

Völkerrecht, Europarecht und Vergleichendes Öffentliches Recht
International Law, European Law and Comparative Public Law

Peter Hilpold [ed.]

Neutrality in the Age of the UN Charter

With Special Consideration of the Ukraine Conflict



Nomos

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International Law, European Law and Comparative Public Law

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Foreword

This publication presents the results of a research project examining the current state of the law of neutrality in light of the conflict in Ukraine. The project brought together Austrian, Swiss, German, and Italian experts in international law, EU law, public law, and history. It was first published in German under the title *Neutralität im Zeitalter des UN-Rechts – unter besonderer Berücksichtigung des Ukraine Konflikts* and now appears in an expanded English edition.

A specific aim of the project was to involve not only academics but also practitioners, in order to add a practical perspective. The analysis of the present legal framework of neutrality has yielded critical findings regarding the continued existence and relevance of neutrality as a legal concept. At the same time, the contributors identified a significant gap between the state of academic understanding in this field and the official statements made by politicians, particularly in permanently neutral states. The prevailing impression is that political interest groups and parties in such states have fostered a “myth of neutrality” that lacks a current legal foundation, yet is perceived by large parts of the population as an element of national identity and is therefore perpetuated for domestic political purposes.

In the context of the war against Ukraine, it is becoming increasingly apparent that this myth is not only legally unsustainable, but that defending it may also run counter to the interests of self-declared neutral states. Ultimately, the security and independence of the free world are at stake. These achievements can only be safeguarded through cross-border cooperation, including cooperation of a military nature, even though such cooperation is, under the traditional understanding, incompatible with neutrality.

Moreover, the attack on Ukraine raises fundamental questions about the content and reach of the principle of solidarity, which has become increasingly embedded in modern domestic legal systems as well as in the international legal order. Here too, the principle appears difficult to reconcile with neutrality in its traditional sense.

This volume seeks to encourage an open discussion of neutrality grounded in international law and, where applicable, EU law, even if doing so requires questioning convenient but ultimately self-defeating and, in any

Foreword

event, outdated positions that conflict with solidarity and binding international norms.

This project would not have been possible without the generous support of the University of Innsbruck, the DDr. Franz-Josef-Mayer-Gunthof Wissenschafts- und Forschungsstiftung, the Merlin Foundation, the Land Tyrol, the Land Vorarlberg and the Austrian Federal Ministry for European and International Affairs. We gratefully acknowledge their assistance and extend our sincere thanks.

Innsbruck, April 2026

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Introduction

The war in Ukraine has once again highlighted the challenges the United Nations system of peace law is confronted with, as well as the persistent gaps in the system of collective security, in force since 1945, that was intended to safeguard the absolute prohibition of the use of force in international relations. Do these weaknesses in UN law open up new opportunities for the law of neutrality, as codified in the Hague Conventions (V) and (XIII) of 1907?

The aim of this project, which brought together recognized experts on neutrality from Austria, Switzerland, Germany, and Italy, was to provide a comprehensive assessment of the current state of neutrality law, while also taking into account the historical development of this field. Given that the governments of these states, particularly in response to the Ukraine crisis, have taken numerous decisions that directly or indirectly touch upon issues of neutrality, clarifying the legal foundations in this area is of considerable practical relevance.

In the opening contribution, entitled “*The right to neutrality at a cross-roads: The situation in Austria and Switzerland from the perspective of international law, European law and constitutional law*”, Peter Hilpold focuses in particular on the “permanently neutral” states of Austria and Switzerland. There can be no doubt that the international legal concept of neutrality has been shaped decisively by the legal views and state practice of these two countries. For the purposes of this analysis, the international legal framework of neutrality law is examined, and, with regard to Austria, the interaction between international law, EU law, and national constitutional law in this field is assessed.

