CHAPTER ONE

INTRODUCTION: EVOLVING PRINCIPLES OF INTERNATIONAL LAW – THE QUEST FOR DEMARCATION

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1. Aims of this Chapter

This volume contains studies that reflect on ‘evolving principles of international law’ – a terrifyingly rich phrase. The sentence instantly prompts several questions, inter alia: which principles of international law are discussed? Did the authors deliberately opt for an indefinite indication, or have ‘the’ principles of international law been singled out? In the latter case, which may be qualified as ‘the’ (main) principles of international law? What period of evolution are we focusing on exactly? And how can one assess whether an international legal principle is truly ‘evolving’ or not?

The aim of this introductory chapter is to shed some light on these questions, as the title of this book would otherwise remain excessively enigmatic. By way of prelude to the studies that comprise the heart of this volume, but also with the intention of proffering some building blocks for future scholarship, an attempt is made to delineate our subject of enquiry as clearly as possible. For that purpose, we will also elaborate on the merits of the approach that has been adopted, outline the results it aims to deliver, and indicate what inferences might be drawn from the evolutionary process we seek to portray.

2. Principles of Law – Quid?

To begin with, let us first muse for a short moment on the more general notion of a ‘legal principle’. What are its determining characteristics, in other words, what makes a ‘principle of law’ truly a ‘principle of law’? This is essentially a question of semantics and terminology. Usually, one means to indicate those basic precepts underpinning and defining a legal system. If something is qualified as a ‘legal principle’, one may assume it to have a certain normative quality; for cases of non-observance of and non-compliance with a legal principle immediately call for a condemnatory statement. Principles of law would seem to constitute the inner sanctum of any legal order, delivering guidance to, and preferably steering the conduct of, lawyers, judges, politicians, even the

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1 To be sure, there are other works explicitly devoted to ‘principles of international law’, but these commonly tend to be textbooks discussing the general aspects of the field.
public-at-large. Yet, the normative element need perhaps not necessarily be present: for a principle may equally function as a source of inspiration, outlining only a possible course of action, whereas another (possibly conflicting) principle may just as well lead to the satisfactory resolution of an issue. Therefore, the status of principles can be relatively soft, with the definite coercive force depending on the context. At the same time though, it is rather difficult to confer the edifying qualification of ‘legal principle’ when one considers it totally unimportant whether it is ever being adhered to or not.

A further characteristic of a principle of law appears to concern the extent to which its ‘principal’ status is recognised. Evidently, an individual opinion will not suffice. There would need to be more widespread acceptance within the international judicial community, preferably proof of a broad consensus, before one can proceed to award the qualification of ‘a principle of law’. While for some, the recognition of a legal principle does not have to be universal, in our view, at least a certain level of generality should surely be present. This facet may pertain to either a protracted period of time, or a significant geographical area. Admittedly, there is thus little room to distinguish between ‘principles of law’ and ‘general principles of law’. However, as will be elaborated in greater detail below, the studies in the present volume are not confined to the ‘general principles of international law’ indicated by article 38 of the Statute of the International Court of Justice.

It is comparatively easier to distinguish between ‘principles’ on the one hand and ‘concepts’ on the other. ‘Concepts’ are standard and predominantly practical notions, a category which in public international law encompasses e.g. ‘state’, ‘territory’, ‘treaty’ and ‘use of force’. Consequently, if the current volume would have been devoted to ‘evolving concepts’ instead of ‘evolving principles of international law’, its scope would have been unpalatably broad. Concepts are amply discussed in encyclopaedic works, alongside a plethora of other basic terms and expressions contained in the international lawyer’s toolbox.

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2 Besides, if the capacity to excite obedience is considered crucial, one would be reverting to John Austin’s outmoded ‘command theory of law’.
3 To the mind of the authors though, one should not proceed to presume there exists a direct parallel with (the formation of) international customary law.
4 Although a principle can develop and be recognised in only a few years’ time (a point to which we will return below). This is akin, but not identical to the emergence of ‘instant custom’ in public international law.
5 Matters are similarly blurred in the EU legal order, where the European Court of Justice established the official general principles of Union law as well as numerous other basic principles, taking its cue from the provision that instructs it to “ensure that in the interpretation and application of the Treaties the law is observed”.
7 Cf. Malcolm Shaw’s contribution to this volume, referring to ‘continental shelf’ as one of the ‘expressions’ of international law, and the chapter by Eric Myjer, pointing to the interrelationship between values, rules and principles.
As remarked above, one should not immediately equate a legal principle with a binding rule. Comity is but one illustration of this point. Conversely, a binding rule may well reflect a principle, as is the case for example with *bona fides* in contractual relations, enshrined in countless national and international legal codes. It is, however, hard to draw sharp lines here, since not all rules have to be binding, meaning that the latter can occasionally be just as ‘soft’ as principles. In the same vein, ‘principles’, ‘concepts’ and ‘rules’ share the trait that they need not be codified, as in virtually every legal system, unwritten rules, concepts and rules are known to exist.

