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Reflections from a Politics of Law Perspective**

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Active Neutrality with the New International Law. Reflections from a Politics of Law Perspective

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Abstract

This paper discusses the meaning and scope of the concept of neutrality. After having rapidly outlined the origin and features of this norm, as introduced by customary and conventional international law between the 19th and 20th century, the paper argues that the rationale of neutrality has changed with the coming of new international law, which organically took shape starting from the UN Charter and the Universal Declaration of Human Rights. Such law introduces the principle according to which the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and states that the repudiation of war must be accompanied with the exercise of active roles in the construction of a world order of positive peace. The new rationale of neutrality lies therefore in its being functional to the affirmation of a governance which is decisively oriented to peace and human rights while international human rights law offers the opportunity to liberate the praxis of neutrality from the traditional war/negative peace/armed defence paradigm. The last part of the paper provides and discusses some operational ideas to put this new rationale into practice.

Keywords: neutrality, international human rights law, peace, UN Charter

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1.

Neutrality, not to be confused with occasional non-belligerency choices which can be also taken by non-neutral states, is a traditional concept of international law – both customary and conventional – that distinguishes neutrality between permanent and temporary, armed and non-armed (the latter potentially guaranteed by another state), individual and collective, active and passive.

The law of neutrality thoroughly sets forth rights and obligations of neutral subjects and those of non-neutral subjects in time of war and in time of peace. Its main sources are, besides the 1856 Declaration of Paris and the 1909 Declaration of London, the 1907 Hague treaties, in particular the V Convention concerning the rights and duties of neutral powers and people in case of war by land and the XII, on the rights and duties of neutral powers in case of war by sea. Also relevant on this matter are the IV Convention concerning the laws and customs of war by land and the principles and norms of humanitarian international law. Within the framework of these norms, the choice of one state of being neutral is enshrined in a norm within its Constitution or in a unilateral declaration-notification, or even in an international treaty.

The status of neutrality is defined with primary reference to the theme of war and to the principle of sovereignty and territorial integrity of nation-states, therefore of national interest, according to the logic of *ius in bello*, or law of war, where *ius ad pacem*, as shown by the multi-century history of inter-state relations, is widely outdone by *ius ad bellum*. We are in the field of the ambiguities that characterise humanitarian law (which is yet helpful as things stand), intended to mitigate the effects of war without, however, questioning the, say, ‘physiological’ existence and thus the legitimacy of war in the international political system. The logic of the double truth or of the pseudo-compassion of states (*machinae machinarum*, as Norberto Bobbio wrote) that shape humanitarian law clearly shines through the semantic contortions of the preamble of the aforementioned IV Hague Convention:

‘seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert; Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible

[...]; According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants ...’.

The fundamental principle is the respect of territorial integrity of states, as peremptorily set forth by art. 1 of the V Convention: ‘The territory of neutral Powers is inviolable’.

Under this Convention, neutral states are entitled to both negative (restrain from) and positive (activate for) rights and duties. Belligerent states, in particular, are prohibited from moving troops or weapons across the territory of a neutral state and from forming corps of combatants there. Moreover, the neutral state is not responsible for the fact of persons crossing the frontier separately to offer their services to one of the belligerents (article 6) and ‘is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet’ (article 7). Article 10 states that ‘the fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act’.

2.

We can preliminary wonder whether neutrality is helpful nowadays, that is, whether it entails security for the state that chooses it and for others. Classical neutrality in its, so to speak, military rationale (abstentionist or passive) made sense, although not in absolute terms, when states’ independence and sovereignty were true facts. It is not so in the current interdependent, globalised, transnationalised world, full of weapons of mass destruction from which it follows that real security is either collective or it is not security.

The rationale of neutrality changes with the coming of international law which organically took shape starting from the UN Charter and the Universal Declaration of Human Rights. This new law introduces the principle according to which the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and states that the repudiation of war must be accompanied with the exercise of active roles in the construction of a world order of positive peace, contributing, in particular, to the good functioning of the United Nations and of other legitimate multi-lateral institutions within a vision of multi-level governance and collective security.

The new rationale of neutrality lies therefore in its being functional to the affirmation of a governance which is decisively oriented to peace and human rights.

The case of Switzerland exemplifies the evolution of the concept of neutrality according of its concrete sustainability.

As is well known, before becoming a party to the UN in 2002, Switzerland had long reflected if this belonging would have entailed incompatibility with its status of permanent neutrality, also considering that, incidentally, the UN Security Council can decide, under Chapter VII of the UN Charter, to apply measures that imply the use of military force. After becoming a member of the UN, Switzerland has also participated in peace-keeping operations and is active in many sectors of United Nations where a political 'lining up' is necessary.

States with consolidated experience of neutrality, such as Sweden and Finland, are generous providers of Blue Helmets to UN peace-keeping operations demonstrating that there is no incompatibility between neutrality and the deployment of military forces for objectives that are different than those of war. Incompatibility arises when the use of military force is exploited for goals that are different from those set forth by the new international law and according to customs that are typical of war actions, as in the case of the military interventions in Iraq, in Afghanistan and against Serbia.