Numerous discrepancies are identified in this context. Since 1945, neutrality law has largely receded into the background of international law. References to it are rare and, where they do occur, they tend to be spontaneous and occasion-specific, no longer revealing a coherent legal framework. This raises the question of whether an international law of neutrality in the traditional sense still exists at all. The “chaotic condition” of neutrality law

identified by the Vienna international lawyer *Karl Zemanek* in 1989¹ has become a widely used description of this body of law, insofar as it is still taken into account at all. As far as Austria is concerned, any international legal obligations in this area, assuming they continue to exist, are largely superseded by provisions of EU law. As in Switzerland, however, the concept of neutrality in Austria is “mythically elevated” and declared a defining element of national identity. Whereas in the past concrete political interests underpinned the promotion of neutrality among the population, political actors in both countries must now come to terms with the consequences of this policy. In particular, Switzerland now has an arms export regime that not only severely restricts its domestic arms industry but also hampers defence cooperation. Similar problems arise with regard to the “Sky Shield” programme, which makes sense from a defence policy perspective for both states but appears difficult to reconcile with a traditional understanding of neutrality.

In his contribution entitled “*Permanence as a Unique Feature – Switzerland and Its Policy of Neutrality*”, *René Rhinow* addresses the fundamental functional prerequisites for the effective application of neutrality in general, and of permanent neutrality in particular, which are frequently ignored or are in fact not met. In this context, *Rhinow* places central emphasis on the principle of trust. Neutrality can only be effective if it is associated with mutual trust, and this applies in a heightened form to permanent neutrality. If such a basis of trust between a self-declared neutral state and other states, in particular the parties to a conflict, is already difficult to establish in a concrete conflict situation, it appears even more problematic with regard to all future wars, given the changing and often unforeseeable constellations of interests. Trust can only be created through credibility, but what is considered to be credible is decided by others, *Rhinow* writes. Such a policy therefore requires intensive efforts and entails loss of sovereignty. *Rhinow* advocates moving away from the scarcely feasible concept of permanent neutrality and towards the more realistic alternative of “situational neutrality”, which is defined on a case-by-case basis and can therefore be rendered more credible.

In his contribution entitled “*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*”

1 See Karl Zemanek, The Chaotic Status of the Laws of Neutrality, in: W. Haller (ed.), *Im Dienst der Gemeinschaft, Liber Amicorum Walter Haller*, 1989, pp. 443-454.

international humanitarian law”, Markus Mohler undertakes a comprehensive examination of Swiss neutrality practice and policy in light of UN law and other rules of modern international law, including international humanitarian law, international criminal law, and the law of state responsibility. He concludes that Swiss neutrality law has been “distorted” and that, in particular, the principle of equal treatment, meaning the equal treatment of the aggressor and the victim of aggression, which Switzerland claims to uphold, is incompatible with modern international law.

His conclusion is sobering and calls for reorientation. Switzerland’s neutrality, he argues, has long resembled a slalom riddled with contradictions, reflecting the chaotic state of neutrality law described by *Karl Zemanek*. It hangs by the fragile thread of a myth, invokes the obsolete neutrality provisions of the Hague Conventions, and disregards obligations under UN law. Internationally, it has lost all credibility.

In Switzerland, and to a lesser extent in Austria, where neutrality has a much more recent tradition beginning in 1955, adherence to the concept of neutrality is often justified through historical idealisation.² In his contribution entitled “*The Long Road to Deadlock for Swiss Neutrality*”, *Marco Jorio* shows that many of the historical myths surrounding Swiss neutrality require reassessment. For example, the preservation of Swiss sovereignty during the Second World War was less a result of Swiss neutrality policy than of a favourable turn of events based on the calculations of the warring parties dictated by *realpolitik*. The neutrality concept of the Cold War has long been outdated, and the exaggerated reliance on neutrality arguments following Russia’s attack on Ukraine on 24 February 2022, for instance through the equal treatment of Ukraine as the victim of aggression and Russia as the aggressor, has further aggravated the problem. *Jorio* concludes that Hague neutrality law, which continues to serve as the central reference point for neutrality-based argumentation, should be abandoned, while leav-

