

Elevating Foreign Policy Principles To the Constitutional Level

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Mexico cannot give itself the luxury of a foreign policy that bends to the circumstances of the moment, a mere glittery garment, ready to be put on or taken off as the momentary needs of this or that passing political situation dictate.



Courtesy of the Senate

In Mexico, the Senate approves overall foreign policy guidelines.

INTRODUCTION

In 1988, Mexico's Constitution was amended to include the guiding principles that the president must use to develop foreign policy:

- Non-intervention;
- Self-determination of peoples;
- Peaceful solution of disputes;
- Banning the use of threats or force in international relations;
- The legal equality of states;
- International cooperation for development;
- The fight for international peace and security.¹

The first question we have to ask ourselves is if there was a real need to amend the Constitution to expressly include these foreign policy principles. At first glance, there does not seem to be a real need because these principles are included in a multitude of international instruments that Mexico has signed, approved, ratified or adhered to. Suffice it to mention Mexico's ratification of the United Nations Charter on November 7, 1945, and of the Organization of American States Charter on November 23, 1948.² The guidelines of our foreign policy are expressly stated in the principles, proposals and objectives of both these charters. In addition, they are also delineated in one form or another, clearly, precisely and legally unquestionably, throughout the chapters referring to the rights and obligations of member states.

According to article 133 of our own Constitution, both these charters are international treaties approved by the

Senate and, therefore, "the supreme law of the land." We also cannot deny that the guiding principles established in Article 89, Fraction X of our Constitution are part of "international common law," that is, the law that is obligatory for all nations, regardless of international treaties, pacts, accords or conventions.

Now, if we review the precept about foreign policy guidelines that has been amended, we cannot know if it is a mere enunciation of the guidelines or if it

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purports to be an exhaustive list. This could cause delicate problems of constitutional and international policy in the future, which would undoubtedly lead to a restatement of "new principles" and, therefore, new and problematic constitutional reforms. However, possibly its greatest merit is elevating our foreign policy guidelines to a constitutional level, which makes for their greater dissemination, a greater understanding of their significance and breadth and compels a more careful analysis of them, both from the point of view of legal theory and that of political practice.³

OUR FOREIGN POLICY GUIDELINES

I. Non-interventionism

Non-intervention is a principle of international common law. However, the

extremely multifaceted nature of intervention in international relations means that respect for this principle is very random. According to The Hague International Court of Justice 1986 decision, the existence of the principle of non-intervention in the *opinion juris* of states is fundamentally based on well established and significant international practice. This principle can be understood as a corollary of the principle of sovereign equality of states.⁴ The interven-

tion prohibited must, therefore, affect issues or matters about which the principle of sovereignty of the states allows each of them to decide upon with absolute freedom. Concretely, says the court, this freedom is reflected in the free determination of each state's political, economic, social and cultural system and the formulation of its foreign policy. Therefore, all states must abstain from applying, fostering or causing the use of economic, political or other measures to force another state to subordinate the exercise of its sovereign rights in order to obtain any kind of advantage or benefit; they must also abstain from organizing, aiding, fostering, financing, provoking or tolerating armed, subversive or terrorist activities aiming to violently change the regimen of another state; and they must abstain from attempting to intervene in the internal struggles of any other state.⁵

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II. *The Self-Determination of Peoples*

Most international doctrine and jurisprudence agrees that the notion of self-determination became a key principle of contemporary international law when the United Nations Charter was adopted.

One of the UN's aims is "To develop friendly relations among nations based

peoples," initially proposed by Nikita Khrushchev, was insufficient for these peoples to achieve self-determination, a principle universally accepted as obligatory under international law. However, we must also recognize that subsequent juridical evolution made it possible to situate this right on the same plane as other principles, such as the prohibition of aggression or

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on respect for the principle of equal rights and self-determination of peoples" (Article 2, Paragraph 2).

Article 55 of the charter stipulates, "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living...b)solutions of international economic, social, health and related problems... [and] c) universal respect for, and observance of, human rights."

