

Neutrality, Trade in Implements of War and the Prohibition of Force – From equal treatment of belligerents to the protection of human rights, democracy and the rule of law

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Abstract

The law on implements or materials of war is part of foreign trade law. Today, it is at the heart of neutrality policy and neutrality law. This article discusses the relevant rules for Switzerland. It examines the implications of the Hague Protocols of 1907 on international trade, their relationship to the prohibition of force and the right to individual and collective self-defence. It submits that United Nations law takes precedence over neutrality. The principle of equal treatment of the belligerent parties clearly does not apply in wars of aggression. Instead, the export of war material must be aligned to the protection of human rights, democracy and the rule of law. Contrary to the amendments passed by Parliament at the end of 2025 subject to referendum, this is possible under current legislation on the re-export of war materials and must be considered when redesigning the export criteria. It is increasingly difficult to distinguish between implements of war and dual-use goods. Both should be regulated together and subject to uniform principles. Future cooperation in arms procurement in Europe necessarily excludes neutrality. Accordingly, it must be restricted by treaty law.

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I. Introduction

Neutrality is part of a country's security policy. It serves to preserve independence and seeks sparing the country from acts of war. Historically, the prohibition of aggression, non-alignment and the requirement of equal treatment of belligerent parties in the export of war material in times of war by neutrals was also in the interest of competing European powers to create neutral buffer zones of unoccupied territory. This interest no longer exists in the European theatre. Today, the prohibition of aggression is part of *ius cogens*. It applies to all states alike, whether or not neutral. But non-alignment of neutrals and the issue of exporting war materials to belligerents and economic sanctions remains relevant and controversial. Both are at the heart of the debate on neutrality today. The costs of neutrality are primarily reflected in its limitations on international cooperation. Neutrality undermines cost-effective defence and security, thus inhibiting central constitutional goals. This is aggravated when neutrality, as in Switzerland, is exaggerated as a policy of neutrality, as an "all-encompassing state doctrine" (Alois Riklin), or in Austria as a mystified "doctrine" (Peter Hilpold), far beyond what is required by international law. Neutrality is perceived as a matter of national identity and is used and practised by politicians in ideologically charged debates.¹ It is largely supported in public opinion, albeit no consensus exists the precise contours of neutrality. In export driven Switzerland, neutrality primarily has become a reputational business model in the global economy, enabling trade relations on all sides, regardless of the ideological leanings of trading partners. Security policy has been pushed out of the spotlight. It is apparent that neutrality is increasingly leading to isolation in Europe, thereby fundamentally calling into question its original functions.²

Striking a balance between neutrality, arms procurement and security policy is difficult, especially when neutrality is comprehensively under-

1 Alois Riklin, Neutralität am Ende – 500 Jahre Neutralität der Schweiz, (The end of neutrality -500 years of Swiss neutrality), *Zeitschrift für schweizerisches Recht* 5 (2006) I. S 563, 592; Peter Hilpold, Das Neutralitätsrecht Österreichs und der Schweiz im «weiten Feld» des internationalen Rechts, (The law of neutrality of Austria and Switzerland in the "wide field" of international law) *Archiv des Völkerrechts* 60 (2022) pp. 268, 284/285.

2 For a detailed discussion of the uncertainty in Austria and Switzerland and the current debate on neutrality, see in particular Peter Hilpold, The right to neutrality at a cross-roads: The situation of Austria and Switzerland from the perspective of international law, European law and constitutional law, in this volume pp. 17-66.

stood in terms of policy, exceeding legal requirements of international law. Switzerland is a good example of these difficulties with the doctrine of perpetual and armed neutrality. Restrictions on the export and re-export of war materials, motivated by its policy of neutrality, fundamentally call into question not only the reputation of the country and the legitimacy and acceptance of its neutrality but also own supplies and defence capability. Without ongoing and legally secure cooperation and supplies in times of crisis, complex weapon systems cannot be developed, maintained and deployed. With the digitalisation of warfare and the introduction of new weapon systems, the boundaries between war material and *dual-use* goods and services are becoming increasingly blurred and inconsistencies in policy increase.

The chapter of the book addresses these issues. It first examines the foundations of the law on implements of war in domestic and international economic law, using Switzerland as an example. It then considers the implications of neutrality. In the context of European integration and the challenges of Switzerland in security policy³, it calls for a stronger focus on the constitutional goals of foreign policy and on modern international law, in particular the United Nation's prohibition of the use of force and the Arms Trade Treaty, which was concluded within the framework of the UN in 2013. Arms procurement in Europe must be approached in international cooperation with the EU and NATO. It must be secured also in times of war. To this end, it is advisable to conclude appropriate international agreements that ensure non-discriminatory access to cooperation and the procurement market in Europe. This goes hand in hand with a shift of focus towards the strategic protection of the rule of law and democracy in the confrontation with autocracies. It allows overcoming the problems caused by the traditional doctrine of neutrality. For the time being, it opens the way for qualified neutrality and will gradually move away from it in stages to make way for new alliances.

3 For the background and state of play see Thomas Cottier, Sicherheitspolitische Herausforderungen der Schweiz in Europa (Swiss challenges of security policy) in: Astrid Epiney/Sarah Progin-Theuerkauf/Flaminia Dahinden/Sophie Dukarm (Hrsg.), Schweizerisches Jahrbuch für Europarecht (SJER) 2023/2024, Zürich/Bern 2024, pp. 421-438.

II. The Law on War Materials

A. Foundations

International trade in implements or materials of war is a special and complex area of foreign trade law. Under international law, it is governed by numerous agreements that primarily contain minimum standards and regulate procedures for international cooperation. These agreements form the basis for trade in goods and services that can be used for military purposes. They primarily deal with the prohibition of the proliferation of weapons of mass destruction, in particular nuclear and chemical weapons, but also cover trade in conventional weapons and military goods.⁴ They also deal with goods that can be used for both civilian and military purposes. Together, they set the framework for national legislation upon which states rely to enforce trade bans, authorisations and restrictions.

International law provisions must be considered when drafting and applying national law. In practice, the determination in individual cases is largely determined by the provisions of national law and therefore varies from country to country. To date, there is no international system with direct application, not even in the EU. With the exception of the WTO, they are also not subject to binding arbitration. What all national regulations have in common is that, unlike purely civilian goods, exports are subject to import and export licences. The criteria for granting licences vary from country to country. What they have in common is the protection of national security and the effort to ensure that the material does not fall into wrong hands.

In Switzerland, trade in war materials is subject to economic freedom which is enshrined in Article 27 of the Federal Constitution.⁵ The provision also applies to foreign relations but may be subject to restrictions in accordance with Articles 36 and 101 of the Federal Constitution. Article 107

4 For detailed information on these agreements applicable to Switzerland, see Patrick Edgar Holzer, *Das Güterkontrollgesetz* (The Goods Control Act), in: Thomas Cottier and Matthias Oesch (eds.), *Allgemeines Aussenwirtschafts- und Binnenmarktrecht* (General Foreign Trade and Internal Market Law), *Schweizerisches Bundesverwaltungsrecht* Vol. XI, 3rd edition, Helbling und Lichtenhahn, Basel 2020, pp. 147-230; Hansjörg Meyer, Simon Plüss and Nicolas Bieri, *Das Kriegsmaterialgesetz* (The War Materials Act), *id.* pp. 232-290.

5 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101 (official translation).

grants the Confederation the authority to enact legislation against the misuse of weapons, weapon accessories and ammunition. It enacts regulations on the procurement and distribution, as well as the import, export and transit of war material. The relevant rules are now essentially contained in two acts with respective implementing provisions. In view of the increasing difficulty of distinguishing between civilian and military goods, the Goods Control Act forms the general basis.⁶ This Act is not based on the Constitution but implements international agreements. These primarily aim the prevention and proliferation of weapons of mass destruction. The Act also covers a range of military goods and is subject to corresponding authorisation procedures. It applies insofar as an offence does not fall under special rules, in particular the War Materials Act addressed below. Distinct from these two acts is the Embargo Act, which applies to civilian goods and services and serves to implement economic sanctions imposed by the UN Security Council and, above all, to enforce embargo measures imposed by the EU and the USA.⁷ Other decrees, such as the Weapons Act or the Federal Act on Explosives, relate to internal security and are not relevant here.⁸

B. The War Materials Act

The War Materials Act (KMG) and its ordinance include in a list not only weapons, ammunition, military vehicles and combat agents, but also prohibit nuclear weapons, biological weapons and anti-personnel and cluster munitions.⁹ The Act also covers equipment designed for combat operations. This includes electronic devices and systems used to operate the goods listed. It also covers corresponding parts and assemblies, thus also affecting

6 Federal Act on the Control of Dual-Use Goods, Specific Military Goods and Strategic Goods (Goods Control Act) of 13 December 1996, SR 946.202 (official translation); for details, see Patrick Holzer, loc. cit. (note 4).

7 Federal Act on the Implementation of International Sanctions (Embargo Act) of 22 March 2002 (Embargo Act, EmbG), SR 946.231, see Martin Wyss, Die Umsetzung wirtschaftlicher Sanktionen durch die Schweiz (The Implementation of economic sanctions by Switzerland), in: Thomas Cottier and Matthias Oesch, op. cit. (note 4) pp. 291-358.

8 Federal Act on Weapons, Weapons Accessories and Ammunition of 20 June 1997 (Weapons Act, WG), SR 514.54; Federal Act on Explosives of 25 March 1977 (Explosives Act, SprstG), SR 941.41.

9 Federal Act on War Materiel of 13 December 1996 (official translation, hereinafter War Materials Act, KMG), SR 514.51; for details see Hansjörg Meyer et al., op. cit. (note 4).

international supply chains. The Act and Ordinance do not cover personal equipment such as uniforms, helmets or protective vests for army personnel, nor goods that can be used for both military and civilian purposes, such as training aircrafts. These are partly subject to the provisions of the Goods Control Act, even if they can carry bombs. The distinction is not always easy to make, but it is relevant because the licensing procedures under the Goods Control Act are more liberal than those under the War Materials Act.

The War Materials Act permits the manufacture, brokering, export and transit of war material "if this does not contravene international law, international obligations and the principles of Swiss foreign policy" (Art. 22 KMG). In its version of 1 May 2022, it provides for complex authorisation procedures and a series of soft criteria that must be considered when assessing export applications. These criteria include the maintenance of peace, the internal situation and human rights in the country of destination, the interests of development cooperation, behaviour towards the international community and international law, and the views of states that participate with Switzerland in international export control systems.¹⁰ These criteria reflect broad discretionary powers of the executive branch. Subsequently, discretion was significantly restricted by Parliament as a result of a popular initiative.¹¹ The combination of pacifist and development aid concerns, with the support of the centre party, led to an absolute ban on the export of implements to war zones. The criteria for export bans previously addressed in the Ordinance were incorporated in Art. 22a KMG and exceptions were eliminated. Today, the export ban applies absolutely and without exception if a country of destination is involved in an internal or international conflict.¹² It also applies if a country seriously and systematically violates human rights or if there is a high risk that the material will be used against the civilian population. Finally, it applies if there is a high risk that the material will be passed on to an undesirable recipient.¹³ Exceptions to this rule exist only for handguns and firearms used for private or sporting purposes, as

10 For the development of these criteria, see Evelyne Schmid, *Ausschlusskriterien für Kriegsmaterialexporte* (Exclusion criteria for war material exports) (2008–2019), AJP/PJA, 2019, pp. 1171–1185.

