

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.

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Introduction

Even today, the first sentence of DANIEL Woker's article still seems to apply to some: "Everything has already been said about neutrality." So, what's the point? Another book with several articles on the same old topic – in Switzerland and (partly) Austria? Looking more precisely, however, considerable doubts appear. Yet, various political circles consider further discussion unnecessary. The "killer" argument against discussions about the substance of neutrality is that neutrality is Switzerland's so-called identity. The neutrality initiative was launched against those who doubt the meaning and legitimacy of Switzerland's current neutrality policy. A look at the new foreign literature on neutrality under international law also makes an updated overview necessary.¹

First, however, the question arises in Switzerland as to whether the term "neutrality" should be understood in its pure form, i.e. *neutrality law*, *neutrality policy*, *the understanding of neutrality*, or an *instrument of neutrality*.²

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1 For recent and contemporary debates on neutrality under international law, see Matthew Parish, *The Principle of Separation and the Law of Neutrality*, in: *International and Comparative Law Quarterly* (2025), 74, 91 ff., *passim*.

2 See the explanatory report (Erl. Ber.) on the preliminary draft (VE) of an amendment to the War Material Law (KMG, Business 23.403) of the Security Policy Committee of the National Council (SiK-N) of June 18, 2024 (https://www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/dl/proj/2024/62/cons_1/doc_5/en/pdf-a/fedlex-data-admin-ch-eli-dl-proj-2024-62-cons_1-doc_5-en-pdf-a.pdf), in the report of the Federal Council in fulfillment of Postulate 22.3385, Foreign Affairs Committee of the Council of States, April 11, 2022, *Clarity and Orientation in Neutrality Policy* (<https://www.news.admin.ch/newsd/message/attachments/73615.pdf>) (cited as *Neutrality Report 2022*) as well

And what does "pure" neutrality actually mean? Is the term synonymous with impartiality, or not? Hear nothing, see nothing, speak nothing? Or should neutrality be enriched with an adjective, such as the frequently used "permanent,"³ "armed," "cooperative," "integral," "differential," "flexible," or "agile"? This list (from the vocabulary of the federal government and related literature) demonstrates above all the enormous *uncertainty* surrounding what "neutrality" generally means and under what circumstances.⁴

"As a political concept, there is no universally accepted definition of what neutrality actually means."⁵ Swiss politics have never addressed the *fundamental* questions of neutrality [...] And this uncertainty is linked to the *unpredictability of Switzerland's neutrality policy* in the context of international law.⁶ *Predictable is only its unpredictability*, both from a domestic and foreign perspective, which has been confirmed once again in connection with Russia's aggression against Ukraine. There is an incomprehensible jumble of arguments in the political discussion in the chambers of the Swiss Parliament.⁷

as in the message on the popular initiative "Preservation of Swiss neutrality (neutrality initiative)" of November 27, 2024 (24.092, BBl 2024 3136) (cited as Botsch. N-Iv).

- 3 This is the wording of the neutrality initiative. The intellectual father of this initiative, former Federal Councilor Blocher, described those who did not share this opinion (permanent neutrality) as "stupid or idiots." Given the geopolitical situation and, among other things, the state of the Swiss army, his disqualification of those who think differently could backfire on him.
- 4 See ASTRID EPINEY/DAVID KLÄUI/SOPHIE DUKARM, Switzerland's neutrality – status quo and prospects, in: Journal of Swiss Law (ZSR), Volume 144 (2025) II (cited as Epiney et al., Neutrality 2025), 8.
- 5 PASCAL LOTTAZ/HEINZ GÄCHTER, *An expert's point of view on a current event*, in: Foreign Policy, June 6, 2023 (<https://foreignpolicy.com/2023/06/06/ukraine-russia-war-neutrality-nonalignment/>).
- 6 Report *Swiss Neutrality in Practice – Current Aspects*, Report of the interdepartmental working group of August 30, 2000 (<https://www.files.ethz.ch/isn/109736/Swiss%20Neutrality%20in%20practice%20.pdf>) (cited as Swiss Neutrality in Practice), 18 ("Discussions during the Kosovo conflict showed that the reorientation of Switzerland's neutrality practice and especially the Federal Council's 1993 report on neutrality had been insufficiently debated and understood."). This was also omitted when Switzerland joined the UN (see section II.4).
- 7 See MARKUS MOHLER, Neutrality with an expiry date for war material? Instead of this: Proposal in line with the UN Charter, in: Jusletter of March 3, 2025 (cited Neutrality), *passim*, and most recently the press release of the Security Policy Committee of the Council of States (SiK-S) of April 1, 2025 (<https://www.parlament.ch/press-releases/Pages/mm-sik-s-2025-04-01.aspx>), whose proposal is based on a regulation the War Material Law (KMOV, SR 514.511) contains a *provision* (list of countries) that is

Examining the context precisely, there are also glaring contradictions: How, for example, could *the law of neutrality* be understood in an agile way? Conversely, established law, including its interpretation, must prove itself in reality. What do these adjectives actually mean? In any case, not enough to be useful as a reasonably reliable yardstick for political decisions or to be understood abroad.

What does "armed neutrality" mean, for example? First of all, neutrality cannot be armed, but the country with an army can. What is meant by "armed"? Is the armed police force in Switzerland sufficient?⁸ Or is it an *army that is indisputably incapable of defending the country*. Less than a third of the army is equipped with operational military equipment, severely understaffed, without robust digitalization, and without defences against long-range air strikes (cruise missiles, glide bombs, drones), is this sufficient?⁹ Therefore, "armed" has nothing to do with reality. It amounts to a shameless *exaggeration*. It should be emphasized that the current *policy of neutrality* regarding the (re-)export of military equipment is destroying the Swiss arms industry, as no NATO country is buying arms anymore due to the current legal regulations (ban on re-export to countries involved in an "armed conflict"). Furthermore, no foreign investor will contribute start-up capital to a start-up company based in Switzerland that also develops IT for military use (*dual-use* product). Companies in the industry are moving away. This means that the army cannot be equipped with Swiss-made products, even if it were still in a position to do so. Highly complex defensive weapon systems (combat aircraft, air defence missiles, drones) are in any case only available from foreign arms manufacturers.¹⁰

undoubtedly *contrary to neutrality* (but has been repeatedly ignored). See also section IV.4.

- 8 A parliamentary initiative has just been submitted in Lausanne with the aim of disarming the city police.
- 9 Compare this with the devastating losses suffered by the civilian population and the destruction of civilian facilities, especially civilian infrastructure, caused by Russia in Ukraine.
- 10 Destinus, a start-up from Payerne that successfully manufactures drones (sales of CHF 250 million in 2024) and supplies them to Ukraine, recently relocated its headquarters to the Netherlands (<https://www.destinus.com/>). It will not be returning. The company is now seeking growth capital with a valuation of around CHF 1 billion, which it cannot obtain as a Swiss-domiciled company with this neutrality policy regarding KMG.

And whether Switzerland would still be supplied by foreign countries with this attitude is another question.¹¹

Let us beware of empty phrases. With regard to “permanent”¹², it should be remembered that laws are man-made rules, social constructs, whether in international agreements, the constitution, a law, or other decrees, which can be changed any time. The Swiss Federal Constitution does not contain an “eternity clause” like the Basic Law of the Federal Republic of Germany in Art. 79 para. 3.¹³ Since reality is never static, the law cannot be static, “ever lasting”, “permanent”¹⁴ either. *Panta rhei*, everything flows (Heraclitus, Plato).¹⁵

I. Where does the right to neutrality come from?

It should be reiterated that *the right to neutrality*, which is still highly valued by politicians in Switzerland today, is based on the Hague Conventions of 1907, specifically the Fifth Convention concerning the Rights and Duties of Neutral Powers and Persons in the Event of Land Warfare¹⁶ and the Thirteenth Convention concerning the Rights and Duties of Neutral Powers in the Event of War at Sea,¹⁷ both concluded on October 18, 1907, in The Hague. At that time, war was not yet prohibited; there was a *ius ad bellum*, a right to wage war, meaning that one state could declare war on another state and attack another country militarily.¹⁸ At that time, war was considered merely being a continuation of politics by other means (Clausewitz,

11 See Botsch. N-Iv. (Fn. 2), 29.

12 On “permanent” from the perspective of international law, see section II below.

13 REGINA KIENER, Fundamental Rights in the Federal Constitution, in: Oliver Diggelmann/Maya Hertig Randall/Benjamin Schindler (eds.), Constitutional Law of Switzerland, Zurich/Basel/Geneva 2020, vol. 2, V.2 (cited as Constitutional Law of Switzerland), margin no. 19.

14 This linguistically imprecise description (in the N-Iv. French “perpétuelle,” Italian “permanente,” which are not synonymous) and classic neutrality (between conflicting parties in a specific situation) is not discussed here, but referred to the convincing explanations by RENÉ RHINOW, Dauerhaftigkeit (Permanence), in this volume.

15 The question of legal philosophy and sociology as to whether there is a higher constitutional power (such as natural law or divine power) as the *pouvoir constituant* – i.e., a body composed of appointed members – which invokes this power and would also be accepted later and elsewhere, cannot be addressed in this context.

16 SR 0.515.21.

17 SR 0.515.22.

18 See EPINEY et al., Neutrality 2025 (fn. 4), 11; MARCO JORIO, Switzerland and its Neutrality, Zurich 2023, N 361.

referring to Machiavelli). In other words, the Hague Conventions are the laws of war, in contrast to the UN Charter, whose purpose and goals are peace and security.

The Hague Conventions deal exclusively with sea and land warfare. At that time, there was no such thing as air warfare, nor was there *cyberwarfare* and global electronic communication, which is also misused for deliberate disinformation as a form of hybrid warfare. In addition to the legal fact that the Hague Conventions are martial law, their factual limitations and complete detachment from current reality show that they have become obsolete, defunct with regard to neutrality. The Hague Conventions have never been updated.

Furthermore, the provisions in these two conventions on the rights and obligations of neutral powers are not identical, or only partially so. In both conventions, Article 9 requires neutral powers to apply conditions or prohibitions "equally to both belligerents." However, what is to be applied equally is defined differently in these two provisions.

Article 6 of the (XIII) Convention on Maritime Warfare then prohibits a neutral power to supply directly or indirectly warships, ammunition, or other war material "to a belligerent power for any reason whatsoever." The reference to "other war material" and the wording in Article 7 "as well as anything that may be useful to an army [...]" has led to the customary assumption that this provision from the Convention on Maritime Warfare also applies to the Convention on Neutrality in Land Warfare.

It should also be noted that Article 7 of the Land Warfare Neutrality Agreement stipulates that a neutral power is not obliged to "prevent the export or transit of arms, ammunition, and anything that may be useful to an army or navy on behalf of one or the other belligerent." According to this, *private* transactions involving war material with foreign governments do not violate the obligation of neutrality.¹⁹ This applies not only to the transit through the territory of a neutral country, but also to exports from another country. Even the Hague Convention does not require neutral states to prohibit another country from re-exporting war material that originally came from its own stocks.

Article 6 of the Convention on Maritime Warfare does not distinguish between the aggressor and the defender with the phrase "to a belligerent

19 See Motion Molina (25.3452) of May 6, 2025, according to which KM exports to non-governmental bodies should also be subject to a non-re-export declaration.

power," unless the term "*belligerent*" is restricted exclusively to the aggressor. Unfortunately, this is not the case.

Some international law professors in Switzerland argue that the Hague Conventions (V and XIII) have not been repealed. They interpret this as the (continued) existence of two legal systems that apply simultaneously, i.e., martial law (legitimate war under the Hague Conventions) and the peace and security order (prohibition of the threat and use of force) under the UN Charter. They base the continued existence of the provisions on neutrality law in these agreements on mere *customary law*. However, in the event of a violation of Art. 2(4) (and 5)²⁰ in conjunction with Art. 51 of the UN Charter, which are part of *peremptory international law*, such a *right of neutrality* no longer exists under customary law²¹ or can no longer be invoked.²²

In this regard, even interpretations of international law of the *International Law Commission* contradict itself; furthermore, the resolutions of the UN Security Council (SC) and the General Assembly (GA) on the admission of states declaring themselves neutral are also contradictory or at least misleading.

The 2011 *Yearbook of the International Law Commission*²³ reports, among other things, on the deliberations on various issues of international law. Draft regulations are presented and commented but there are some discrepancies in these explanations: Art. 17, *Circumvention of international obligations through decisions and authorizations addressed to members*, Chapter V/E,²⁴ deals with the responsibility of *international organizations*. This is referred to in the message of the Federal Council on the Neutrality Initiative (N-Iv) with the comment that "the rules of the UN Charter and

20 EPINEY et al., Neutrality 2025 (fn. 4), 11.

21 PARISH (fn. 1), 109.

22 Report of the International Law Commission Seventy-first session (April 29–June 7 and July 8–August 9, 2019) General Assembly, A/74/10 (<https://docs.un.org/en/A/74/10>), (cited as ILC 2019), *conclusion 14*, 181 ff.; GIULIO BARTOLINI, The Ukrainian-Russian Armed Conflict and the Law of Neutrality: Continuity, Discontinuity, or Irrelevance? in: *Netherlands International Law Review* (2024) 71, 281 ff., 294, sees the assumption of the continued existence of the law of neutrality applicable to the Hague Conventions as posing the risk of substantially favoring politically and militarily strong states.

23 Volume II, Part Two (https://legal.un.org/ilc/publications/yearbooks/english/ilc_2011_v2_p2-pdf).

24 P. 17.

the law of neutrality then coexist."²⁵ However, this does not apply to the question of the relationship between the neutrality provisions of the Hague Conventions and the UN Charter, as is clear from both the draft text of the provisions and the commentary on Art. 17²⁶. In contrast, Article 17 in Chapter VI (not V), Effects of Armed Conflicts on Treaties/E, Draft Regulations, deals with the question of the significance of *neutrality*.²⁷ Article 17 states that these provisions are *without prejudice to States with neutrality obligations*. This also follows *mutatis mutandis* from Articles 4, 6(a), 7 (reference to Annex 1) and 14. Annex I lists the Hague Conventions under "*International humanitarian law and disarmament treaties that indirectly protect the environment in relation to armed conflict*."

In contrast, the *Articles on Responsibility of States for internationally wrongful acts* (ARSIWA) stipulate clear obligations under international law in the case of "*wrongful acts*" by a state. For more details, see section III.3.

