

The Declaration on Principles Turns Fifty: *Rondó* of Sly Power

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The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)), adopted by consensus on 24 October 1970, is turning 50. Not only is it one of the handful of United Nations General Assembly resolutions worth remembering, it is probably the most remarkable, due its value and legal and political importance.

From the outset, the Declaration sparked extensive literature, and its interest has not waned over the years. It is considered the tabernacle in which the fundamental principles of the international order are preserved, i.e. the peremptory or *jus cogens* rules, the core of a system before which any rules that might dare to challenge them must yield on grounds of absolute nullity or irrevocable termination, the full measure for judging the behaviour of those who form part of international society.

Shall we recall these principles, as they are enshrined in that laconic declaration? The first one extends to all states the prohibition articulated in reference to members of the Organization in Article 2.4 of the Charter of the United Nations: the obligation to refrain, in their international relations, from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. The second does the same with regard to the obligation, previously recorded in Article 2.3 of the Charter, for states to settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered. The third is the principle of non-intervention in matters within the domestic jurisdiction of any state, and the fourth establishes the duty of states to cooperate with one another in accordance with the Charter. The fifth affirms the principle of equal rights and self-determination of peoples, and the sixth proclaims the sovereign equality of states. The seventh and final principle establishes that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter. According to the Declaration, these principles are “interrelated and each principle should be construed in the context of the other principles”.

When debating between the three worlds —capitalist, socialist and non-aligned— the members of the United Nations believed that by developing the principles of the Charter they would help to strengthen world peace and the rule of law by consolidating their universal application. Consequently, in the scholarly literature, there were some —such as myself— who considered the Declaration an

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excellent cornerstone of a concise and critical exposition of the rules that should govern international relations.

In evoking the fiftieth anniversary of the Declaration, I could not help but take down from a shelf in my library my copy of *Principios Fundamentales del Derecho Internacional Público* [Fundamental Principles of Public International Law], which I published in 1982 and rescued from a University expurgation. It was a somewhat melancholic gesture, akin to opening the tin box in which we once kept the faded photographs of our best memories, along with some petals and withered leaves.

The prologue began like this: “Due to the dialectical dance of principles that can support contradictory behaviours, the uncertainty regarding what is the *given* rule and what is the rule *still to be constructed*, the way in which the phenomena of power and domination are evidenced... in its constant restlessness, public international law encourages critical approaches and evaluative attitudes... Contributing to such approaches and attitudes is the first objective of this book, dedicated to examining the principles that should govern coexistence and cooperation amongst the members of international society today, with a claim to realism, commitment, dynamism and verification.”

Over time, that claim settled into a sort of critical realism, and it would be welcome news indeed —let this be an invitation to others— were someone, using that same yardstick, to revisit the Declaration, fifty years after its adoption, analysing its (non)application or the contradictory set of principles, despite the paragraphs with which the Declaration itself sought to illustrate and specify them.

What better time than now to take up the defence of the principles, denouncing both the incomplete and perverted way in which they have been applied and the devastating efforts of their deniers? The planet we love —to the point where the vast majority of us only depart from it regretfully and under protest— reeks in the hands of foolish, ignorant, feckless, corrupt, greedy, criminal leaders... These derogatory remarks may be unfair to upstanding members of the political class, who also exist, like truffles; they may even be caricature, although caricaturing an image makes it possible to capture the salient features of a subject, an object, a situation. The truth is the *bad guys*, who think they are the *good guys*, are beating the *good guys*, who are labelled as *bad*. Concepts such as *humanity*, *international community* and *common heritage* are hollow shells, shamelessly bandied about by all manner of factions.

Today, as yesterday, the capacity for contradiction of the fundamental principles is exploited in support of antinomic interests of powers with the necessary ability to influence and determine the position of others — whether with regard to sovereignty and self-determination, non-intervention and protection of human rights, or the prohibition of the use of force and countermeasures. Instrumentalized to attack and defend, the principles are used tactically, according to the playing field. As a weapon to attack, as a shield to defend. This state of affairs is due to the fact that the supposed regulatory advances have not been accompanied by the strengthening of the multilateral institutions that should watch out for them. When principles advance without maintaining the chain of intendancy, they end up becoming mere rhetorical tools at the service of all kinds of causes, many of them base.