11 Federal popular initiative 'Gegen Waffenexporte in Bürgerkriegsländer (Korrekturinitiative)' (Against arms exports to countries involved in civil wars) (correction initiative) of 24 June 2019, withdrawn on 21 January 2022.

12 Art. 22a para. 2 lit. a KMG.

13 Art. 22a para. 2 lit. b-c KMG.

well as for peacekeeping missions under the mandate of the UN, OSCE, EU or NATO. These exceptions, however, cannot be invoked independently. They depend on decisions by the relevant international organisations.¹⁴ The government's hands are largely tied.

The provisions and criteria of the new KMG are also applied in practice to the issue of re-exporting war material, which is regulated in Art. 18 of the Act. An export licence generally is only granted if the recipient country declares that the material will not be re-exported. Exceptions to this rule exist for assemblies and components in supply chains. The Federal Council (the Swiss government) has repeatedly rejected requests from Germany, Spain and Denmark to transfer war material purchased in Switzerland to Ukraine.¹⁵ The sale of battle tanks from Swiss Army stocks to Germany was only made on the condition that they would be used for Germany's own purposes, but without ruling out a ring exchange.¹⁶ The same applies to the sale of 200 Swiss-owned decommissioned battle tanks in Italy, which were owned by the Swiss federal government's armaments company. Transfer to Ukraine was ruled out.¹⁷

The Swiss legislation is essentially based on the assumption that war materials and foreign armies pose a threat to human rights but may also be necessary for their protection. In the age of terrorism, the focus was primarily on internal conflicts and civil wars in the Third World, where autocratic regimes frequently use weapons and war material against their own population. No one at the time anticipated a conventional war in Europe. The new provisions came into force on May 1st, 2022, immediately after Russia's open war of aggression against Ukraine broke out on February 24th, 2022 (the occupation of Crimea in 2014 and the occupation of Luhansk and Donetsk interestingly was not considered in the legislation).

As a result, no war materials have been exported to Ukraine to date, even though the government and a large majority of the population support Ukraine's defensive struggle and Switzerland also adopted the EU's economic sanctions under the Embargo Act. The Federal Council's revised Ukraine Ordinance categorically excludes deliveries of war materials to

14 Art. 22a (3) and (4) KMG.

15 Ukraine: Federal Council reaffirms its position on the re-export of war material, Federal Council press release dated 10 March 2023.

16 Agreement signed on the sale of 25 battle tanks to Rheinmetall Germany, Federal Council press release dated 23 November 2023.

17 RUAG MRO can sell Leopard 1 battle tanks to Germany without authorisation, Defence Group, press release dated 28 May 2025.

Russia and to Ukraine.¹⁸ The ban even applies to aid supplies such as protective vests for the civilian population. Mine clearance equipment from Switzerland must not be used in the war zone. The absolute ban is not compensated for by increased solidarity with Ukraine in the civilian sector. Switzerland has shown its commitment to providing diplomatic services in organising the Lugano and Bürgenstock conferences, but in terms of per capita income, it ranks last in Europe on aid to Ukraine, at 0.1%.¹⁹ The Federal Council and Parliament have also failed to take effective measures against commodity trading based in Switzerland, the revenues from which are used by Russia to finance its war of aggression.

Russia's war crimes in Ukraine and the return of aggressive warfare in Europe are forcing a rethink and suggest that the supply of war material is necessary to protect the civilian population, human rights and against genocide. The absolute ban on deliveries of war material to crisis regions is incompatible with the constitutional objectives of foreign policy. It perverts the principles set out in Article 54(2) of the Federal Constitution. The provision requires, *inter alia*, to contribute to the respect of human rights and to promote democracy in foreign affairs.

Switzerland's legal situation also leads to widespread isolation and the decline of the Swiss arms industry, whose goods are shunned by foreign countries due to restrictive re-export practices and a ban to export in periods of war when the material is most needed. This even applies to camouflage nets in the case of Germany. Switzerland's arms exports fell by a full 27 per cent in 2023.²⁰ And this occurred at times when the whole of Europe is rearming. Correspondingly, the scope for cooperation with

18 Verordnung über Massnahmen im Zusammenhang mit der Situation der Ukraine (Ordinance on measures in connection with the situation in Ukraine) of 4 March 2022, SR 946.231.176.72. Art. 2a para. 1 reads: "The sale, supply, export and transit of military equipment of any kind, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and components, accessories and spare parts for such equipment, to the Russian Federation or Ukraine or for use in the Russian Federation or Ukraine is prohibited." (author's translation).

19 Christina Neuhaus, Daniel Gerny, Selina Berner, Keine Waffen, keine Munition und auch weniger Flüchtlinge – die Schweiz ist in Sachen Ukraine Hilfe Mittelmass (No weapons, no ammunition and now fewer refugees – Switzerland is mediocre when it comes to aid for Ukraine) NZZ, 5 December 2024.

20 According to the arms industry, exports fell by 5% in 2024 and by 27% in the previous year, 2023; Swissmem: Verhinderung von Rüstungsexporten: die Sicherheit der Schweiz ist in Gefahr (Prevention of arms exports: Switzerland's security is at risk) 13 March 2025.

Swiss companies is narrow and encourages outsourcing. At the same time, it marks the end of an independent arms industry capable of meeting the needs of the Swiss army at low cost, as required by Article 1 of the KMG.²¹ This cannot simply be changed by the government's intention to procure 60% of goods in Switzerland in future.²² It is obvious that domestic law is unsatisfactory for all interests and concerns and needs to be revised. The question arises as to what leeway exists within the framework of international economic law and the law of neutrality.

III. International Economic and European Law

A. WTO Law and National Security

While the Goods Control Act exclusively implements international obligations and, in some cases, non-binding intergovernmental agreements, the scope for shaping domestic law on war materials has long been largely determined by the multilateral trade rules of the WTO and preferential agreements, with the exception of special areas such as nuclear armaments, biological and chemical weapons, mines and cluster munitions.²³ Arms are subject to WTO regulations in terms of tariff and non-tariff regulations, particularly in the area of technical regulations and intellectual property rights. The latter plays an important role in the protection of patents and trade secrets and on rules on licensing, including for arms. It also covers services relevant to armaments within the framework of the GATS agreement on services. Nevertheless, the sector has a strong domestic focus

21 Art.1 War Materials Act (KMG) states in official translation: "The Act has as its aim the fulfilment of Switzerland's international obligations and the respect of foreign policy principles by means of controlling the manufacture and transfer of war materiel and related technology, while at the same time maintaining an industrial capacity om Switzerland that is adapted to the requirements of its national defence".

22 Hans Ueli Schöchli, Bundesrat will künftig 60 Prozent des Rüstungsvolumens in der Schweiz kaufen – und nur 10 Prozent ausserhalb von Europa (Federal Council wants to purchase 60 per cent of armaments in Switzerland in future – and only 10 per cent outside Europe), NZZ, 20 June 2025.

23 Marrakesh Agreement establishing the World Trade Organisation of 15 April 1994, SR 0.632.20, World Trade Organization, For a comprehensive discussion see Thomas Cottier and Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland*, Bern/London: Stämpfli and Cameron May 2005.

and is characterised by the fact that business is always done with foreign governments. It largely remains outside the market economy. Government procurement of defence equipment is subject to its own practices which are primarily determined by offset deals for large purchases. Economic competition is largely eliminated in this process. The WTO Agreement on Government Procurement does not generally apply to defence equipment.²⁴ Moreover, articles XXI GATT, XIVbis GATS and 73 TRIPS Agreement of the WTO reserve the right to protect essential security interests. This includes all trade in arms, ammunition and other military equipment, insofar as this is necessary for the equipment of the army. The extent to which these provisions are enforceable is a matter of debate.²⁵

Against the backdrop of today's geopolitical conflicts, the US – unlike in the past – takes the view that the application of these provisions is reserved for WTO member states and their governments and therefore is a political matter subject to the discretion. US trade policy in particular is increasingly dominated by national security interests. The rules-based order and thus legal certainty are being pushed back. This is particularly problematic with regard to goods that can be used for both civilian and military purposes. The export of critical technology, particularly in the field of integrated circuits, is now subject to security policy restrictions. They influence the entire customs policy of the USA which under the Trump administration has become increasingly protectionist. Even the alleged restoration of balanced trade has been justified on security grounds. With very high protective tariffs announced on 2 April 2025, the USA is blatantly violating most-favoured nation treatment obligations and its tariff bindings in the WTO. This also applies to most of the ad valorem tariffs of 10% or 15% for goods that have been introduced in the meantime.²⁶ These tariffs were successfully challenged in the US Court of International Trade Court and

24 Agreement on Government Procurement as Amended by the 2012 Protocol Amending the Agreement on Government Procurement of 15 April 1994, SR 0.0632.231.422, World Trade Organization.

25 WTO case law considers the issue to be justiciable on the basis of the requirement of necessity and the classification as *essential* security interests, see DS512: Russia – Measures Concerning Traffic in Transit (Ukraine).

26 Thomas Cottier, Die neue Zollpolitik der USA aus WTO-rechtlicher Sicht: Beurteilung und Vorgehen, (The new US customs policy from a WTO legal perspective: assessment and approach), Jusletter 28 April 2025 and World Trade Institute, Working Paper No 3/2025.

the United States Court of Appeal for the Federal Circuit.²⁷ The Supreme Court confirmed the rulings on February 20th, 2026.²⁸ Irrespective of the landmark decision, security interests will remain predominant and traditional distinctions between civilian and military material in international trade no longer stand. Security policy in international trade today is broadly defined in view of geopolitical tensions. It calls into question existing legal foundations and, in practice, leads to great uncertainty. It places a heavy burden on businesses and investment decisions. It is important to keep this background in mind when seeking to realign the law on war materials.

B. The UN Arms Trade Treaty

The United Nations Arms Trade Treaty of 2 April 2013 (ATT) created a general contractual basis for trade in conventional weapons.²⁹ It is currently in force in 125 countries, including the member states of the EU, the United Kingdom, Norway and Switzerland, but not in the United States and Russia. The treaty sets out principles and criteria for the export and transit of military equipment, which must be considered in national legislation. It obliges member states to establish a control system for the export, transit, transshipment and re-export of military equipment. The principles of the treaty are set out in the preamble as follows. It is worthwhile reproducing them in full text:

- The inherent right of all States to individual or collective self-defence as recognised in Article 51 of the Charter of the United Nations;
- The settlement of international disputes by peaceful means in such a manner that international peace and security and justice are not endangered in accordance with Article 2(3) of the Charter of the United Nations;
- Refraining 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 in accordance with Article 2(4) of the Charter of the United Nations;

27 V.O.S. Selections, Inc., Plastic Services and Products et al v. Donald J Trump et al, US Court of Appeals for the Federal Circuit, August 29, 2025 (accessed May 31, 2026).