The UN Charter of 1945 outlawed war. It reversed the former *ius ad bellum* into a *ius contra bellum*.²⁸ Since the UN Charter came into force, *war in the sense of aggression can no longer be legitimate*. This is also evident from the vote on Resolution ES-11/1, *Aggression against Ukraine*, at the UN General Assembly on March 2, 2022²⁹, which was adopted by 141 states (= 77.9% of those voting, 73.1% of the UN member states) with 5 votes against (Belarus, Eritrea, North Korea, Russia, Syria) and 35 abstentions. There can therefore be no question of *legitimacy* (of the war in the sense of aggression) in the opinions of the UN member states.³⁰ There can be no *legitimacy* – as claimed, for example, by Russia, based on historical distortion and disregard for international treaties concluded by its own predecessor governments, and now (for the time being) echoed by Trump – for the undoubted *violation of applicable peremptory international law*. The threat and use of force against another state, *warfare* in the sense of an attack (aggression) against another state, is *both illegal and illegitimate*.

25 Botsch. N-Iv. (Fn. 2), 29.

26 Nos. 4, 8, 10, 11.

27 P. 106 ff.

28 See RALPH JANIK, Return of Neutrality, in this volume, 292.

29 Link: https://en.wikisource.org/wiki/United_Nations_General_Assembly_Resolution_ES-11/1.

30 On the significance of UN General Assembly resolutions, see: JOHANN RUBEN LEISS/ ANDREAS PAULUS, Art. 103, in: Bruno Simma (ed.)/Daniel-Erasmus Khan (ed.)/Georg Nolte (ed.)/Andreas Paulus (ed.), *The Charter of the United Nations: A Commentary*, 4th edition, Oxford 2024 (cited as Simma et al., *Charter*), N 44, 49.

The *crime of aggression* is defined in Article 8^{bis} of the Rome Statute of the International Criminal Court³¹ with explicit reference to the UN Charter (Art. 77 f.). A neutral stance toward the crime of aggression by a state or those responsible for it is therefore untenable. Switzerland has adopted and ratified the Rome Statute, including the criminal offenses contained therein, and integrated it into its Criminal Code,³² with the exception, to date, of the crime of aggression.³³ The ratification of the Rome Statute supplemented by the crime of aggression³⁴ precludes a neutral stance toward a violation of Art. 2(4) of the Charter and toward all crimes contained in the Rome Statute and is adverse to Swiss law, i.e. Art. 5 para 4 of the Federal Constitution.

It is therefore not possible to justify the continuation of a *right to neutrality* in such a situation that is blatantly contrary to the Charter. *Art. 2 para. 4 of the Charter* as part of *peremptory international law* (cf. paras. IV and VI/2, 3).

It also seems completely absurd to assume that two legal systems that are diametrically opposed to each other in terms of their meaning, purpose, and character can coexist, both relating to collective and individual existential (human) rights³⁵ (see section III/2 below).

For the sake of completeness, it must be added that the non-repeal of international agreements (as argued by these authors) alone does not prove their continued validity. There are countless global conventions that have

31 SR 0.312.1.

32 Swiss Criminal Code, Title XIIbis: Genocide and crimes against humanity, Art. 264 ff., Title XIIter: War crimes, Art. 264b ff.

33 However, both chambers adopted the motion 22.3362 of Sommaruga Carlo, *Lutte contre l'impunité. Transposition du crime d'agression défini par le Statut de Rome dans la législation suisse* (AB 2022 S 956/AB 2023 N 594). Motion Arslan Sibel, 22.4503, Inclusion of crimes of aggression under international criminal law in the Criminal Code, was adopted by the National Council (AB 2023 N 875) but rejected by the Council of States because of the retroactive clause it contained (AB 2023 S 960). The Federal Council will therefore submit a bill for a federal law amending federal laws (including the Criminal Code) to implement the Rome Statute of the International Criminal Court.

34 Adopted by the Federal Assembly on March 20, 2015, and entered into force for Switzerland on September 10, 2016 (AS 2015 3825).

35 See JAMES CRAWFORD/JACQUELINE PEEL/SIMON OLLESON, The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading, *European Journal of International Law (EJIL)* 2001, Vol. 12 No. 5, 963 et seqq. (cited Crawford et al.), 973.

been replaced by more recent ones and have thus become obsolete without the older ones having been formally repealed.^{36,37}

The extent to which the Hague Conventions have fallen out of date *with regard to the law of neutrality* is demonstrated by the Third Convention on the Commencement of Hostilities of October 18, 1907.³⁸ The first three articles read as follows:

"Article 1.

The contracting powers recognize that hostilities between them may not commence without prior unambiguous notification, which must take the form of either a declaration of war stating the reasons or an ultimatum with a conditional *declaration of war*.

Article 2.

The *state of war* must be notified to the neutral powers without delay and shall only become effective for them upon receipt of a notification, which may also be sent by telegraph. However, the neutral powers may not invoke the absence of notification if it is beyond doubt that they were in fact aware of the state of war.

Article 3.

Article 1 of this Convention shall come into force *in the event of war* between two or more contracting powers.

Article 2 is binding in relations between a belligerent contracting power and neutral powers that are also contracting powers.

Article 1 states that hostilities and warfare against another state were not prohibited, but that the aggressor had to comply with formal requirements for a declaration of war. According to Article 2, the aggressor had to notify the neutral powers of the state of war.

Russia did not declare war on Ukraine – on the contrary, the day before the invasion, the Russian foreign minister stated that no attack on Ukraine was planned – nor were other countries informed about the "special military operation." The US did not declare war on Iraq in 2003 and on Iran on 21st June 2025 and 29th February 2026. The US also did not inform

36 See the numerous examples in MOHLER, Neutrality (fn. 7), 13. Fn. 57-59.

37 Of the 13 Hague Conventions, only ten are listed in the SR.

38 SR 0.515.210; emphasis added.

Switzerland, as the "protecting power" in relation to Iran, of the impending attack.³⁹

How this Third Hague Convention on the commencement of hostilities is in any way compatible with the UN Charter, including its prohibition of aggressions⁴⁰ *as part of mandatory international law*, and the criminality of the crime of aggression under the Rome Statute, or how it can continue to claim validity as part of a continuing legal system, the advocates of the alleged continuation of the international law of neutrality have so far been unable to explain. To be clear, the Hague Conventions of 1907 are only *obsolete* as far as they *contradict any other legal provisions being part of peremptory international law. particularly the UN Charter as well as the Rome Statute (War (crime of aggression and war crimes) and, of course the humanitarian international law.*

Russia's semantic warfare, which will not be discussed further here,⁴¹ proves that the Russian leadership has also been aware that this aggression violates international law under the UN Charter.

When Russia mentions the elimination of the "*very roots*" of the conflict as a precondition for a ceasefire, its representatives are not referring to its violations of international law, but to the sanctions against Russia. Hence the term "special military operation" for the ongoing war of aggression or armed international conflict.

Conversely, at the UN Security Council meeting on June 21, 2025, Russia accused the US of violating the UN Charter.⁴²

39 Announcement by the FDFA on June 22, 2025 (Basel Zeitung/Tagesanzeiger dated June 22, 2025, https://www.bazonline.ch/us-angriff-auf-den-iran-schweizer-spitzendiplomatin-wir-wurden-nicht-informiert-161160924741?utm_source=sfmc&utm_medium=email&utm_campaign=BS_ED_9_ENG_EM_NL_XX_DERABEND_XX_WEEKEN&utm_term=2025-06-22&utm_content=5796634_).

40 See number III.

41 CLAUSEWITZ sarcastically remarked to Napoleon: "The conqueror is always peace-loving; he would gladly enter our state peacefully." (On War, Chapter 5). Russia's war of aggression, including its methods, also constitutes a flagrant violation of the Charter of Paris of November 21, 1990, signed by President Gorbachev.

42 Link: <https://www.reuters.com/world/middle-east/un-security-council-meet-sunday-over-us-strikes-iran-2025-06-22/>; SRF editor F. Gsteiger on SRF-Info on June 22, 2025 (<https://www.srf.ch/news/international/uno-zu-us-angriffen-nur-eine-seite-kritisiert-washington>).

II. On the handling of neutrality under changing conditions: "permanent" yet always different

Switzerland's handling of neutrality under changing conditions of international law and factual circumstances reveals the inconsistent, even contradictory nature of this policy:⁴³

Until the beginning of the 20th century, the neutrality of a state referred to the non-participation in war and the equal treatment of both warring parties by the military. When Switzerland joined the League of Nations, founded in 1919, it was confronted for the first time with military and economic sanctions imposed by an international security organization. Due to its centuries-old tradition as a neutral state (apart from mercenary activities), it was exempted in 1920 as the only member from the obligation to participate in military sanctions, but not from economic ones. Therefore, it reluctantly and incompletely adopted the economic sanctions against Italy in 1935 when Mussolini's militarily aggressed Abyssinia. However, it also sanctioned the victim state of Abyssinia, what enraged the other member states. The interwar period was the age of so-called "differential neutrality." Since the League of Nations failed to fulfil its peace making function and lost its universal character due to the withdrawal of several states (e.g., Italy, Germany), Switzerland, in view of the threat of war, anxious not to be drawn into the imminent conflict, requested in 1938 the League of Nations under slogan "return to integral neutrality" to release it also from the obligation to participate in economic measures.⁴⁴

Later on, Switzerland, as a non-member of the UN, secretly participated in the embargo policy against the communist bloc (CoCom embargo) under pressure from other countries, primarily the US.⁴⁵

1. 1966 (Rhodesia)

Before joining the UN Switzerland did not officially participate in the economic sanctions imposed by the UN Security Council against Rhodesia in

⁴³ For more on this: JORIO (fn. 18), *passim*.

⁴⁴ See also JANIK, Return (fn. 28), 289.

⁴⁵ The so-called Hotz-Linder Agreement of 1951, informal, not recorded in writing (Historical Dictionary of Switzerland, version 17.11.2006); Neutrality Report 2022 (fn. 2), 13.

1966⁴⁶ citing its permanent neutrality.⁴⁷ Switzerland declared that adopting the sanctions could be interpreted as a commitment to UN Security Council resolutions for non-members of the UN. In order to avoid being accused of circumventing or profiting from these sanctions, the economic sanctions were imposed on an exclusively autonomous basis with the introduction of the concept of "*courant normal*"^{48,49}

2. 1990 (Iraq)

The next change of course came in connection with the UN Security Council sanctions against Iraq in 1990.⁵⁰ Following the collapse of the Soviet Union and the Warsaw Pact, and with it the (supposed) end of the so-called bipolar world, the Federal Council abandoned its previous policy of neutrality.⁵¹ This resulted in the complete adoption of the UN economic sanctions against Iraq, which the Federal Council regarded as an autonomous implementation.⁵² However, unlike Austria, Switzerland did not grant the air forces of the intervening states overflight rights.⁵³ In *the report on neutrality* as appendix to the Federal Council's report on Swiss foreign policy in the 1990s⁵⁴ the policy of neutrality and the binding nature of neutrality law were examined. It highlighted the relationship between UN coercive measures and neutrality, including the distinction between

46 UNSC Res. 232 of December 16, 1996 (<https://digitallibrary.un.org/record/90502?v=pdf>). This was *not* an armed *international* conflict.

47 MATHIAS-CHARLES KRAFFT/DANIEL THÜRER/JULIE-ANTOINETTE STADELHOFFER, in: Vera Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions, A Co-operative Study*, Leiden 1994, 525; STEFAN TALMON, in: Simma et al., *Charter* (fn. 30), N 63 on Art. 2(6) with further references.

48 See KRAFFT et al. (fn. 47), 525; TALMON (fn. 47), loc. Cit.

49 As a non-member of the UN, Switzerland imposed restrictions up to the "*courant normal*" only on Rhodesia, but not on other states that did not comply with UN sanctions, which strictly speaking was contrary to the principle of equal treatment (Federal Council Message on Switzerland's accession to the United Nations [UN] of December 21, 1981, BBl 1982 I 497, 547 f.). In the case of Rhodesia, the Federal Council argued that the unilateral nature of the measures against the state sanctioned by the UN was justified by the *right of self-preservation* of even a neutral state (ibid., 548). Above all, this was not an armed conflict between states.

50 UNSC Res. 661 (1990) (<http://unscr.com/en/resolutions/doc/661>).

51 KRAFFT et al. (fn. 47), 528.

52 KRAFFT et al. (fn. 47), 526.

53 Swiss Neutrality in Practice (fn. 6), 4; KRAFFT et al. (fn. 47), 528.

54 BBl 1994 I 157 ff., Appendix, 206 ff. (cited Neutrality Report 1993).

economic and military sanctions and the review of the previous stance of strict non-participation or support for military sanctions in military terms.⁵⁵ The report then presents the more recent, *almost unanimous doctrine* that "the law of neutrality does not apply in principle to sanctions decided by the Security Council on the basis of Chapter VII of the UN Charter and supported by the international community as a whole." The participation of a neutral state in coercive measures taken by the UN under Chapter VII of the Charter is not contrary to the law of neutrality.⁵⁶ This does not constitute the use of military force relevant under the law of neutrality, but rather legal measures to enforce Security Council decisions; the states that made use of the authorization did not act as warring parties, but as an organ of international law enforcement.⁵⁷ In the following the Federal Council granted overflight rights on several occasions (UNPROFOR 1993, *Kosovo Verification Mission* 1998, IFOR/SFOR (Bosnia-Herzegovina 1995, KFOR [Kosovo 1999]).^{58, 58a}

For the first time, aspects of non-participation in sanctions were also raised in the context of the UN measures against Iraq. The Federal Council concluded that standing aside would amount to partiality in favour of the lawbreaker.⁵⁹ In terms of neutrality, the danger no longer lay in participating in economic sanctions, but in standing aside, which called into question the credibility of Switzerland's neutrality.⁶⁰ This has obviously been forgotten in relation to the Ukraine, even against the art. 1 of the Embargo Act.⁶¹

55 Neutrality Report 1993 (fn. 54), 227; see also the Federal Council's response to the urgent simple inquiry Oehler of January 21, 1991 (91.1003) <https://dodis.ch/59768>.

56 Neutrality Report 1993 (fn. 54), 229 with further references.

57 Neutrality Report 1993 (fn. 54), 229 f. See also Swiss Neutrality in Practice (fn. 6), 5, and "Uno-Politik der Schweiz" (https://www.eda.admin.ch/dam/eda/de/documents/aussenpolitik/internationale-organisationen/uno/2017-und-aelter/20140814-UNO-Politik-der-Schweiz_DE.pdf), 6.