In 1989, when the socialist bloc collapsed and the Cold War ended, we were blinded by the shining promise of an order in which, to paraphrase Álvaro Mutis, time had lost the deceptive condition of its powers. Was it an illusory hope, a dream that has gnawed away at its own garments, because of vain people, given to lies, used to continue the dance of fertile misery in regions where every voice is an order, where insects are guardians of the sown fields? Freely drawing on Mutis, I articulated the

rubrics of a text in which, at the end of the century, I expressed my disappointment at the wretched ashes of the lost years, the irretrievable opportunity to arrive at the ecumenical city where abundance was to have reigned, the abandonment in an inhospitable wasteland where antediluvian jackals rule and the innocent never know the grace of the chosen ones, lords of the night, where a miracle is awaited that never comes.

Compare the annual reports of the Secretary-General of the United Nations on the organization's work. Then and now, they reflect a catalogue of calamities that can hardly be faced. The very words used in an attempt to give hope are like the tolling of a bell calling people to honour the dead. The reality is grim: wars, border conflicts, armed interventions, genocides and massive human rights violations, terrorism, organized crime, mass migrations to flee from violence, hunger and misery, natural disasters in which humans all too often have a hand, the arms race, hundreds of thousands of refugees and displaced persons, outrageous social inequalities between and within states, global warming and climate change, rising sea levels with Moses wandering somewhere in the Sinai...

The examination and assessment of the fundamental principles contained in the Declaration is caught in the web of an international society incapable of advancing its institutionalization. Many of those who speak of promoting *multilateralism* fail to mention that there can be no multilateralism without representative institutions endowed with the necessary powers to achieve their objectives. I fear it is useless to advocate strengthening the United Nations —the UN and its extensive family of specialized agencies— which is the universal structure available to us rather than blowing it up to the benefit of rival blocs shepherded by great powers, classified as leagues of democratic states and similar labels, which serve only to heighten the perverse way in which the universal principles are used.

Let's take a closer look at a sample of them. The first principle prohibits the threat or use of force in international relations against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. The Declaration is exemplary in its development, to which it devotes 13 paragraphs. I do not believe that a single one of them has emerged unscathed from subsequent practice, which includes wars of aggression, considered “a crime against the peace, for which there is responsibility under international law” under the second paragraph, which has found in successive US administrations its most conspicuous —albeit not its sole— offender. A paradigmatic example was the armed attack and occupation of Iraq by the armed forces of Commander-in-Chief Bush Jr. in 2003, based on a string of fake news —of *false positives*, as they say in parts of Latin America, borrowing the language of serological diagnoses— a breeding ground for pests that have been plaguing us ever since.

But who said it was an aggression? The Security Council simply covered up its consequences, giving the actor (or offender) everything it needed to continue its tragic performance. From this perspective, it was thus a crime that never existed and which, of course, did not result in a demand for any sort of accountability. True, academia and the fine arts responded, with powerful independent denunciations that often-roused public opinion and sparked protest and social rejection. But not the institutions, which proved unable to assume a response, corroded as they are statutorily due to the positions that the most dangerous potential criminals hold within them, sure of their impunity.

I urge the reader to go to the Declaration. Take half an hour to read it at your leisure. If only those who signed it were loyal to fulfilling in good faith, as the last principle states, the obligations they assumed in accordance with the Charter! But the principles' sociological validity is so precarious it is barely enough to sustain their normative validity. Thus, when you write or speak about them for this purpose, you are nagged by the irritating feeling that disbelieving readers and listeners are looking at

you, judging the extent of your foolishness. I am reminded of an anecdote, which I witnessed, that took place at a lecture given by Professor Juan Antonio Carrillo Salcedo, whose brilliant speech exuded faith and hope for the principles that were to illuminate the world to be built. At the subsequent discussion, an audience member asked him: did you tell us everything you just explained because you actually believe it or because you want to sleep easy at night?

We must not be intimidated. We must not give an inch in our positions in defence of the principles' normative value before those uncritical realists who call for us to accept as normative a practice built on all kinds of violations. The principles are what allow us to judge behaviours rather than merely chronicling them. As long as the yearned-for institutions come from the planet Utopia, the scholarly literature, in stimulating public opinion, must assume a sort of dual function.

Earlier, I mentioned what it means to transfer the *commitment* to ethical options to the legal system. We must not allow it to bother us when we are dismissed as *activists* —as happens in the establishment stables— with a view to discrediting us when we provide a legal basis for progressive policies to which others have paid only lip service, and we have the necessary tools for that. We must not confuse objectivity with equidistance, nor impartiality with neutrality. Not only is taking a position after an unbiased review of the facts legitimate, it is mandatory for academics and institutions, although in the latter case, always within —not beyond— the scope of their competencies.