28 Learning Resources, Inc., et al., v. Trump, President of the United States, 697 U.S. ____ (2026).

29 United Nations, The Arms Trade Treaty (ATT), SR 0518.61.

- Non-intervention in matters which are essentially within the domestic jurisdiction of any State in accordance with Article 2(7) of the Charter of the United Nations;
- Respecting and ensuring respect for international humanitarian law in accordance with, *inter alia*, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, *inter alia*, the Charter of the United Nations and the Universal Declaration of Human Rights;
- The responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems;
- The respect for the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms;
- Implementation this Treaty in a consistent, objective and non-discriminatory manner,

These principles place trade in military equipment within the framework of United Nations law, the prohibition of the use of force, the natural right of self-defence and collective self-defence, and the principle of non-intervention. Particular importance is attached to compliance with international humanitarian law. The Parties have undertaken to implement these principles and criteria. They act not only as barriers, but also as a possible motivation for the trade in conventional military equipment to enforce international law. Neutrality is not addressed in this context. We will come back to this below.

C. European Law

Under European Union law, implements of war are generally excluded from the provisions of the internal market. Article 346(1)(b) TFEU reserves trade in defence materials to the Member States, provided that this does not adversely affect the conditions of competition for civil goods subject to internal market law. A list defines the relevant implements. However, the Common Foreign Policy has led to the gradual integration of the law on war materials. Today, there are common criteria for its export within the

framework of the CFSP, the application of which is the responsibility of the Member States.³⁰ They cover the implementation of existing agreements, including the UN Arms Trade Treaty, and are based on the protection of human rights and international humanitarian law, the right to self-defence and collective self-defence for exports and transfers. Once again, neutrality is not addressed.

The continuing exemption of war materials from the principles of trade in goods and services has also meant that the war material business has long been largely excluded from the principles of public procurement in the EU. Here, too, important steps towards integration have been taken. In the wake of the war in Ukraine and the necessary European rearmament, new forms of armaments cooperation are emerging among the EU and EEA member states.³¹ Financial incentives from the EU are intended to increase and improve armaments cooperation through PESCO and SAFE, which aims to increase cost efficiency and ensure the interoperability of equipment and troops in joint defence efforts within NATO and the EU.³² Within the EU, the traditional reservation of Article 346 TFEU is gradually being dissolved and replaced by concrete measures within the framework of the common security and foreign policy. Even though the EU is still a long way from having a common armaments market, let alone a European army, efforts to cooperate in training and armaments procurement are having a restrictive effect on what were previously exclusively national competences. Existing rules are limited to the Member States. To date, there are no known agreements between the EU and third countries on cooperation in armaments procurement. This also applies to Switzerland.

Overall, it can be said that trade in war material is increasingly governed by international agreements and European law, and that the traditional scope for action by nation states is becoming more limited. Exports are assessed in accordance with international agreements based on the protec-

30 COUNCIL DECISION (CFSP) 2025/779 of 14 April 2025 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, OJ L 15.4.2025.

31 REGULATION (EU) 2023/2418 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 October 2023 establishing an instrument for reinforcement of the strengthening the European defence industry through common procurement (EDIRPA), OJ L 26.10.2023.

32 See Peter Hilpold, op. cit. (note 1), pp. 278/280, with particular reference to Austria as a neutral EU Member State, and by the same author, *Solidarität und Neutralität im Vertrag von Lissabon* (Solidarity and neutrality in the Treaty of Lisbon) (Baden-Baden/Bern/Vienna: Nomos, Stämpfli and facultas 2010).

tion of human rights, international humanitarian law and the prohibition of violence, taking also into account own security interests. As indicated, the traditional distinction between civilian and military goods no longer holds true in trade policy and that the US in particular is increasingly invoking security policy deviations from the multilateral order. At the same time, within the European Union, the armament and export of war material, which was previously reserved for member states, is gradually being integrated under common rules and procurement procedures for EU and EEA member states. This means that non-members, namely the United Kingdom and NATO members, must also be included and relations with NATO, in particular the United States and Turkey, must be clarified. These developments pose new challenges for the neutral states in Europe. This applies to Austria, Ireland and Malta within the framework of the EU. It applies above all to Switzerland, where armed and perpetual neutrality has been deeply rooted in the population for centuries. It has been part of the national identity and has shown a high degree of political persistence that is out of step with the present time. None of the international developments mentioned above take neutrality into account.

IV. Effects of Neutrality

Articles 1 and 22 of Switzerland's War Materials Act refer to international law and the principles of Swiss foreign policy. These principles are set out in Article 2 (4) of the Federal Constitution. "It [the Swiss Confederation] is committed to the long term preservation of natural resources and to a just and peaceful international order." They are set out in Article 54(2) of the Federal Constitution: "The Confederation shall ensure that the independence of Switzerland and its welfare is safeguarded; it shall in particular assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful coexistence of peoples as well as the conservation of natural resources."³³

33 Federal Constitution of the Swiss Confederation, SR 101 (official translation).

A. Neutrality in the Constitution

Neutrality is not one of these principles under constitutional law, although politically it is elevated above the constitution as a doctrine. Under constitutional law, it is understood as an instrument of foreign policy. Articles 173(1)(a) and 185(1) place neutrality under the responsibility of the Federal Assembly and the Federal Council as a joint task. The Constitution does not contain a definition or description of neutrality. It implies a reference to international law for the law of neutrality, while the policy of neutrality is left to foreign policy and may vary accordingly. Under constitutional law, it must be placed at the service of the constitutional principles mentioned and therefore must not be treated in isolation and absolute terms. Nor can it be understood as a recognised principle of foreign policy under customary law. This is because neutrality has always been applied flexibly in practice throughout Swiss history.³⁴ This finding is supported by the fact that the so-called neutrality initiative, as a popular initiative, seeks to redefine neutrality in response to the adoption of EU sanctions against Russia, and a counter-proposal submitted by the Council of States seeks to establish integral neutrality as a principle in the Constitution.³⁵ The government and opponents oppose these proposals in order to preserve neutrality as a flexible foreign policy instrument, to enable military cooperation with the EU and NATO, and to avoid a constitutional ban on adopting economic

34 See Marco Jorio, *Die Schweiz und ihre Neutralität – eine 400 jährige Geschichte* (Switzerland and its neutrality – a 400-year history), Zurich: Hier und Jetzt 2023. Jorio details the different stages of neutrality, its fluctuations throughout history, and repeatedly emphasises its importance as a flexible instrument of foreign policy until its "exaggeration" from 1945 to 1990.

35 Federal popular initiative 'Wahrung der schweizerischen Neutralität (Neutralitätsinitiative)' ('Preservation of Swiss neutrality (neutrality initiative)', submitted on 11 April 2024. The counter-proposal of the Council of States (Senate) aims to enshrine armed and perpetual neutrality as a principle in the Constitution: Art. 54a FC (new): "1. Switzerland is neutral. Its neutrality is perpetual and armed. 2. The Confederation shall use its neutrality to guarantee the independence and security of Switzerland, to prevent conflicts or to contribute to the resolution of conflicts. It shall be available as a mediator," (author's translation), Official Bulletin of the Council of States, 19 June 2025. The counterproposal adopted by the Senate avoids the exclusion of economic sanctions but enshrines a static, traditional and isolationist understanding of neutrality without having thought through its consequences for security policy and without consideration for future cooperation needs in Europe. The counterproposal was rejected by the Nationalrat (house of representatives) and the popular initiative will be put to the vote of the people and the Cantons in fall 2026.

sanctions imposed by the EU and the US, which would be impossible to uphold in realpolitik.³⁶

B. Neutrality and the War Materials Act

Swiss legislation on implements of war does not refer directly to neutrality. It is addressed implicitly in Art. 22 KMG and, since 2022, has been implemented as an irrevocable rule in Art. 22a(2)(a). As soon as a state is involved in an international conflict, as described above, the export of war material and thus also of spare parts to the belligerent parties is prohibited by law. This emphasises equal treatment of the belligerent parties as an essential principle. In practice, the same applies to the transfer of war material of Swiss origin by third parties to a belligerent party. Article 22a(2) (a) of the KMG thus reflects an absolute understanding of neutrality that goes beyond the requirements of international law and makes neutrality absolute in terms of equal treatment of the belligerent parties in the field of armaments. This leaves no room at all for the implementation of constitutional principles of Swiss foreign policy, namely the commitment to human rights and democracy. If neutrality is a constitutional instrument of foreign policy, then neutrality and its requirement of equal treatment of belligerent parties cannot be understood as absolute in the law on implements of war. This applies even if it were to be understood as a constitutional principle in future, as must be balanced and brought in line with other constitutional objectives. Overall, the current legal situation regarding the export of war material is an exceptional situation which ultimately expresses an absolute

36 24.092 Message [from the Federal Council] on the popular initiative "Preserving Swiss neutrality (neutrality initiative)" of 27 November 2024, BBl 2024 3136. The initiative is recommended for rejection. For debate, see the discussion between Thomas Cottier and Florence Sager-Koenig, *Der Ukraine Krieg stellt die Neutralität in Frage* (The war in Ukraine calls neutrality into question), *Plädoyer* 1/2023, pp. 6-10. A ban on economic sanctions (with the exception of those imposed by the United Nations) would cause major difficulties for the economy, particularly the financial sector, because it would have to implement the sanctions under private law in order to conduct business abroad, but this would conflict with Swiss law. In practical terms, the sanctions would have to be implemented silently and clandestinely, as was previously the case with the US COCOM list, which the federal government complied with unofficially and in secret, without any protocols or files being kept. In other words, the constitution cannot enforce a ban on sanctions. The idea that an alliance could only ensure Switzerland's defence after it had entered the war is also unrealistic. Rather, it must be expected that NATO would occupy key Swiss territory as a preventive measure.

understanding of neutrality that goes far beyond the obligations of neutrality law. It does not comply with constitutional law.

C. The Hague Conventions of 1907

The legal basis for international law on neutrality dates back to the era of European imperialism before the outbreak of the First World War. At that time, war was a legitimate instrument of politics and was not prohibited under international law. This also applied to the export and transit of war material. These provisions can be found in the Hague Conventions of 1907, which are still formally in force. They were expanded by customary law regarding overflight of the territory of a neutral state but have not fundamentally changed or developed since 1907 in light of new fundamental values of international law, in particular the prohibition of violence and the protection of human rights. A static understanding continues to prevail.³⁷

The law of neutrality with regard to the export of war material during the imperial era was merely intended to ensure that neutral states did not influence the balance of power between the belligerent states. The aim was not to prevent the supply of war materials from neutral buffer states, but simply to ensure that none of the belligerent parties was given preferential treatment.³⁸ Art. 9(1) of the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Fifth Hague Convention) of 18 October 1907³⁹ obliges neutral states within the scope of the treaty to ensure that no preference is given to any of the belligerent parties. "Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents". The principle of equal treatment of the belligerent parties is at the heart of the law of neutrality, regardless of who

37 S. Michael Bothe, *Neutrality, Concept and General Rules*, in Rüdiger Wolfrum (ed.) *Max Planck Encyclopaedia of Public International Law*, Vol. VII Oxford: Oxford University Press 2012, pp. 617-643.

