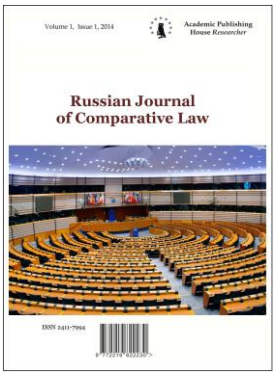

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The United Nations Human Rights Council and the Right to Peace

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Abstract

The present article studies and criticizes the "right to peace" as an individual's fundamental right, as claimed by the resolution of 24 June 2016 of the UN Human Rights Council. The criticism concerns problems of content and method of the aforesaid Resolution (to be approved or not by the UN General Assembly), and this also with regard to the so-called "soft law" especially with regard to the difficulty of identifying the subject holder of the so called "right to peace" and even more the difficulty of enforceability in judgment of such a supposed "right to peace". This, both with regard to the identification of the competent judicial instance and the identification of the subject responsible for the breach of law, as well as the assessment of the specific facts at which the "right" in question can be considered as violated. It is no coincidence that it is included in the category of "soft law" which, having no binding force, cannot certainly be understood as a legal category.

Keywords: United Nations Human Rights Council, "*Right to Peace*", "soft law", "peace education", fundamental rights, actionability, individual.

1. Introduction

It is since ancient times that the issue of peace has been the subject of speculation by philosophers and men of letters and it is unnecessary to operate references in this regards. This for their not containable amplitude as well as for the extraneousness of such speculations with respect to the object of this study which, moreover, has to be contained in a well limited number of pages.

Just to give a point of reference confirming the assumption, it would be enough to think about Emmanuel Kant and his philosophical speculations on the theme of peace.

The problem of peace among men within the limits of the state organization, as well as the issue of peace in the context of inter-state relations in the entire international community, has always been addressed, obviously, in a strictly political context. The most expressive example consists of the primordial purpose for which it is addressed, or should be addressed, the United Nations: "the maintenance of international peace and security." A very different question is whether this objective has been achieved or not. Certainly, after seventy years of UN activities there is good reason to doubt that this objective has been achieved and that, in many cases, there was the intention of achieving it.

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However, it is not an opinion but a statement of fact that in those seventy years, there were situations of serious and widespread armed conflict far greater than the ones occurred in the two hundred years preceding the creation of the UN.

That such a failure was caused by the very questionable decision to provide, within the UN Security Council, five states with permanent seats - and each one of them capable of preventing the adoption of its resolutions with their vote against [1, p. 665] - is a different problem from what constitutes the object of this short study.

It cannot be denied that the jurists, and especially internationalist jurists, have dealt with the problem of peace, that is how to ensure the maintenance of peace or, from a different standpoint, how to forestall and prevent armed conflicts between States.

Even in this respect the scientific production of Hans Kelsen, that for his fame does not require specific bibliographical references, is significant and emblematic. And finally, the scientific production of Ugo Villani which is indicated, given its amplitude, only in its most significant expressions [2, p. 225; 3, p. 19; 4, p. 57; 5, p. 428; 6, p. 8; 7, p. 3; 8, p. 11; 9, p. 252; 10, p. 53; 11, p. 69; 12, p. 141; 13, p. 163] for the purposes of the present study.

However, internationalist jurists who have dealt with the problem of peace and how to prevent the war – as well as how to restrict the legitimacy of using military force (legitimacy sometimes allowable) - did so by offering organizing schemes of international relations between the states considered most fit for the purpose. This by identifying, in the changed historical and political context of international relations, either the general principles of international law and the extension, on the interpretative level, of their receptive reach, or through the identification of rules that, while not attributable to the category the general principles of law, can be intended as binding or prevailing over rules of equal rank.

2. Materials and methods

This paper is based upon UN documents: United Nations Human Rights Council, Resolution June 24, 2016; Universal Declaration of Human Rights of December 10, 1948: Newsletter *Pace e diritti umani* Doc. A/HRC/20/31; Doc. A/HRC/RES/14/3 (Resolution 14/3 of June 23, 2010).

The article examines the so-called "right to peace" with regard to the relevant international instruments and in the framework of the general theory of international law.