58 Swiss Neutrality in Practice (fn. 6), 5

58a Federal Act on the Implementation of International Sanctions of 22 March 2002 (SR 946.231).

59 Swiss Neutrality in Practice (fn. 6), 4.

60 Swiss Neutrality in Practice (fn. 6), loc. cit.

61 Federal Act on the Implementation of International sanctions (Embargo Act), SR 946.231.

3. 1998/1999 (Kosovo)

The Kosovo conflict raised various questions relating to neutrality, which were reflected in changing sanctioning behavior. The conflict unfolded in two phases: before and during the NATO intervention with the bombings.⁶² The UN Security Council imposed partial sanctions against Yugoslavia, including an arms embargo at the end of March 1998. Switzerland followed suit. However, it continued to allow exports of war material to NATO countries. In order not to profit economically from this situation, such exports were curbed as the conflict intensified. The unilateral embargo against Yugoslavia was not considered a violation of the principle of equal treatment (or prohibition of discrimination), as it was based on a decision by the UN Security Council (see section II.2 above).

The Federal Council did not consider non-military sanctions to be a problem for neutrality, with the exception of the oil embargo against Yugoslavia: it regarded oil as war material in the same way as weapons and ammunition, which is why it did not impose an oil embargo against Yugoslavia for reasons of equal treatment, but prohibited the transit of oil products.

During the overflights, which were carried out as part of the *OSCE Verification Mission in Kosovo (KVM) by means of airspace control*, Switzerland granted overflight rights to the aircraft involved.

This OSCE mission was covered by a UN Security Council resolution. With the start of the *air strikes*, this was no longer the case, except for humanitarian purposes.

What is *incomprehensible* in the 2000 report *Swiss Neutrality in Practice* from the perspective of *neutrality law* is that the relationship between the UN Charter, namely Articles 2 and 5, and the two Hague Conventions was *not examined in detail*. Neither Article 103 of the UN Charter nor Article 30(3), 53, 64 and 71(2) of the Vienna Convention on the Law of Treaties⁶³ are even mentioned. This would have been all the more necessary given that on March 8, 1998, the collection of signatures for the popular initiative "for Switzerland to join the United Nations (UN)" began, which was declared valid on August 25, 1998, and submitted on April 11, 2000.⁶⁴ The criticism that the reorientation of Switzerland's neutrality policy in

62 For the whole: *Swiss Neutrality in Practice* (fn. 6), 6 ff.

63 WÜV, SR 0.III.

64 BBl 1998 IV 4369, BBl 2000 2453.

connection with the Kosovo conflict was never sufficiently discussed and understood⁶⁵ is to be redirected at this interdepartmental working group of August 30, 2000 in a fundamental sense, i.e. not to have examined the relationship between the neutrality provisions in the Hague Conventions V and XIII and the UN Charter.

4. 2002 (Switzerland's accession to the UN)

Another new but equally unclear *understanding of neutrality* (again as "integral neutrality"⁶⁶) followed when Switzerland joined the UN in 2002 with its *declaration* in its application for UN membership.⁶⁷ The Federal Council wrote in its application for membership:

The United Nations recognizes that the neutrality of a Member State does not affect the fulfillment of its obligations under the Charter and contributes to the achievement of the purposes of the United Nations. Switzerland remains neutral even as a member of the United Nations.

"Switzerland will remain neutral even as a member of the United Nations," was communicated to the voting population as a partial quote in the "Voting Booklet".⁶⁸ What this sentence meant remained unclear, especially in relation to the legal fact that the UN does *not accept reservations* upon accession.⁶⁹ The explanatory notes then continued: "UN sanctions are also compatible with our neutrality. For over ten years, Switzerland has consistently supported the UN's non-military measures against peacebreakers. Switzerland would still not have to participate in military operations." This last sentence was doubly unclear: Firstly, the word "would" directly contradicts the obligations under Article 25 of the Charter, and, secondly, the term "military operations" is related to Article 43(2) of the Charter (in Chapter VII). The provision of military forces in terms of numbers and type does indeed require a (separate) agreement with the Security Council. However,

65 See Swiss Neutrality in Practice (fn. 6), 18 (para. 6.1.1).

66 According to Federal Councilor Joseph Deiss, AB 2001 N 1036.

67 Original letter from the President and the Chancellor in accordance with the decision of the Federal Council, reproduced in UN Doc. A/56/1009 S/2002/801.

68 Explanatory notes by the Federal Council on the referendum of March 3, 2002 (<https://www.bk.admin.ch/bk/en/home/documentation/referendums/referendum-20020303.html>), 13.

69 BARDO FASSBÄNDER, in: St. Galler Kommentar (4th edition, Zurich/St. Gallen 2023) (cited as SGK), N 40 on Art. 197 Fed. Cst. with further references.

"operations" for which military forces are made available do not include facilities and rights of passage "for the purpose of maintaining international peace and security."⁷⁰

The UN bodies took no notice of this declaration. The UN Security Council Resolution S/RES/1426 (2002)⁷¹ stated:

"Resolution 1426 (2002)

Adopted by the Security Council at its 4585th meeting, on July 24, 2002
The Security Council,

Having examined the application for admission to the United Nations submitted by the Swiss Confederation (S/2002/801),

Recommends that the General Assembly admit the Swiss Confederation to the United Nations.

The President of the UN Security Council also expressed himself accordingly to the General Assembly:

Statement by the President of the Security Council

At the 4585th meeting of the Security Council, held on July 24, 2002, in connection with the Council's consideration of the item entitled 'Admission of new Members,' the President of the Security Council made the following statement on behalf of the Council:

"The Security Council has decided to recommend to the General Assembly that the Swiss Confederation be admitted as a Member of the United Nations. On behalf of the members of the Security Council, I wish to extend my congratulations to the Swiss Confederation on this historic occasion. The Council notes with great satisfaction the Swiss Confederation's solemn commitment to uphold the purposes and principles of the Charter of the United Nations and to fulfill all the obligations contained therein.

"We look forward to the day in the near future when the Swiss Confederation will join us as a Member of the United Nations and to working closely with its representatives."⁷²

It became clear here that the sentence in the application for membership, "The United Nations recognizes that the neutrality of a Member State

70 See above number II.4.

71 <https://documents.un.org/doc/undoc/gen/n02/494/29/pdf/n0249429.pdf?OpenElement>.

72 S/PRST/2002/23 (<https://docs.un.org/en/S/PRST/2002/23>).

does not affect the fulfillment of its obligations under the Charter and contributes to the achievement of the purposes of the United Nations," had contrasting meanings from the perspective of Switzerland and that of the UN.

From the UN's perspective, neutrality played no role in the fulfillment of obligations under the UN Charter,⁷³ but Switzerland was of the opinion that it was at least exempt from military coercive measures. However, it was precisely this attitude, which amounted to a reservation, that was unacceptable to the UN and therefore meaningless.⁷⁴

This discrepancy is also evident in the speech given by the then Federal President Kaspar Villiger to the UN General Assembly.⁷⁵ It began with the first sentence, without any form of address: *"Le Président Villiger: Par votation populaire du 3 mars 2002, le peuple suisse a décidé d'adhérer à l'Organisation des Nations Unies."* (by public referendum the Swiss people have decided to join the United Nations Organisation). However, the Swiss people could not decide on the accession themselves, but only on the application for accession. This is not a technicality but illustrates the diverging perspectives (or Swiss arrogance). A little later, he continued:

"On the one hand, justice, peace, and solidarity are key values for both our democracy and the UN [...] Our foreign policy objectives are in line with the objectives of the UN The Swiss people identify themselves with the objectives and efforts of the United Nations."

Villiger then pointed to neutrality:

"In our application for membership, we referred to Switzerland's neutrality. Essentially, this means rejecting the use of war and violence to resolve conflicts as a matter of principle. For all these reasons, neutrality is very important to us. [...] However, Swiss neutrality is not based on timid self-interest. It goes hand in hand with solidarity, which is also deeply rooted in the Swiss spirit. Switzerland will not participate in peace enforcement operations, but it will always be there when it comes to peacekeeping operations or humanitarian engagements. On the eve of the first anniversary of the tragedy of September 11, I would like to affirm that there has never

73 See before number III.1 below on Turkmenistan.

74 See also: FASSBENDER (fn. 68), N 40 ff. on Art. 197 of the Fed. Cst.

75 UN Doc. A/57/PV.1 (<https://docs.un.org/fr/A/57/PV.1>), 11 f.

*been and never will be neutrality towards terrorism or crime. That is why Switzerland is actively involved in the fight against terrorism.*⁷⁶

There is no need to go into detail about the multiple contradictions. Examples include solidarity (with whom, the UN or a victim state [Art. 51 UN Charter]?), the alignment of Swiss foreign policy goals with those of the UN (which ones?), and the Swiss population's identification with the goals and efforts of the UN. This is followed by the actual *neutrality reservation* of the principled rejection of war or violence ("*violence*"!) as a means of conflict resolution, that neutrality is synonymous with solidarity (again: with whom?), that Switzerland does not participate in peace enforcement operations, but is always ready to participate in peacekeeping and humanitarian missions. No more mention of enforcing the Charter (see section II/2). The Federal President concluded by stating that there has never been and never will be neutrality towards terrorism, nor towards crime. He also said that neutrality is not a product of fearful egoism.

The fact that aggression within the meaning of Article 2(4) of the UN Charter and the tactics and methods used are mostly terrorist in nature and fulfill many of the elements of crimes of war under the Rome Statute, which came into force in Switzerland two and a half months before this speech,⁷⁷ was already being ignored at that time.

The many contradictions have become apparent, at the latest with Russia's war of aggression against Ukraine. There can be no neutrality towards terrorism and crime, said Federal Councilor Villiger in his speech. Since then, on September 10, 2016, Switzerland also recognized the crime of aggression, and the corresponding amendment to the Rome Statute came into force in this country.⁷⁸

Swiss politicians continue to ignore this. However, former Federal Councilor Villiger would now give a different speech to the UN General Assembly.⁷⁹ In particular, he now clearly criticizes the bans on the (re-)export of war material based on the policy of neutrality: "We are a selfish oddball."⁸⁰

76 Particularly offensive in this speech was the phrase "[...] le recours à la guerre et la violence"

(the use of war and violence). Regarding "*guerre*," see section II.2 above. "*Violence*" means *illegal* force; the correct term would be "*force*".

77 AS 2002 3741.

78 AS 2015 3825. See above, margin note 33.

79 See NZZ of April 11, 2023.

80 Journal 20 Minuten, April 12, 2023.

III. The significance of the UN Charter

1. General

The *Briand-Kellogg Pact* prohibited the use of force between states as early as 1928.⁸¹ The UN Charter⁸² fundamentally changed international law with regard to the threat and use of force worldwide (Art. 2, paras. 2-4): War as a threat or use of force has since been prohibited (Art. 2, paras. 1 and 4), and the principles of sovereign equality of UN members (Art. 2, para. 1), the territorial integrity and political independence of states (Art. 2, para. 4) were enshrined.⁸³ Furthermore, the UN Charter clearly distinguishes between the aggressor and the victim state of an armed attack (Art. 51).

In contrast to the Hague Conventions, neutral powers are not mentioned in the UN Charter. Neutrality was not a criterion or an option, given the prohibition of the threat or use of force and the non-distinction between the aggressor and the attacked state. This was already made clear by the eminent international law expert Hersch LAUTERPACHT.⁸⁴

81 See Neutrality Report (fn. 54), 214; also: HILPOLD, *Solidarity and Neutrality*, Innsbruck 2010, 13.

82 Charter of the United Nations, concluded in San Francisco on June 26, 1945; SR 0.120.

83 The various arguments put forward that Article 2(4) of the Charter is "dead" (sic!) and outdated in practice (e.g., Michael Walzer, Thomas M. Franck, Michael J. Glennon, quoted by C. Tams) have been convincingly refuted by CHRISTIAN TAMS, in: Simma et al., *Charter* (fn. 20), N 1 ff. on Art. 2(4). This argument would also render all other international agreements on the prevention or punishment of the most serious crimes (e.g., genocide, torture, etc.) meaningless from the outset, meaning the premature submission to the criminal world and the abandonment of all civilization and all law. I allow me to draw a comparison: just because criminals commit homicides or acts of terrorism, among other things, this does not mean that criminal law, the relevant criminal code, is repealed.

84 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, p. 89 ff., 110: "Moreover, insofar as the prohibition or limitation of the right of war has been combined with the establishment of a system of collective security and collective enforcement of peace—such as in the Covenant of the League of Nations or the Charter of the United Nations—the *right of the neutral to discriminate against and to penalize the aggressor has been transformed into a duty*" (emphasis added).

Neutrality was considered *incompatible with the fundamental principles of the UN Charter*.⁸⁵ In 1949, the UN International Law Commission refused to discuss a revision of the law of war and neutrality.⁸⁶ In contrast, however, the UN General Assembly recognized Turkmenistan's permanent neutrality under the title "Maintenance of International Security";⁸⁷ however, it was expressly stated that *"the adoption by Turkmenistan of the status of permanent neutrality does not affect the fulfilment of its obligations under the Charter and will contribute to the achievement of the purposes of the United Nations"*.⁸⁸

On the one hand, the text of this resolution makes no reference to obligations under the law of neutrality and refers on the other side primarily to the fulfilment of the obligations under the Charter and the purposes of the United Nations to which it is to contribute. In other words, this neutrality also has its limits.^{89,90}

85 PHILLIP AUST, N 17 on Art. 2(5), in: Simma et al., Charter (fn. 30); See MOHLER, Neutrality (fn. 7), 12, with the assessment of the then Federal Councilor and Foreign Minister Max Petitpierre in fn. 51; HILPOLD, Neutrality and Solidarity (fn. 80), 22. The British GLADWYN JEBB, acting UN Secretary-General for the years 1945/46, stated clearly: *"Neutrality is a word I cannot find in the Charter."* (quoted from Jorio, (fn. 18), 361).