Unmasking those who would deny a type of international relations subject to rules, to the principles contained in the Declaration, exposing those who wield an *arrogant* power, which they use to put their interests ahead of any other consideration and destroy any notion of order, is relatively easy. Such people clash head-on with the last of the principles set out in the Declaration, which, in accordance with another principle —this time, evangelical— will be the first: fulfilment in good faith of the obligations assumed by states in accordance with the Charter of the United Nations.

However, the task is anything but easy when the power is *sly*, i.e. when it twists the principles in unfair service to its cause. In a decentralized society, the relationship between the basic or fundamental principles and the interpretation of each one in the context of the others is often used to sow confusion and weaken or break the scope of some principles by invoking others.

Thus, with regard to the prohibition of the threat and use of force, beyond the debate over whether it is limited to armed force or includes all types of force, some have sought to point to the last sentence of the principle (and of Article 2.4 of the Charter) as proof that certain cases of the threat and use of force are allowed, as they are consistent with the purposes of the United Nations.

Likewise, the principle of non-intervention has been shaken up with the Charter provisions concerning the maintenance of international peace and security and the protection of human rights in cases of mass violation: rather than non-intervention, *humanitarian* intervention in keeping with the *responsibility to protect*.

There are those who, whilst they are at it, propose intervening in third countries to protect their particular version of *democracy*, denying states, on behalf of peoples, their “inalienable right”, according to the Declaration, “to choose [their] political, economic, social and cultural systems, without interference in any form by another state”. Needless to say, those who make such proposals take it for granted that the relationship between peoples and states is adversarial.

And as long as we are on the topic of peoples, what about the manipulation of the principle of self-determination, invoked to further the separatism of those who are not holders of this right? Is there no one who speaks about the right of remedial secession in situations of serious discrimination against a dominant minority in part of a state's territory? Referring to the population as a whole, the principle

proclaims. “Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.” It follows that a democratic principle is the goal of self-determination, which legitimizes the principles of non-intervention and sovereign equality, which, in turn, should govern state cooperation in the economic, social, cultural, technical and trade fields.

Finally, what about *justice*, the *ugly duckling*, often put off when, doing more harm than good, the principle of peaceful settlement of international disputes is applied “in such a manner that international peace and security and” —now, the *duckling*— “justice are not endangered”?

Those who adopt a critical realism with regard to the acts and behaviour of states cannot, at first, rule out the existence of a third expression of power —a power *based on solidarity*— wielded to protect common public goods in the broad range spanning from fundamental rights and freedoms to a planet threatened by a nature defiled by human activity.

That power, however, seems to show itself more in social circles than government ones, and those circles could come to be manipulated by the *sly powers* as a channel for their policies, turning the *idealists* who generously feed them into guileless tools in the service of interests that have little to nothing to do with the goals they advocate.

True *solidarity-driven* power can only reside in universally or regionally representative multilateral institutions, invested with the necessary powers to achieve their purposes. States whose governments pursue such policies are on the right track and civil society at this stage of globalization can breathe wind into their sails.

Unfortunately, the facts suggest that we are on the wrong course. Are we not bombarded, day after day, by talk of the *crisis of multilateralism*? This phrase, accessible only to the initiated, masks the much more serious reality of the systematic violation of the fundamental principles laid out in the Charter of the United Nations, and echoed and developed in the Declaration, by those who wield power, in some cases *arrogant*, and in many others *sly*. Although this is hardly new, it has taken on a more and more alarming character, especially since the turn of the century. *Sly* power, in particular, in keeping with its very nature, seeks to *pass off* as *multilateralism* things that are not. Number alone is not enough to define this concept. Acting as a group, gang or pack is not an expression of multilateralism. The number must be complemented by a certain quality: respect for (international) law and the channelling of collective action through the representative institutions I referred to earlier.

At a recent conference held in The Hague on 2 and 3 September 2019, I heard a speaker say that international law is part of the DNA of multilateralism. It was a timely phrase that should be framed in neon lights. One cannot evoke multilateralism to bury respect for principles, rules and institutions, forging coalitions that interpret the law *pro domo sua*. In short, there can be no genuine multilateralism without respect for the rule of (international) law, and there is no better multilateralism than that which translates to open collective institutions, whether universal or regional, governed by rules that ensure a certain balance between the powerful and the many in their various combinations.

Multilateralism has always been threatened by unilateralism, i.e. the temptation to exercise power —whether *arrogant* or *sly*— against or in abuse of the rules when, if properly interpreted, they would not safeguard the interests of the great powers —and their clients— in an unequal relationship that ensures the offenders go unpunished.