3. Discussion

Today we are faced with a new and relatively recent fact: the alleged assertion of a right to peace intended as a fundamental right of the individual and not as a mandatory rule of conduct for States to ensure the maintenance of international peace and security.

Thus, we would be in presence of a new fundamental right of the individual in addition to the numerous others of which is claimed the existence, the recognition and the alleged obligation to guarantee that, since the Universal Declaration of Human Rights of December 10, 1948 [14], it has expanded enormously the ranks of the pretended fundamental rights. And this is – incidentally – to the detriment of even the slightest guarantee of their effective and concrete claim against the state authority that should ensure their recognition and application.

The so-called right to peace formally expressed by the Human Rights Council of the United Nations and which will be discussed below, requires a preliminary observation: this new and purported fundamental right is understood in some sort of logical and methodological contradiction to the armed conflict between states. The operating end enforcing implication of this new claimed fundamental right is that armed conflict would always be illegitimate with respect to general international law.

This will be discussed below, but it is now appropriate to make an observation as elementary as it is not felt by the authors of the claimed fundamental right and by the members of the United Nations Human Rights Council.

It means to say that peace on the one hand cannot be understood reductively as a situation of no war, but vice versa it must be understood as a situation indicative of even minimum acceptably living conditions of every individual.

In this perspective it is clear that it is not only the armed conflict that compromises effective peace in the sense indicated above -and that, therefore, gives a shareable content to the same peace- but there are other, more harmful causes that compromise peace: the economic

overwhelming, the exploitation of other peoples' natural resources, the political abuse of power, the imposition of economic models only meaningful of the interests of international finance, the currency speculation, the unemployment, the underdevelopment and so on.

Not to trivialize, but what's the difference on the moral, political and, as now claimed, legal level, between the children who die of hunger and the children who die because of war events?

As already pointed out, the alleged recognition of the right to peace is meant as a fundamental right of the individual by the UN Human Rights Council *Resolution*, adopted June 24, 2016 with thirty-four votes in favour, nine against and four abstentions [14], (*Resolution* that will be brought to the General Assembly for its final approval) results in a general, vague and implicit claim that any international armed conflict is unlawful.

With this *Resolution*, therefore, it would like to affirm also the illegitimacy of the use of military force to self-defence requirements [15, p. 392], as well as the illegitimacy of any military intervention in defence of others and primordial fundamental rights of the person (when this actually happens, not when, as almost always happens, the military intervention takes the defence of those primordial fundamental rights as a pretext, but is actually aimed to the pursuit of other illegal purposes and thus presents itself as the "armed wing" of the overbearing political will of certain States to the detriment of others, celebrating in this way the indiscriminate use of force that is justified by nobles and false needs and cloaked in a false formal legitimacy; and this often precisely by means of certain resolutions of the UN Security Council: think of the aggression on Serbia, Iraq, Libya, Syria, etc., or the case of Ukraine [16, p. 53; 17, p. 451; 18, p. 18; 19, p. 3]) that contradictorily and curiously the resolution of June 24, 2016 through "the right to enjoy the peace" would guarantee "so that all human rights are promoted and protected and the development is fully realized".

The *Resolution* at issue not only claims, to its inevitable implications (where the *right to peace* was actually meant as a right that can be operated in any way), to abolish at a stroke the substantial body of law of *jus in bello*, but would also like to disown to the States the *jus ad bellum*, even in cases of non-contestable requirements of self-defence.

Moreover, the *Resolution* does not take into account not only the history, but above all phenomenal reality that cannot be cancelled or cannot be impeded in its repetition by utopian efforts, while laudable on the moral level, of those who participate in the approval of the *Resolution* in question.

It must be said that in the extent of the awareness of the reality and of the consciousness of what is feasible, important attempts have been done in the sense of the limitation of the *jus ad bellum* and even more in the sense of the limitation of the *jus in bello*. Think of the definitional efforts and the efforts of content related to the ban and to the enforceability of the war of aggression; or think of the significant body of regulations of the well-known Geneva Conventions relating to the war in its development, in its manners and in the discipline of the subjects who take part to it, to the guarantee of the civil population, the treatment of prisoners, etc.