86 JÜRGEN MARTIN GABRIEL, Sackgasse Neutralität (Neutrality: A Dead End), Zurich 1997, 75; idem, Schweizer Neutralität im Wandel (Swiss Neutrality in Transition), Frauenfeld 1990, 67 ff.; PETER HILPOLD, Solidarität und Neutralität (Solidarity and Neutrality) (fn. 80), 23; idem, Neutralität am Scheideweg (Neutrality at a Crossroads), in this volume, fn. 10; LUZIUS WILDHABER, Switzerland, Neutrality and the United Nations, in: Malaya Law Review, 1970/12(1), 140–159, 147. See also ULRICH FASTENRATH/DONALD RIZNIK, in: Simma et al., Charter (fn. 30), N 25 on Art. 4.

87 A/RES 50/80 of December 12, 1995.

88 HILPOLD, Solidarity and Neutrality (fn. 80), 24.

89 See Swiss Neutrality in Practice (fn. 6): "Firstly, it is difficult to justify neutrality's raison d'être when the international community resorts to violent (!) means to counter serious and systematic violations of human rights.", 19.

90 See also the interpretative tightrope walk described in the wake of Austria's subsequent reservation of permanent neutrality in FASTENRATH/RIZNIK, in Simma et al., Charter (fn. 30), N 26 on Art. 4. Since the reservation of permanent neutrality contradicts the purpose of the Charter, it cannot have any legal effect. Austria therefore revised its position in connection with the measures taken by the UN Security Council under Chapter VII of the Charter against Iraq and conceded, in accordance with Articles 49 and 103 of the Charter, the primary obligation of all UN member states to strengthen the UN system of collective security. With this interpretation, the status of permanent neutrality was linguistically compatible with the obligations under the Charter, analogous to Turkmenistan, loc. cit., even if it was meaningless in terms of content.

Since the adoption of the UN Charter, there is therefore *no longer any right to neutrality* stipulated under international law regarding armed conflicts between states.⁹¹ The requirement *to observe international law* in Art. 5 para. 4 of the Federal Constitution also refers in particular to the UN Charter and thus to "preventing the scourge of war," "affirming the fundamental rights of man, the dignity and worth of the human person," "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained," and to "use armed force only in the common interest" (preamble) as well as to "take effective collective measures to suppress acts of aggression and other breaches of the peace" (Art. 1 para. 1).⁹² This *obligation under international law* seems to have been forgotten or even ignored. The so-called permanent or "everlasting" neutrality does mentally not change this.⁹³ Genuinely peaceful states have long been benefitting from the prohibition of war and the use of force, even if they provide military assistance to a country under attack in the exercise of the (collective) right of self-defence." and "[e]very state merely may, but is not required to stay neutral" but then: Only permanently neutral states can be expected, because of their unilateral declarations, constitutional provisions, or long-standing foreign policy, to stay out of future wars.⁹⁴

91 See Art. 17 in Chapter VI/E of the Yearbook of the ILC 2011 (footnote 23) for the updated confirmation. RENÉ RHINOW, Plädoyer für eine offene Schweiz (Plea for an open Switzerland), Zurich 2025 (cited as Open Switzerland), 75. In a detailed interview published on February 22, 2022, in the Tagesanzeiger (<https://www.tagesanzeiger.ch/dann-machen-wir-uns-politisch-und-moralisch-enorm-angreifbar-793560648925>), OLIVER DIGGELMANN explains that Switzerland has the rights and obligations of a neutral country under international law. It has declared itself permanently neutral. However, he does not explain what the obligation under international law is based on. His following differentiation led to obvious contradictions.

92 See BARDO FASSBENDER, Constitution as a pluralistic structure, in: Constitutional Law of Switzerland (fn. 13), vol. 1, I.8, N 26.

93 PETER HILPOLD, Das Neutralitätsrecht Österreichs und der Schweiz im „weiten Feld“ des internationalen Rechts – Aktuelle Entwicklungen im Vergleich (The law of neutrality in Austria and Switzerland in the "broad field" of international law – a comparison of current developments), in: Lecture given on September 8, 2022, to the Swiss Parliament in Bern as part of an expert hearing on "Parliamentary Foreign Policy Day"; AVR Vol. 60/2022, 268 ff. (cited Hilpold, Neutrality Law A and CH), 280; FASTENRATH/RIZNIK, in: Simma et al., Charter (fn. 30), N 26 on Art. 4. In this regard, see Janik, Return (fn. 28).

94 JANIK, Return (fn. 28), 306.

This permanence is a unilateral, a self-imposed foreign policy stance that has no foundation as an obligation under international law and can be abandoned at any time.

At the 2005 UN General Assembly, a resolution was adopted as *the World Summit Outcome*, which states, among other things:

*"72. We therefore reaffirm our commitment to work towards a security consensus based on the recognition that many threats are interlinked, that development, peace, security and human rights are mutually reinforcing, that no State can best protect itself by acting entirely alone and that all States need an effective and efficient collective security system pursuant to the purposes and principles of the Charter."*⁹⁵

This UN resolution leaves no room for a neutral stance on violations of the UN Charter, such as in the case of Russia's aggression against Ukraine. It also rules out the self-reliant lone protection of a country.

Russia's war of aggression reignited long-dormant discussions about the relationship between the *permanent neutrality* advocated by Austria and Switzerland. Neither country pursued a straightforward or consistent line. The distinction between military and economic sanctions, as understood by Switzerland, also plays a role here, leading PHILLIP Aust to conclude that the status of permanent neutrality is more political than legal in nature.⁹⁶

At the same time, Article 2(5) of the Charter also has come back into focus. The former view that military sanctions under Chapter VII of the Charter did not lead to the status of a classic *war* was no longer easy to reconcile with the term "armed conflict" commonly used in the Charter,⁹⁷ but was based on an inaccurate classification in terms of legal systematics. The view previously held was abandoned that it was questionable whether the support for a victim state in its collective defence efforts by a neutral state was compatible with the latter's neutrality status.⁹⁸ Today, the prevailing opinion is that, based on binding decisions of the UN Security Council, it is lawful to differentiate between the side that enforces the interests of

95 Res. A /60/L.1, published on September 20, 2005 (<https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/SSR%20A%2060%20L%20I.pdf>).

96 AUST, in: Simma et al., Charter (fn. 30), N 17 on Art. 2(5) (p. 376).

97 AUST, in: Simma et al., Charter (fn. 30), N 25 on Art. 2(5).

98 See JANIK, Return (fn. 28), 306.

the (UN) community and the side that is the target of sanctions.⁹⁹ Military measures against a state that violates Article 2(4) of the Charter are, in legal terms, *part of the enforcement* of the purpose of the Charter, i.e. *the maintenance and/or restoration or enforcement of security* and international law in the sense of a peaceful and just order, i.e. *policing law*.¹⁰⁰ Similarly, the condemnation of the use of force by the UN General Assembly – as in the case of the Russian attack on Ukraine in the absence of a Security Council resolution due to the aggressor's veto – is a sufficient basis for military sanctions. Through the link between Chapter VII and Article 5(2) of the Charter, *the latter protects the common values of international peace and security*.¹⁰¹ Therefore, customary international law must be interpreted in the light of the Charter as a whole and not be regarded as conflicting.¹⁰² This is underlined by various provisions in *the Articles on Responsibility of States for internationally wrongful acts* (ARSIWA).¹⁰³

2. On the "principle of separation" and "qualified neutrality"

In an analysis of various contributions in recent international (exclusively English language) literature on the significance of neutrality under international law in connection with war within the meaning of Art. 2(4) and (5) in conjunction with Art. 51 of the UN Charter, PARISH examines attempts to distinguish between the principle of *separation* and the term "*qualified neutrality*" and their relationship to each other and to peremptory international law.^{104,105} The focus here is on the situation with Russia's war of aggression against Ukraine.¹⁰⁶

The so-called principle of distinction refers to the separation between (the *ius*) *ad bellum* and *in bello*;¹⁰⁷ in doing so, it disregards Art. 2(4) and Art. 51 of the Charter, it creates conceptual confusion with the question

99 AUST, in: Simma et al., Charter (fn. 30), N 25 on Art. 2(5).

100 See HILPOLD, Solidarity and Neutrality (fn. 80), 66.

101 AUST, in: Simma et al. Charter (fn. 30), N 29 on Art. 2(5).

102 LEISS/PAULUS, in: Simma et al., Charter (fn. 30), N 74 on Art. 103.

103 See number III.3.

104 However, the legal concept of qualified neutrality is not new; it was already postulated in 1836 by HENRY WHEATON in *Elements of International Law* (quoted from Janik, Return [fn. 28], 285).

105 PARISH (fn. 1), *passim*.

106 PARISH (fn. 1), 91, 103 ff., 107, 118 f.

107 PARISH (fn. 1), 116 ff.

whether the war is just and what "*belligerent*" refers to, and without any justification, it reverts to the state of international law prior to the UN Charter. The existence of a *law of neutrality*, repeatedly cited by the authors quoted by PARISH, is based purely on customary law, without ever proving the necessary foundation of sufficient state practice.¹⁰⁸ Individual violations of this binding international law, even by permanent members of the UN Security Council, do not justify such a law. Parish refers to it as "traditional neutrality" without the qualifying suffix "law," which he ultimately rejects. "Traditional neutrality" denies the distinction between aggressor and victim, which he considers morally untenable,¹⁰⁹ and this is indeed the case (cf. sections VI/4 and IX).

The division of *ius in bello* into "*belligerent in bello* (which concerns the protection of individuals) and *neutrality in bello* (which governs inter-state relationships)" is being discussed. The assertion that "*in bello* (which governs inter-state relationships)" disregards the fact that *ius ad bellum* no longer exists since the UN Charter. Similarly, the boundary between *ad bellum* and *in bello* is shifted in a strange way, creating a gray area: even non-military, i.e., purely verbal support for the victim becomes "*in bello*." This led directly to an obligation of neutrality of opinion. Thus, even the famous phrase attributed to Niklaus von Flüh in 1537, "do not interfere in foreign disputes," would already be *neutral in bello*, even towards an aggressor state. The view that, in the event of a clear violation of the prohibition of violence within the meaning of Art. 2(4) of the Charter (*ius contra bellum*), it is permissible to abandon the traditionally neutrality-based prohibition on supplying lethal weapons to a state exercising its right of self-defence is gaining increasing support.¹¹⁰

This dilemma has given rise to the concept of *qualified neutrality* (or, rather, revived it).

108 EPINEY et al. (Neutrality 2025, footnote 4), 13, also fail to provide such evidence when they write: "It can therefore be concluded that the right to neutrality is still justified and continues to apply under customary international law and international treaty law." The reference (ibid.) to the fact that "it is very often disputed [...] who is the aggressor and who is the defender" is not relevant here, as a potential question of evidence cannot be used to decide on the existence or non-existence of a substantive legal provision. Otherwise, criminal law, for example, would also have to be abolished.

109 PARISH (fn. 1), 116 f.

110 BARTOLI (fn. 22), 296.

It respects the distinction between aggressor and victim in accordance with the UN Charter,¹¹¹ avoids the inevitable support of the aggressor and thus the exacerbation of the war due to the principle of equal treatment; and by supporting the victim state, it does not violate its otherwise possibly sensible neutrality.¹¹² In particular, it represents the only ethically justifiable position (see also number VI/4).

3. On Article 103 of the UN Charter and Article 30 of the Vienna Convention on the Law of Treaties

The tension between the provisions on neutrality in the Fifth and Thirteenth Hague Conventions and the UN Charter is first resolved by the wording of Article 103 of the UN Charter itself:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

What does this mean in detail? Article 103 of the Charter refers to bilateral or multilateral treaties between UN member states that were or will be concluded before or after the entry into force of the UN Charter. For UN member states, Article 103 gives the provisions of the Charter *precedence* over legislative or judicial acts of international organizations that contain obligations *that are incompatible* with the UN Charter as a whole.¹¹³ Article 6 of the Convention on the Law of the Sea prohibits a neutral power (i.e. a state) from directly or indirectly supplying war material to a belligerent power, which also applies analogously to the Convention on Land Warfare (see number I above). Article 9 of the two Hague Conventions mentioned above obliges the contracting states to apply conditions, restrictions, or prohibitions equally to both belligerents. These are such obligations. The obligation to apply restrictions or prohibitions equally to both belligerent parties disqualifies, by the way, the strict meaning of both, restriction and prohibitions.

111 See RHINOW, Permanence, in this volume.

112 PARISH (fn. 1), 118 ff., 121.

113 LEISS/PAULUS, in: Simma et al., Charter (fn. 30), N 55 on Art. 103. See the revised position of Austria, which recognizes this priority, above fn. 89. Similarly: RHINOW, open Switzerland (fn. 90), 72.

Indirect and direct transfers of (private) war material and the principle of equal treatment according to the Hague Conventions (*which clearly contradicts* the prohibition on surrender under Article 6 of the Convention on the Law of the Sea) are not compatible with the distinction between aggressor and victim state under the UN Charter.

The equal treatment of the warring parties under the Hague Convention on the one hand and the distinction between aggressor and victim under the UN Charter on the other represent an *irresolvable diametrical conflict* which – prior to the application of Art.103 of the Charter – does not allow for any interpretation techniques to avoid legal conflicts¹¹⁴ and thus rendered their application superfluous. If a norm *ipso iure* conflicts with the Charter, the conflicting norm takes second place to the Charter, as this conflict is irresolvable and permanent; according to LEISS/PAULUS, this leads to its *nullity*.¹¹⁵ Consequently, Art.103 is applicable and the Charter takes precedence, at least regarding obligations under the Hague Convention *on neutrality*.

Art. 30(1) and (3) of the Vienna Convention on the Law of Treaties leads to the same conclusion:

(1) Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States that are parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

(3) If all the parties to an earlier treaty are also parties to a later treaty, without the earlier treaty being terminated or suspended under Article 59, the earlier treaty shall apply only to the extent that it is compatible with the later treaty.

First, the UN Charter takes precedence over other obligations arising from other international agreements. It follows from this that binding provisions contradicting the Charter, such as the principle of equal treatment under the law of neutrality with regard to the aggressor and the victim state, no longer apply.

