international des relations amicales et de la coopération entre les Etats' (1972) 137 *Recueil des Cours* 243–310.

[34] See eg F Anjak, *La Codification des principes de la coexistence pacifique: le comité spécial des principes de droit international touchant les relations amicales et la coopération entre les états conformément à la Charte des Nations-Unies* (Office des publications universitaires, 1980).

[35] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America)*, Merits, Judgment, ICJ Reports 1986, 14 [*Nicaragua* case], paras 188, 191, 228, 264 (prohibition of the use of force), 212–13, 251–52 (sovereign equality) and 202–9, 264 (non-intervention).

[36] Since the 1990s, the main contribution on the Friendly Relations Declaration is C Warbrick and V Lowe (eds), *The United Nations and the Principles of International Law, Essays in Memory of Michael Akehurst* (Routledge, 1994). The explanation why the volume is devoted to the Declaration is stated as follows: 'The essays collected in this volume re-examine the Declaration of Principles of International Law Governing Friendly Relations between States. The Declaration embodies the fundamental values of the international system and is the nearest thing that states have to an international constitution. The great changes in the international system since 1989 hold out the prospect for the reinvigoration of the Charter, perhaps for a new system of international legal relations, and make the reconsideration of the Declaration in these essays particularly timely.' The brief but illuminating chapter by G Abi-Saab to the *Melanges Virally*, published in 1991, highlights a forgotten aspect of the contribution of M Virally, who was the French representative in the Special Committee which drafted the Friendly Relations Declaration. See G Abi-Saab, 'La Reformulation des principes de la charte et la transformation des structures juridiques de la communauté internationale' in *Le droit international au service de la paix, de la justice et du développement: mélanges Michel Virally* (Pedone, 1991) 1–8.

[37] With the exception of a full chapter devoted to the fundamental principles of international law, although not specifically to their statement in the Friendly Relations Declaration, in A Cassese, *International Law* (Oxford University Press, 2001), ch 3.

[38] On this line of work, which has attracted particular attention from German-speaking scholars, see: P-M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 *Max Planck Yearbook of United Nations Law* 1–33; R Kolb, 'La Structure constitutionnelle du droit international public' [2001] *Canadian Yearbook of International Law* 69; T Cottier and M Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 *Max Planck Yearbook of United Nations Law* 261; A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579; A Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Duncker & Humblot, 2007); O Diggelmann and T Altwicker, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 623; A Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513–44; B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009); N Krisch, *Beyond Constitutionalism: The*

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attention, and the Declaration as such is referenced – albeit often in passing – in major international law textbooks. Yet, interest in it as the synthesis instrument marking the reappropriation of the fundamental principles of international law by the then much wider international community of States, including developing and newly independent countries, has all but waned.

This fate may be explained, as for other cultural objects, by the very dynamics of collective memory, although a more granular and familiar perspective would have to refer to the close links between the Declaration and the Soviet doctrine of peaceful co-existence, now mainly of historical interest, the almost completion – with some significant exceptions – of the decolonisation process, and the rise of a new logic – that of sustainable development – with its own imperatives. But, from the perspective of how international law is studied, understood and taught, something more than the Declaration was lost: namely a general or 'generalist' perspective of international law, a 'big picture' of the interrelations across values and their legal expression in legal norms and processes. For someone sceptical about the trend towards extreme and narrow specialisation, who benefited from the teachings of generalists, the Friendly Relations Declaration is more than a mere resolution or codification statement. It is an attempt at agreeing on and synthesising the foundations of the rules-based international order. Thus, the decay of the collective memory of the Friendly Relations Declaration is, in many ways, the passive acceptance of a false impossibility, namely that in a context characterised by increasing specialisation, it is no longer possible or useful to be a generalist international lawyer. What is left then? '"So perhaps you are an expert on the leech?" asked Zarathustra . . . "O Zarathustra," answered the man who was trodden on, "that would be a colossal task, how could I undertake it! But what I am master of and expert on is the leech's *brain* – that is *my* world!"'[39]