3.

Among the causes of the ongoing world disorder, one has to highlight the commitment by those nostalgic of the old international law and of armed and border state sovereignty – state-centric law – and of warmongering geopolitics to oppose the effectiveness of the new international law.

In the background, there is the juxtaposition between two models of world order. It may help to recall that in 1991, on the occasion of the first Gulf War, President Bush Sr evoked the need of establishing a 'new' world order several times that, substantially, reproduced the features of the system inaugurated in 1648 with the Peace of Westphalia. In 2003, on the occasion of the War in Iraq, President Bush Jr again proposed the same vision assuming as well that war victory on the ground legitimates the winner, as it happened many times in the past, to impose new world order rules. There are even those who, like professor Kagan (2004), author of the book *The Crisis of Legitimacy: America and the World*, provide a flagrantly arbitrary interpretation of the UN Charter, arguing that the latter is functional to the restoration of the international political system in the logic of the Peace of Westphalia.

Evidence has today claimed that those who trigger wars do not win them and, instead of a new order, produce disorder and snow-ball destabilisations.

A proper metaphor to describe this scenario, which we find plastically represented on the façade of some Romanic churches, is that of the angel and the devil that compete for one person's soul. In our case, the soul is peace, which the old state-centric law insists on subordinating to the motives of *ius ad bellum*, the strong attribute of state sovereignty.

4.

The model of world order outlined by the new international law is in opposition to the Westphalia model, as it bites into states sovereignty with precise reference to its strongest attributes. The prohibition of war set forth in the UN Charter in conjunction with international human rights law norms eradicates the *raison d'être* of *ius ad bellum*. Owing to international human rights law (see art. 28 of the Universal Declaration of Human Rights), the ownership of *ius ad pacem* moves up to the original subjects of the fundamental rights of the person as this *ius* is connected to the supreme right to life. The consequence for states is that the *officium pacis* – the duty of building peace: *ne nationes ad arma venient, ut cives vivant* – becomes part and parcel of their constitutive essence. In particular, humanitarian law must confront the attractive force of two innovative 'chapters' of public international law, respectively constituted by international human rights law and international criminal law, which deny at their roots the formal equalisation of the *ius ad bellum* and the *ius ad pacem* as it is assumed, more or less explicitly, by humanitarian law itself.

It is worth underlining that international criminal law has introduced revolutionary principles such as the universality of criminal justice for crimes against humanity and war crimes, and the possibility of internationally prosecuting personal criminal responsibility throughout the International Criminal Court and the specialised international tribunals. In its resolutions, moreover, also the UN Human Rights Council insists on citing together with international human rights law, international criminal law and international humanitarian law, the implicit assumption that the principle of the respect of the fundamental rights of the human person is superordinate to the norms included in the two second 'chapters'. According to the UN Charter, international security is incorporated into collective security, which must be managed under the supranational authority of the United Nations.

Officially, no state questions that the UN Charter is formally in effect. On the contrary, its persistent validity is underlined, especially as a starting point for hoped reforms, above all concerning the composition of the

Security Council. In fact, as hinted at above, the new legality is opposed from the behaviour of states which make the old international law of armed sovereignty prevail, for instance by interpreting extensively article 51 of the UN Charter in the sense of classical legitimate preventive defence (and even pre-emptive) and misleading the principle of the responsibility to protect. The latter has been evoked to legitimate military interventions in presence of gross human rights violations within states that show to be unable of containing them and are, thus, considered 'failed'. In these cases, mention is made to 'humanitarian war' and even to 'human rights wars' or 'wars for human rights' with a view to cover absolutely illegitimate war interventions. In this context, some have even theorised an arbitrary division of labour between the UN and the states departing from the assumption that the responsibility to protect falls primarily on states, not on the United Nations: the UN would make peace-keeping with Blue Helmets, while states would be legitimate to use force with their armies (Papisca, 2005).

5.

The new legal framework offers the opportunity to liberate the praxis of neutrality from the traditional war/negative peace/armed defence paradigm. As far as Italy is concerned, the Constitution itself provides the legal basis for an effective policy of active neutrality also in view of the requalification of its whole foreign policy.

The forward-looking article 11 of Italian Constitution, indeed, contains the fourfold repudiation of war, of the old international law of armed state sovereignties, of negative peace and of unilateralism, and the commitment for the active participation to institutional multilateralism for positive peace.

The application of article 11 *sub specie* active neutrality entails the formulation of a political agenda that takes into consideration, fundamentally, what is entailed by the new international human rights law. Some operational ideas follow.

As far as the United Nations are concerned – to be reformed according to the 'strengthening and democratising' – it is in particular to implement article 43 of the Charter as a premise to liberate the UN from the longstanding commissioned management of the five states that won the Second World War as envisaged (in a transitory way) in article 106 (Papisca, 2006).