114 See LEISS/PAULUS in: Simma et al. Charter (fn. 30), N 22 ff. on Art. 103.

115 LEISS/PAULUS, in: Simma et al., Charter (fn. 30), N 86 on Art. 103.

This *lex posterior* rule states that the newer law not only takes precedence over the older law (as in Article 103 of the Charter), but that the conflicting older rule may no longer be applied, i.e. it is abrogated.¹¹⁶

In other words, the *requirement of equal treatment* of “belligerents”¹¹⁷ has not only been superseded by the distinction between aggressor and victim states under the UN Charter, it also contradicts the spirit of the Charter. EPINEY describes this as a foreign body in the system of international security created by the UN Charter.¹¹⁸ This is also evident in the “natural right of individual or *collective* self-defence” expressly included in Article 51 of the Charter. Nor does the UN Charter contain any restriction whereby neutral states would not be entitled to participate in collective self-defence. On the contrary, the *protection of the common values of international peace and security* by the Charter takes precedence (see above, number III.1, *in fine*).¹¹⁹ This also means that *the right of neutrality* recognized under international law in such situations no longer exists. Consequently, no state can retroactively invoke the provisions of the Hague Convention *on neutrality*.

The same authors (mentioned above) then cite customary international law, the customary recognition of Swiss permanent neutrality. However, the “obligations” in article 103 of the Charter refer exclusively to *treaties* and *agreements*, but not to customary law.¹²⁰ A formulation that would have explicitly included customary law or other sources of law was rejected.¹²¹ The customary recognition of permanent neutrality *does not* mean that it exempts Switzerland from its obligations under the Charter in the sense of a reservation; this is demonstrated by the restrictive interpretation of “permanent neutrality” with regard to Turkmenistan and Austria and the non-consideration of Switzerland’s declaration upon its accession to the UN (see number II.4 above). *Customary law has no standing with regard to peremptory international law* (prohibition of violence) anyway (see numbers I and III, 2, reference in footnote 136).

In individual state’s court rulings constitutional limits to article 103 of the Charter were invoked. These related, among other criteria, to fundamental

116 LEISS/PAULUS, in: Simma et al., Charter (fn. 30), N 16 on Art. 103; RHINOW, Open Switzerland (fn. 90), 75.

117 Art. 9 in both Hague Conventions the term “belligerents” refers without distinction between aggressor and victim.

118 EPINEY et al., Neutrality 2025 (fn. 4), 11.

119 FASTENRATH/RIZNIK (fn. 89), N 26 on Art. 4; cf. also section II, 1 above.

120 LEISS/PAULUS, in: Simma et al., Charter (fn. 30), N 73 on Art. 103.

121 LEISS/PAULUS, in: Simma et al., Charter (fn. 30), loc. cit.

constitutional provisions that cannot be changed and that define the statehood of the country in question, such as the rule of law, democracy, or federalism.¹²² None of this applies to the Federal Constitution regarding article 103 of the Charter. On the contrary, article 5 para. 1 and 5 of the Federal Constitution oblige Switzerland to observe *applicable* international law. Neutrality is not a national objective of Switzerland.¹²³ Even the adoption of the neutrality initiative did not constitute such a limitation, as the provision could be repealed. Finally, the Vienna Convention on the Law of Treaties stipulates in art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Even though the Hague Conventions have formally not been repealed,¹²⁴ their *neutrality* provisions that contradict the UN Charter are not applicable and are therefore obsolete. As has been shown, this applies to everything under international law on neutrality.¹²⁵ The (increased) attention paid to *qualified neutrality* is likely to mean that there will be fewer situations in which the law on neutrality will apply, if it does not disappear altogether due to obsolescence.¹²⁶

122 A similar comment can be found in BARDO FASSBÄNDER, N 75 on Art. 2(1), in: Simma et al., Charter (fn. 113) with reference to CHRISTIAN TOMUSCHAT.

123 Cf. instead of many: ALAIN PAPAUX/VINCENT MARTENET, in: Vincent Martenet/Jacques Dubey, Constitution fédérale, Commentaire romand, Basel 2021 (CR Cst.), art. 2, n. 31. See also HILPOLD, Neutralitätsrecht A und CH (fn. 92), 282; RHINOW, Permanence), in this book.

124 EPINEY et al., Neutralität 2025 (fn. 4), 12, note that there is no evidence that the international community has "tacitly" repealed these treaties. In view of the numerous international agreements that have never been repealed but have nevertheless become obsolete, this formal argument does not withstand the facts. Not the entirety of the Hague Conventions is obsolete, but the *neutrality provisions* (see the wording of article 30(3) of the Vienna Convention on the Lw of Treaties as referred to on p.118).

125 EPINAY et al. (Neutrality 2025, f. 4), state there were no indications that the community of states had silently repealed those conventions. Yet, many international law conventions were not formally repealed but became anyway obsolete (see the references cited in footnote 36). Conversely, several authors have declared Article 2(4) of the UN Charter to be "dead" (see footnote 82). Art. 30 (3) and 71(2b) as well as art. 14 ARSIWA relate precisely to not repealed conventions containing provisions contradictory to the UN Charter which become abrogated.

126 BARTOLI (fn. 22), 296 ('the law of neutrality [...] appears destined to find still less room for application, if not to vanish entirely through obsolescence') with reference to PAOLO PALCHETTI, Consequences for Third States as a Result of an Unlawful Use of Force (2015).

IV. On the provisions in the *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA)¹²⁷

The ARSIWA deal with *all disputes under international law* relating to "wrongful acts," i.e. unjustified conduct by a state, and thus go far beyond the scope of the UN Charter.¹²⁸ They are not limited to international armed conflicts but do include them. Therefore, the most subtle questions defined therein, such as "injury" or "damage," are not relevant in the present context.¹²⁹ There is no need for further discussion of the fact that Russia's aggression against Ukraine has caused enormous destruction and serious violations (territorial integrity, life and limb of thousands) and damage (including civilian infrastructure and residential areas) in many respects.

However, aspects of international law are being clarified that have so far – as far as can be seen – received little attention in the discussions in Switzerland. First, it is important to note that *acts and omissions* in relation to "wrongful" conduct are treated *equally* under Article 2, Ingress, and Article 15(1) and (2) ARSIWA. This finding also applies to "*wrongful*" conduct and is in line with Article 5(4) of the Swiss Federal Constitution about measures primarily aimed at protecting international humanitarian law and *preventing violations of peremptory international law*, also in connection with Art. 51 of the Charter (collective self-defence).

What constitutes *peremptory norms* of international law is defined in Article 53 of the Vienna Convention:¹³⁰ These are norms that are accepted and recognized by the international community as a whole as norms from which no derogation is permitted and which can only be modified by a subsequent norm of general international law of the same legal nature. These include, as core provisions of international law, serious *breaches of fundamental human rights guarantees*, i.e., as CRAWFORD et al. put it, those characterized by *gross or systematic failure* of the responsible state to fulfil

127 UN A/RES/56/83, adopted by the UN General Assembly on December 12, 2001.

128 See, for example, REGINA KIENER, ARSIWA, ISDS, and the Process of Developing an Investor-State Jurisprudence, Cambridge University Press 2021 (<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2C5A3E1EBC1BC50E2301E52D0530C887/S2633900521000473a.pdf/arsiwa-isd-and-the-process-of-developing-an-investorstate-jurisprudence.pdf>).

129 See CRAWFORD et al. (fn. 35), 971 f.

130 CRAWFORD et al. (fn. 35), 972 f.

its obligations under international law,¹³¹ such as genocide, aggression¹³² and the *war crimes* listed in article 8 of the Rome Statute, as well as the *denial of another state's right to self-determination*,¹³³ and, complementarily, mandatory provisions under separate international agreements, such as the prohibition of torture (SR 0.105). However, whether all of these are recognized and respected by the international community appears questionable in view of the current reality. This does not mean, however, that *ius cogens* should be watered down in the spirit of *appeasement*, especially not by a state that considers itself part of the Western community of values committed to the rule of law. Clear regulations to resolve possible conflicts between international contracts with the focus on *ius cogens* are laid down in art. 53, 64, and 71 (particularly para. 2 b) of the Vienna Convention on the Law of Treaties.

Art. 41(1) and (2) ARSIWA, specific consequences of serious violations Violation of mandatory obligations under international law, *obliges states* to use legal means *to put an end to* the violation of international law (para. 1) and neither regard the *serious violation of international law* as legal nor support its maintenance and continuation by failing to act (para. 2).¹³⁴ *This applies to acts as well as omissions* (Articles 2 and 15 ARSIWA). It directly concerns, among other things, the refusal of any (re-)export licenses for war material to support Ukraine as a victim state; this contradicts these rules.

In *conclusion 14* of the ILC Report 2019¹³⁵, which refers to Art. 41 of ARSIWA, it is stated that a rule of customary international law has no right to exist if it conflicts with a peremptory norm of general international law. *A rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (ius cogens)*¹³⁶. *"Peremptory norms of general international law (ius cogens) are hierarchically superior to other norms of international law and therefore override such norms in the case of conflict."*¹³⁷ In *conclusion 17*, the ILC states that *"peremptory norms of general international law (ius cogens) give rise to*

131 CRAWFORD et al. (fn. 35), 978.

132 See Art. 8bis of the Rome Statute Rome Statute of the International Criminal Court.

133 CRAWFORD et al. (fn. 35), 978.

134 AUST, in: Simma et al., Charter (fn. 30), N 29 on Art. 2(5).

135 See footnote 22.

136 ILC Report, p. 181.

137 No. 3, p. 182. See also JANIĆ, Return (fn. 28) "As a cornerstone of modern international law, the prohibition of violence clearly takes precedence over neutrality."

*obligations owed to the international community as a whole (obligations erga omnes), in which all States have a legal interest.*¹³⁸

This means that, in accordance with the spirit and purpose of the UN Charter, *all* states are obliged to refrain from any conduct that would assist an aggressor by violating peremptory norms of international law.

This also includes omissions (when active action would be possible) to stop the aggression or mitigate its effects.¹³⁹ The simultaneous violation of international humanitarian law and fundamental human rights is also significant in this context.

EPINEY et al., on the other hand, note that international law in general and the UN Charter do not impose any obligation to behave in a certain way toward violators of the law, even when it comes to the prohibition of the use of force.¹⁴⁰ Similarly, AMMANN¹⁴¹ notes that in the absence of a decision by the UN Security Council, no state is obliged to provide assistance to the victim.

Ignoring the ILC and its interpretation of ARSIWA according to the opinion expressed here, with reference to the ILC interpretation, this view is extremely legalistic and untenable, it ignores the conflict regulations of the Vienna Convention on the Law of Treaties mentioned above. It meant furthermore that article 2(4) of the UN Charter did not apply to the permanent members of the UN Security Council and that these member's worst violations of the Charter such as serial war crimes were to be accepted as conform to international law. The fact that Switzerland itself could be a victim state and then changed its view literally overnight is ignored, too. The principle of equal treatment of aggressors and victims under the Hague Convention, which Switzerland repeatedly invokes, directly contradicts the UN Charter and its interpretation by the ILC.

138 *Conclusion* 17, para. 1, p. 190.

139 See BARTOLINI (fn. 22), 293.

140 Fn. 4, 13. Similar: JANIĆ, Return (Fn. 28).

141 Quel futur pour la neutralité suisse? Interprétation(s) d'un concept à la croisée du droit et de la politique ion: ZSR Volume 144 (2025, II, 95 ff. (cited Ammann, neutralité), 157.

V. The mixture of arguments regarding neutrality law and neutrality policy

1. Federal Council

A glance at the Federal Council's statements and the current debate reveals a constant shift between arguments *based on* (supposed) *neutrality law* and those *based on neutrality policy*. If one argument does not sound convincing, the other is put forward.¹⁴² Or no clarification of what is meant is provided at all.¹⁴³ This is clearly explained in the 2007 Neutrality Report: "The term 'neutrality policy' refers to all measures taken by a permanently neutral state on its own initiative and regardless of the obligations associated with neutrality law in order to ensure the effectiveness and credibility of its neutrality. Unlike the law of neutrality, the policy of neutrality is not subject to any legal provisions."¹⁴⁴ Put more clearly, this means that the respective neutrality policy stance is determined opportunistically on a case-by-case basis without any legal reference. "It is at Switzerland's discretion and is subject to change of the time."¹⁴⁵ A typical example was provided by Federal Councilor Guy Parmelin during the deliberations on a motion concerning greater emphasis on the protection of the civilian population in armed conflicts regarding the export of protective vests:¹⁴⁶

"Parmelin Guy, Federal Councillor: With the entry into force of the sanctions on March 4, 2022, the Federal Council decided to essentially adopt the sanctions imposed by the European Union. The sanctions were implemented in accordance with neutrality and humanitarian activities were taken into account. This adoption of sanctions against Russia also had repercussions on exports of goods to Ukraine. In the case of the international armed conflict between Russia and Ukraine neutrality applies to our country."

The Federal Council's delayed decision to adopt the EU sanctions in essence ("pour l'essentiel!") was a purely political one: from a (more or less)

142 See M. HILPOLD, *Neutralitätsrecht A und CH* (note 92), 274. See RHINOW, *Offene Schweiz* (note 90), "Osmose von Recht und Politik," 114.

143 AMMANN, *neutrality* (fn. 141), 109.

144 Neutrality Report 2007, BBl 2007 5557, 5558.

145 URS SAXER/FLORIAN BRUNNER, SGK (fn. 68), N 32 on Art. 185. In the same vein, "[...] neutrality is a concept with a high degree of indeterminacy: its meaning is not immediately accessible."), AMMANN, *neutrality* (fn. 141) 04.

146 Official Bulletin of the National Council of February 28, 2024 (AB 2024 N 97).

"integral" to a (more or less!¹⁴⁷) "differential" understanding of neutrality.¹⁴⁸ This is followed by the strange statement that the sanctions were implemented with regard ("dans le respect") to neutrality, i.e., another restriction. This was a contradiction in itself, but was probably intended to justify the (belated and) incomplete adoption of the EU sanctions.¹⁴⁹ As a supposed justification, the Federal Council said that in the case of armed conflict between Russia and Ukraine, neutrality – by which it obviously meant the law of neutrality – was applicable, but avoided using the term "*law of neutrality*."

