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Neutrality – A Survivor?

Maria Gavouneli*

Abstract

Nicolas Politis argued in 1935 that the law of neutrality was obsolete, a product of the international anarchy of the times, doomed to be replaced by a new centralized international community. His vision of the League of Nations ended in the fire of World War II but his prediction proved to be mostly true. In the collective security system created by the UN Charter and its prohibition of the use of force, the traditional rules of neutrality do not find scope of application. Yet, transposed into fundamental principles of humanitarian law, they continue to rule over peace-keeping and humanitarian operations. In addition, they complement the existing rules for military action mandated by the UN Security Council, especially during operations at sea. He was essentially right: the institution had to change and it has changed.

Writing in January 1935 Nicolas Politis was adamant: 'today neutrality appears to be a true anachronism; being no longer in harmony with the status of the law of nations or with the economic necessities and aspirations of the nations, it is, as an institution, irrevocably doomed; it is destined to disappear'.[1] His logic was impeccable: '[n]eutrality' – he argues – 'was born and was developed as a product of international anarchy, in a world where States pretended to exercise, without the slightest control, an unlimited sovereign power; where they had the absolute right of making war; where they knew no regular system of justice; where the interdependence of their interests could only be conceived as an academic question; and where, finally, the community composed of such States was devoid of all organization. The situation with respect to all these factors is today very different. Although international anarchy has not yet entirely disappeared, it is no longer the dominant trait, recognized and accepted as such, of our era. Consequently, neutrality could not escape the transformations undergone by the international institutions whose offspring it is. It was bound to be, and has been, affected by them.'[2]

* Assistant Professor of International Law, University of Athens. With grateful thanks to Professor Constantine Antonopoulos, University of Thrace, an old friend and colleague. Email: mgavoun@law.uoa.gr.

1 N. Politis, *La neutralité et la paix* (1935). The quotations used here come from the English translation: N. Politis, *Neutrality and Peace* (trans. F. Crane Macken) (1935), at p. xiii.

2 *Ibid.*, at p. xii.

Politis was at the time one of most prominent international lawyers of the era, a celebrated jurist but also a deeply political animal, thoroughly steeped in the tortuous ways of international negotiation both as a representative of his own country, indeed Foreign Minister, but also as the figurehead of what was then the first attempt at international governance, as President of the Assembly of the League of Nations. Could it be that he was so carried away by his own deep conviction that an international community existed – or at least had started along a route with 'indicated tendencies and interpreted ideas, which because they are the product of a long evolution in international life, will sooner or later achieve the result towards which they aim' – that he failed to realize that by then the preparations were completed, all the nefarious actors were in place, and another drama, the bloodiest yet in human history, was set to unfold? Hardly. In the following pages, I would argue (1) that although the institutions of neutrality remain valid law today, (2) their application in practice has changed so profoundly as to confirm Politis' conviction that 'reality can be hidden behind appearances'.[3]

1 The Law of Neutrality

Strange as it may seem, neutrality never featured large in the traditional scheme of things in international law. Perceived as a practical arrangement for pragmatic purposes[4] and developed through state practice and the occasional jurisprudence of domestic courts and international tribunals,[5] it became part of the great codification exercise that started in the mid-19th century and continues even today. The core rules may be summarized in two major principles: abstention and impartiality towards the belligerents[6] – although the former was initially conceived as freedom from interference with the neutral's territory and trade and the latter as a question of equal treatment.

A first attempt to reconcile the conflicting ideas of neutrality was made through the 1856 Declaration of Paris Respecting Maritime Law,[7] which signalled the deathknoll of privateers; and the 1872 Washington Rules of neutral duty,[8] which imposed

[3] *Ibid.*

[4] S. Neff, *The Rights and Duties of Neutrals* (2000). For a succinct summary of theoretical approaches to neutrality see Antonopoulos, 'Neutrality and Humanitarian Law of Armed Conflict', in S. Perrakis and M.-D. Marouda (eds), *Armed Conflict and Humanitarian Law: 150 Years after Solferino. Acquis and Prospects* (2009), at 367.