The assumption is that real disarmament begins from bestowing the United Nations parts of national armies for the creation of a permanent military police force under the supranational authority of the UN. The unilateral initiative of one country under article 43 would suffice to give full execution to the Charter.

In this context, it is necessary to insist, *opportune et inopportune*, in making the literal interpretation of article 51 of the Charter explicit with a view to ensure that the *exception* of the use of force by states as self-protection following armed attacks, remain so and does not become, therefore, a *general rule*.

In order to simulate the democratic reform of the United Nations, the Italian Parliament must also participate in the campaign for the institution of a UN Parliamentary Assembly, on which the German Parliament (2005; 2015), the Panafrican Parliament (2007; 2016) and the European Parliament (2005; 2011; 2017) have favourably pronounced in recent times.

At the regional European level, the integration of military forces in the EU framework for functions different than warlike must happen with explicit reference to chapters VII and VIII of the UN Chart and the OSCE system must be reinvigorated, also with a view to contain the drifts of illegitimacy (intervention outside area, violation of its own Statute) to which NATO is prey. Within the EU, the politics of active neutrality of Italy must be characterised for its valorisation of the Committee of the Regions, as protagonist of the principle of subsidiarity in the framework of a multi-level democratic governance. (Committee of the Regions, 2009 and 2015; Papisca 2009). It is important to recall that sub-national governments are 'territory' but not 'border', constitutively far from the logic of weapons and of war (Papisca 2008 and 2011).

Another qualifying point of the Italian agenda of active neutrality concerns the implementation of law 21 July, No. 145 (Measures concerning Italy's participation to international missions). Article 1 of this law precisely explicate the legal framework within which Italy can deploy military forces and 'civil peace corps': 'article 11 of the Constitution, general international law, international human rights law, international humanitarian law and international criminal law'.

It is a matter of immediately orienting the praxis of implementing this law in the sense of widening the controlling function by Parliament. It is also, as set forth in article 3 of that law, a matter of enhancing the 'participation of women and the gender approach in the different initiatives to implement the resolution of UN Security Council No. 1325 and ensuing resolutions, as well as, the national action plans envisaged for the implementation of the former'.

A further point concerns the implementation of the institutive law of the Civilian Peace Corps to be deployed for the prevention and peaceful resolution of conflicts (Mascia and Papisca 2017). In this regard, besides the increasing in funding, it is necessary to simplify bureaucracy and to envisage bigger possibility of protagonism for associations both in the period of training and

in the implementation phase of projects, with a neat distinction between military roles and personnel. In this context, it is necessary to implement article 18 of the cited law on international missions, which envisages, as optional, the figure of the 'adviser for civil cooperation of the Italian military commander of the international contingent'. It is to make the institution of this figure compulsory and to immediately orient its role with reference to the Ombudsman's function.

Furthermore, the Italian Government must take into consideration the wide mobilisation of local and regional authorities in favour of the adoption of the United Nations Declaration on the Right to Peace as a fundamental human right and right of the peoples, whose text was approved by the General Assembly on 19th December 2016. During the preparatory works in Geneva, the Italian Government following a first instance of prejudicial opposition (in line with the negative USA-EU behaviour) has adopted a position of abstention, which was kept also on the occasion of the General Assembly vote. Italy could have made an intervention of adhesion, taking the opportunity to explicate its own interpretation of the right to peace in the framework of an organic vision of world order taking advantage of the wide internal block of legitimation constituted by the thousands of Municipal statutes and regional laws, which, starting from the years 1988-1991 contain the so-called 'peace-human rights norm' (Mascia 2013), The original wording of this norm reads:

The Municipality [...] (the Province [...], the Region [...]), consistent with the Constitutional principles sanctioning the repudiation of war as a means of resolving international controversies, and the promotion of human rights, the democratic freedoms and international cooperation, recognises peace as a fundamental human and peoples' right.

To this end the Municipality [...] (the Province [...], the Region [...]) promotes the culture of peace and human rights through cultural, research, education, cooperation and information initiatives aimed at making the Municipality a land of peace.

In order to achieve these goals, the Municipality [...] (the Province [...], the Region [...]) will take direct initiatives and foster the initiatives by local authorities, associations, cultural institutions, volunteers and international cooperation groups.

The reality of this very original constituency of peace-driven legality must be enhanced as a formidable resource of political power to be spent at the world and European level.

To conclude, it is necessary that those who rule Italy, the cradle of Humanism and of the Renaissance, a substantial part of world heritage, rich

with volunteers and with local governments committed by statute to the development of a culture of peace and human rights, gather up the courage to make everyone aware of the choice of using the soft power of a civil actor in the international system and within the European Union for the effectiveness of the new international law, appealing in synopsis to article 11 of the Republican Constitution, to the UN Charter, and to article 28 of the Universal Declaration of Human Rights.

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