3. *Principles of International Law – Quae?*

Now that we have sketched some contours of legal principles *sensu lato*, let us take a more specific doctrinal approach and outline which principles of international law will be highlighted in this volume. For starters, the studies included in this book are not directed at *the* principles of international law, since that would presume that there exists an official (and exhaustive) canon. Instead, there is no common agreement on the notions that may be designated as *the* principles of international law. At most, one can point to article 38 (1) of the Statute of the ICJ, but there is still no absolute unanimity as to the precise meaning and scope of the phrase “the general principles of law recognised by civilised nations”.

One might suggest confining the inquiries to the ‘most important’ principles of international law, but this too remains easier said than done. Whereas it could be tempting to focus only on the paramount norms, i.e. *ius cogens* or *erga omnes* obligations, we would first have to surmount classic and rather tiresome problems of definition. Moreover, countless publications have been devoted to these themes already. Suffice to say that some of the international legal principles discussed here can (also) be categorised as *ius cogens* or obligations *erga omnes*, but that this did not constitute a precondition for their inclusion.

At the other end of the spectrum, if an extremely liberal approach were to be adopted in which the weight or hierarchical position is considered totally irrelevant, the list of (supposed) international legal principles to be included

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8 We consciously deviate here from the approach of the ICJ, which has often referred to ‘principles’ and ‘rules’ interchangeably. In its judgment in the *Gulf of Maine* case (ICJ Reports 1984, p. 246, at p. 288–90), the Chamber of the Court noted that, in the context of the question put before it, ‘rules’ and ‘principles’ conveyed the same idea, since the term ‘principles’ clearly referred to principles of law, which also included rules of law. Yet in this respect, it did note the “more general and more fundamental character of general principles” (par. 79).

would grow infinitely long – albeit that such an approach does render it unnecessary to pronounce on their exact order of priority.

Something that is patently clear anyhow is that, for a principle of international law to be labelled as such, it does not need to have originated in that legal order. On the contrary, as is the case for the “general principles” referred to in article 38 (1) of the ICJ’s Statute, first and foremost, notions that originate in municipal law have been recognised as international legal norms, a point underscored by a vast jurisprudence. This e.g. holds true for desuetude, acquiescence, res judicata, estoppel, and even for a principle as colloquial as that of proportionality. To this batch, one may add those principles derived exclusively from international legal practice and invariably identified as such in legal doctrine, inter alia: self-determination, non-intervention, self-defence, good faith and uti possidetis.

In all then, this book treads a middle ground. The reader will not find analyses of the principles of international law, in the absence of a sufficiently compact and coherent set of norms that could be qualified as such. At the same time, it contains no exhaustive treatment of every notion that might be tagged as a principle of international law, reflecting instead on a limited selection. Admittedly then, this amounts to an undertaking that is more modest than the title may have led one to believe. Yet, as will be further detailed below, it is one that does carry broader significance nevertheless.