2 The historical justification of current claims and assertions under international law is generally a very sensitive issue. As the case of Ukraine shows, where the Russian leadership is attempting to justify its position primarily on the basis of historical arguments, such an approach can, in extreme cases, lead to fundamental principles of international law being called into question. See *Peter Hilpold*, *Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History*, in: 14 *Chinese Journal of International Law* 2/2015, pp. 237-270, and *idem*, *Justifying the Unjustifiable: Russia’s Aggression against Ukraine, International Law, and Carl Schmitt’s “Theory of the Greater Space” (“Großraumtheorie”)*, in: *Chinese Journal of International Law*, Volume 22, Issue 3, September 2023, pp. 409-433.

ing room for a limited, UN-compliant updating of the neutrality concept along the lines of the *Neutrality 21* manifesto³, to which leading Swiss neutrality experts, including *Marco Jorio*, contributed. Among other things, this manifesto calls for the adaptation of Switzerland's War Materiel Act in light of Switzerland's security and foreign policy interests, with arms export policy to be shaped autonomously rather than determined by neutrality.

Former ambassador *Daniel Woker* contributes a practice-oriented report entitled "*The Dwindling Importance of Swiss Neutrality in the International Context – Practical Experiences of a Former Swiss Ambassador*". He shows that Swiss neutrality, contrary to how it is often portrayed domestically, enjoys neither particular recognition nor deference on the international stage. Rather, it tends to disadvantage Swiss diplomacy and restrict its room for manoeuvre. Drawing on his practical experience, Woker corroborates the findings of other scholars, concluding that the frequently invoked concept of 'neutrality'—often claimed to be embedded in the Swiss national DNA—is a strictly domestic political construct with no functional relevance for the conduct of Swiss foreign policy.

In his contribution on "*Three Layers of International Law and the Law of Neutrality*", *Urs Saxer* situates the debate on neutrality law within the broader discussion on the development of international law as a law of coexistence, cooperation, and integration. While neutrality played a significant role in the law of coexistence, it has lost relevance as the degree of integration within the international legal order has increased. In the UN system of collective security, neutrality has virtually no place, provided that the system functions effectively. In an integrated international community, neutrality produces dysfunctional effects and survives only in a niche of exceptional relevance. Almost all forms of conduct justified by reference to neutrality can be grounded instead in traditional principles of international law, notably sovereignty, the prohibition of intervention, and the prohibition of the use of force. Conversely, invoking neutrality leads into a semantic cul-de-sac that obscures the core issues and fuels irrational debate. In a pragmatic concluding outlook, *Saxer* suggests that while the concept of neutrality will endure, it will be stripped of any sense of legal obligation, serving instead as a mere rhetorical tool for addressing concrete, practical challenges.

As mentioned at the outset, the central aim of this cross-border research project was to assess the practical relevance of neutrality in the context of

3 <https://suisse-en-europe.ch/neutralitaet-21/>.

the Ukraine conflict. Repeated reference is made to the principle of equal treatment, which, under the traditional understanding of neutrality, does not distinguish between aggressor and victim. *Thomas Cottier* places this issue at the centre of his contribution entitled “*Neutrality, War Materiel, and the Prohibition of the Use of Force – From Equal Treatment of Belligerents to the Protection of Human Rights, Democracy, and the Rule of Law*”. He criticises Switzerland’s War Materiel Act, which provides for an absolute export ban on military equipment to war zones, contrary to international law, thereby equating aggressor and victim. *Cottier* argues that Russia’s war crimes in Ukraine and the return of wars of aggression in Europe compel a rethinking and suggest permitting the delivery of war materiel to protect civilians, human rights, and to prevent genocide. An additional problem arises from the fact that Switzerland does not compensate for this broadly interpreted ban, which even covers protective equipment such as ballistic vests, through increased civilian solidarity with Ukraine. Switzerland’s restrictive practice regarding the re-export of Swiss armaments has further led to extensive isolation and a decline in its defence industry, thereby also jeopardising Swiss security. *Cottier* advocates abandoning the principle of equal treatment and limiting neutrality through treaty-based and European pan-continental constraints, noting that Austria’s experience as an EU member demonstrates that this approach is already being implemented in practice.