2. The National Council Security Policy Committee (SiK-N)

In June 2024, the SiK-N submitted a preliminary draft amendment to the KMG regarding the relaxation of the re-export regulations for war material in a consultation procedure. This was triggered by the Federal Council's refusal to lift the re-export ban on war material (including anti-aircraft ammunition) purchased in Switzerland by various countries years ago, due to the applicable KMG provisions, which did not provide for any exceptions. This commission endeavor was linked to the recognized danger of a decline in the Swiss arms industry. The preliminary draft contained various options:¹⁵⁰

"Art. 18 para. 3 (new)

³ If the recipient country is one of the countries listed in Article 17(3) to countries listed in Annex 2 of the Ordinance on War Material (KMG) and at least five years have elapsed since the signing of the non-re-export declaration, the latter shall be deemed to have been revoked if the reci-

147 The Federal Council decided that Switzerland would not participate in the G7 task force for the "in-depth search for oligarch funds" (NZZ, April 14, 2023, following several identical media reports), which was followed by the National Council, see footnote 149 below. In contrast, the Office of the Attorney General had already set up a task force "in connection with the war of aggression in Ukraine" in March 2022 (Activity Reports of the Office of the Attorney General 2023, 28 and 46, and 2024, 19).

148 This was the result of a clear threat by another state to sanction Switzerland as a whole if the EU sanctions were not immediately adopted.

149 See item 22.3451, Motion Ryser Franziska, Participation of Switzerland in the multi-national Repo Task Force for the implementation of economic sanctions against Russia, AB 2024 N 738: 80 yes, 101 no, 6 abstentions.

150 S. remarks about the whole issue: MOHLER, Neutrality (fn. 7).

ent country has undertaken to transfer the war material only under the following conditions:

- a. the third country is not involved in an internal or international armed conflict, unless the third country is exercising its right of self-defence under international law and the United Nations Security Council has determined that there has been a violation of the prohibition of the use of force under international law pursuant to Article 2(4) of the UN Charter; or the recipient state concludes, based on its analysis of international law, that the conditions for the right of self-defence under Article 51 of the UN Charter are met; or the United Nations Security Council has ordered measures under Article 42 of the UN Charter that involve the air, sea, or land forces of member states;
- b. the third country does not violate human rights seriously and systematically;
- c. there is no high risk that the war material to be exported will be used against the civilian population in the third country.

Minority I (Fivaz, Fabien, Andrey, Fridez, Schlatter):

³ If the recipient state is one of the countries listed in Article 17(3) [= countries listed in Annex 2 KMV] and if, since the signing least ten years have elapsed since the non-re-export declaration was made, the following applies [...]

Minority II (Tuena, Addor, Gartmann, Götte, Heimgartner, Hess Erich, Hurter Thomas, Walliser, Zuberbühler):

³ Non-re-export declarations shall be limited to five years.

Art. 46 para. 3 (new)

³ If the non-re-export declaration was signed before Article 18 para. 3 came into force and is more than five years old, the recipient state may subsequently declare compliance with the conditions for the transfer of war material set out in this provision. Upon receipt of the corresponding declaration, the non-re-export declaration shall be deemed to have been revoked.

Minority I (Fivaz, Fabien, Andrey, Fridez, Schlatter):

³ If the non-re-export declaration was signed before Article 18 paragraph 3 came into force and is more than ten years old, the recipient state may [...]

Minority II (Tuena, Addor, Candinas, de Quattro, Gartmann, Götte, Heimgartner, Hess Erich, Hurter Thomas, Walliser, Zuberbühler):

³ Delete."

The support for this consultation procedure provided for by the federal administration was already irritating, as it came not from the Department of Foreign Affairs (FDFA) but from the State Secretariat for Economic Affairs (SECO), specifically from the Export Controls War Material Division of the Federal Department of Economic Affairs, Education and Research (FDEER). The accompanying explanatory report about the preliminary draft¹⁵¹ refers in unspecific terms to the "law of neutrality" and to different interpretations regarding re-export licenses or bans.¹⁵² This is followed by contradictory statements: for example, that the non-re-export declaration is "not an instrument of neutrality."¹⁵³ Then, with regard to the principle of equal treatment under *the Hague Convention on Maritime Warfare*, it states that since the non-re-export declaration is not *an instrument* of (now) *neutrality law* and is only mentioned in the *preamble*, a neutral power should "in principle not change such rules in the course of the war," it is *negligible* (sic!).¹⁵⁴ Ultimately, the SiK-N agreed on a "solution" to the problem with a narrow majority, setting an *expiry date for neutrality* with regard to the re-export of war material.¹⁵⁵ However, it is difficult to justify the re-export restriction by a purchasing country itself on the basis of international law.¹⁵⁶

The fact that this would not lift the re-export ban on Ukraine, which, according to Switzerland's interpretation, was and is "involved in an international conflict," was either overlooked or deliberately ignored—which directly contradicts the initial motivation for this partial revision of the law.

3. The Director of International Law at the FDFA at an international law conference

At the international law conference on "*State Assets / Immunities & Accountability for War Damages*" held on February 27, 2025, organized by

151 Explanatory Report (fn. 2).

152 Explanatory Report (fn. 2), margin note 5.

153 Explanatory Report (fn. 2), margin note 6, p. 5.

154 Erl. Ber. (fn. 2), 22. This view explicitly contradicts Art. 31 para. 2, preamble, WÜV.

155 See MOHLER, Neutrality (fn. 7), margin note 20 ff.

156 HILPOLD, Neutrality Law A and CH (fn. 92), 282. This is a bilateral international treaty provision with no sanctions for violations.

the University of Fribourg in collaboration with the Swedish and Ukrainian embassies in Switzerland and the FDFA, the Director of the FDFA's International Law Directorate stated in his welcoming address: "as you know, neutrality prohibits Switzerland from exporting war material to a belligerent country." This is an obligation that does not even appear in the Hague Conventions. *Belligerent?*¹⁵⁷ In relation to Ukraine? What was meant by "neutrality" remained unanswered, as did the question of whether Switzerland would become a *belligerent country* if it had to defend itself against a military attack.¹⁵⁸

4. The Council of States' decision on the export of war material on June 11, 2025

On June 8, 2025, the Swiss peoples party was the first to perform a backflip on neutrality policy. The *Sonntagszeitung* newspaper reported that day: "We have clarified that re-export has nothing to do with neutrality." Whether neutrality law or neutrality policy was not mentioned. This raises the question why then the Federal Council rejected all requests from other countries received after Russia's attack on Ukraine for the re-export of war material purchased in Switzerland years ago, citing the principle of equal treatment under neutrality law. If neutrality is irrelevant according to this view, the Federal Council's rejections were arbitrary.

On April 1, 2025, the SiK-S (S = Chamber of States) decided by a majority to contribute a variant for an amendment to the KMG for the same reasons. The motion was to supplement Art. 22a KMG as follows:

"^{2bis} Paragraph 2 does not apply to countries for which the Federal Council provides exceptions to the individual licensing requirement [countries listed in Annex 2 KMG]. Export applications for these countries are approved unless there are exceptional circumstances and Switzerland's foreign or security policy interests require rejection."

According to this, applications to export war material to countries listed in Annex 2 to of the War Material Ordinance¹⁵⁹ should in principle be approved, unless two criteria requiring rejection are met. It is unclear whether

157 According to Pons: combative, warlike.

158 The Director of the International Law Directorate left the meeting due to a lecture commitment immediately before the response was due.

159 KMG, SR 514.511.

these criteria ("and") are to be understood cumulatively, even though they do not necessarily have anything to do with each other legally or politically – and this would hardly allow for a quick decision. Apart from the newly inserted relevance of this list of countries, the motion reverses the Federal Council's proposal of February 12, 2025¹⁶⁰ which corresponds verbatim to that of March 5, 2021:¹⁶¹

"Art. 22b Deviation by the Federal Council from the approval criteria for foreign transactions

¹ The Federal Council may, subject to the conditions set out in Article 22, deviate from the authorization criteria set out in Article 22a if:

- a. there are exceptional circumstances; and
- b. this is necessary to safeguard the country's foreign or security policy interests."

This proposal by the Federal Council was narrowly rejected by the Council of States at the time (2021) by 22 votes to 20,¹⁶² and the National Council followed suit.¹⁶³ As a result, the so-called correction initiative, which aimed to ban arms exports to *countries involved in civil wars*, was withdrawn.

The list of countries in Annex 2 to the KMV is, to put it mildly, highly questionable *in terms of neutrality policy*, as only "Western" countries are listed. It contradicts the much-vaunted "permanent" neutrality, which is supposed to be decisive not only in the event of an international armed conflict between states, but also as a "preliminary effect," i.e. it also covers such a situation (peace time). Furthermore, it is discriminatory, as other states that also meet the requirements of the rule of law and have ratified numerous international conventions that are relevant in this context are not listed (e.g. the Baltic states, Slovenia, and newer Schengen member states).¹⁶⁴ Arguments based on neutrality (without specifying whether this refers to political or international law) were not taken into account.

On June 11, 2025, the Council of States accepted this motion from its SiK. In addition, Council of States member Thierry Burkart submitted an individual motion to supplement Art. 18 KMG:

160 Message on the amendment to the War Material Act (inclusion of a deviation authority for the Federal Council) of February 12, 2025 (25.024, BBl 2025 650); draft BBl 2025 651).

161 BBl 2021 624, 2.

162 AB 2021 S 446 (vote of June 3, 2021).

163 AB 2021 N 1621 (vote of June 15, 2021).

164 See MOHLER, Neutrality (fn. 7), margin no. 13 f.

^{1bis} If the recipient country of war material is one of the countries for which the Federal Council provides for exceptions to the individual authorization requirement [countries listed in Annex 2 KMV], it may transfer the war material received since this provision came into force to another country without Switzerland's consent.

Regarding the list of countries, the above also applies to this provision. The original aim of the parliamentary efforts to lift the re-export ban on war material purchased in Switzerland long ago with regard to the Ukraine is undermined by this motion, which has also been accepted by the Council of States, because the relaxed provision would only apply to war material delivered after this provision came into force. Nor was there any discussion of whether to include the Ukraine into this list or of whether one of the eligible countries could deliver military equipment supplied to it by Switzerland to a country that does not meet the criteria set out in Art. 22a para.

5. The purpose is exclusively the promotion of security-related technology and industrial base (STIB)

Furthermore, such a provision would violate Articles 7 and 11 of the Arms Trade Treaty¹⁶⁵ which stipulates that *each individual export must be reviewed* and that efforts must be made to prevent "diversions."

On the same day, the Council of States also adopted a new version of the amendment to Article 22a by inserting a paragraph ^{2bis}:

"Paragraph 2 shall not apply to countries for which the Federal Council provides for exemptions from the individual authorization requirement [countries listed in Annex 2 KMV]. Export applications for these countries shall be approved unless there are exceptional circumstances and the foreign or security policy interests of Switzerland require rejection."

If enacted, this provision could lead to delicate foreign policy dilemmas. Furthermore, "foreign policy or security interests" are by no means identical to the criteria for export bans under Art. 22a para. 2 KMG.

165 SR 0.518.61.

A proposal that strictly bases KM (re-)export licensing on the UN Charter and the Federal Constitution¹⁶⁶ was rejected (as it had been in the committee) by 32 votes to 10. This proposal is also compatible with the Arms Trade Treaty (ATT). The first of eight principles in the preamble to the ATT states:

"Determined to act in accordance with the following principles: Principles:

– the inherent right of all states to individual or collective self-defence (as recognized in Article 51 of the Charter of the United Nations)."

This left four options for further debate: that of the Federal Council, the two options of the SiK-S (one of which is the reverse of the Federal Council's option) and that of the SiK-N.^{166a}

6. The deliberation of the neutrality initiative and the counterproposal in the Council of States on June 19, 2025^{166a}

During the deliberations on the Swiss people's party's neutrality initiative (N-Iv) and the Federal Council's message rejecting it a counterproposal was submitted and debated in the Council of States. It reads as follows:

Art. 54a

¹ Switzerland is neutral. Its neutrality is permanent and armed.

² The Confederation shall use its neutrality to guarantee Switzerland's independence and security, to prevent conflicts, and to contribute to the resolution of conflicts. It shall be available as a mediator.

¹⁶⁶ Cf. MOHLER, *Neutrality* (fn. 7), margin no. 43:

« 1 No armed conflict within the meaning of paragraph 2(a) a is the armed defence of a country against aggression contrary to international law (Art. 2 para. 4 UN Charter) and against further war crimes by the aggressor or its auxiliaries (Art. 6 to 8 of the Rome Statute) in accordance with Art. 51 of the UN Charter.

²After examining the legal situation, the Federal Council may, under these conditions, grant authorization for direct and indirect exports of war material to a country defending itself in accordance with this provision.»

^{166a} On 19th December 2025 the Parliament has by its final votations on this subject (AB 2025 N 18.12.2025, prov; AB 2025 S 19.06.2025, prov) accepted the legal version text in conflict with the ATT, yet, according to the Federal Council's explanations, each export has to be checked and may be allowed only with restrictions. This means that other countries will maintain their refraining to buy war material in Switzerland with the uncertainty about possible restrictions. Cf. immediately following number 6.

This proposal can also be described as "cartoon nostalgia" (Anne Applebaum). Neutrality itself cannot be armed. Switzerland, with its army that will not be capable of defending the country for decades to come, cannot be described as armed.

This isolationist policy does not guarantee Switzerland's security; on the contrary, it poses a real threat to its security. Although the reliance on NATO coming to Switzerland's aid in the event of an attack is not explicitly stated, as it is in the Ni-Iv, the same expectations lie behind it ("free riding"). Considerations of the real geopolitical situation, the framework of international law (UN Charter), or the state of Switzerland with its army are absent from the debate. The Council of States decided to recommend rejecting the N-Iv and accepting the counterproposal. Meanwhile, the counterproposal was dropped by the Parliament (12 December 2025). Therefore, only the Initiative itself will be put on public votation requiring a proposed change of the Constitution by a "double yes", i.e. the majority of the individual votes countrywide as well a majority of the cantons (determined by the votation outcome in each canton).