A study of the fundamental principles of international law formulated in the Friendly Relations Declaration is, in my mind, a tactical step to explore a more integrative view of a rules-based international order. It is integrative because it attempts to bring together, in an articulate manner, the main technical and intellectual traditions of international law as well as to provide a substantive common ground (the fundamental principles reviewed in this volume) for the integration of specialised knowledge into a general account of international law. The goal, whether it may be qualified as intellectually- or policy-driven, is to bring the study of fundamental principles back to the centre stage of international legal education and, thereby, to refresh or restage our collective memory of why those principles emerged, why they were felt as pressing needs, why we attached so much value to their enactment and placed so much hope in them. We are entering a phase where the common normative foundations of the international legal order are again contested. Our focus must therefore move away from our habits of specialisation and technical dexterity in narrow issues, comfortably sitting on the post-1990 normative consensus, and confront again the normative choices that serve as the foundations of the international legal order, not to

Pluralist Structure of Postnational Law (Oxford University Press, 2010); JA Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2011); T Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer, 2011); E-U Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and EU Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart, 2011) 5–57.

[39] F Nietzsche, *Thus Spoke Zarathustra: A Book for Everyone and No One* (RJ Hollingdale tr, Penguin, 1961), pt IV, 'The Leech', 263.

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thoughtlessly challenge every normative foundation but to lucidly rebuild a more acceptable synthesis.

III THE FUNDAMENTAL PRINCIPLES OF THE INTERNATIONAL LEGAL ORDER TODAY

The Friendly Relations Declaration is not a complete statement of the fundamental principles (or 'basic principles', as the Declaration calls them) of the international legal order. Some other principles were expressly discussed during the negotiations within the Special Committee that drafted the Declaration, and they were either excluded (e.g. the permanent sovereignty over natural resources, which was deemed to be carefully and adequately formulated in Resolution 1803 (XVII)[40]) or only mentioned in the preamble (e.g. the non-appropriation of Outer Space[41]). For this reason, the chapters in this volume are not confined to the seven principles of the Declaration[42] and cover five other fundamental principles or 'clusters' thereof (human rights protection as a principle,[43] the 'cardinal' principles of international humanitarian law,[44] prevention of environmental harm,[45] the principles governing freedoms in the global commons[46] and the principles governing the global economy[47]). Because the focus of the volume is more on the principles than on its supporting instrument (i.e. the Declaration itself), it also includes chapters focusing on the historical and conceptual foundations of these principles.[48] In this context, perhaps the most difficult aspect of designing the contents of this volume was the identification of the relevant principles. I should therefore state, in this introduction, what I understand by the 'fundamental principles of international law' before further elaborating on their fundamental or foundational character.

The 'fundamental principles of international law' as an object are circumscribed from four main perspectives. First, within the broader category of 'norms' in general, the focus of the volume is on the subcategory of 'principles', which can be understood as a type of norm characterised by their higher generality/abstraction (as compared to 'rules'), their formulation (which combines both prescriptive aspects – commands or prohibitions to be 'obeyed' – and permissive aspects – entitlements that can be 'relied on' or not), their mode of application (which entails a proportionality or value-weighing assessment, rather than a binary compliance/non-compliance outcome), and their functions (which, despite variations in proposed taxonomies, may include the actual regulation of behaviour, the co-ordination of reactions against a

[40] See Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (16 November 1964), A/5746, para 280, referring to Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962).
[41] Friendly Relations Declaration, preamble, seventh para, '[r]ecalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.
[42] See the chapters by O Corten (on the prohibition of the use of force), Shotaro Hamamoto (on the peaceful settlement of international disputes), D Tladi (on non-intervention), L Boisson de Chazournes and J Rudall (on co-operation), M Kohen (on self-determination), M Koskenniemi and V Kari (on sovereign equality) and G Futhazar and A Peters (on good faith).
[43] See the chapter by E Riedel on the protection of human rights as a principle.
[44] See the chapter by Bing Bing Jia on the cardinal principles of international humanitarian law.
[45] See the chapter by L-A Duvic-Paoli and JE Viñuales on the prevention of environmental harm.
[46] See the chapter by T Treves on the freedoms and uses of the Antarctic, outer space and marine global commons.
[47] See the chapter by J Kurtz, JE Viñuales and M Waibel on the principles governing the global economy.
[48] See the chapters of G Abi-Saab on the system of the Declaration, of S Moyn and U Özsu on the historical origins of the Declaration and of P-M Dupuy on the Declaration at fifty.