The title of *Ralph Janik*’s contribution succinctly captures its core argument: “*The Return of Neutrality: How a Legally Defunct Concept Is Kept Alive Politically*”. *Janik* traces the development of neutrality from its origins to the present. He shows that neutrality had a clear function in periods of international law that recognised a free right to wage war. The decline of neutrality law began with the Briand-Kellogg Pact of 1928: “To outlaw war means also to outlaw neutrality.” This applied even more forcefully with the entry into force of the UN Charter. Austria’s example illustrates that neutrality retained a certain political function, but this too lost relevance with the end of the Cold War.

Janik concludes that neutrality has been effectively dead for over 80 years, or nearly 100 years if one is precise. As he puts it provocatively, Germany could supply Taurus missiles to Ukrainian forces tomorrow and deploy the Bundeswehr to defend eastern Ukraine the day after without thereby becoming a legitimate military target. At the same time, no state has a legal claim to obtain support in defending itself against an unlawful attack, and the ILC Articles on State Responsibility have proven toothless

in practice. In light of the inadequate functioning of the collective security system, neutrality has not become entirely obsolete, but survives only in a political, not a legal, sense.

This book offers a series of comparative analyses of current and former neutral states. In his chapter, “*Neutrality in Europe – Between Law and Politics: The Experiences of Austria, Finland and Sweden*,” Paul Luif examines developments in Austria, Finland, and Sweden, while Ulrike Haider-Quercia turns to Ireland and Malta.

The three countries discussed by Luif joined the European Union together in 1995. Their foreign and security policies, however, soon began to diverge. Finland and Sweden moved significantly closer to NATO and ultimately became members in 2023 and 2024 respectively, whereas Austria did not follow the same path. Luif explores the political reasons underlying these different trajectories.

In her chapter, “*Neutrality in the European Context: Constitutional Perspective of Ireland and Malta*,” Ulrike Haider-Quercia shows that the neutrality regimes of Ireland and Malta, although constitutionally entrenched only in Malta and not in Ireland, were originally shaped primarily in relation to the United Kingdom, but have since developed broader implications.

Both states are EU members and thus in principle integrated into the emerging Common European Security and Defence Policy. However, the “Irish clause” in Article 42(7) TEU allows far-reaching exemptions for neutral states, which both Ireland and Malta have in fact invoked. At the same time, intense domestic debates on neutrality take place in both countries.

The war in Ukraine will come to an end, and a peace settlement, explicit or implicit, will have to be found. Its shape will depend on the further course of the war. Any settlement that does not entail the full restoration of Ukraine’s state borders would conflict with existing international law. How should such arrangements be addressed by third states, in particular neutral ones? This question is tackled in the contributions by Stefan Oeter (“*The International Legal Framework for a Peace Settlement in Ukraine and the Reactions of Third States: What Does the Obligation of Non-Recognition of Territorial Acquisition by Force Mean for Neutrality?*”) and Markus Beham (“*Neutral in the Light of Coercion and Force? Treaty Law Challenges of a Peace Solution in the Ukraine Conflict for Third States*”).

The concluding remarks summarize the findings of the volume and demonstrate that much of the neutrality debate finds no basis in existing international law, even though the underlying motivation, the pursuit of do-

mestic political interests, is understandable from a realpolitik perspective. However, while realpolitik must be acknowledged as a fact, legal scholarship in particular is called upon to take a clear and legally sound position, taking into consideration the requirements of the United Nations system of peace law.