[5] A typical example being the Alabama claims, which included a number of disputes that had arisen during the American Civil War (1861–1865), as a result of the 1872 Washington Treaty between the US and the UK; Chadwick, 'Gone with the War? Neutral State Responsibility and the Geneva Arbitration of 1872', in E. Chadwick, *Traditional Neutrality Revisited. Law, Theory and Case Studies* (2002), at 19.

[6] Politis, *supra* note 1, at 38.

[7] Reprinted in A. Roberts and R. Guellf (eds), *Documents on the Laws of War* (2nd edn, 1989), at 24.

[8] J.H.W. Verzijl, *International Law in Historical Perspective: The Law of Neutrality* (1979), x, pt IX-B, at 117–118.

upon the neutral party a duty of due diligence in protecting alien merchandise. But the culmination and – as is frequently the case – the turning point of the codification process was reached with the 1907 Hague Conventions. No fewer than five of the 13 conventions dealt with the matter of neutrality, one of them with land neutrality: the Hague Convention (V) respecting the rights and duties of neutral Powers in case of war on land, and the others with maritime neutrality: the Hague Convention (XIII) concerning the rights and duties of neutral Powers in naval war; as well as the Hague Convention (VIII) relating to the laying of automatic submarine contact mines, the Hague Convention (XI) relative to certain restrictions with regard to the exercise of the right of capture in naval war, the Hague Convention (XII) relative to the creation of an International Prize Court, and the Hague Convention (XIII) relating to the rights and duties of neutral powers in naval war. For the most part these provisions – most of which remain in force today – indeed represented a codification of customary law. There were, however, several new provisions, including – as Politis notes[9] – the obligation not to lay mines for the sole purpose of intercepting commercial shipping off the coast and ports, which was to be treated as customary by the International Court of Justice in the *Corfu Channel* case, before it was set aside in favour of its celebrated dictum on responsibility.

The picture was completed with the 1909 Declaration of London on naval warfare, which attempted to define contraband and regulate naval blockade, hostile assistance, right of visit, and convoy. Although it never came into force, mostly due to the objections of the British Government at the time, it appears that it was abided by as customary law[10] in the Italian–Turkish War of 1911, by Greece in the Balkan wars of 1912–1913,[11] and even by Italy in the Iran–Iraq war in 1980–1988.[12] The essence of this corpus of provisions was also to be reproduced in the 1928 Havana Convention on maritime neutrality open to all American states.

Although Politis himself was not overly impressed by this flurry of codification, which he found 'not, from a practical point of view, to have very appreciable results',[13] these were the rules that would steer humanity into the shoals of World War II. The advent of Article 2(4) of the UN Charter would bring about an absolute prohibition of the use of force, clearly well beyond the unilateral declarations of abstention which characterized the 1928 Kellogg–Briand Pact, which would put the concept of neutrality beyond the pale – but was this indeed the case?

[9] Politis, *supra* note 1, at 27.

[10] E. David, *Principes de droit des conflits armés* (4th edn, 2008), at para. 18; E. Kastrén, *The Present Law of War and Neutrality* (1954).

[11] Chadwick, 'Neutrality's Last Gasp? The Balkan Wars of 1912–1913', in *supra* note 5, at 59.

[12] Goia and Ronzitti, 'The Law of Neutrality: Third States' Commercial Rights and Duties', in I.F. Dekker and H.H.G. Post (eds), *The Gulf War of 1980–1988* (1992), at 221.

[13] Politis, *supra* note 1, at 27.

2 Neutrality in a Contemporary Context

The centralized system of regulating peace and war created by the UN Charter through the allocation of Chapter VII powers to the Security Council was indeed the realization of Politis' ideal. Much stronger than the mechanism put forth by the League of Nations, the collective security system thus created would not tolerate the survival of any notion of neutrality: under Article 2(5) of the UN Charter the member states are required to assist the Organization at all times and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action. In addition to the passive obligation to be bound by all Security Council decisions (as per Article 25 of the Charter), all states also have a positive duty (under Article 40 of the Charter) to join in affording mutual assistance in carrying out any measures decided upon the Security Council. Although there is always room for decentralized action,[14] generally in this brave new world, which is already more than 60 years old,[15] we are all collectively responsible for our continued existence on an equal footing, and thus the very idea of neutral unilateralism remains foreign to the system.