The *Resolution* at issue in its assumptions and in its manifest utopian purposes, as we said, would assume an international community no longer formed by States but by individuals and, although out of every anarchist vision, an international community governed by a sort of (nonexistent) world government, and from which it is rejected any possibility of recourse to force.

In the observation of the non-contestable reality emerges not only the utopian character of the *Resolution*, but rather the impossibility to achieve the objectives that are, with it, nobly pursued.

Nor it seems possible a reutilization of the said *Resolution* in the context of law arguing that it would integrate a sort of *soft law* for the sole and primary reason that the *soft law* is not law, and it should be more correctly interpreted as a recommendation or a moral or political solicitation; this confirms the absence of its legality: the *jus* is will that makes itself command in its normative form, expressive of a mandatory command that requires, demands and guarantees execution even in coercive forms and in its punitive previsions.

We are well aware of exposing absolutely elementary reflections but in the presence of these allegedly juridical elaborations (the *right to peace*) we are in the need of repeating and remembering them.

Below the affirmation of the principle in article 1 of the *Resolution*, which states "the right to enjoy peace", the following article 2 seems to indicate the ways of achieving peace and places upon

Member States obligations already imposed on them in derivation from the international general principles or consisting of a different way of being of their internal systems expressive of a certain social body, finalized at the maintenance of peace from the perspective of the *Resolution*: equality and non-discrimination, justice and rule of law and the guarantee of freedom "from fear and from want".

Apart from the apparent interference in state affairs (what was once called the *domestic jurisdiction*), the question is: what equality? According to what parameters and compared to what criteria? What justice? Freedom from fear of what? Freedom from which need? In this regard, apart from the already highlighted aspects and utopian content, the authors of the *Resolution* still seem to realize that true peace is founded on social justice within the State and in the relations between states. But, then, they must change, with regard to this second aspect, the economic, commercial and financial linkages among the states.

The *Resolution* does not say it but it would appear to be meant the prohibition of any – not only economic and commercial- policy of oppression and exploitation by some States to the detriment of others.

The article 3 states that the States, the United Nations and specialized agencies, particularly the UNESCO "should take appropriate sustainable measures to implement the present Declaration". It is not specified what kind of measures. It isn't neither written what kind of "support and assist" should give the "International, regional, national and local organizations" and even "civil society"!

The article 4 of the Resolution underlines the role of the "education" to "the spirit of tolerance, dialogue, cooperation and solidarity" and to this end, a reference is made to a "University for Peace" that should contribute to the "dissemination of knowledge": what that means in practice is objectively hard to imagine.

The final article 5 takes on a role in a sense of the *safeguard clause* providing that nothing in the *Resolution* shall be construed "as being contrary to the purposes and principles of the United Nations" but it is to be understood in line with the Charter of the United Nations, the Universal Declaration of Human Rights and "the relevant international and regional instruments ratified by States" (of course, those relating to the rights and fundamental freedoms of the individual).

4. Results

The goal of peace, guaranteed by its alleged *legal cover* through the *Resolution* at issue, and thus understood as the *right* of every individual and of the peoples (but there is no reference to them in the *Resolution*) would actually deprive the State sovereignty of all its content and all its political autonomy, placing this new *right* in the context of the recognition and guarantee of rights and fundamental freedoms of the individual insured at the international level.

Therefore, as initially mentioned, the State would be deprived not only of his actual ability to autonomous government of the community allocated in its territory to the limits imposed by the *Resolution* at issue for the pursuit of the alleged *right to peace* (the content of which is not, however, defined), but is deprived of any autonomous policy-making capacity in terms of choice of use of military force as regards the defence of its interests. Interests that are indispensable and consubstantial to the way of being of the State: its territorial integrity, its sovereignty (particularly monetary), its political independence, its right to enjoy exclusively from their own natural resources, etc.

It is for this reason that at the beginning it has been necessarily underlined the relapse that such declaration shall determine to the legitimate use of military force.