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certain conduct, the evaluation of conformity of a certain conduct, the interpretation of other norms, and a value-expressive function). Second, within 'principles', 'foundational' principles perform their value-expressive function in a distinctive manner. They do not only 'recognise' and 'store' value, but they do so for values that define the 'identity' of a legal order, a feature which is itself manifested by the 'architectural' function performed by such values in the definition of the structures and institutions of an order. Third, in international law, the 'fundamental principles' have been identified by the community of States or subsets thereof through initial statements (e.g. the 1941 Atlantic Charter[49]), then formal enactment (specifically Articles 1, 2 and 55 of the UN Charter[50]), and then restatements (a series of declarations and resolutions, most notably the 1970 Friendly Relations Declaration but also several others,[51] and restatements in the jurisprudence of the ICJ[52]). Fourth, these

[49] Joint Declaration of President FD Roosevelt and Prime Minister W Churchill, 14 August 1941, known as the 'The Atlantic Charter'.

[50] Charter of the United Nations, 26 June 1945, Arts 1(2) (referring to 'the principle of equal rights and self-determination of peoples' as a purpose of the organisation), 1(3) (referring to 'international cooperation' inter alia 'in promotion of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion', as a purpose of the organisation), 2(1) (stating the 'principle of sovereign equality' of States), 2(2) (stating the requirement to 'fulfil in good faith' the obligations assumed under the Charter), 2(3) (stating the requirement to 'settle their international disputes by peaceful means'), 2(4) (stating the obligation to 'refrain . . . from the threat or the use of force'), 2(7) (stressing that nothing in the Charter 'shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state') and 55 (referring inter alia to the 'principle of equal rights and self-determination of peoples' and the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion').

[51] See, among several other instruments: Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948); Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960); Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Art 73e of the Charter, UNGA Res 1541 (XV) (15 December 1960); UNGA Res 1803 (XVII); Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA Res 1962 (XVIII) (13 December 1963); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965); Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of Nations Jurisdiction, UNGA Res 2749 (XXV) (17 December 1970); Stockholm Declaration (n 27); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res 36/103 (9 December 1981); Manila Declaration on the Peaceful Settlement of Disputes, UNGA Res 37/10 (15 November 1982); Rio Declaration on Environment and Development, 13 June 1992, UN Doc A/CONF.151/26.

[52] See inter alia: (1) on the prohibition of the use of force: *Nicaragua* case (n 35), paras 188, 191, 228, 264; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 [*Legality of Nuclear Weapons*], paras 37–39; *Oil Platforms (Islamic Republic of Iran* v *United States of America)*, Judgment, ICJ Reports 2003, 161 [*Oil Platforms*], paras 43–78; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 [*Wall Opinion*], paras 86–87 and 138–39; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v *Uganda)*, Judgment, ICJ Reports 2005, 168 [*DRC* v *Uganda*], paras 92–166; (2) on peaceful settlement of disputes: *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, 3 [*North Sea Continental Shelf*], para 83–87; *Nicaragua* case (n 35), paras 290–91; (3) on non-intervention: *Nicaragua* case (n 35), paras 202–9, 264; *DRC* v *Uganda*, paras 155–65; (4) on co-operation: *Corfu Channel* case, Judgment, ICJ Reports 1949, 4 [*Corfu Channel*], 22–22; *North Sea Continental Shelf*, paras 83–87; *Legality of Nuclear Weapons*, paras 98–103; *Pulp Mills on the River Uruguay (Argentina* v *Uruguay)*, Judgment, ICJ Reports 2010, 14 [*Pulp Mills*], paras 90–122, 132–50; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v *Chile)*, Judgment of 1 October 2018, ICJ General List No 153 [*Obligation to negotiate*], paras 86–87, 91, 146–47, 152, 158–59, 162, 165–67; (5) on self-determination: *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, paras 48–78; *East Timor (Portugal* v *Australia)*, Judgment, ICJ Reports 1995, 90, para 29; *Wall Opinion*, paras 82, 88, 115–22, 156; *DRC* v *Uganda*, paras 222–50; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, paras 79–84; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ, Advisory Opinion, 25 February 2019, paras 148–53; (6) on sovereign equality: *Corfu Channel*, 35; *Nicaragua* case (n 35), paras 202, 212–13, 251–52; *Jurisdictional Immunities of the State (Germany* v *Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, 99, paras 57–58; (7) on good faith see: *Nuclear Tests (Australia* v *France)*, Judgment, ICJ Reports 1974, 253, para 46; *Elettronica Sicula Sp.A (ELSI)*, Judgment, ICJ Reports 1989, 15, 76–77; *Land and Maritime Boundary between*