Resolution 1514 (xv) adopted by the UN General Assembly in 1960 is considered the true basis for the decolonization process that would give rise to the creation of numerous states that would, in turn, gradually become part of the international organization itself. It should be recognized that this "Declaration on the Granting of Independence to Colonial Nations and Peo-

that of the peaceful solution of controversies. International history and practice would be responsible for giving the principle its full legal value, parallel to its undoubted political value as a democratic ideal.

However, none of the UN's many resolutions and declarations includes a precise definition or a single connotation about what should be understood by the word "people." The main reason seems to be that this right to self-determination is not linked to the particular characteristics of a collective body, but to the concrete situation in which that body finds itself. In that sense, the "peoples" who may enjoy this right would be those who are subject to foreign domination or exploitation.

Here arises another, related problem: the phenomenon of secession, particularly grave in the case of new states, which frequently involves a very heterogeneous population and a political power whose effectiveness is weak or

non-existent. It is not difficult to understand that a well-rooted, consolidated people, with a thousand-year-long history, strong both internally and externally, could, in a concrete case, tolerate the secession of an ethnic group that has not assimilated to the rest of society. But the consequences would be quite different in the case of states composed of 20 or 30 different ethnic groups that may be hostile to each other. In this case, if the state allows the secession of one group, it runs the imminent risk of being swept up in a secessionist whirlwind that would soon condemn it to disappear altogether. Undoubtedly, the right to self-determination put into practice by "peoples" integrated in a sovereign state questions and, therefore, endangers, a real or supposed national unity and territorial integrity.

According to several UN resolutions, a people subjected to the domination of a foreign power has the right to become independent. But, these same resolutions also include the idea that said "domination" would not exist if the state in question had a government representative [sic] of the whole of the people under its rule. It is here, precisely, that the ambiguities, contradictions and fluctuations involved in this controversial, ticklish issue of self-determination become clear.⁶

Regardless of this, diplomatic practice shows that a given "people" with a sufficiently structured organization to be capable of autonomous international action and broad recognition in the international community, can and must be considered an international actor, based fundamentally on the principle of effectiveness.

If we examine United Nations practice, we could think that it has adopted

the idea according to which self-determination should be considered an anti-colonialist and anti-racist principle or a principle of liberty as opposed to the oppression of a foreign state. Nevertheless, this same practice would also seem to indicate that the principle of “self-determination of peoples” does not include or cover the rights of minorities and nationalities that inhabit a single sovereign state.

In this last sense, I have said that the principle of territorial integrity of states plays a fundamental role, since it constitutes a kind of barrier that the principle of self-determination cannot ignore, barring those exceptional cases of colonial domination or of a racist government. Nevertheless, the process of decolonization produced the formation of many new states, most of which were immersed in absolutely dramatic underdevelopment. These states’ international action, particularly in the UN General Assembly itself, would give birth to “International Development Law,” with an eye to achieving economic and cultural independence along with the already completed political independence; in other words, with an eye to building a new international economic order.⁷

Throughout its history, Mexico has proclaimed the right of peoples to self-determination, and, without a doubt, this is one of the principles that has guided its foreign policy. In addition, it has signed and ratified very important international conventions in which this principle is stipulated, such as the International Pact of Economic, Social and Cultural Rights and the International Pact on Civil and Political Rights of 1966, legally binding for Mexico since 1981.

III. *The Peaceful Solution Of Controversies*

This principle is part of most international instruments regarding the maintenance of peace and security. States are obliged to solve their international controversies by peaceful means. To escape this obligation, they can claim that the conflict they are facing—that

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may have led to the use of force— does not constitute a “dispute,”⁸ or they may even admit that there is a controversy, but that it does not constitute an international controversy.

This principle predates the prohibition of the use of force. It was under this principle of seeking peaceful solutions that The Hague Convention of 1907 was signed, with the idea of preventing the use of force in international relations as far as possible.