38 See Max Huber, writing after the adoption of the 1907 Conventions, *Das Neutralitätsrecht in seiner neusten Gestaltung* (The new law of neutrality) in: *Festgabe dem Schweizer Juristenverein bei seiner 46. Jahresversammlung*, 28. und 29. September in Zürich, presented by the Faculty of Law and Political Science of the University of Zurich, Zurich 1908 pp. 201-140.

39 *Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* (Fifth Hague Convention) of 18 October 1907, Yale Law Library, in force for Switzerland, SR 0.515.21.

is the aggressor and who is the victim. The distinction between prohibited and just war is foreign to it. It applies to all measures covered by the Hague Convention. Beyond that, there are no restrictions on private deliveries. Article 7 states that the neutral power is not obliged to prevent the export and transit of war material, and Article 8 extends this to communication technology (at that time telegraphs and telephone lines). The same is stated in Article 7 of the XIII Convention on Maritime Warfare.⁴⁰ The only exception here was the export of existing army stocks under Article 6 of this Convention. There are no restrictions in peacetime, when privileged relations and deliveries are possible. The re-export of war material to third countries is not covered by the neutrality law of the Hague Convention. It clearly does not fall under Article 9 of the Fifth Convention. The only exception under customary law is where this serves to circumvent existing prohibitions and restrictions, the *voyage continue*. The sole purpose here is to avoid circumvention and the abuse of the law.

In practice, the Swiss authorities have long applied the limited disciplines of the Hague Convention flexibly. They took political power relations into account, especially in times of war. During the Second World War, economic and political pressures shifted the export of war material from neutral Switzerland to the Allies to Axis powers in favour of Germany. Strict equal treatment could not be maintained due to strong German pressures imposed which in turn triggered strong criticism from the Allies and isolated Switzerland in terms of foreign policy in the post-war years.⁴¹ At the same time, this isolation encouraged the continuation of the so called *Réduit* mentality during the Cold War, stressing self-reliance. It led to a policy of integral neutrality in the sense of the so-called *Bindschedler Doctrine* which defined the policy of neutrality beyond the legal obligations under international law and delayed Switzerland's accession to multilateral

40 Convention concerning the Rights and Duties of Neutral Powers in Naval War (Eighth Hague Convention) of 18 October 1907, Yale Law Library, in force for Switzerland, SR 0.515.22.

41 Marco Jorio, op. cit. (note 34), p. 293: "Despite its good intentions, however, [Switzerland] was unable to uphold the principle of equal treatment on several occasions, particularly with regard to arms exports, due to the military situation and the balance of power. Strict neutrality was opposed by the behaviour of the belligerents. The Hague Conventions played hardly any role in the Second World War, even though Switzerland repeatedly invoked them." See also p. 352 et passim. See also John Dreyer and Neal G. Jesse, Swiss Neutrality examined: Model, Exception or Both? 15 Journal of Military and Strategic Studies vol 3 (2014).

organisations for years.⁴² It laid the foundation for a very restrictive arms export policy and continues to shape public awareness to this day.

Switzerland did not join the United Nations until 2001. And to this day, the government has not understood or implemented the implications of UN law in the law of neutrality and in neutrality policy. This applies in particular to the issue of war materials. Even today, a quarter of a century after joining, the implications of UN law are still not sufficiently considered in legislation and practice.

V. The Impact of the Prohibition of Force

A. The Paradigm Shift

The appeal to equal treatment of the belligerent parties fails to recognise that international law has changed fundamentally since 1907. War as an instrument of foreign policy lost its legitimacy with the Kellogg-Briand Pact of 1928. After the end of the Second World War, wars of aggression were outlawed by the Charter of the United Nations and prohibited by Article 2(4) of the UN Charter.⁴³ Today, it is part of *jus cogens*. Every state has the right to self-defence under Article 51 of the Charter. Just war (*bellum justum*) is limited to defence and excludes aggression as unlawful. Member states of the UN have the right to participate in collective self-defence in accordance with Article 51, either as a belligerent party or, as is the case today, as a *non-belligerent* state that supports the attacked state with financial, civil and military means. Contrary to popular belief, the prohibition of wars of aggression, self-defence and collective self-defence are rights that do not depend on implementation by the UN Security Council. Actions are not limited to Security Council resolutions and do not depend on the veto power of the permanent members of the Security Council. Article 51 of the

42 The *Bindschedler Doctrine* was characterised by the doctrine of the preliminary effects of neutrality, which gave it a dominant position in foreign policy in the sense of integral neutrality, Rudolf Bindschedler, *Die Neutralität im modernen Völkerrecht* (Neutrality in Modern International Law), *Zeitschrift für öffentliches und ausländisches Recht* 1956/1957, pp. 1-37. Neither accession to the Council of Europe, let alone the EEC, was possible in terms of neutrality policy at that time, see Guiding Principles of the Federal Department of Political Affairs on Neutrality, VEB 24 (1954) 9, in: Jörg Paul Müller and Luzius Wildhaber, *Praxis des Völkerrechts* (Practice of International Law), 3rd edition pp. 863/864 (Bern: Stämpfli 2001).

43 Charter of the United Nations of 26 June 1945, SR 0.120.

UN Charter expressly refers to a *natural* right to individual or collective self-defence. State practice confirms that each state decides independently how it wishes to act and to what extent it wishes to support the attacked state until binding decisions are taken by the Security Council or the General Assembly under the *Uniting for Peace* doctrine.⁴⁴ Support for Ukraine is provided for in accordance with coordinated national government decisions, coordinated by NATO and in the EU by the Commission within the framework of the CFSP. Ultimately, each state decides autonomously how far it can and wants to engage. It is up to states and in their responsibility to do what is right and appropriate for them. The enforcement of the multi-lateral order, and in particular the prohibition of the use of force, depends on the behaviour and actions of states with coercive powers. Enforcement cannot be expected from international organisations. They do not have the means. All states are responsible for the implementation and enforcement of international law. They cannot hide behind neutrality.

The 2013 Arms Trade Treaty confirms the principles of the UN Charter. It reaffirms self-defence and collective defence as a natural right of states. In its principles cited above, the treaty expressly emphasises the prohibition of violence and defence, and thus the distinction between unjust and just war. This must be considered when exporting war material. As a signatory to the treaty, Switzerland has made interpretative declarations but no reservations in favour of the right to neutrality.⁴⁵ It is therefore obliged to apply the principles of the treaty. The same applies to the UN Charter, on which the Arms Trade Treaty is based. There is no reservation for the law of neutrality.

The application of equal treatment of belligerents under neutrality law in accordance with Art. 9 of the Fifth Hague Convention of 1907 clearly violates the prohibition of aggression in Art. 2(4) the UN Charter and of *jus cogens* in the case of a war of aggression. Aggressors and victims are treated equally here, even though they are unequal under international law today. Treating unequal things equally violates the principle of equality before the law established by Aristotle and forms a central principle of the entire legal system.⁴⁶ It is undisputed that perpetrators and victims are unequal in terms of their legal treatment required by international law.

44 A/Res377(V) United for Peace of 3 November 1950.

45 Loc. cit. (note 29) in fine.

46 "Equality before the law is violated when equal things are not treated equally according to their equality, or unequal things are not treated unequally according to their

B. Primacy of the Prohibition of Force

Traditional doctrine argues that equal treatment of the belligerent parties is an essential component and *the actual ratio legis* of neutrality. To abandon it is to abandon neutrality. *Tertium non datur*. Any restriction or qualification of neutrality is rejected, and the concept is understood in binary terms. As Peter Hilpold explains in his article, neutrality was deemed incompatible with membership during the founding period of the United Nations.⁴⁷ Today, it is argued that UN law does not exclude neutrality and that Switzerland, like other neutral states, was admitted on that basis. However, there is no formal reservation in favour of neutrality. The member states were not prepared to grant Switzerland such a reservation. In the referendum campaign on Switzerland's accession to the UN, neutrality was the main argument put forward by the national conservative opposition to membership. It considered UN membership to be incompatible with Switzerland's sovereignty and neutrality and repeatedly opposed the proposal.⁴⁸ On 3 March 2002, the people and the cantons voted in favour of UN membership by 54.6% with a narrow majority of 12 cantons in a popular initiative.⁴⁹ The Federal Council's message considered accession to be compatible with neutrality and did not go into detail about the relationship between neutrality and the prohibition of force or the effects on trade in war materials.⁵⁰ However, accession to the UN clearly entails recognition of the prohibition of violence under Article 2(4) of the Charter and the need to reconcile neutrality with this fundamental norm. This conclusion is inevitable.

Politicians and scholars still refuse to acknowledge this and, for the most part, continue to adhere to the unbroken application of the Hague Conventions. They follow the doctrine that rejects so-called qualified neutrality, arguing above all that abandoning equal treatment and the ban on deliver-

inequality," Swiss Federal Supreme Court, M. et al v. Cantonal Council of the Canton of Zurich, BGE 138 I 321, 324, (30 August 2012) (author's translation).

47 Peter Hilpold, loc. cit. (note 2) p. 22/23.

48 Marco Jorio, loc. cit. (note 34), pp. 411/412; p. 435.

49 Federal Chancellery, Eidgenössische Volksinitiative 'für den Beitritt der Schweiz zur Organisation der Vereinten Nationen (Federal Popular Initiative 'for Switzerland's accession to the United Nations).

50 Botschaft über die Volksinitiative «Für den Beitritt der Schweiz zur Organisation der Vereinten Nationen (Message on the popular initiative 'For Switzerland's accession to the United Nations') of 4 December 2000, section 5.1, BBl 2001 1183 ff.

ies of war material would mean abandoning the very core of neutrality and squandering the opportunities for mediation and humanitarian efforts by the neutral state. Evelyn Schmid discusses the various views in detail and concludes that the advantages of equal treatment of the belligerent parties outweigh the disadvantages, avoid the covetousness of the arms industry and increase the chances of the neutral state playing a constructive role in the peace process.⁵¹ Firstly, this view fails to recognise that neutrality is not limited to the export of war materials. The hard core is non-alliance and non-participation in combat operations with one's own troops on foreign soil short of self-defence. This remains excluded. Secondly, neutrality is understood by adherents as timeless, absolute and independent of other constitutional objectives and obligations under international law, namely the protection of human dignity, fundamental human rights and against war crimes, genocide and other manifestations of massive state failure. The binary view fails to recognise that every principle of law and state action is subject to exceptions and restrictions in the coordination and concordance of different, competing or conflicting objectives. It also does not reflect the relationship to economic sanctions under embargo law, which, although outside the scope of neutrality law, have led to a qualified policy of neutrality that is ultimately based on the prohibition of violence in the UN Charter.