Nor is it possible to argue today that neutrality would assist in defining those involved in a state of war and those who wish to abstain from any direct involvement in, and thus the legal repercussions of, such action. The legal notion of war having been replaced by the real-life attributes of a state of armed conflict, the desuetude of the distinction corresponds to the lack of any appreciable difference for the parties involved.[16]

If the case is that clear, then it is truly perplexing to see a chapter on neutrality appearing in almost every contemporary military manual on the conduct of hostilities,[17] or to review learned expositions on the law of neutrality as it exists today,[18] or even to find an unequivocal judicial assertion that the law of neutrality continues to be in force in its entirety, as per Judge Ammoun in his separate opinion in the *Namibia* Advisory Opinion.[19] It appears that through the cracks of our collective security system, there is still room for the application of some of the tenets of neutrality, albeit in a modified form.

An evident case is that of the continued employment of the terms 'neutral or non-belligerent Powers' or 'neutral and other States not Parties to the conflict' in

[14] L.-A. Sicilianos, *Les réactions décentralisées à l'illicité : des contre-mesures à la légitime défense* (1990); A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011).

[15] A. Orakhelashvili, *Collective Security* (2011).

[16] See, however, Greenwood, 'The Concept of War in Modern International Law', 36 *ICLQ* (1987). 283.

[17] See, for instance, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005), ch. 1(3), paras 1.42–1.43.

[18] Bothe, 'The Law of Neutrality', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), at 571; Levie and Grunawalt, 'The Law of War and Neutrality', in J.N. Moore and R.F. Turner (eds), *National Security Law* (2005), at 321; Schindler, 'Aspects contemporains de la neutralité', 121 *RCADI* (1967-II) 221.

[19] ICJ, *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 1, at 93.

the Geneva language. Under the 1949 Geneva Convention (III) relative to the treatment of prisoners of war – and thus post the UN Charter – protected persons may be received into the territory of 'neutral or non-belligerent Powers', which then have the obligation to treat them as mandated by the Convention (Articles 4.B(2) and 122). If that was too soon after the World War II experience to strive for legal clarity, there is no reason not to find it in the 1977 Additional Protocols, where Article 19 of the Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts is specifically entitled 'Neutral and other States not Parties to the conflict'. One could certainly argue that this corresponds to a statement of fact, since even in our global village not all the world is necessarily a party to an international armed conflict.[20] It is, however, almost inescapable to draw an inference therefrom for the continued survival of at least some of the neutrality rules, even after the advent of the Charter.[21]

It is in the same context that one may also ascertain the evolution of the neutrality laws. Indeed, the most obvious such case must certainly be the transformation of the privilege of neutrality at a time of war for states not wishing to interfere in a messy business into a duty of impartiality for those who are destined to alleviate the pain produced by an armed conflict: peacemakers[22] and the humanitarian associations, among which is primarily the International Commission of the Red Cross. Non-interference in the form of impartiality remains at the core of such operations,[23] and indeed is supposed to secure their continued effectiveness in the field. Whether the principle could remain true in the face of increasingly brutal conflicts, which move easily away from the traditional classifications, constitutes an open question.[24]

There is no doubt, however, that there is a precarious line to be toed when one attempts to apply the precepts of neutrality within the context of full-blown armed conflict, where layers of conflicting self-defence claims and collective security action by both the UN Security Council and regional organizations aggravate an already complex, indeed explosive, situation.[25] In reaffirming the continued survival of neutrality as 'an established part of the customary international law',[26] the Court

[20] Antonopoulos, *supra* note 4.

[21] See, however, Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Fault Lines. Essays in Honour of Yoram Dinstein* (2007), at 543.

[22] Engdahl, 'Compliance with International Humanitarian Law in Multinational Peace Operations', 78 *Nordic J Int'l L* (2010) 513.