In international law, all the procedures for the solution of controversies are “voluntary measures.” In that sense, we can point to a contradiction between the general obligation to solve controversies and the eminently facultative nature of each of the means and procedures that make it possible to fulfill the general obligation.

This is why different techniques and procedures make it possible for the states to commit themselves to submitting a dispute to the framework of the previously negotiated instrument. This is pre-

cisely the aim of the so-called “commitment clauses” of arbitrating treaties, of conciliatory accords or even of the famous “facultative clause of obligatory jurisdiction,” whereby the states recognize *ipso facto* and without special convention, the jurisdiction of the International Court of Justice with regard to any other state that has accepted the same obligation.

Now, the difference between “diplomatic means” and “jurisdictional means” is a classic and essential distinction in international law. “Diplomatic means,” such as good offices, mediation or those offshoots of “parliamentary diplomacy,” inside international organizations, are means that can be used and appropriated for any kind of dispute, and the decision will not be binding. By contrast, “jurisdictional means” cannot be used except for in the case of juridical disputes; they imply an arrangement or solution that emanates from a body established so that, at the end of a process, it can make a decision based in law.

IV. *The Prohibition of Threats And the Use of Force in International Relations*

This principle is probably the central cog in the United Nations security mechanism. However, it does bring

with its certain limitations and ambiguities that have become clear in the history of international relations. These limitations arise mainly out of the fact that recourse to the use of force is prohibited only in the framework of international relations and because of its design: that is, that it be used against the territorial integrity and political independence of any state, or in any other way that would be incompatible

political, economic and other forms of pressure.

It is important to point out that the 1969 Vienna Convention on the Law of Treaties (ratified by Mexico in 1974 and in effect since 1980) stipulates in sections 51 and 52 that coercion exercised on a representative of a state to express his/her consent to bind his/her represented state by a treaty will have no legal effect (will be absolutely null

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with the aims of the United Nations. This means, even if only implicitly, that recourse to the use of force can be legitimate under certain circumstances or in order to pursue certain ends or objectives.

The main exception to the prohibition of using force is “the legitimate right to self-defense,” whether it be individual or collective. While the need to include this fundamental exception is indisputable, its breadth is considerable and its application brings with it an extremely difficult problem: as Michel Virally says, neither more nor less than the definition of what an “aggression” is, which will justify or legitimize the right to self-defense.⁹

One of the problems that the prohibition of the use of force has always come up against is determining whether “force” should be understood as only military force or, if, as the countries of Latin America have always argued, it also includes all kinds of force, including

and void) and, on the other hand, any treaty that has been signed under threat or as a result of the use of force, in violation of the principles of the UN Charter, will be equally void. The conference also approved a declaration condemning the recourse to threats or the use by any state of pressure in any of its forms, whether it be military, political or economic.¹⁰

V. Juridical Equality of States

This principle means first of all that despite differences in power, development or industrialization, all states, as subjects of international law, are entitled to the same rights and capabilities.

One of the UN’s fundamental principles is that “The Organization is based on the principle of the sovereign equality of all its Members” (Article 2, Paragraph 1).

The Charter of the Organization of American States also proclaims this principle, but in more detail, saying, “States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not on its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law” (Article 9).

It might have been better to speak in terms of “sovereign equality,” as the UN Charter does, given that, strictly speaking, independence is a corollary and concrete manifestation of “sovereignty.”¹¹

A first and essential right in matters of immunity theory is derived from this principle of juridical equality of states: that no state shall be brought to justice under foreign domestic jurisdiction if it has not given its express consent.

It follows as a corollary that no legal action can be brought by the court against any state’s goods, rights, assets or sites in foreign territory. In other words, immunity of execution supplements its immunity of jurisdiction, which is a cause-effect relationship.

The Declaration on the Principles of International Law with Regard to Friendship and Cooperation Among States in Accordance with the United Nations Charter (UN General Assembly 1970 Resolution 2625) also deals with the principle of sovereign equality of states. In general, most doctrine accepts that the 1970 declaration is one of the most important ever adopted by the international community and that it has had much greater impact and influence than was originally thought with regard to the development of international law. It does not

amend the UN Charter, but clarifies its basic principles contained in Article 2 and elsewhere.