The right to neutrality at a crossroads: The situation in Austria and Switzerland from the perspective of international law, European law and constitutional law

Peter Hilpold¹

Abstract

The present conflict in Ukraine has forced a critical re-evaluation of the role of neutral states within the global landscape, prompting the international community to question the enduring relevance of the right to neutrality amidst a profound assault on the international legal order. Yet the issue is not novel. It became acute already with the entry into force of the Charter of the United Nations, which fundamentally reshaped the normative framework of collective security. Since then, the conviction that neutrality has little meaningful place in the contemporary peace order has grown so pervasive that it has influenced governmental practice to the point where a thorough legal examination of neutrality has often seemed superfluous. This assessment has not been significantly challenged by the fact that some states have sought to preserve their neutral status or to assert neutrality anew. The international community has largely tolerated such positions, albeit with uncertain legal implications. The war in Ukraine and its consequences, however, have renewed the need for clearer legal and political delineation, a need that is particularly evident in the cases of Switzerland and Austria. This contribution examines and compares the respective debates from a comparative-law perspective and situates them within the broader context of the Ukraine conflict.

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- 1 This article builds on ideas from the author's earlier work, in particular the following article published in 2022 in the journal *Archiv des Völkerrechts*: "Das Neutralitätsrecht Österreichs und der Schweiz im 'weiten Feld' des internationalen Rechts", in: 60 AVR pp. 268-287. Numerous other developments have been taken into account, such as the "Sky Shield" defense project and the discussion on the adaptation of Swiss neutrality law. In addition, reference has been made to more recent publications that are also worthy of consideration and may be useful for future studies on Austrian and Swiss neutrality law. All links were last accessed on 20 March 2026.

I. Introduction

The present conflict in Ukraine has forced a critical re-evaluation of the role of neutral states within the global landscape, prompting the international community to question the enduring relevance of the right to neutrality amidst a profound assault on the international legal order. In essence, however, this question is not really new, but became immediately relevant with the entry into force of the Charter of the United Nations. The conviction that neutrality has no real *raison d'être* in the peace order has become so overwhelming that it has shaped the attitude of governments to such an extent that a detailed examination of questions of neutrality seemed superfluous. This was not undermined by the fact that individual states wanted to maintain their status as (permanently) neutral or claimed such status anew. The international community tolerated this position – with unclear legal consequences.² However, the Ukraine conflict and its consequences require a clearer position, both in terms of the domestic relevance of the law of neutrality but also with regard to the significance of the law of neutrality in the modern international legal system as a whole and with regard to the concrete possibility of providing Ukraine, as the victim of an aggression unprecedented in the present day, with help and support – including from neutral states.

Austria and Switzerland offer a paradigmatic lens through which to assess the current state of the law of neutrality. Both states, according to their own understanding, claim a status of “permanent neutrality” and therefore a particularly robust form of neutrality, defined both by its enduring character and by the obligations it entails. For this reason, they have been especially engaged in sustaining the conviction that the law of neutrality remains valid and operative. Internationally, however, their efforts attracted only limited attention, and within academic discourse they were scarcely registered. That the law of neutrality has vanished altogether from many international law textbooks is telling in this regard.

Even within these two countries, interest in the law of neutrality has been characterized by significant fluctuations. Viewed against the current backdrop, a cursory look at Switzerland and Austria might suggest that the debate on reforming neutrality has reached a state of stagnation. In Switzerland, Federal President Ignazio Cassis’s initiative to modernise neu-

2 This article refers primarily to permanent neutrality, i.e. the assumption of neutrality obligations regardless of any specific military conflict.

trality policy by introducing the qualifier “cooperative” was rejected by the Federal Council on 7 September 2022. The proposal was driven in part by Switzerland’s initially hesitant, and internationally criticised, approach to joining economic sanctions against Russia following the attack on Ukraine on 24 February 2022. At the same time, the closer military cooperation with the EU and NATO advocated by the Federal President is already regarded as compatible with Switzerland’s neutrality framework under the 1993 Neutrality Report.³ Subsequent efforts to at least ease the strict re-export restrictions on Swiss war materiel, introduced shortly before the outbreak of the Ukraine conflict, have long remained unsuccessful.⁴ Only recently, at the end of 2025, a partial relaxation of these restrictions was adopted. However, the law has not yet entered into force and, as of March 2026, remains subject to a possible referendum. Even under this revision, the direct export of war materiel to Ukraine would remain prohibited. In 2022, Austrian Chancellor Karl Nehammer declared the debate on neutrality closed after the question of NATO membership had once again been raised at the political level.⁵ In reality, however, the issue remains unresolved, not least because political decision-makers have yet to offer technically and doctrinally satisfactory answers to the questions it raises.