In the event of conflict, the prohibition of force under international law pursuant to Article 103 of the UN Charter clearly takes precedence over the right of neutrality under the Hague Conventions and a broadly defined policy of neutrality as implied in Article Art. 22a(2)(a) of the Swiss War Materials Act (KMG). The same applies on the basis of Article 30(3) of the Vienna Convention on the Law of Treaties, where older treaties, in this case the Hague Convention, give way to more recent law in the event of contradictions in accordance with the principle of *lex posterior*.⁵² In addition, the prohibition of force is part of mandatory international law and takes precedence over other norms for this reason alone. Finally, Article 41 of the ILC Draft Articles on State Responsibility, which is recognised under customary law, obliges states to cooperate in cases of serious violations of

51 Evelyn Schmid, Optional but not qualified: Neutrality, the UN Charter and humanitarian objectives, *International Review of the Red Cross* Vol. 106 (2024) pp. 1044-1064. In the recent debate on Ukraine see Oliver Diggelmann und Robert Kolb, Im Ausnahmefall könnte die Neutralität ausgesetzt werden (in exceptions, neutrality may be suspended), *NZZ* 8. June 2024.

52 Vienna Convention on the Law of Treaties of 23 May 1969, SR 0.111.

international law and prohibits the granting of direct or indirect assistance to the violator.⁵³ This also includes refraining from helping the victim. Cooperation manifests the idea of solidarity with the victim.⁵⁴ It clearly precludes equal treatment.

The government and traditional doctrine in Switzerland so far deny any incompatibility or conflict of norms, arguing that there is no contradiction between UN law and neutrality.⁵⁵ Otherwise, it is argued, neutral states would not have been able to join the UN, which was initially the case. However, it is not a matter of comparing neutrality and UN membership in general, or the voluntary right to collective self-defence with neutrality. There is no conflict of norms here because collective self-defence or support as a non-belligerent state is a right, not an obligation. Rather, it is a matter of the fundamental contradiction between the prohibition of violence and the equal treatment of the belligerent parties under neutrality law, which cannot be resolved in the case of a war of aggression.⁵⁶ Refusing to supply war material to the aggressor and the attacked state on the grounds of equal treatment is not sufficient. Even without supplying weapons to the aggressor, equal treatment inherently supports the aggressor and weakens the victim. The policy undermines the prohibition of force and the implementation of this fundamental principle of *jus cogens*. Moreover, it also violates the obligation of solidarity with the victim by withholding essential war materials necessary for self-defence.

Equal treatment and the refusal to supply war material to the attacked state indirectly support the aggressor, and thus Russia in the European war since 24 February 2022, if not since 2014 (occupation of Crimea). The neutral state thus makes itself an accomplice of the aggressor. It does not live up to fulfilling its responsibility. The policy of equal treatment contradicts the prohibition of force in Article 2(4) of the UN Charter and thus international law. Article 103 UN Charter removes the application of

53 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission 2001 vol II Part Two p. 113 ff.

54 See also Hilpold, loc. cit. (note 2), p. 28 et passim.

55 The goal to join the United Nations obliges to avoid the issue from the outset, cf. Luzius Wildhaber, Switzerland, Neutrality and the United Nations, 12 Malaya L. Rev. 140, 147 ss. (1970) discussing a 1969 report of the government favourable to accession to the United Nations.

56 See Hersch Lauterpacht, Rules of Warfare in an Unlawful War, in: George A. Lipsky (ed.), Law and Politics in the World Community, University of California Press: Berkeley/Los Angeles 1953, pp. 89-113.

Article 9 of the 5th Hague Protocol. The neutral state is no longer bound under international law to treat the belligerent parties equally in terms of neutrality, and the protection of human rights and dignity of the population in the attacked state takes precedence. Accordingly, the aggressor cannot demand compliance with obligations of neutrality. Participation in collective self-defence is not mandatory, but it is permitted even for neutral states in the case of war of aggression.

It may be argued that under the current erosion, even denial of international law under the US Trump Administration, the Russian aggression and open claims by China on the South China Sea and Taiwan, fundamental principles of the UN no longer apply and give way to power politics which no longer require to respect the rights and obligations of the Charter. For Switzerland, and many other median and small countries, this is not an option. They depend upon compliance with international law and need to defend the international rule-based order. The more so, it is important to take UN law seriously and avoid contributing to its decline by continued practices undermining the prohibition of use of force.

C. Qualified Neutrality

Qualified neutrality necessarily follows from the prohibition of force. The fundamental difference between neutral and *non-belligerent* states disappears. This is particularly important for permanently neutral states such as Switzerland, which cannot adjust their status depending on the conflict situation. Both can choose to side with the victim in matters of war materials in order to contribute to restoring the legitimate order, protecting the civilian population, the right to self-determination and the territorial integrity of the victim, and to contribute to a just peace. This is in line with the constitutional objectives of Swiss foreign policy as set out in Article 54(2) of the Federal Constitution. It is also consistent with the principles of the 2013 Arms Trade Treaty.

According to Manuel Rodriguez, qualified neutrality can be traced back to the period after the First World War.⁵⁷ It can already be found in the

57 Manuel Rodriguez, Das Neutralitätsrecht und das umfassende Gewaltverbot gemäss Art. 2 Abs. 4 UNO-Charta (The right to neutrality and the comprehensive prohibition of violence under Article 2(4) of the UN Charter), Library of the Journal of Swiss Law, Supplement 65, Basel: Helbling und Lichtenhahn 2024, pp. 45-49, see also René Rhinow, Friedensneutralität – ein Konzept für die Zukunft (Peaceful neutrality – a

Budapest Articles of Interpretation of 1928 on the prohibition of violence in the Brian-Kellogg Pact, to which Switzerland is also a signatory and which, like the Hague Conventions, is still in force.⁵⁸ It can be found in Art. 10 of the 1939 *Draft Convention on Rights and Duties of States in Case of Aggression*: "By becoming a supporting State, a State acquires the right to discriminate against the aggressor, but it may not do any act to the detriment of States other than the aggressor unless such act would be lawful if done by a defending or co-defending State. Against an aggressor, a supporting State has the rights, if it were neutral, it would have against a belligerent."⁵⁹ The aggressor can no longer invoke the right to neutrality. In the literature, unequal treatment is justified by reference to *bellum justum*.⁶⁰ Michael N. Schmitt and the Research Service of the German Bundestag argue that even neutral states should be allowed to supply war material to the attacked state.⁶¹

The manifesto for Neutrality²¹⁶² as well as the contributions of its authors, namely Markus Mohler's contribution in this volume support qualified neutrality.⁶³ In his study, Manuel Rodriguez concludes that states have

concept for the future), in: *ibid*, Plädoyer für eine offene Schweiz: Im Gespräch mit Nadine Jörgensen und Roger de Weck 37-107, at 71 (Zurich: Hier und Jetzt 2025).

- 58 Budapest Articles of Interpretation, International Law Association (ILA), London 1934, Manuel Rodriguez, (note 57) at p. 47.
- 59 Draft Convention on the Rights and Duties of States in Case of Aggression, The American Journal of International Law, Vol. 33, No. 1, Supplement: Research in International Law (1939), pp. 827-830, Manuel Rodriguez *id* at p. 47.
- 60 References in Manuel Rodriguez, *id.* at p. 45 notes 228-230, 277/278 and Andrian R. Schaub, Neutralität und kollektive Sicherheit: Gegenüberstellung zweier unvereinbarer Verhaltenskonzepte in bewaffneten Konflikten und Thesen zu einem zeitgemässen *modus vivendi* (Neutrality and Collective Security: Comparison of two incompatible concepts of conduct in armed conflicts and theses on a contemporary *modus vivendi*), Basel Frankfurt am Main 1995; Alexander Spring, The international law concept of neutrality in the 21st Century: An analysis of contemporary neutrality with a focus on Switzerland, St. Gallen 2014.
- 61 US Congressional Research Service, International Neutrality Law and U.S. Military Assistance to Ukraine, LSB 10735, 2022 pp. 2-3; Research Service of the German Bundestag, Military Support for Ukraine: When We Become a Party to the Conflict, WD 2-3000-023/23, 2023, pp. 13-14, cited from Evelyn Schmid, *op. cit.* (note 51), p. 1058.
- 62 Manifest: Eine Neutralität für das 21. Jahrhundert (Manifesto: Neutrality for the 21st Century), 29 May 2024.
- 63 Markus Mohler, The Swiss combination of neutrality policy and neutrality law – An analysis based on the example of Russia's war of aggression against Ukraine and the relationship between neutrality and international humanitarian law, in this volume

no right to invoke the principle of impartiality as binding international law vis-à-vis neutral states in cases of violations of the prohibition of violence, and clearly advocates the primacy of Article 2(4) of the UN Charter.⁶⁴ In their report to the Swiss Lawyers' Day 2025, Astrid Epiney, David Kläui and Sophie Dukram advocate a qualification of neutrality, limited to cases of violation of Article 2(4) of the UN Charter.⁶⁵ They largely agree with the view expressed here. The report of the Study Commission on Security Policy of August 2024 states that the application of neutrality is no longer effective under current circumstances and that the policy of neutrality must be adapted; a majority of the commission calls for a stronger alignment with the UN-Charter but paradoxically does not question the principle of equal treatment. The commission recommends adjusting the criteria of the War Materials Act (KMG) to give the Federal Council more leeway. It advocates a longer-term and far-reaching revision of the legislation.⁶⁶ Finally, qualified neutrality is also supported by international relations scholarship which stresses the importance of flexibility of neutrality which the binary approach excludes.⁶⁷

pp. 87-144; *ibid.*, Neutralität mit Verfalldatum bei Kriegsmaterial?, (Neutrality with an expiry date for war materials?), in: Jusletter 3 March 2025.

64 Manuel Rodriguez, *op. cit.* (note 57), pp. 50, 65–68.

65 Astrid Epiney, David Kläui David, Sophie Dukarm, Die Neutralität der Schweiz – status quo und Perspektiven, *Zeitschrift für schweizerisches Recht*, Band 144 (2025) II p. 5 ss at 12: "even a permanently neutral state such as Switzerland must be permitted, in an exceptional situation in which a state violates the prohibition of violence in a massive and systematic manner and this is recognised by the international community, to waive its obligations under the law of neutrality in relation to a specific international armed conflict, provided that it gives appropriate notice of this." (author's translation). But see Odile Ammann, *Quel futur pour la neutralité suisse?*, *Zeitschrift für schweizerisches Recht*, Band 144 (2025) II p. 95 ss. para IV(1). She does not consider the concept of qualified neutrality to be applicable law.

66 Bericht der Studienkommission Sicherheitspolitik (Report of the Study Commission on Security Policy), paras. 22.1 and 2.2.2, Bern 2024.

67 See Pascal Lottaz, The Future of Neutrality, GCSP Policy Brief No. 4 (March 2023). The author specialised in the study of neutrality recognises the difficulties of it, but also its usefulness as long as warfare and conflict among States is a reality. It is mainly of interest to the Global South, today. Navigating neutrality policies requires adaptability and flexibility, and he concludes: "*Engaged neutrality*, as historian Heinz Gärtner points out, means "getting involved as much as possible and remaining on the sidelines as little as necessary" for the sake of international conflict mitigation and mediation. Overall, an internationalist neutral approach is a way to avoid the accusation of lack of solidarity and give back to the world community." (footnote omitted).