VI. *International Cooperation For Development*

Despite the primacy given in the UN Charter to problems of international security, economic and social cooperation also occupy an important place.

International cooperation should above all make it possible to create the conditions of stability and well-being needed for peaceful and friendly relations among nations based on the principle of equal rights and self-determination of peoples, as stipulated in the Charter's Article 55. While it is clear that the final objective is political in nature, goals of an economic character are also defined, among them, that of promoting a "higher standard of living, full employment, and conditions of economic and social progress and development" (Article 55, Section a).

These objectives were based on the belief that underdevelopment was worldwide in nature, that it brought with it disturbing consequences not only for the countries directly involved, but for the world as a whole, threatened by grave instability because of severe economic disequilibrium.

The division among industrialized and non-industrialized countries, the latter marginalized from benefits of science and technology, is much more grave and has many more long-lasting effects than ideological divisions. As Michel Virally says, the abyss separating developed from developing countries introduces an element of fundamental imbalance in the world economy, the long-term political consequences

of which are unpredictable and highly dangerous and cannot be suppressed or softened except through a substantial improvement in the most backward economies.

The ideology of decolonization together with that of development were undoubtedly for a long period the most powerful driving force in the United Nations system for countries with precarious, highly unstable economies.

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VII. *The Struggle for International Peace and Security*

Together with the Dumbarton-Oaks Proposals, the UN Charter postulates the maintenance of peace and security as the organization's first and main aim. Nevertheless, the peace it is talking about is peaceful international relations. This would seem to mean that its express intention is not to intervene in internal wars.

This principle is the aim of the organization simply because without it, its other principles cannot be complied with, nor can the basic conditions be established that would make possible the achievement of the organization's other aims.

Clearly, the UN Charter offers no magic formula capable of dealing with every kind of situation that threatens international peace and security. It merely offers a specific framework for its application, giving each and every

one of its member states a series of rights and obligations for acting collectively and in concert every time there is a threat against the peace of any of them.

The very system of security is founded on a mechanism of cooperation in order to be able to act jointly in the defense of a state that is a victim of aggression. At the same time, the system's proper functioning depends on the cooperation of the permanent members of

the Security Council and, in general, of the global effectiveness it shows.

Another important aspect is that to maintain international peace and security the states must peacefully achieve the "adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Article 1, Paragraph 1).

In addition to recognizing the degree of interdependence of foreign policy principles, it is also important to note that, while it would be utopian to think that all disputes can be solved through traditional means, as the former president of the International Court of Justice in The Hague, Manfred Lachs, used to say, there is always the possibility of "adjusting" international situations in the interests of the parties involved. The settlement of controversies is a very ambitious operation, whose objective is bringing litigation to a close. However, both "settlements" and "agreements" are meant to prevent a breach of the peace.

Lastly, we should note that while the system of collective security was characterized from the start by its realism, it was also very ambitious. The instrumentation of the military apparatus that was the key in the system through the “special accords under article 43,” committing themselves to put at the disposition of the Security Council the necessary armed forces for the purpose of maintaining international peace and security, never happened, and therefore, the whole edifice was condemned to collapse.¹²

CONCLUSION

We should be fully convinced that international law cannot be a secondary aspect of the foreign policy of a country like Mexico.

We cannot give ourselves the luxury of a foreign policy that bends to the circumstances of the moment, a mere glittery garment, ready to be put on or taken off as the momentary needs of this or that passing political situation dictate.

International law must be our instrument par excellence to maintain our political independence. This is pure realism, not “legalistic” posturing.

Good sense has always shown that a weaker country must always seek the establishment of a system that will not allow the more powerful to have complete freedom of interpretation of the legal system in direct proportion to their military and economic might. ■■■

NOTES

¹ Fraction IX, Article 89 of the Constitution was amended by the decree published

in the federal official gazette, the *Diario Oficial de la Federación*, 11 May 1988.