7. The newly aligned 2025 armament policy strategy

On June 20, 2025, the head of the Department of Defence, Population Protection and Sports (DDPS) presented the new armament policy strategy. It states that the deteriorating security situation in Europe had an impact on the international arms market with excess demand. In addition, manufacturers of military equipment primarily serve countries in which they operate, as well as allies and partners in other forms of cooperation. As a result, Switzerland finds itself in a difficult negotiating position with longer delivery times and higher prices.¹⁶⁷

Section 4.3 of the strategy paper sets out Objective 3: "Switzerland contributes to European security in the field of defence, thereby increasing its own security and independence." At present, it remains largely on the sidelines. "By making Switzerland's defence-related services available to its neighbouring countries and other European states, Switzerland can expand

167 Switzerland's changing armament policy, Armament Policy Strategy of the Federal Council of June 20, 2025 (BBl 2025 2151 of July 11, 2025) (cited as Armament Strategy 2025), 4.

its own access to security-related systems [...] produced by cooperation partners.¹⁶⁸

Section 4.6 deals with *conflicting objectives*. It states: "European states [...] are attaching ever greater importance to issues of security of supply in the event that their allies or they themselves have to exercise their right to self-defence. In addition to their own supply of military equipment, and spare parts in particular, it is crucial for European states to be able to pass on military equipment procured abroad to partner states or, more generally, to states that exercise their right to self-defence in accordance with the Charter of the United Nations. However, Art. 22a para. 2 lit. a of the KMG explicitly excludes the delivery of war material to states that are involved in an international armed conflict. [...] Regarding direct deliveries, however, Switzerland is *unable to guarantee* recipients of Swiss war material *that they will continue to be supplied if they themselves become involved in an international armed conflict – even if they are acting in self-defence*."¹⁶⁹

The timing of this publication is strange: for more than three years parliamentary efforts have been underway to at least relax or lift re-export restrictions. Should these be adopted in one form or another, significant parts of this "strategy" will become obsolete. The Federal Council also rejects the N-Iv, which would also ban KM exports. To be cancelled.

The fact that the Federal Council writes in the same strategy paper that Switzerland contributes to European security in the area of armaments and then immediately excludes one of the most essential components for this is incomprehensible, to say the least. The actual change of the KMG with regard to (re-) exporting war material (footnote 167a) even considering the announced restrictions would have to be cancelled as unconstitutional if the initiative would be adopted. Given the *continued ban* on re-exports of KM to countries involved in international armed conflicts, i.e. victim states, as announced here, the Swiss defence industry is also beyond being saved. With the resulting procurement problems described in the report itself, Switzerland will have to abandon the rearmament of its army, at least within the targeted timeframe until 2035. This situation appears to be a direct violation of Art. 2 para. 1 of the Federal Constitution, which stipulates that the security of the country must be maintained. And no consideration is given to how other states would respond to Switzerland if it were attacked itself (see section VIII).

168 Arms Strategy 2025 (fn. 169), 15.

169 Arms Strategy 2025 (fn. 169), 15 (emphasis added).

VI. The implications of Switzerland's stance on neutrality

1. In practice

Switzerland prohibited Germany from re-exporting 12,400 rounds of *anti-aircraft ammunition* purchased in Switzerland decades ago. Ukraine urgently needed such ammunition in its fight against Russian air strikes with drones, missiles, and glide bombs. The lack of such *defensive ammunition* thus supported the effectiveness of the Russian air strikes to the detriment of Ukraine, including the civilian population, in violation of neutrality. Therefore, there could and can be no question of "equal treatment" *de facto*.¹⁷⁰

The same applies to banning Denmark from supplying Ukraine with armoured personnel carriers that were purchased in Switzerland decades ago and have long since been mothballed in Germany, as well as with decommissioned tanks belonging to RUAG that are stored in Italy.

In the meantime, the Federal Council has approved RUAG MRO's sale of 71 Leopard 1 A5 tanks, which the company purchased from the Italian Ministry of Defence in 2016 (with an option for 25 more once the ownership situation has been clarified), and at the same time banned their transfer to the Ukraine.¹⁷¹ This ban even exceeds the requirement of neutrality under Art. 6 of the Fifth Hague Convention (see section I above) and cannot be justified under neutrality law.

The low point of this policy, contrary to neutrality, was the rejection by the Council of States to allow the delivery of *non-military* protective vests for the civilian population. For more details, see section IV.1 above. It should be noted in this regard that the Munitions List (ML) of the Wassenaar Agreement¹⁷² in Note 3 to section 13 d expressly excludes *non-military* protective vests from war material. A delivery in accordance with the motion would have been possible without further ado, even without a request,

170 PARISH (Fn. 1), 116.

171 Federal Council press release of May 28, 2025 (https://www.news.admin.ch/de/newnsb/MhXemVQdwdZF6PM60_fb5).

172 This is reproduced (in part) in Annex 2 to the War Material Ordinance (KMV, SR 614.511), making it part of Swiss law. Wassenaar Munitions List: <https://www.wassenaar.org/app/uploads/2023/12/List-of-Dual-Use-Goods-and-Technologies-Munitions-List-2023-1.pdf>.

if humanitarian aid had been mentioned. The Council of States rejected the motion on 23 September 2024 by 17 votes to 24, with 2 abstentions.¹⁷³

After the barbaric Russian air strike on Palm Sunday, April 13, 2025, on the Ukrainian city of Sumy, which could hardly be surpassed in cynicism, in which, according to current information, 34 people, most of them on their way to Palm Sunday services, were killed and nearly 200 injured, Switzerland contented itself with expressing its condolences and making an indirect reference to international humanitarian law through the Swiss embassy¹⁷⁴ in Ukraine, while the FDFA in Bern remained silent.¹⁷⁵

2. With regard to international humanitarian law

a) A look at its origins

What is now referred to as international humanitarian law began – after the atrocities of the Crimean War (1853–1856) and Solferino (1862) – with requirements for the law of war or martial law that was to be established.¹⁷⁶ The content of the original basic principle came from FRIEDRICH FROMHOLD MARTENS, the Russian delegate at the first Hague Peace Conference in 1899. His goal was to insert a clause that would establish a minimum humanitarian standard independent of the treaty in the event that no agreement could be reached on the treatment of irregular combatants.¹⁷⁷ The formula (translated from French into English) reads:

"In cases not covered by the written rules of international law, civilians and combatants remain under the protection and authority of the principles of international law, as derived from established customs, i.e. the *principles of humanity*, and the *demands of public conscience* [...]"

173 AB 2024 S 875.

174 "Our condolences go out to the families of the many innocent victims and injured in this morning's Russian attack in Sumy. Civilians must never be targeted. International humanitarian law must be respected," Watson, April 13, 2025 (<https://www.watson.ch/international/ukraine/977986132-internationale-reaktionen-auf-den-russischen-angriff-auf-sumy>).

175 The expression of condolence did not appear in the media releases of the Federal Council or the FDFA.

176 DANIEL THÜRER, *Armed Conflict and the Rule of Law*, introductory remarks to HANS-PETER GASSER/NILS MELZER/ROBIN GEISS, *International Humanitarian Law*, 3rd edition, Zurich/Basel/Geneva 2021 (cited as Gasser et al.), XVII.

177 UDO FINK/INES GILLICH, *Humanitarian International Law*, Baden-Baden 2023, 72.

This *Martens clause* applies universally under customary law and independently of membership to all future rules that have the same objective,¹⁷⁸ even if the consequences of violating it remain open and its applicability to new technologies (nuclear weapons, robotic weapons) remains unclear.¹⁷⁹ It can be found (in different wordings) in the Hague Convention on Land Warfare and in the Geneva Conventions.

In 1862, Henry DUNANT self-published his book *Un souvenir de Solferino*, describing the horrors he witnessed during this battle. It was translated into eleven languages.¹⁸⁰ The First Geneva Convention relating to DUNANT's Proposals followed 1866, 1876 then when the International Committee of the Red Cross (ICRC) was founded¹⁸¹ - and afterwards the 1st International Convention with respect to the Laws and Customs of War on Land of 29 July 1899 was agreed upon.¹⁸²

It is also worth mentioning that in 1868, Russian Tsar Alexander II invited representatives to a conference in St. Petersburg with the intention of banning certain explosive projectiles that caused particularly cruel injuries. This was achieved through an international treaty even though the final declaration relativised what had been achieved.¹⁸³ His successor, Tsar Nicholas II, initiated an international conference in 1898 with the aim of abolishing war; it took place from May to July 1899 with 26 participating states (including the USA, China, and Japan) on invitation of Queen Wilhelmina of the Netherlands in The Hague (known as the Hague Conference I).

178 FINK/GILICH (fn. 179), loc. cit.

179 GASSER ET AL. (fn. 178), 184, 194.

180 THÜRER (fn. 178), XXI.

181 Wikipedia.

182 SR 0.515.III; the agreement is the Final Protocol of the Hague Peace Conference of July 29, 1899 (SR 0.193.211).

183 GASSER et al. (fn. 178), 23 f.

b) Current situation

International humanitarian law is under great pressure today, on the one hand because it is simply ignored (e.g. by Russia¹⁸⁴ Israel, Hamas, Sudan, partly the USA), and secondly because it is now generally considered irrelevant (USA¹⁸⁵). This reveals not only different perspectives, such as that of the USA in connection with the *war on terror*, which it has understood and wants to be understood after 9/11 (2001) not as a metaphor but in the

184 It should be noted that, in a declaration to the Swiss Federal Council dated October 23, 2019, Russia renounced the reservation it had made when ratifying Additional Protocol I to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977 (SR 0.518.521), it withdrew its declaration of unconditional recognition of the competence of the International Humanitarian Fact-Finding Commission pursuant to Art. 90(2) (<https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/ru?activeTab=default>). This withdrawal referred to Russia's declaration upon ratification of Additional Protocol I on September 29, 1989, which read as follows: "The Soviet Union's ratification of the Protocols additional to the Geneva Conventions for the protection of the victims of war constitutes an unusual event in the recent diplomatic history of our country. It reflects the spirit of new political thinking and demonstrates the Soviet State's commitment to humanizing international affairs and strengthening the system of international law. At the same time, it exemplifies the spirit of continuity between Russian and Soviet diplomacy, extending back to the 1860s, in seeking to ensure that the principles of humanism and mercy are respected even in the tragic circumstances of war. The Additional Protocols, in whose drafting the Soviet Union played a universally recognized role, were among the first international instruments presented for ratification to the new Soviet Parliament. It should be pointed out that the Supreme Soviet of the USSR chose to ratify the Protocols without any reservation whatsoever. At the same time, our State recognized the competence of the International Fact-Finding Commission in cases where international humanitarian law is violated. We in the Soviet Union hope that the ratification of the Additional Protocols will be duly appreciated by all those involved in the noble cause of humanism and the endeavor to free mankind from the horrors of war." (ibid.). Ten years after recognizing independent investigations, this recognition was withdrawn after Russia annexed Crimea and was apparently already planning its aggression against Ukraine. The noble cause of humanism and the liberation of humanity from the horrors of war no longer applied and no longer applies."

185 As early as 2006, the US sent a letter to the ICRC strongly criticizing the ICRC's study on international humanitarian law, written by JEAN-MARIE HENCKAERTS/ LOUISE DOSWALD-BECK, Cambridge 2005, (letter reproduced in *International Law Materials*, vol. 46, no. 3, 2007, 514–31). The current US Secretary of War, Pete Hegseth, called for the Geneva Conventions to be ignored in his 2024 book *The War on Warriors: Behind the Betrayal of the Men Who Keep Us Free*.

sense of international law,¹⁸⁶ or that of Israel with regard to the Palestinian territories conquered after the Six-Day War, to which the Fourth Geneva Convention is considered by Israel not be applicable.¹⁸⁷ There are also differences in the treatment of actual prisoners of war (e.g., Russia in the war against Ukraine) and people captured in *the war on terror* who have actually committed terrorist acts or are merely (summarily) suspected of doing so (the US with regard to prisoners in Guantanamo; Israel).

Nevertheless, international humanitarian law constitutes the minimum standard of those *ethical requirements* that must not be disregarded or fallen short of, even in armed conflict, in order to *preserve what is indispensable for humanity*. According to MARTENS' clause, this applies even to those who do not adhere to it themselves. This is set out in Article 3 of all the Geneva Convention¹⁸⁸ and in the Additional Protocol of June 8, 1977, to the Geneva Conventions of 12 August 1949 on the protection of victims of non-international armed conflicts (Protocol III ¹⁸⁹).

Despite all rejection and disregard, however, *the core area of international humanitarian law* continues to be regarded as *peremptory international law*, the gross and/or systematic violation of which does not allow for a neutral stance.¹⁹⁰

3. With regard to other obligations under international law

International humanitarian law defines various "*wrongful acts*" or prohibitions of crimes that are part of mandatory international law, such as those listed in Article 8 of the Rome Statute.¹⁹¹ To be "neutral" towards crimes that violate such peremptory international law provisions, in particular crimes against humanity (Article 7) means *completely emptying the concept of neutrality* of its meaning or *exceeding its indispensable limits to the point*

186 THÜRER, in: Gasser et al. (fn. 178), XXIV; Gasser et al., 10, 33 f.

187 GASSER et al. (fn. 178), 40.

188 SR 0.518.12, 0.518.23, 0.518.42, 0.518.51.

189 SR 0.518.522. Not signed by the USA, neither the Additional Protocol I (0.518.521), in contrast to Russia, for example.

190 Art. 26, 40 ARSIWA; Thürer (fn. 178), XXXIII; see above, section III/3. It is interesting to note that AMMANN, *neutralité* (fn. 141), does not include international humanitarian law in her analysis (102), but bases her argument on Art. 2 of the Geneva Conventions "en temps de guerre" (107). The meaning of "en temps de guerre" remains unclear here.

191 See section III/3.

*of de facto (albeit not verbal) recognition of such violations of law as at least legitimate*¹⁹²

4. With regard to ethical responsibility

From an ethical standpoint, there is no question that Switzerland must do everything in its power to help a population affected by severe abuse and the most serious violations of international law, providing them with the means to defend themselves or at least mitigate the attacks.¹⁹³ *From an ethical point of view as of war crimes and those responsible for a neutral standpoint is impossible.*

5. In relation to the Federal Constitution

With regard to the clear international legal situation concerning the Russian aggression, reference has to be made to Art. 5 of the Fed. Cst. ("The Confederation and the cantons shall observe international law."). This mandatory provision is *not an à la carte menu*. Nor is it merely a harmonization provision relating to domestic legislation, but concerns foreign policy as well, which is the responsibility of the Confederation (Art. 54^{193a}). This applies in particular to peremptory international law, as is the case here. Art. 5 para. 4 Fed. Cst. must be seen in conjunction with Art. 2 para. 4 Fed. Cst., according to which Switzerland is committed, among other objectives, to a peaceful and just international order. This norm refers directly to the UN Charter as a "commitment to the effectiveness and validity of international law in international relations."¹⁹⁴

192 This is now the case, for example, with Trump in relation to the "cause" of Russian aggression. The fact that even the alleged cause of the aggression directly violates the mandatory provision of Art. 2(4) of the UN Charter is ignored.