4. Ordering Principles of International Law

Before elaborating further on the selection of international legal principles, it is useful to make a few observations on methods of classification. For sure, some principles are more ubiquitous than others, meaning that they are relevant to, and crop up in, virtually all different branches of international law (e.g. the principle of proportionality). Conversely, certain sub-domains contain specific principles that are never or only rarely applied elsewhere (e.g. the principle of equidistance in the law of the sea). More problematic are those principles that signify secondary rules of international law. Consider for example three principles with regard to the law of treaties. One of them, pacta sunt servanda, is the central tenet of the law of treaties, which may at the same time be labelled as a cornerstone of the international legal order as a whole; a treaty rule originating in a general principle, which is accepted as a rule of customary international law as well. In contrast, most authors agree that rebus sic stantibus and exceptio non adimpleti contractus are lex generalis rules of a less foundational character. A lex specialis can replace these general rules, while the principle of pacta sunt servanda is of a ‘higher’ level. Nevertheless all three principles are interconnected, and traditionally mentioned in the one and the same breath.
As already hinted at above, matters would have been comparatively easier if a definitive hierarchy of norms had been established. Of course, the classic distinction between *ius cogens* and *ius dispositivum* may still provide a valuable point of departure. A number of international legal principles may be easily filed in the former or the latter category, for example the prohibition of torture, and certain norms regarding diplomatic and consular privileges. Reliance on Article 38 (1) of the Statute of the ICJ does not resolve the issue either. It could tentatively be argued that principles that have been established exclusively in judicial decisions and scholarly writings ought to be placed in a subordinate position, and that there is no hierarchical relation between treaty law and customary law. In other words, the one principle need not be considered more weighty than the other simply on the mere basis of its source (being a principle reflected in customary law or one codified in a treaty). Overlaps render the issue more complex, as notions originally developed by the International Court of Justice may go on to form part of treaty law or custom, and many rules in the VCLT reflect norms of customary law. At most one could say that those principles reflected in all three sources mentioned in Article 38 have enhanced authority. Other than that, principles could only be ordered based on the norms they reflect, without any bearing on the formal sources, apart from the limited category of *ius cogens*.

Equity presents a further complication. When taken to mean “considerations of fairness, reasonableness and policy”, it may in itself constitute a principle of international law that can be placed in one group or the other. It can however also denote “a set of principles constituting the values of the international legal system”, thus constituting a league of its own. The former sense does not facilitate much the drawing up of an overarching classification; the latter merely leads to the conclusion that some principles are part of equity while others are not. At most then, it serves as an indication of provenance, but a very crude one at that.

Lastly, principles of international law could be classified along the lines of the *lex generalis – lex specialis* distinction, as noted above. For example, in armed conflicts, international humanitarian law may serve as *lex specialis* of international human rights law. Of course, this classification is rather crude and facile, and would in the end only result in two tediously long lists of principles, assigned to either the first cluster or the second.


11 Whereas in most national legal systems (and in the legal order of the European Union), general principles of law reside *eo ipso* at the top of the pyramid, thus being capable of overriding any clashing inferior norms.

In sum, while not all international legal principles are equivalent, of the same pedigree or importance, there seems to be no fixed method to place them in separate (sub-)categories. Stubborn persistence here would run the risk of conveying a false sense of order, as the labels employed are easily too rigid, with the dividing lines proving much more murky in reality.

5. Evolving Principles of International Law

When staging an enquiry into the evolutionary trajectory of international legal principles, some careful thought should also be given to the question where to start. On the one hand, the focus could be placed on the recent past, and all the developments since then up to the present time. Yet, it is equally possible to go a much longer way back, or even attempt to span the entire history of international law, as principles are likely to be discernible in each different epoch. Of course, hereby we ought to take note of the fact that international law did not exist _eo nomine_ before the 19th century, and that the profession of international lawyer was invented fairly recently.13 This entails that, when assessing the more distant past, the sought after principles may be comparatively less visible, also due to the witting and unwitting application of domestic norms to interstate relations. The heuristic problems are compounded by the fact that, for several centuries, decisions of courts and actual state practise were seen as less determinative of the scope and content of the applicable rules than scholarly writings, whereas at present the contrary is true.

We furthermore share the view of those authors that consider the current state of the art with regard to the periodisation of the history of international law as rather unsatisfactory.14 As a result, it is far from easy to ascertain which principles belong to which particular era – a problem that can only be sidestepped by not overrating the importance of dating them with complete precision. Still, it needs to be clear from the outset what period is referred to when one employs the epithets of a ‘classic’, ‘medieval’ or ‘modern’ principle of international law. Unfortunately, the precise ambit of these adjectives is still a subject of debate and controversy among historians.

Through the ages, certain principles have proven to be resilient and of an impressive longevity. These ‘evergreens’ usually receive greater attention than transient ones. Nonetheless, those of shorter duration did not necessarily have a lesser impact; they may just as well have defined their time, and determined the shape of the notions that subsequently took their place. Also, some of

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them may re-emerge after a period of absence, possibly in a different guise.\textsuperscript{15} This calls for a wider-ranging assessment, as the taking into account of the rise and demise of a principle provides valuable insight into the underlying process of evolution, and the underlying factors and variables that steer the course of events.