D. Direct Effect of International Law

In Switzerland, the Federal Council, Parliament and authorities in practice can directly apply UN law to the export of war material. Switzerland has a monistic legal system, and Article 5(4) of the Federal Constitution requires the Confederation and the cantons to comply with international law.⁶⁸ It takes precedence over statutory law in the event of conflicts between norms. UN law therefore already allows the authorities to deviate from the strict prohibition of Art. 22a War Material Act (KMG) in the event of wars of aggression and to directly apply and exploit the scope for manoeuvre under international law within the framework of the principles of the Arms Trade Treaty.

It will be argued that this is not possible as long as an absolute ban is enshrined in Article 22a of the War Materials Act (KMG) in the event of international conflicts, because international law does not require support for the party under attack and whose existence is threatened, but only makes it possible. This view negates the constitutional requirement to take international law into account in accordance with Article 5(4) of the Federal Constitution and the aforementioned conflict of norms. In order to resolve this conflict under Article 103 UN Charter and to avoid indirectly supporting the aggressor, it is possible to deviate from the absolute ban under national law and to supply war materials to the attacked state. A courageous government can do this by invoking the prohibition of force under international law and the Arms Trade Treaty. The Ukraine Regulation could allow deliveries of war material to Ukraine and at the same time prohibit them to Russia. If, for reasons of political expediency, one wishes to continue to refrain from providing support with war material, the indirect support of the aggressor would have to be compensated for by other measures in the

68 For a detailed discussion of the relationship between international law and national law in Switzerland and the possibility of direct application of international law, see Daniel Wüger, *Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht: Grundlagen, Methoden und Kriterien* (Applicability and Justiciability of International Law Norms in Swiss Law: Foundations, Methods and Criteria) Bern: Stämpfli 2005, Thomas Cottier, Alberto Ackermann, Daniel Wüger and Valentin Zellweger, *der Staatsvertrag im schweizerischen Verfassungsrecht*, Bern (The Status of international treaties in Swiss constitutional law): Stämpfli 2001; Thomas Cottier and Maja Hertig-Randall, *Das Völkerrecht in der neuen Bundesverfassung* (International law and the Swiss constitution), in: Ulrich Zimmerli (ed.), *Die neue Bundesverfassung: Konsequenzen für Praxis und Wissenschaft* (Bern: Stämpfli 2000) pp. 1-24.

civilian sphere, so that the result is effective support that implements the goals of the United Nations and also one's own constitutional principles and actively supports the attacked state. Another possibility would be joint humanitarian engagement by neutral countries in the combat zone within the framework of *the Responsibility to Protect* (R2P).⁶⁹

E. Consistent Interpretation

All domestic law must be construed, to the utmost extent possible, in line with international law. The principle of consistent interpretation fully applies in Switzerland.⁷⁰ As to re-exportation, interpretation of the War Materials Act consistently with international law solves the problem. Firstly, re-export is not at all covered by neutrality law and the Hague Conventions, except in cases of circumvention and abuse of rights (so-called *voyage continue*) in the context of export. Switzerland's negative practice therefore cannot be justified on the basis of neutrality law and the principle of equal treatment. Secondly, the prohibition of violence and collective self-defence clearly argue in favour of transferring goods to the attacked state. Thirdly, unlike actual exports under current law, there is no legal prohibition. Applying the same criteria of Art. 22(a) War Materials Act (KMG) to assess exports and re-exports from abroad fails to recognise the fundamental difference between export and re-export in practice. Whereas exports from Switzerland involve a purchase and transfer of ownership, this has long since taken place in the case of re-exports. The material is owned by the third country, which is free to dispose of it as it sees fit.

69 The relationship between neutrality and R2P has hardly been explored, cf. Peter Hilpold (ed.), *The Responsibility to Protect (R2P): A New Paradigm of International Law?* Leiden/Boston: Martinus Nijhoff 2014; Sonja Grover (ed.), *The Responsibility to Protect: Perspectives on the concept's meaning, proper application and value*, 2nd ed. (London: Routledge 2025), Efforts by the author to take up this idea at the beginning of the war in Ukraine in the context of the evacuation of civilians met with interest in the Foreign Ministry, but remained without consequence. The Swiss Army is not equipped or prepared for such operations.

70 The leading case of the Supreme Court is BGE 94 I 670, 678 E. 6 *Frigerio v. Federal Department of Transport and Energy* (1968). "In case of doubt, domestic law must be interpreted in accordance with international law, i.e. in such a way that there is no conflict with international law. This rule of interpretation makes it possible to avoid conflicts between the two legal systems in most cases. [...] The Federal Council basically comes to the same conclusion when it states that, in the event of contradictions, international treaties generally take precedence over national legislation. [...]" (author's translation and references omitted).

The provision of Art.18 War Materials Act (KMG) allows re-exports to be treated as a separate institution and, on the basis of enquiries, to be assessed on a case-by-case basis, taking into account the constitutional objectives of foreign policy and the criteria of international law set out in the Arms Trade Treaty and the prohibition of the use of force under international law, and to be approved if necessary.⁷¹ Article 5a of the Ordinance on war materials (KMV) expressly stipulates that the country of destination undertakes *not* to export the war material *without the consent of the licensing authority*, which obviously implies the possibility of subsequent exemptions.⁷² Article 11 of the Arms Trade Treaty requires Member States to take appropriate control measures to prevent diversion and to cooperate internationally. The verification of the parties, additional evidence, certificates and assurances are considered appropriate. The treaty does not provide for any general exceptions but assumes that the verification will be carried out on a case-by-case basis. Neither is a general ban on re-exportation provided for, nor can individual states be completely exempted from verification. A general waiver of the re-export ban is not compatible with Article 11 of the Treaty. Neither a waiver nor a time limit serves the legitimate goal of preventing war material from falling into the wrong hands.

Switzerland can regulate the issue of re-export largely independently and decide on applications for re-export, preferably on a case-by-case basis on the basis of the current law and ordinance. These allow, upon request, the suspension of requirements and conditions that were imposed in advance and as part of the authorisation. The administration can revisit an administrative act at any time if the circumstances have changed. The Federal Council can therefore adapt its practice to UN law immediately and without amending the law. It can examine applications in accordance with the criteria of the Arms Trade Treaty and on the basis of Article 54(2) of the Federal Constitution. It is not bound by the narrow criteria of the export ban in Article 22a of the War Materials Act. Regardless of the conflict situation, the assessment is not bound by the principle of equal treatment under neutrality law because, as explained above, this does not cover re-exports. If the transfer continues to be refused, this corresponds to a foreign policy that understands neutrality in absolute and broad terms

71 For more details, see Thomas Cottier, Die Wiederausfuhr von Kriegsmaterial: Die Zeit ist reif für eine Praxisänderung (The re-export of war material: The time is ripe for a change in practice), (11.3.25/6.8.25); René Rhinow shares this view loc. cit. (note 57), pp. 80-82.

72 Ordinance on War Materiel of 25 February 1998 (KMV), SR 514.511.

and gives priority to other interests, namely economic relations with the aggressor and its allied states. Under UN law, the neutral state can no longer hide behind its policy of neutrality and the requirement of equal treatment of the belligerent parties.

With the return of *justum bellum*, the just war in defence against an aggressor, the neutral stance contradicts today's ideas of justice. In the case of wars of aggression, this can be achieved not only through the direct application of international law and an interpretation in accordance with international law, but also domestically through recourse to the principle of legal equality (treating equal equally and unequal unequally) and equity, which can also be applied in domestic law as an implicit exception, either *infra* or even *contra legem*.⁷³

F. Allocation of Powers

From a constitutional law perspective, the only question that arises is who should make decisions on deviations from neutrality. Is it the government, parliament or the departments (ministries) of the federal administration? Whether a war of aggression is taking place must be decided jointly by the government and parliament under Article 173 and 185 of the Federal Constitution, considering United Nations decisions and resolutions. This will often be controversial and must be decided by majority vote. Decisions on individual export applications can only be made on a case-by-case basis, considering the overall context and the aforementioned objectives and criteria of the Arms Trade Treaty. This clearly is not a matter for the legislature, but for the government, the administration and the courts.⁷⁴ Only they can ensure justice in individual cases. The law should define the competences accordingly. Current efforts are a long way from achieving this.

73 For a detailed discussion of the principle of equity in international law, see Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: the Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press 2015; Catherine Titi, *The Functions of Equity in International Law* (Oxford: Oxford University Press 2021).

74 On suitability as a criterion for assigning regulatory powers, see Thomas Cottier, *Das Erfordernis der gesetzlichen Grundlage*, 2nd expanded edition, Chur/Zurich: Ruegger 1991.

VI. Efforts at Revision

It goes without saying that all this is politically very controversial, as it calls into question the traditional static understanding of Switzerland's deeply rooted policy of neutrality which goes way beyond the right to neutrality. It primarily serves foreign economic relations, attaching little importance to justice, morality and ethics and hiding behind an alleged *raison d'état* and the provision of good offices.⁷⁵ Both the neutrality initiative and the counterproposal of the Council of States (abolished in the mean-time) primarily serve this purpose and prevent flexible handling of neutrality under constitutional law. In view of the ideological trench warfare over neutrality, it is imperative to address the scope for manoeuvre under international law and to express this in domestic law. Efforts made so far by Parliament and the Government have failed to do so.

A. Re-exportation of War Materials

Since the outbreak of war in Europe, the ban on the re-export of war material has been met with incomprehension abroad and has triggered widespread debate at home. The situation is widely regarded as unsatisfactory. It seriously undermines the legitimacy of Switzerland's policy of neutrality. The two Chambers of Parliament have attempted to revise the rules on re-exportation with the intention of not leaving the government with too much discretion. Negotiations in the parliamentary committees proved extremely difficult. This did not help Ukraine in the first four years of the war, and there is no way around calling this a political failure.⁷⁶ Under discussion were a self-defence reservation and a time-limit solution, according to which like-minded states could decide on the transfer after five years without Switzerland's involvement. It was believed that this would allow questions of neutrality law to be avoided, but as explained above,

75 On the relationship between neutrality and morality, see Dietrich Schindler, *Neutrality and Morality: Developments in Switzerland and in the International Community*, *American University International Law Review* vol. 14 (1998) pp. 155-177, in: *Anthology of Swiss Legal Culture*.

76 For details on the individual proposals, see Markus Mohler, loc. cit. (note 63), section V, and Markus Mohler, *Neutralität mit Verfalldatum bei Kriegsmaterial?* (Neutrality with an expiry date for war material?), loc. cit. (note 63). Markus Mohler proposes instead a legal definition of international conflicts in Art. 22a KMG, subject to the prohibition of violence in Art. 2(4) of the UN Charter.

it fails to recognise that, contrary to the prevailing interpretation under the Hague Convention, re-export is not covered at all and there are no obligations under neutrality law. It was also examined whether certain states listed in the ordinance could be generally exempted from the transfer ban without ensuring that they all meet the requirements of the rule of law. A proposal that re-exportation could only be granted on the basis of UN Security Council decisions or General Assembly resolutions condemning an attack by a two-thirds majority was examined and rightly so rejected. The proposal failed to recognise that, as explained above, support for a state under attack is an autonomous decision and cannot be made dependent on UN decisions. Furthermore, it is by no means certain that two-thirds of the UN General Assembly's decisions will be in line with Switzerland's interests in the future. At the end of 2025, proposals were ultimately adopted in parliamentary deliberations that lift the ban on re-export in Art. 18 KMG, but grant the government the right to demand a ban "if this is necessary for reasons of foreign, neutrality or security policy".⁷⁷ In the opinion of the legislator, such reference to the policy of neutrality means that the transfer of war material to Ukraine will continue to be prohibited, even though such transfers are not covered by the law on neutrality. The reservation of neutrality policy is highly unsatisfactory. It neither provides legal certainty for potential buyers of Swiss military equipment nor does it justice to legitimate self-defence and collective self-defence and thus to UN law. It hardly does justice to the control mechanisms required by Article 11 of the Arms Trade Treaty. The efforts of the legislature demonstrate the difficulties associated with an extensive and deeply enshrined understanding of neutrality and equal treatment of belligerents. The application of the current regulation and the new regulation, which is subject to an optional referendum, both fall within the scope of an excessive policy of neutrality and do not make full use of the scope available under international law. It is better to resolve the issue on a case-by-case basis by means of exemption orders, as outlined above, on the basis of the current law.