Regarding the *Resolution* in question it has been observed that "just for the Western countries it would have been the opportunity to assert forcefully that peace is an individual and collective right involving specific obligations for States *beginning with the disarmament and the economic global governance in respect of economic and social rights* in the light of the principle of interdependence and indivisibility of all human rights" [20]: it is so confirmed the assumption that the right to peace is founded on disarmament, namely the prohibition of armed conflict in all its forms and justifications. The reference to the *global economy governance* confirms, then, what we have pointed out about the utopian, and as such useless, approach, of the June 24, 2016 *Resolution*, with the resulting depletion of any content of state sovereignty. The rest is just the usual panegyric of human rights that, as such, far from promoting them, trivializes them.

Given that, between the States that have approved the *Resolution*, numerous were those that, in the field of fundamental rights and freedoms of the individual, should just keep quiet, there is also to say that the text of the *Resolution* did not incorporate the previously prepared and proposed by the Consultative Committee where, in addition to a *right to peace* and not right to *enjoy peace*, referring not only to individuals but also to the peoples, *individually or jointly* States (?) are indicated as the *main counterpart of the right to peace* [21]. Therefore, a right and as such should be *operated* in respect of States which violate it: before which judicial instance, how and when, is not provided by the *Resolution* either in its draft nor in its text as finally approved.

It was also noted that the holders of the *right* "in the traditional form of the *jus ad pacem* therefore remain the States" [20] and not the individuals.

Then, being the individuals mere beneficiaries of peace and not the holders of the alleged *right*, each State may have a claim to its *right to peace* against any other State. And if a State becomes defaulting, the State alleging the violation of his *right* what does it do? It suffers the violation? It reacts with the use of military force failing, even it, the obligation? He cites the defaulting State in legal proceedings? And, in what jurisdiction?

It is clear in this regard that we are facing a fanta-legal elaboration that would be based essentially on the illegitimacy for every State to exercise its sovereign powers relating to the *jus ad bellum*, with the addition of a superfluous reference to the provisions of the UN Charter about the prohibition of the use of force and the obligation to peacefully resolve international disputes. Then, as if reality did not say anything and as if from 1945 to date nothing had happened in the opposite direction; or as if the UN had actually guaranteed during its seventy-one years of peace and international security.

It was also noted that "The fact that in this majority there are countries whose governments do not stand for the respect of human rights, democracy and the rule of law, highlights the lack of political intelligence and the bad conscience of those governments that profess loyalty to universal values and at the same time excel in producing and exporting weapons and unleash wars and armed interventions outside of international legality" [20].

Which is to say that if those countries governed with "bad conscience" had also them approved and undersigned the *Resolution* at issue, the would have ceased to produce and export weapons and unleash wars: here the ingenuity overcomes the intelligence.

How it is possible to say that although the *Resolution* is expression of *soft law*, that is of *lightweight mandatory*, it would contain, in substance, "the principles of *jus cogens*, highly mandatory" [20], is a statement impossible to decipher for its inherent contradictions and it is impossible to give to it a logical meaning.

5. Conclusion

Conclusively, it is unthinkable to promote the development of the international legal order, a more precise *organization* of its general legislation, and thus develop a renewed general theory of international law, regardless of the phenomenal reality, as well as the retrospective and historical perspective; or, worse, proposing sentences that, while politically and morally assessable as new general principles of international law which, as such, should be methodologically traced as the source of their legitimacy and their effectiveness in the collective legal consciousness of States that certainly is not the one manifested in the context of the Human Rights Council of the United Nations or in the framework of the UN General Assembly, where the positions of each State and the correlative voting expressions are too often dependent on political and economic circumstances and on power relations.

The general principle that, as mentioned earlier, would be represented by rules of *jus cogens*, should be identified in its existence and effectiveness and in the context of historical and political circumstances, in the concrete behaviour of States in their international relations in accordance with their common *feeling* of relating to a non-derogable obligation.

The general principles and/or the *jus cogens* rules cannot be the way of *feel* the spirits willing but utopian, and even less they can be the expressions of political intentionality. If it was so, it would compromise the fundamental relationship that justifies the existence and legitimacy of any legal rule: it is not through a legal rule that one a political outcome can be achieved, even in the noblest sense of the expression, but the opposite is true, namely that the legal rule comes from the

phenomenal reality and the way of being of political relations that constitutes the collective legal consciousness abovementioned.