² The OAS Charter was amended by the Buenos Aires Protocol of 1967 and the Cartagena de Indias Protocol of 1985.

³ In that sense, “Once the possibility of framing our international doctrine in the Constitution is opened up, it is possible that the new norm would not include all Mexico’s fundamental, permanent principles regarding this matter. What is more, it could be the means whereby each president stated his momentary preferences in the matter.” Emilio O. Rabasa, “Nota introductoria,” *Los siete principios básicos de la política exterior de México* (Mexico City: Comisión Nacional de Asuntos Internacionales, 1993), p. 13.

⁴ *Affaire du Déroit de Corfou (fond)*, “Arrêt du 9 avril 1949,” *Recueil des Arrêts, Avis, Consultatifs et Ordonnances. Opinion Individuelle de M. Álvarez*, p. 45, point VIII.

⁵ See N.A. Ouchakov, “La compétence interne del États et la non-intervention dans le droit international contemporain,” *Rec Cours Ac. H.*, book 1, vol. 141, 1974, pp. 1-86. Article 2, paragraph 7 of the UN Charter, which prohibits the intervention in “affairs that are essentially of the internal jurisdiction of the States,” was already part of the founding document of the League of Nations (Article 15), but allowed the League of Nations’ council or assembly complete latitude in exercising the functions of mediator or conciliator. For its part, the OAS Charter establishes the principle of non-intervention in its Article 18, which excludes any type of influence “prejudicial to the state.” See Antonio Augusto Cançado Trindade, “The Domestic Jurisdiction of States and the Practice of the UN and Regional Organizations,” *International Law and Corporative Quarterly*, 1976, pp. 715-765.

⁶ A. Sureda Rigo, *The Evolution of the Right of Self-determination-A Study of the United Nations Practice* (The Hague-Boston: A.W. Sijthoff-Leiden, 1973), p. 397. Sureda was quite right when he said, “After all, self-determination started off as an individual right, and became a collective right because it was thought

that individual rights could be better exercised within a demonstrably coherent human group” (p. 356).

⁷ Alonso Gómez-Robledo V., *La soberanía de los Estados sobre sus recursos naturales* (Mexico City: UNAM, 1980).

⁸ The notion of “dispute” implies a very circumscribed object, in contrast with the “situation,” which is more diffuse and almost always prior to the emergence of a controversy. But the notion of “dispute” also implies the notion that there are “parties” among which diverging points of view have arisen; and, since the “dispute” is international, said parties are no other than the states.

⁹ Michel Virally, “L’Article 2: Paragraphe 4,” *La Charte des Nations Unies*, Jean Pierre Cot and Alain Pellet, comps. (Paris: Bruilant, 1985).

¹⁰ *Conferencia de las Naciones Unidas sobre el Derecho de los Tratados, Documento oficial A/CONF.39/11/Add 2*. This important declaration was the most that the developing countries could achieve; obviously, since it is part of the final statements of the conference, it is not legally binding.

¹¹ Guy Lacharrière, “L’influence de l’inégalité de développement des États sur le droit international,” *Recueil des Cours de l’Académie de Droit International*, vol. 2 (The Hague: Martinus Nijhoff, 1973), pp. 227-268. We should be clear that, in fact, it is because states are not equal that a proclamation of the principle of equality is necessary.

¹² Michel Virally, *L’Organisation mondiale*, op. cit., pp. 468-482. As long as the Military Staff Committee does not function according to Article 45 of the UN Charter and as long as permanent armed forces and the necessary logistical means are not put at the disposal of the Organization, the United Nations will always depend on the powers for its armed might. See Marie-Claude Smouts, “Le Conseil de Sécurité,” *Aspects du Système des Nations Unies dans le cadre de l’idée d’un nouvel ordre mondial* (Paris: Pedone, 1992), pp. 61-69.