77 25.024. 25.024. s Kriegsmaterialgesetz (Aufnahme einer Abweichungskompetenz für den Bundesrat). Aenderung. (War Materials Act (inclusion of a derogation power for the Federal Council)). Amendment.

B. The Exportation of War Materials

In view of the increasing isolation of the Swiss arms industry due to restrictive export regulations and the cautious approach of the authorities, the Federal Council submitted a legislative amendment to Parliament in February 2025 which suggested to relax the strict requirements of Art. 22a of the War Materials Act and to allow exceptions in exceptional circumstances or when required to safeguard foreign and security policy interests.⁷⁸ This would be accompanied by immediate information requirements and a limitation to four years with the possibility of a one-time extension. It would expire if the Federal Council did not submit a draft amendment to the authorisation criteria by that time. The re-export of war material was not addressed. As a result, the bill sought to restore the flexibility that had previously existed. The Federal Council's revision was intended as a temporary relief and aimed at a further revision of the law, which was to be more closely aligned with the authorisation criteria of the EU and the Arms Trade Treaty. However, it continued to assume that the right of neutrality prohibits the supply of war material to belligerent parties and, unlike the parliamentary work on the re-export of war material, made no reference at all to the influence of Article 2(4) of the UN Charter and the implications of collective self-defence. The provisions of the Arms Trade Treaty therefore were not being sufficiently considered.

In its amendment at the end of 2025, which is subject to an optional referendum, Parliament went far beyond this proposal. It exempted a group of 25 mostly Western states and members of NATO from the requirement to examine exports of war material on a case-by-case basis in Article 22a of the Arms Trade Act. It allows deliveries to these countries even during internal and international conflicts. The government may then also grant exemptions to other countries in accordance with Article 22(b) of the War Materials Act. However, all exports are subject to Switzerland's security, neutrality and foreign policy interests. The government can therefore prohibit exports at its own discretion. Here too, the amendment fails to achieve the goal of sufficient legal certainty in the trade of war materials. Contrary to rejected minority motions, suggesting a carve in case of aggressions

78 Botschaft zur Änderung des Kriegsmaterialgesetzes (Aufnahme einer Abweichungskompetenz für den Bundesrat) (Message on the amendment to the War Materials Act) (inclusion of a derogation power for the Federal Council) of 12 February 2025, BBl 2025 650.

proposed by Markus Mohler⁷⁹, the bill is not at all based on the prohibition of force and concerns of legitimate self-defence and collective self-defence under UN law. It does not change the constraints of the prevailing understanding of neutrality and even reinforces them, as the bill is not based on neutrality law but on a broad and undefined neutrality policy. This will not satisfy Switzerland's European partners and jeopardises Switzerland's participation in European armament programmes. By excluding Ukraine, it shamefully fails to live up to the claim of defending freedom, democracy and the rule of law in a wise and forward-looking manner. At the same time as the amendment was passed, the outgoing head of the Swiss Armed Forces, Corps Commander Stüssli, officially stated on 4 December 2025: "We are already in a hybrid war with Russia."⁸⁰ The contradiction and obvious inconsistency of new war material legislation geared towards a policy of neutrality could not be more clearly expressed. The amendment was strongly influenced by the pending and pro-Russian neutrality initiative of the Swiss People's Party. If this is rejected, the War Materials Act must also be thoroughly revised and placed on a new footing.

VII. Prospects

A. Focus on Human Rights, Democracy and the Rule of Law

In the longer term, the revision of the law on war materials must aim to completely separate the criteria for the export of war material from considerations of neutrality law and place them on an independent footing in the service of Switzerland's security and foreign policy interests, including the strengthening of human rights, democracy and the rule of law, as called for in the *Manifesto for Neutrality*²¹.⁸¹ These and other criteria should be used to determine whether war material and services may be supplied to a foreign government in times of relative peace, but also in times of war.

⁷⁹ Loc. cit. (note 63).

⁸⁰ SRF Tagesschau, 2 December 2025.

⁸¹ Loc. cit. (note 62) Point 10: "Switzerland is amending the War Material Act. The export of war material is to be re-regulated in light of Switzerland's security and foreign policy interests. The structure of arms exports is autonomous. It is not determined by neutrality." (author's translation).

It is therefore advisable to base any future, longer-term revision primarily on the criteria of the Arms Trade Treaty.⁸² Unlike the current Swiss legislation, this treaty does not assume that the use of weapons always threatens peace and human rights but also recognises that they can be used to protect these values. The liberation of Europe in the Second World War says it all. Both must be examined and weighed up on a case-by-case basis. The treaty formulates its criteria accordingly and requires that decisions be made on the basis of an assessment of the specific effects.

Article 7 of the Arms Trade Treaty requires that an export application be examined to determine whether the conventional arms or goods

- a) would contribute to or undermine peace and security;
- b) could be used to:
 - i) commit or facilitate a serious violation of international humanitarian law;
 - ii) commit or facilitate a serious violation of international human rights law;
 - iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
 - iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

These criteria and considerations (reproduced in full text) focus on whether the war material serves peace and peace efforts in accordance with the principle of *si vis pacem para bellum*. They provide for a series of criteria that are essentially geared towards the protection of human rights and exclude deliveries where these are seriously endangered under certain agreements. No distinction is made between war and peace. Ultimately, however, they are based on the prohibition of force in the UN Charter and exclude assessments based on neutrality and equal treatment of the belligerent parties. The only thing that matters is the purpose for which the equipment is to be used by a destination country. It cannot be made dependent on the intentions of another belligerent party. The assessment criteria are no longer based on neutrality. Exports should primarily be refused in cases where there is a threat of serious violations of human rights, humanitarian law and international criminal law. These considerations are

82 Loc. cit. (note 29).

not exhaustive. States can also protect their own values in war material law. This also applies to the EU, Switzerland, Austria and Ireland, namely to constitutional democracy, which is not enshrined in international law and coexists with other forms of government. Their protection is therefore not mentioned in the Arms Trade Treaty and must be supplemented in Switzerland by the constitutional objectives of Art. 54(2) of the Federal Constitution.

VIII. Uniform Legislation

The reservation in Article 2(4) and 51 of the UN Charter, as well as the orientation of legislation towards peace, the protection of human rights and constitutional democracy in accordance with the constitutional objectives of Article 54(2) of the Federal Constitution, are not yet sufficient to create a framework that allows for close cooperation within international supply chains in the manufacture of military equipment with sufficient legal certainty. It is essential to recognise that, as explained above, the distinction between war materials and *dual-use* goods and services is increasingly being blurred. Goods that are subject to free trade or fall under the current Goods Control Act rather than War Materials Act are increasingly decisive in warfare. The use of drones is a good example. They serve both civilian and military purposes and today shape the face of modern warfare. The same applies to information technology which is of central importance for intelligence gathering and precise fire control. GPS serves both military and civilian purposes. Cognitive artificial intelligence completely blurs the line between civilian and military applications. The big challenge is to distinguish between technologies that are relevant to security policy and those that need to be widely accessible as *a common concern of humankind* in order to solve global challenges, particularly in the areas of health, climate change and the protection of biodiversity.⁸³ The example of semiconductors shows how difficult such distinctions are and how, as mentioned above,

83 See Thomas Cottier, Technology Diffusion in the Triangle of China, the West and Developing Countries: The Contribution of Common Concerns of Humankind, in: Henry Gao, Damien Raess, Ka Zeng (eds.), *China and the WTO: A Twenty-Year Assessment*, Cambridge: Cambridge University Press 2023, pp. 514–533. The theory of common concern is developed in Thomas Cottier and Zaker Ahmad (eds.) *The Prospects of Common Concern of Humankind in International Law* (Cambridge: Cambridge University Press 2021).

they now lead to large areas of trade being approached from a security perspective, with corresponding export restrictions covering both civilian and military applications. These issues must be addressed within the framework of the WTO and primarily concern the rules governing technical barriers to trade and intellectual property rights. New approaches must be developed that can do justice to the new complexity in licensing procedures and cooperation without national security interests superseding the rules. The existing separation between civilian and military goods is largely outdated – and with it the question of neutrality. The question arises as to whether it would not be better to create a uniform regime and framework. The Goods Control Act, based on the non-proliferation of nuclear weapons, is founded on international agreements and implements them. Unlike war materials legislation, questions of neutrality have not arisen here so far. This is largely due to the primacy of international agreements. They allow restrictions under neutrality law and, above all, of neutrality policy only to the extent provided for. With the Arms Trade Treaty, this restriction also applies to war materials in the narrower sense and, together with other treaties, creates the basis in international law for a uniform control system for *dual-use* goods and military goods in a comprehensive legislation regulating export restrictions. This includes special criteria for conventional war materials within the meaning of the Arms Trade Treaty.

IX. Defence Cooperation of Neutrals within Europe

Trade in war materials is only one aspect of neutrality. It goes hand in hand with the issue of national defence, collective security and future cooperation of neutrals with and within the EU and with NATO. It cannot be considered in isolation. Without cooperation in the field of armaments, cooperation and interoperability between armed forces is impossible. The prohibition of aggression under neutrality law is obsolete and is now part of general international law. Neutrality creates no added value here, nor does it create any additional problems. These lie elsewhere. As long as comprehensive neutrality is primarily about staying in business with everyone, regardless of their political persuasion, or about reputation, the interests of effective national defence and the preservation of independence in association with like-minded states and allies will have a difficult time. Much is already gained by reducing neutrality in matters of war materials

to its legal core and placing it under the reservation of UN law, thereby removing the extensions and self-imposed barriers of integral neutrality, as is currently practised in Switzerland even with regard to re-export. This will enable neutral states to contribute to and participate in the necessary and increasing cooperation in arms procurement within the European Defence Agency, SAFE and PESCO, and to assert their position. However, closer cooperation with the EU and the EEA within the framework of Regulation 2023/2418⁸⁴ will not be possible without abandoning neutrality in Europe in the field of war materials, as the mutual supply of material, components, services and know-how must be ensured even in times of open conflict.