Let us therefore warn, out of an excess of academic caution, that not all unilateral action qualifies as unilateralism. *Self-defence*, i.e. the right of a state to defend its interests with the backing of

international law, is legitimate. *Promises* are a way of unilaterally undertaking a binding commitment, even though the International Court of Justice's most recent case law (in 2018, *Obligation to Negotiate...*) refused to confirm this notion after its improvised baptism (in 1974, *Nuclear Tests*).

In the current century, in the capitalist *first world*, it has been the Republican presidents of the United States, George W. Bush and Donald Trump, who have best embodied *arrogant* power, although both, the Republican and the Democratic presidents, and State Department, under any administration, have responded better to *sly* power. Of course, incarnations of these powers, like evil lamas, can also be found in other worlds, but this one, supposedly led by the United States, is the one we live in and the one in which our governments —the European ones— can either *do the wave* as part of a *group* unilateralism or surf it, more or less skilfully, taking care to nurture and cultivate any outbreaks of *solidarity-based* power.

Certainly, the unilateralism of the United States, as an *arrogant* power, has been particularly intense since Mr Trump became president, and the desired extraterritoriality of its (internationally wrongful) decisions is quite troubling. A good number of governments, banks and companies submit to these decisions when faced with the warning and fear of paying the consequences for non-compliance in the markets the great power directly or indirectly controls.

In the evolutionary process of the principles set forth in the Declaration, policies have been promoted that, when pursued by a *solidarity-based* power, are unobjectionable. Such is the case of the assertion of the right of third parties to decide and apply *countermeasures* in response to violations of peremptory, *jus cogens* rules that they would not be the direct victims of. Witness, too, the endorsement of humanitarian interference, under the recycled concept of the *responsibility to protect* populations whose (undemocratic) governments massively and systematically mistreat them to the point of making them the alleged perpetrators of international crimes.

Those are just two examples.

However, in a decentralized and hugely unequal society, such as the international one, these policies, although conceptually felicitous, are a source of Manichaeism and arbitrariness. In other words, they end up providing cover for wrongful acts, interventions that are at odds with the sovereignty and formal equality of states, due to interested categorizations of certain situations or the creation of those *false positives* referred to earlier, without any sort of institutional check.

This gives rise to a sort of *seizure* of the fundamental principles of international law by those who apply a *double standard* of conduct, to further their own interests, wielding a *sly* power under the guise of progressive proposals at the regulatory level that lack the essential institutional complement. Hence, even at the risk of being misunderstood, there are those who, recognizing the pernicious manipulation of the rules, refuse to get involved in a form of preaching that would render them accomplices of this *sly* power. After all, it already has numerous think tanks at its service.

It is not admissible for the United States and/or the European Union with its Members States to claim to speak on behalf of a —today non-existent— *international community*, as they do, for example, when presenting as *sanctions* the coercive measures they apply to third parties, assuming a role of supremacist verticality. *Arrogant* or *sly*, they are simply breaching the rules, the fundamental principles of international law.

Sly power is the more dangerous because, far from submitting to the rule of law, it tries to submit the law to its rule. One of its most perverse expressions can be found in the international institutions under the control of a hegemon that denatures their multilateral condition, turning them into tools for its own ends, in collusion with the clientelist regimes —the *coteries*— established in countries that

like to call themselves *allies*. Regional organizations such as the OAS or military alliances such as NATO are the kinds of intergovernmental organizations that try to cloak the practice of unilateral group enforcement action in the guise of organic resolutions. In these formally multilateral institutions, group unilateralism finds an excellent tool to present wrongful acts as *sanctions*.

This action often has harmful effects for the population it is supposedly intended to protect, seeking to encourage insurrection against a hostile government —treated as a criminal organization— and laying the groundwork for a destabilization that will culminate in a situation meriting categorization as a threat to regional peace and security, with the naturally ensuing consequences. By then, Chapter VIII of the Charter and, in particular, Article 53.1 thereof, which requires the authorization of the Security Council for the undertaking of enforcement action, would seem more an inconvenient witness, best ignored.

Is might right? Legal *activists* for a fairer system must enlist in the effort to reverse the order of these factors in order to dramatically transform the result. But law will be power —right will be might— only when power is based on *solidarity*, which requires institutional advances to accompany the regulatory ones. Blindly barrelling ahead with just principles can cause only fleeting pleasure, until we inevitably fall prey to *sly* power.