Of course, our analysis could be focused on principles that have been around equally long, but then the question remains what should be the preferred point of departure. Such a uniform set-up does benefit overall coherence, but there will always be a certain randomness in the choice of where to begin. Additionally, where a process of evolution stretches out through several different ages, proceeding on the basis of a strict temporal compartmentalisation requires making some hard choices, and may lead to rash exclusions that are not always scientifically tenable.

Ultimately, the studies in the present book are not symmetrical, in the sense of concentrating on one and the same timeframe. Taking a flexible approach with regard to the temporal dimension allows for a multi-faceted analysis, chiefly predicated on thematic foundations.\textsuperscript{16} Therefore, the studies in the following chapters take a diachronic perspective, providing a chequered overview of principles of international law in varying stages of evolution.

6. Tracing the Evolution of International Legal Principles

In theory, it is not too difficult to pinpoint an evolutionary development: it seems acceptable to claim its existence whenever one stumbles upon consequential, but not overly radical signs of change. Appearances can be deceptive however: an established principle could appear to be morphing into a different shape, but may already become wholly unrecognisable at a very early stage. Consider for example the curtailing of the possibilities to lawfully resort to the use of force in the period between the First and the end of the Second World War. One might herein discern a process of sovereignty in transition, which eventually culminated in article 2 (4) of the UN Charter.\textsuperscript{17} Yet, instead of a gradual evolution, it is possible to identify a ‘hard break’ with the past, as in the same short time span, the sovereign prerogative to start a war of aggression was already completely (albeit not effectively) forestalled.\textsuperscript{18}

\textsuperscript{15} Cf. Mariano Aznar-Gómez’s contribution to this volume, discussing the extinction of states.

\textsuperscript{16} Thus covering the “traditional themes of the modern international law project”. Cf. Martti Koskenniemi, From Apology to Utopia, Cambridge: Cambridge University Press 2006, p. 5.

\textsuperscript{17} Cf. the contribution of De Hoogh to this volume, referring to the first limitations on the sovereign right to wage war put in place at the Peace of Westphalia.

Conversely, not every mutation signals the dawn of an evolutionary trajectory, since the changes may only be slight, when there are only minor alterations in the general understanding, mode or scope of application of an international legal principle. So long as the ‘hard core’ remains intact, it can justifiably be regarded as ‘static’. The same goes for principles that develop so as to remain in sync with changing times or circumstances: paradoxically, they do adapt, but merely in order to stay the same. Self-defence may serve as one example, reflecting a universal constant from ancient times up to the *Caroline* case, stretching out to the present article 51 of the UN Charter. By sifting out these ‘static’ principles, it becomes easier to isolate the evolving ones, but with the threshold between perceived and veritable evolution varying from case to case, this is no sinecure.

A related issue pertains to the question of when a new principle has emerged and superseded the previous one, and when it is still intrinsically the same, despite its evolution. Contemporary authors may deny that the established understanding, mode or scope of application has changed, until there are manifest and irrefutable indications to the contrary. Swift recognition of a complete novelty is even rarer. Consider the Responsibility to Protect (RtoP), which, although embraced by many, will not be accepted by everyone as already sufficiently ‘mature’ to qualify as a principle of international law. At the same time, one may argue that it represents the pinnacle of a development originating in the Roman *bellum iustum* doctrine, or, rather more narrowly, the outcome of decades of discussion on the defects of the UN Charter and the concept of humanitarian intervention.19 For the moment though, RtoP cannot immediately be labelled as either an old or a new principle; it seems stranded somewhere between the past and the future.20 The principle is evolving, rather than evolved and firmly established. At the end of the day, where a substantial change in bearing is required as proof of evolution, there needs to have been a substantial passage of time, apart from a more radical alteration, before a new principle will be recognised as such.

In sum, before one can contend that a principle has evolved, a meaningful shift should have taken place with regard to either its position, reach or content, without its essence being displaced. Where this is not the case, constancy appears to be its overriding characteristic. Even then however, the parameters are hardly fixed, and we should take heed of the subjective elements in appreciating the dimension of the change that has (or has not) occurred.


20 But cf. the contribution of Van Boven to this volume, qualifying it as “a newly emerging principle of international law”. 
7. The Significance of Studying Evolving Principles

While almost every scholar in the field is – knowingly or unknowingly – engaged with (aspects of) the topic, the added value of taking a closer look at evolving principles of international law may not be readily evident.