The reasoning that is implicitly contested and unknowingly operates on the basis of an assumption, of an alleged essentially and inherently authoritarian that, beyond the role of a misunderstood *irenics*, is not aware of consolidating through the proposal of a general disarmament and a corresponding general prohibition of armed conflict, the balance of power of certain political and economic hegemonic States against weak States.

References

1. See: Sinagra A. Diritto di veto o dovere di voto al Consiglio di Sicurezza delle Nazioni Unite? // Studi in onore di Manlio UDINA. Milano: Giuffrè, 1975.

2. Viillani U. Les rapports entre l'ONU et les organizations regionales dans le domaine du maintien de la paix // Recueil des cours de l'Academie de droit international de La Haye, 2001, vol. 290.

3. Viillani U. La crisi delle Nezioni Unite e i progetti di rilancio // Pace, diritti dell'uomo, diritti dei popoli, 1989, № 2.

4. Viillani U. Popoli e Stati nella crisi iugoslava // Delta, 1993, № 58.

5. Viillani U. Il ruolo delle organizzazioni regionali per il mantenimento della pace nel sistema dell'ONU // La Comunità Internazionale, 1998.

6. Viillani U. Peace maintaining in the United Nations // Lezioni delle Scuole estive sul processo di pace in Medio Oriente, CIRP, Bari, 2000.

7. Viillani U. Riflessioni sul ruolo dell'ONU per il mantenimento della pace e la lotta al terrorismo nella crisi afghana // Volontari e terzo mondo, 2001, № 4.

8. Viillani U. Attuazione dei trattati che riguardano la mutua difesa e prevedono l'uso della forza // Rivista della Cooperazione Giuridica Internazionale, № 13, 2003.

9. Viillani U. La Pacem in terris e il diritto internazionale // La Società, 2003, № 6.

10. Viillani U. Il ruolo del diritto internazionale nel messaggio per la giornata mondiale della pace 2004 // Iustitia, 2004.

11. Viillani U. L'emploi unilateral de la force dans le droit international contemporain // Le Devenir du Droit International, Publications de la Revue Marocaine d'Administration locale et de developpement. Serie "Thèmes Actuels". Rabat, 2004, № 48.

12. Guerre giuste, difesa preventiva e interventi umanitari alla luce della Carta delle Nazioni Unite // Annuario di filosofia 2006, Pace e guerra tra le nazioni (a cura di V. POSSENTI), Milano, Edizioni Guerini, 2006.

13. Viillani U. L'attuazione da parte dell'Unione europea delle decisioni del Consiglio di Sicurezza per il mantenimento della pace e la lotta al terrorismo // La Crisi dell'Unione europea. Problematiche generali e verifiche settoriali (a cura di M. TUFANO), Napoli, Editoriale scientifica, 2007.

14. Human rights Council, Declaration on the Right to Peace (A/HRC/32/L.18), 24 giugno 2016.

15. Viillani U., Uso della forza e legittima difesa // Il Diritto. Enciclopedia giuridica del Sole 24 Ore, Vol. 16, Milano, 2008.

16. See: Viillani U. L'intervento militare in Libia: responsibility to protect o … responsabilità per aggressione? // I diritti dell'uomo. Cronache e battaglie, 2011, № 2.

17. Viillani U. La nuova crisi del Golfo e l'uso della forza contro l'Iraq // Rivista di diritto internazionale, 1999.

18. Viillani U. La crisi dei Balcani: origini, problemi e prospettive // Volontari e terzo mondo, 1999, № 1-2.

19. Viillani U. L'Unione europea e le Nazioni Unite di fronte alla crisi della Crimea // Sud in Europa, maggio 2014.

20. Newsletter Pace e diritti umani / July 27, 2016 / of the Centro di Ateneo per i Diritti Umani dell'Università degli Studi di Padova e Archivio Regionale "Pace diritti umani/Peace Human Rights" // http://unipd-centrodirittiumani.it.

21. Doc. A/HRC/20/31. The draft declaration completed in 2012 by the Consultative Committee, was requested by the Human Rights Council // Resolution 14/3 of June 23, 2010, Doc. a/hrc/res/14/3).