193 See Swiss neutrality in practice (footnote 6), 16. See also the significance of Article 41 ARSIWA (section IV above).

193a In art. 54 para. 2, establishing the criteria and goal of the foreign policy, neutrality is not mentioned. To include neutrality was explicitly rejected during the revision of the Fed. Cst, 1998 (AB 1998 NR, Separate edition of the revision of the Constitution, S.271ss).

194 BERNHARD EHRENZELLER, in: St. Galler Kommentar (fn. 68), N 25 on Art. 2.

VII. On Swiss-style distorted neutrality

1. On the distinction between military/non-military and economic sanctions

Two examples, among others, illustrate the hidden nature of this neutrality: the Council of States also refused to supply non-military protective vests for the Ukrainian civilian population, supported by the Federal Council with the "justification" that Ukraine had not submitted a request for them. See number VI/4.

Switzerland largely followed (initially hesitantly) the sanctions imposed on Russia by the EU and the US, but not completely (see number V/1 above). However, the decision not to impose all economic sanctions had nothing to do with neutrality^{194a} but served exclusively particular economic interests.

This has been evident in recent months with various attempts to amend the KMG so that the Swiss arms industry is not subject to go to its doom, but rather to enable it to export products without excessive restrictions. Security policy considerations regarding the equipment of the Swiss army also played a role here, but these are of secondary importance given the dependence on resources that cannot be produced domestically.¹⁹⁵

2. Discrepancies between official statements and conduct

Most of these discrepancies can easily be verified. One example will suffice: One week after the Council of States rejected the delivery of non-military protective vests for the Ukrainian civilian population (see number V/1 above), Federal Councillor Cassis, as head of the FDFA, declared during Switzerland's presidency of the UN Security Council that his country would make the protection of the civilian population a priority issue.¹⁹⁶

195 See *Armement Strategy 2025* (fn. 169), section 4.6. The report uses obfuscating verbiage to gloss over the core issue.

196 Media release from the Federal Council dated October 1, 2024 (<https://www.news.admin.ch/de/nsb?id=102663>).

VIII. Reversal of neutrality

According to the so-called neutrality initiative, Swiss neutrality is to be enshrined in the Federal Constitution as a rigorous foreign policy requirement. Paragraph 2 reads:

"² Switzerland shall not join any military or defence alliance. Cooperation with such alliances is reserved in the event of a direct military attack on Switzerland or in the event of actions in preparation for such an attack."

This provision means that Switzerland may not join NATO or any EU defence alliance, it rejects any form of solidarity.¹⁹⁷ Conversely, however, the initiators expect other countries to come to Switzerland's military aid in the event of an immediate threat or military attack. What is tacitly ignored here is that the other countries asked for help could behave neutrally simply because Switzerland itself refuses any solidarity.

Switzerland would then be left to fend for itself with an army that would remain incapable of defending the country for decades to come, particularly without any protection against long-range air strikes. Even if the countries asked for help were still (partially) willing, it would no longer be possible to achieve effective cooperation. The consequences need no explanation. The alternative for NATO, in order to prevent an enemy bridgehead in the middle of its continental European defence concept ("hole in the doughnut"), would be to occupy at least a large part of Switzerland.

The view of law experts who advocate the continued (co-)existence of *the law to neutrality* with the principle of equal treatment, and of the majority of politicians who support the continuation of Switzerland's current neutrality, is exclusively that of an outside observer who is not affected by geopolitically threatening developments. The fact that Switzerland itself could become a victim state is ignored. This is also clearly demonstrated by the new armament policy strategy of June 20, 2025 (see number V/6 above).

¹⁹⁷ See also THOMAS ROTHACHER, Ich glaube nicht, dass unsere Nachbarn uns beistehen würden (NZZ, June 3, 2025, 7.

IX. Conclusion

Switzerland's neutrality has long been akin to a slalom¹⁹⁸ course riddled with contradictions, reflecting the chaotic state of neutrality law described by KARL ZEMANEK.¹⁹⁹ It hangs by the fragile thread of a myth, invoking the obsolete neutrality provisions of the Hague Conventions V and XIII (Section I, III/3) as *the law of war*, disregards the obligations under the UN Charter (para. III/1), and constantly pushes against or violates ethical, international legal, and logical boundaries, forcing ever new course changes and truth contradictory statements (or silence).²⁰⁰ The continuation of behaviours prescribed by the law of neutrality (obligations and *non*-obligations of various kinds) of states in the event of a violation of Article 2(4) of the Charter²⁰¹ is also the result of purely dogmatic highwire acts²⁰² or – with all due respect – legal letter-bound hair-splitting that obscures the *meaning and purpose of the UN Charter* as a whole. This corresponds to a predominantly Swiss view, without regard for the credibility of such neutrality abroad. However, neutrality is per se an external relationship. Its prerequisite is credibility.²⁰³ But credibility has been lost with the current practice and the false dogmatism it represents. The neutrality initiative to amend the Constitution is the silent admission of the initiators that here is no international legal provision regulating neutrality. The reference to "permanent" or "everlasting" neutrality is an unsuitable attempt of justification with no connection to reality.^{203a} This detaches legal formulations from their underlying meaning and content, which is not only untenable from a legal-philosophical point of view, but also contradicts the Universal Declaration of Human Rights.²⁰⁴ The assertion that neither international law in general nor the UN Charter in particular (except in the case of correspond-

198 See JORIO (fn. 18), *passim*, for more on this topic. HILPOLD, *Solidarität und Neutralität* (fn. 85), describes it as self-referential (16).

199 K. ZEMANEK, *The Chaotic Status of the Laws of Neutrality*, in: W. Haller et al. (eds.), *FS Schindler*, 1989, pp. 443–454 (cited in Hilpold [fn. 85], 70).

200 HILPOLD, *Neutrality and Solidarity* (fn. 85), 19. On the myth, see also Rhinow, *Open Switzerland* (fn. 90, 50f).

201 See the note in EPINEY et al., *Neutrality 2025* (footnote 4), 12 f.

202 DANIEL THÜRER, *On the Meaning of Neutrality Today*, in: Roberto Bernhard, *Nationalisms*, Aarau 1998, 217 ff. 2019.

203 RHINOW, *Permanence* (fn. 14); IDEM, *Open Switzerland* (fn. 90), 62.

203a RHINOW, *loc.cit.*

204 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (not included in the SR).

ing resolutions of the UN Security Council) impose any obligation on states to behave in a certain way towards violators of the peremptory international law – even when it comes to the prohibition of violence – contradicts the interpretation of general international law by the ILC based on Art. 41 of the ARSIWA,²⁰⁵ as well as LAUTERPACHT's fundamental analysis.^{205a} It leads to the detachment of individual provisions from the objectives of the Charter, which are directed at the prohibition of violence, the sovereignty of states and their territorial inviolability, human rights, and international humanitarian law, through sophistically misleading interpretations of these provisions. Any ethical and human rights reference is thus cut off by this legal positivist and highly controversial interpretation, which also contradicts Swiss legal doctrine and Swiss understanding of law.²⁰⁶ This also applies to international humanitarian law. The legal system, including its meaning and purpose, the *ratio legis* or *ratio chartae*, is to interpret and apply as a whole.²⁰⁷

Otherwise, such an understanding of "neutrality" also applies to the worst war crimes, including terrorism and torture.²⁰⁸ It directly carries the risk of favouring the politically and militarily most powerful states in their worst violations of the UN Charter's prohibition of violence, especially when the UN Security Council is paralyzed by their veto power, thereby sabotaging the peace order (number I with footnote 22).

The neutrality practiced by Switzerland has thus become completely unbelievable abroad, especially in Europe, where it originated (even in early forms in antiquity).²⁰⁹ Customary international law is used to justify reference to the rules of neutrality. In recent literature, this is referred to as "traditional neutrality" and is considered outdated by the prevailing doctrine, at least abroad, and replaced by the concept of "*qualified neutrality*" (number III/3). This, too, lacks a positive legal regulation or, for the time being, a sufficient basis in customary law, but it helps to prevent the worst effects of "traditional neutrality" as currently advocated in Switzerland.

205 EPINEY et al., Neutrality 2025 (fn. 3), 13.

205a Cf. number III/1 with footnote 83.

206 See, for example, (Federal Supreme Judgement) Court BGE 139 II 233, 242; 150 V 454.

207 RENÉ RHINOW, Concluding remarks, in: Anne Peters/Markus Schefer, Fundamental problems of interpretation from the perspective of public law, Bern 2004, 96.

208 MARKUS MOHLER, Neutrality towards war crimes? in: Aargauer Zeitung, September 13, 2024, 4.

209 JORIO (fn. 18), 19 ff.

During the Iraq War, the Federal Council also highlighted aspects of non-participation in sanctions and concluded that, in terms of neutrality, the danger no longer lay in participating in economic sanctions, but in standing aside, which called into question the credibility of Switzerland's neutrality position (number II/2). This position seems to be being applied only partially in the current situation (cf. rejection of joining a G7 task force [footnotes 147, 149]).

The principle of equal treatment repeatedly invoked by the Federal Government under – in this respect – the now obsolete Hague Convention violates Switzerland's obligations under international law as set out in the UN Charter and the core principles of international humanitarian law, thereby unilaterally supporting the effects of Russia's military operations in Ukraine (KMG-related export bans based on neutrality law [Re]export bans) (number III/1, V/1).

Since the collapse of the Soviet Union and the Warsaw Pact (at the latest), the Federal Government has never analysed Switzerland's neutrality in sufficient depth or defined it where necessary, not even in the 1993 and 2022 neutrality reports, which took into account the relationship to mandatory international law.²¹⁰ This was also evident in connection with the declaration made upon accession to the UN (number II/4).

Even in Parliament and the respective commissions, neutrality has never been discussed in depth, as evidenced by the two drafts of the SiK-N and SiK-S (cf. numbers IV/2 and 4) and the handling of the neutrality initiative as well as the counterproposal. Fundamental problems of state and foreign/security policy are to be "solved" in a fast-track procedure by "means", not by objectives.

The Federal Council contradicts itself in its message on the N-Iv with regard to the law to neutrality: "It (Switzerland) is not obliged to maintain neutrality under international law."²¹¹ If this is not the case, *then logically there is no binding international law of neutrality.*

210 Mandatory international law is mentioned only once in connection with economic sanctions, and then in the sense of a "may" option, Neutrality Report 1993 (fn. 54), 231. In the Neutrality Report 2022 (fn. 2), mandatory international law is mentioned only in the glossary.

211 Botsch. N-Iv (fn. 2), 20. The representative of the FDFA's Directorate of International Law at an event on May 18, 2025, in Bern (impulse conference on neutrality policy, organized by the Swiss Peace Council) explained that, in contrast to international law, this right of neutrality is "status law." The question of what the alleged duty of neutrality was based on remained unanswered due to her urgent departure.

Wrongful acts may also consist of *omissions* if they impact against violations of *ius cogens* (number III/3).

There is *no legal basis for neutrality* with regard to violations of Art. 2 in conjunction with Art. 51 of the UN Charter, the *core content of international humanitarian law* and the so-called *emergency-proof human rights*.²¹² Contrary to all assurances of the rule of law, Switzerland's practice to the contrary leads to an untenable double standard in human rights – for people in Switzerland and people who are victims of aggression and other violations of existential rights prohibited under the UN Charter (including torture²¹³).²¹⁴ This is particularly striking when compared, for example, with the strictly applied practice of non-refoulement.

In my view, this policy is neither ethical nor justifiable under international and constitutional law. It negates the commitment to a peaceful and just international order (number III/1) such as required as political goal in Article 2(4) Fed. Cst. in accordance with the UN Charter by refusing to being solidaric with victims indispensable as far as possible; it undermines – politically and with pseudo-moralistically unjustified exaggerated "neutrality" – the state objective of sovereignty and, in particular, the security of the country (Art. 2 para. 1 Fed. Cst.) in an irresponsible manner (number I, VII). The latest incomprehensible twist in this overall context, with regard to international humanitarian law, is that on October 15, 2025, the Federal Council lodged an objection with the UN Secretary-General October 2025, to Ukraine's announced suspension of the Ottawa Convention (ban on anti-personnel mines).²¹⁵ The fact that four of Russia's neighbours had previously terminated this agreement did not seem to bother him. It is obvious that Ukraine did this to make it more difficult for Russian forces to break through the Donbas front line; the suspension (not termination!) of the mine ban is not directed against civilians, but against the troops of Russia's aggression, which is contrary to international law. Switzerland is also not a depositary state of the agreement. Nor can it invoke the

212 Jörg KÜNZLI, International Human Rights Protection and Switzerland, in: Constitutional Law of Switzerland (fn. 13), Vol. II, V.4, N 22.

213 Basel Zeitung, April 30, 2025, 6: Death in a torture prison; NZZ, May 2, 2025, 3: Paid with his life.

214 HILPOLD, Neutrality and Solidarity (fn. 80), 71; Mohler, Neutrality (fn. 7), margin no. 36.

215 SR 0.515.092; cf. MARKUS MOHLER, What does the Federal Council understand by neutrality? (<https://www.journal21.ch/artikel/was-versteht-der-bundesrat-unter-neutralitaet>).

provisions on neutrality in the Hague Conventions. Given Switzerland's other behaviour toward the atrocities of Russian aggression, the reasoning is simply hypocritical and pseudo-moralistic.

This policy ignores the fact that Switzerland, as a potential victim state, could be left helplessly alone because of its "neutrality-based" rejection of solidarity with other victim states. Myth or not, this attitude has the exact opposite effect on the country's security and credibility.

Criticising Switzerland's current practice of neutrality does not mean that Switzerland should abandon neutrality *per se*, but it does call for a policy of neutrality that is detached from arguments based on international law, complies with the UN Charter and the Constitution, and is ethically sustainable in the spirit of the Manifesto for Neutrality in the 21st Century.²¹⁶

Abbreviations:

AB = Official Bulletin of the National Parliament with "N" for National Council and "S" for Council of States with

BBl = Federal Gazette, official organ of the Federal Authorities

BGE Bundesgerichtsentscheid (Judgement of the Federal Supreme Court)

BK = Federal Chancellery

Dodis = Diplomatic Documents of Switzerland (documents diplomatiques suisse) of the Institute of the Swiss Academy of Humanities and Social Sciences (Competence Centre for the History of Swiss Foreign Relations)

NR = National Council

NZZ = Neue Zürcher Zeitung

SR = Council of States

SR= Security Council of the UN

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