To begin with, charting longitudinal changes to the theorems underpinning the public international legal order may shed new light on the broader patterns of change, and expose the key factors that are at play. Trends such as that of increasing humanisation and the emergence of international constitutional law can be better understood once it is clear which elements are in flux and which remain unaffected. Moreover, such developments have wider-ranging implications that are at present not yet fully known, but might be surmised once the underlying dynamics are uncovered. Trite as it may sound, here too, intense scrutiny of the past and present makes it possible to draw up a more accurate prognosis for the future.

In addition, while to study the evolving principles is – quite agreeably – to study the evolution of international law itself, a full comprehension of the process enables us to better appreciate similar processes taking place elsewhere. Also, vice versa, the insights gained can be tested and compared with experiences acquired in other legal orders. One example may illustrate this point. So far, it has been a general rule of thumb that principles are more necessary, more useful, and able to expand more vigorously in a new and pristine legal domain. As known, in comparison to municipal systems, international law has fewer courts, no central legislator and no uniformly structured rules. Consequently, there are gaps abundant, as most harrowingly exemplified by the ICJ’s Nuclear Weapons opinion. Nevertheless, one cannot automatically assume that general principles of law have been all-decisive in the shaping of international law, if only because this is hard to square with the order of preference stipulated in Article 38 of the Statute of the ICJ. While the rule of thumb might hold true for a sub-domain like international criminal law, thorough studies are needed to corroborate that inference as well. If such research were to validate the aforementioned rule of thumb, one may proceed to test the reverse hypothesis, and explore to what extent legal principles may induce the recasting of an overregulated field. This all goes to show how enquiries into evolving principles can contribute to the body of knowledge on international law.

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21 Which in passing could help subvert the excruciatingly bold assertion of Jack L. Goldsmith and Eric A. Posner in their The Limits of International Law (New York: Oxford University Press 2005) that, overall, states only pursue their own rational interests, and obey international norms only to the extent the latter serve those interests.

22 For example the legal order of the European Union, where the general principles of law are of late steadily gaining in prominence – a process which, contrary to what one might expect, compounds problems of legitimacy instead of diminishing them.

8. A Contextual Approach

Contrary to what the title of this volume might suggest, in the following chapters, evolving principles are not portrayed individually. This is the result of a conscious choice, the very last point that needs to be clarified here.

Above all, if the studies were to discuss their topics completely severally, the book would risk to be permeated by a soporific repetitiveness. After all, the developments depicted have all taken place in the same field (public international law), and the timeframes of the evolutionary processes are bound to overlap.24 A corollary drawback would be that the analyses proceed in an unsatisfactory staccato fashion. Interesting as it may be to observe the inevitable differences between the various contributions, especially as regards the accentuation or exclusion of specific details, this (potentially) positive aspect appears to be outweighed by the more negative ones.

The approach that has been preferred instead is one of enveloping movements, whereby principles of international law are studied within a broader context, or through a particular thematic lens. Thus, the analyses do not consist of (predictable) discussions to the background of the unfolding political, social or economic events – a story that is preferably not recounted more than once – but a more comprehensive survey of a field, theme or topic.25 It is true that, in this set-up, international legal principles do not receive undivided attention, and do not play a starring role themselves. Yet, they are not pushed to the background either, but structurally – and arguably more effectively – weaved into the larger picture. This profoundly contextual approach enables a sound and natural elucidation of the factors contributing to their genesis and shaping, offering a richness and breadth that an assessment of isolated principles and their evolution is thought to lack. To this end, the authors of the studies were encouraged to make use of their expertise with regard to a specific field, theme or topic, and not to don any blinkers. This *modus operandi* also meant to ensure a bond with the intended readership, as this book was not intended to cater for an audience solely composed of specialists.

As such, the present volume evidently does not have the coherence of a dedicated monograph. On the other hand, it does constitute a treatise that is markedly different from the existing reference works, compendiums and textbooks. The upshot is an original series of reflections on international legal principles, highlighting their development over time from numerous different angles.

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24 For reasons provided above, a rigid chronological compartmentalisation has been deliberately shunned.
25 But cf. the contribution of Teruo Komori, engaging in a scrutiny of the fragmented international public order in its entirety, while reviewing the available options for reassembling it.