No country today is in a position to secure the procurement of armaments autonomously. This applies even to the USA and China. It also applies in Europe to both EU member states and non-members. And it also applies to neutral states such as Switzerland, whose armaments industry is specialised and internationally oriented, but by no means covers the entire spectrum of army stocks. The national procurement market is regularly too small and unable to produce cost-effectively for the domestic market and its own army alone. Added to this is cost pressure, particularly in periods of necessary rearmament. Arms procurement places a strain on the national budget and is at the expense of other tasks. This is particularly true when targets of 3.5% (5% including infrastructure expenditure) of GNP are set, as was decided for NATO on 25 June 2025 (against Spain's will). Neutral Switzerland is struggling to reach a target of 1% of GNP. Parliament has not been prepared to relax the debt brake and wants to continue to cover all military expenditure within the ordinary budget. This necessarily comes at the expense of other government tasks and triggers unnecessary resistance to the army and its rearmament. In Switzerland, one cannot help but get the impression that many politicians are secretly continuing to rely on the armament of neighbouring countries and want to continue to ride on Europe's coattails. This is not sustainable and seriously jeopardises sovereignty and national defence. With such an attitude, solidarity and support from Europe and NATO cannot be expected in the event of a crisis.

All of this argues in favour of Europe tackling arms procurement jointly and moving away from the tradition of nation states in matters of defence. The situation is not fundamentally different from the civilian economy, which functions on the basis of international trade in accordance with

84 Loc. cit. (note 31).

comparative advantage and thus achieves the most cost-effective welfare effects. Of course, this is not about free trade. Rather, it is about creating a common legal framework for the manufacture and export of armaments and corresponding licensing procedures for war material and *dual-use* goods, so that the supply and interoperability of the armed forces can be ensured in times of peace and war. In Europe, this is primarily a task for the European Union within the framework of its trade, security and foreign policy objectives. As outlined above, efforts to coordinate arms procurement are already underway. However, this is a task that must also include non-member states of the Union from the outset. This applies in particular to the United Kingdom, Norway and Canada as members of NATO. But it also applies to Switzerland. The modalities are open. The Schengen model, in which both member states and non-member states can participate, offers a model of variable geometry.⁸⁵ It can then serve as a common platform for cooperation within NATO with the United States and Turkey, the two other main pillars of the alliance.

Cooperation agreements must address the issue of neutrality with regard to the neutral countries in Europe. It is obvious that the principle of equal treatment of the belligerent parties can no longer apply here. The reservation in Articles 2(4) and 51 of the UN Charter and the joint recourse to the UN Arms Trade Treaty remedy this situation, but do not regulate hybrid situations where there is no open attack. Here, too, there is no longer any place for equal treatment of the belligerent parties. Rather, there must be an obligation of continued and reliable support and cooperation among Member States in the field of armaments, based on UN and EU criteria and moving away from neutrality in the European context. Mutual support in the supply of provisions and services must be ensured in all situations.

A plurilateral agreement such as Schengen would render the obsolete and outdated Hague Protocols between member states null and void. The new law would supersede the old law. For this reason, national conservative circles in Switzerland will certainly oppose closer cooperation at the expense of neutrality. But this would be at the expense of a well-prepared and cost-effective army. The latter cannot be achieved without close cooperation

85 On the development of the Schengen Agreements from variable geometry to integration into the EU, see Astrid Epiney, *Der Freie Personenverkehr und seine Folgen* (The free movement of persons and its consequences), in: Erhard Buseck, Waldemar Hummer (eds.), *Etappen auf dem Weg zu einer europäischen Verfassung*, (Vienna/Cologne/Weimar: Böhlau Verlag 2004) pp. 514-533.

in the field of armaments. A choice must be made between autonomy, national sovereignty or security and cooperative sovereignty.⁸⁶ National sovereignty alone can no longer guarantee security. Instead, international cooperation is wanted to protect national sovereignty. Anyone who wants to enshrine neutrality as a principle in the constitution today and at the same time demands a strong and affordable national defence is caught up in contradictions. Rather, the focus today and tomorrow must be on placing arms procurement and cooperation at the service of democracy, the rule of law and the protection of human rights in the confrontation with autocracies, oligarchies, dictatorships and theocracies, and on ensuring sufficient strategic autonomy in Europe.

In a sense, this orientation must be the successor to Switzerland's neutrality, whose original purpose was to assert the young democracy against neighbouring monarchies and dictatorships. The associated cooperation within the confederation and the gradual establishment of a joint army of the cantons within the confederation must now be continued in light of the geopolitical challenges facing European cooperation. It builds on Switzerland's economic relations and agreements with the European Union⁸⁷ and extends cooperation to the area of security policy.

On 25 June 2025, the Federal Council announced its intention to cooperate more closely with the EU on arms procurement within the framework of a defence community. It assumes that this is compatible with neutrality.⁸⁸ This is only possible if neutrality is understood in a qualified sense and clearly waives the requirement of equal treatment of the belligerent parties. It will be necessary to restrict neutrality by agreements within Europe.

86 Thomas Cottier and André Holenstein, *Die Souveränität der Schweiz in Europa: Mythen, Realitäten und Wandel* (The sovereignty of Switzerland in Europe: myths, realities and mutation), Bern: Stämpfli 2021.

87 See Matthias Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (Switzerland – European Union: Fundamentals, Bilateral Agreements, Autonomous Implementation) 2nd edition, Zurich: EIZ Publishing 2024. Negotiations for a third generation of bilateral agreements were concluded at the end of 2024 and the agreements are now available, FDFA: Switzerland-EU package: The Federal Council approves the agreements and opens the consultation process, press release dated 13 June 2025. The submission of the treaties to Parliament for approval took place on 13 March 2026, *Botschaft über das Paket «Stabilisierung und Weiterentwicklung der Beziehungen Schweiz–EU (Bilaterale III)»*.

88 *Sicherheits- und Verteidigungspartnerschaft: Bundesrat will Sondierungsgespräche mit der EU* (Security and defence partnership: Federal Council wants exploratory talks with the EU), press release dated 25 June 2025.

Austria's experience as an EU member shows that this is already the case today.⁸⁹ Neutrality may continue to exist in relation to other continents and third countries. Subject to UN law and treaty provisions, member states can determine to which third countries they want to supply goods and war material and to which they do not. National laws apply. The extent to which the export regime will also be harmonised and standardised vis-à-vis third countries is, as in the case of the internal market and common trade policy, a question of time. It will be closely linked to the establishment of European armed forces and common foreign policy subject to majority voting in the EU. Separate from this is the question of whether this also applies in the area of collective defence and the obligation to collective self-defence, as provided for in Article 5 of the NATO Treaty. Abandoning neutrality in the area of European arms procurement does not necessarily entail joining a collective defence alliance. The two are independent of each other and can be approached in stages. Joint arms procurement with the EU and the Member States must be the first step and will form part of the next generation of bilateral treaties with a focus on resilience and security in an increasingly uncertain world.

Selected Bibliography

- Ammann Odile, Quel futur pour la neutralité suisse?, *Zeitschrift für schweizerisches Recht*, Band 144 (2025) II p. 95 ss.
- Cottier Thomas, Oesch Matthias, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland* (Bern/London: Stämpfli und Cameron May 2005).
- Cottier Thomas, Sicherheitspolitische Herausforderungen der Schweiz in Europa, in: Astrid Epiney/Sarah Progin-Theuerkauf/Flaminia Dahinden/Sophie Dukarm (Hrsg.), *Schweizerisches Jahrbuch für Europarecht (SJER) 2023/2024*, Zürich/Bern 2024, p. 421 ss.
- Dreyer John, Jesse Neal G., Swiss Neutrality Examined: Model, Exceptions or Both? 15 *Journal of Military and Strategic Studies*, Issue 3 (2014).
- Epiney Astrid, Kläui David, Dukarm Sophie, Die Neutralität der Schweiz – status quo und Perspektiven, *Zeitschrift für schweizerisches Recht*, Band 144 (2025) II p. 5 ss.

89 See Ralph Jank, Neutralität und Selbstverteidigung: Russlands Angriff zwischen Recht und Moral (Neutrality and Self-Defence: Russia's Attack between Law and Morality), *Juridikum* 1/2023, p. 48 ff, 53, On the effects of EU membership on Austria's neutrality, see Peter Hilpold, loc. cit. (note 32).

- Holzer Patrick Edgar, Das Güterkontrollgesetz, in: Thomas Cottier und Matthias Oesch, Allgemeines Aussenwirtschafts- und Binnenmarktrecht, Schweizerisches Bundesverwaltungsrecht Bd. XI, 3. Auflage (Helbling und Lichtenhahn, Basel 2020), p. 147 ss.
- Hilpold, Peter, The right to neutrality at a crossroads: The situation of Austria and Switzerland from the perspective of international law, European law and constitutional law, in this volume pp. 17-66.
- Jank Ralph S., Neutralität und Selbstverteidigung: Russlands Angriff zwischen Recht und Moral, *Juridikum* 1/2023, p. 48 ss.
- Jorio Marco, Die Schweiz und ihre Neutralität – eine 400-jährige Geschichte (Zürich: Hier und Jetzt 2023).
- Lauterpacht Hersch, Rules of Warfare in an Unlawful War, in: George A. Lipsky (Hrsg.), *Law and Politics in the World Community*, University of California Press: Berkeley/Los Angeles 1953, pp. 89 ss.
- Lottaz Pascal, The Future of Neutrality, GCSP Policy Brief No. 4 (March 2023).
- Meyer Hansjörg, Plüss Simon, Bieri Nicolas, Das Kriegsmaterialgesetz, in: Thomas Cottier und Matthias Oesch, Allgemeines Aussenwirtschafts- und Binnenmarktrecht, Schweizerisches Bundesverwaltungsrecht Bd. XI, 3. Auflage (Helbling und Lichtenhahn, Basel 2020), p. 231 ss.
- Mohler Markus, Neutralität mit Verfalldatum bei Kriegsmaterial?, in: *Jusletter* 3. März 2025.
- Rhinow René, Friedensneutralität – Ein Konzept für die Zukunft, in: ders., *Plädoyer für eine offene Schweiz: im Gespräch mit Nadine Jürgensen und Roger de Weck* (Zürich: Hier und Jetzt 2025).
- Rodriguez Manuel, Das Neutralitätsrecht und das umfassende Gewaltverbot gemäss Art. 2 Abp. 4 UNO-Charta, *Bibliothek zur Zeitschrift für Schweizerisches Recht Beiheft* 65 (Basel: Helbling und Lichtenhahn 2024).
- Schindler Dietrich, Neutrality and Morality: Developments in Switzerland and in the International Community, *American University International Law Review* vol. 14 (1998) p. 155 ss.
- Schmid Evelyne, Ausschlusskriterien für Kriegsmaterialexporte (2008-2019), *AJP/PJA* 2019 p. 1171 ss.
- Schmid Evelyne, Optional but not qualified: Neutrality, the UN Charter and humanitarian objectives, *International Review of the Red Cross* Vol. 106 (2024) p. 1044 ss.
- Wildhaber Luzius, Switzerland, Neutrality and the United Nations, *12 Malaya L. Rev.* 140 (1970).
- Wüger Daniel, *Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht: Grundlagen, Methoden und Kriterien* (Bern: Stämpfli 2005).