[23] Plattner, 'ICRC Neutrality and Neutrality in Humanitarian Assistance', 36 *IRRC* (1996) 161; Rieffer-Flanagan, 'Is Neutral Humanitarianism Dead? Red Cross Neutrality: Walking the Tightrope of Neutral Humanitarianism', 31 *Human Rts Q* (2009) 888.

[24] Anderson, 'Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for UN and NGO Agencies following the 2003–2004 Afghanistan and Iraq Conflicts', 17 *Harvard Human Rts J* (2004) 41; Mollekreiv, 'Do the Principles and Practice of Red Cross Neutrality Meet the Necessities of Today's Humanitarian Action?', in C. Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (2010), at 77.

[25] Greenwood, 'The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign', in C. Greenwood, *Essays on War in International Law* (2006), at 631.

[26] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, at para. 88.

confirmed the ultimate transformation of the abstention rules into self-restriction principles: 'the Court finds that in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be use'.[27]

It is perhaps inevitable that most contemporary instances where there were claims for the application of the traditional neutrality rules relate to the conduct of war at sea, the area which was at the centre of all such discussions in the codification era. The most celebrated example may be found during the Iran–Iraq war, where Iran expressly claimed the right 'in accordance with the established rules of international law regarding the rights and duties of neutral Powers in naval war' to inspect all ships in the Gulf suspected of carrying arms to Iraq. The invocation of the traditional rules, however, did not cover the minutiae of application: there never was a public contraband list, nor was a prize court established until almost the end of the conflict. The reaction came again in the form of traditional practices, involving an extensive re-flagging programme[28] whereby Kuwaiti tankers sought cover under the flags of the US and the UK, which in turn asserted their right to form a neutral convoy, an action 'fully consistent with the applicable rules international law, which clearly recognize the right of a neutral State to escort and protect ships flying its flag which are not carrying contraband'.[29]

In contrast, visit and search operations as a result of UN sanctions, notably against Iraq (Security Council resolution 665/1990), the Federal Republic of Yugoslavia (Serbia and Montenegro) (Security Council resolution 787/1992), and Haiti (Security Council resolution 875/1993), but also during anti-terrorism operations,[30] clearly rely on the collective security system of the UN Charter to the exclusion of any other legal basis. The continued relevance of maritime exclusion zones is also justified on grounds of self-defence rather than neutrality concerns – although such concerns seem to seep into the discussion of the matter in the 1994 San Remo Manual on international law applicable to armed conflicts at sea.[31]

What then could one conclude as to Politis' visceral dislike of the neutrality rules, indeed of neutrality as a concept? If one were to take the maximalist view and search for evidence of the 'doomed to disappear' prediction, then clearly this has not come to

[27] *Ibid.*, at para. 89.

[28] G.P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (1998), at 560.

[29] Statement by the US Assistant Secretary Richard Murphy before the House Foreign Affairs Committee, 19 May 1987, 26 *ILM* (1987) 1425.

[30] Heintschel von Heinegg, 'Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality', 34 *Israel Yrbk Human Rts* (2004) 151.

[31] Politakis, *supra* note 28, at 132–135; Doswald-Beck, 'The San Remo Manual on International Law Applicable to Armed Conflicts at Sea', 89 *AJIL* (1995) 192.

pass: some aspects of neutrality have survived the onslaught of the UN Charter and the collective security system it created and have lived to see another day – most appropriately, at sea. On the other hand, if one were to seek authenticity, the campaign for the authentic interpretation of the neutrality law is over. Whereas the corpus of neutrality regulations was premised upon a decentralized international community, the fragments of law in existence today have a decidedly auxiliary role to play, in the few cases where the collective will of the UN member states has failed to respond adequately and sufficiently in terms of both time and substance. All in all, I would consider that although the rumours of extinction have been exaggerated, the passionate plea for different international arrangements has been mostly fulfilled in the reincarnation of the neutrality rules into fundamental principles of humanitarian law. Once again, Politis has proven to be a visionary and a realist at the same time.