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fundamental principles or clusters thereof are representative of wider non-linear processes of emergence and norm contestation involving other competing concepts and principles, which are of great importance in understanding the origins and evolution of such principles. By way of illustration, a body of competing principles embodying what became known as the 'New International Economic Order' (NIEO)[53] found expression in the 1970s opposing, among others, the principles formulated in the late 1940s to govern international economic relations. The selection of the twelve principles and clusters thereof examined in this volume is designed to take into account such major waves of norm contestation driven by what could be summarily referred to as the North–South divide, Cold War politics and, more recently, the rise of environmental concerns and the digital revolution. The selected principles and clusters thereof are therefore intended not to describe what may appear as a linear or teleological evolution or a cannon set in stone but, quite to the contrary, to take into account these complex processes of norm contestation, with a range of possible outcomes. The 'iceberg' is identified by its 'tip' but the analysis is not confined to the tip; the object is the iceberg.

On the basis of these four considerations, the research object of this volume is given by twelve principles or clusters of principles: prohibition of the use of force, peaceful settlement of international disputes, non-intervention, co-operation, self-determination, sovereign equality, good faith, cardinal principles of international humanitarian law (necessity, distinction, proportionality and humanity), the principle of human dignity, the prevention of environmental harm (prevention, due diligence, co-operation, environmental impact assessment, precaution and sustainable development), the principles governing the global commons (prohibition of appropriation, freedom of use subject to due regard for other uses, and common management), and those principles governing international trade, monetary and investment transactions (sovereign prerogative – to set trade policy, exploit natural resources, and on monetary matters – and constraints on that prerogative – regarding market access, non-discrimination, treatment of aliens, and financial stability). I do not claim that these principles cover every single possible topic or area, but they do underpin, as required by their identity and architectural function, the most major international institutions: the UN Organization; the so-called 'International Bill of Rights';[54] the Hague/Geneva

Cameroon and Nigeria (Cameroon v *Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, 303 [*Cameroon* v *Nigeria*], paras 36–39; *Obligation to negotiate*, paras 86–87, 91, 146–47, 152, 158–59, 162, 165–67; (8) on human rights: *Corfu Channel*, 22; *Wall Opinion*, paras 86, 102–14, 123, 127–37; *DRC* v *Uganda*, paras 205–21, dispositif para 3; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Judgment, ICJ Reports 2012, 422, paras 64–70; (9) on humanitarian law: *Nicaragua* case (n 35), paras 215–20, 254–56; *Legality of Nuclear Weapons*, paras 24–32, 46, 52–55, 85–97; *Wall Opinion*, paras 89–101; (10) on prevention of environmental harm: *Legality of Nuclear Weapons*, paras 27–36; *Pulp Mills*, paras 77, 101–2, 144–46, 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v *Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v *Costa Rica)*, Judgment, ICJ Reports 2015, 665, paras 100–12 and 165–68; (11) on freedoms in common areas: *Nicaragua* case, paras 214, 251–53; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992, 351, para 419; *Case Concerning Maritime Delimitation and Territorial Question between Qatar and Bahrain (Qatar* v *Bahrain)*, Judgment of 16 March 2001, paras 169 et seq, 195 et seq, 223; *Cameroon* v *Nigeria*, paras 288 et seq; *Maritime Delimitation in the Black Sea (Romania* v *Ukraine)*, Judgment, ICJ Reports 2009, 61, paras 115–22; (12) economic activities: *Nicaragua* case (n 35), paras 244–45, 275–76; *Oil Platforms*, paras 45–52; *DRC* v *Uganda*, para 244.

[53] See Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (1 May 1974); Charter of Economic Rights and Duties of States, UNGA Res 3281 (12 December 1974).

[54] This expression is generally used to refer to the Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, and the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

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