Over the past decades, the Austrian debate has periodically intensified, only to fade again into the background.⁶ There are several reasons why questions of neutrality repeatedly return to the fore: they may be triggered by shifts in the global political landscape, or they may arise from domestic political controversies. Notably, the Austrian discussion has often coincided with comparable debates in Switzerland, and this is particularly true today. Yet, viewed more broadly, one is left with the impression that systematic cross-border engagement, rather than being the rule, is currently the exception.

Little seems to be known about the respective situation and considerations in the neighbouring country. This is regrettable, because even a cursory look at the core arguments reveals striking parallels. Recent contributions on neutrality law in the Swiss quality press or on online portals⁷ show

³ See NZZ, 8 September 2022, p. 7.

⁴ See Chapter VII of this contribution.

⁵ See orf.at, 7 March 2022.

⁶ See Der Standard online, 7 March 2022, <https://www.derstandard.at/story/2000133894868/neutralitaet-ist-fuer-rendi-wagner-nicht-verhandelbar>.

⁷ See, in particular, René Rhinow, “Wie weiter mit der Neutralität?”, *Die Schweiz in Europa*, 28 June 2022, <https://suisse-en-europe.ch/rene-rhinow-wie-weiter-mit-de>

notable similarities with debates in the Austrian media and professional circles. A more sustained exchange could therefore be of great benefit to both realities.

As will be shown below, this exchange was more vibrant in the past. It was likely shaped, in part, by differing integration policy orientations, which in turn influenced how each country's neutrality law was interpreted as a core element of its foreign policy. In recent years, however, the scope for action under international law has become increasingly uniform, and the room for manoeuvre in foreign policy has grown ever more similar. This appears to be fostering a convergence in the substance of the neutrality debate. As the conclusion will show, however, this should not obscure the fact that the historical contexts from which the respective neutrality regimes emerged were fundamentally different.

As mentioned, in Switzerland, in recent years, the re-export of war material has been a highly contested issue. Under the current, very restrictive version of the Swiss War Material Act (*Kriegsmaterialgesetz* - KMG), re-exports are subject to authorisation. Re-exports to crisis areas are deemed incompatible with international law and are therefore not approved, with the principle of equal treatment under Article 9 the Fifth Hague Convention of 1907 cited as the key reference point. The relaxation of this prohibition, adopted at the end of 2025, has not yet entered into force and may still be subject to a referendum.

In general it can be said that any requirement to treat the aggressor and the victim of aggression equally is incompatible with United Nations law. Moreover, Article 9 of the Hague Convention, whose practical effectiveness is in any event open to doubt (as will be shown below), does not apply to

r-neutralitaet/; and Mark E. Villiger, "Die dauernde Neutralität der Schweiz – eine Ergänzung", *Unser Recht*, 4 August 2022, <https://unser-recht.ch/mark-e-villiger-die-dauernde-neutralitaet-der-schweiz/>. See also Oliver Diggelmann, *Die Schweiz darf bei allen Sanktionen mitmachen*, *Tages-Anzeiger*, 22 February 2022, <https://www.tagesanzeiger.ch/dann-machen-wir-uns-politisch-und-moralisch-enorm-angreifbar-793560648925>.

Thomas Cottier takes a highly critical view of the legal continuity and factual relevance of Swiss neutrality in "Abschied von der Neutralität", 25 May 2022, <https://suisse-en-europe.ch/thomas-cottier-abschied-neutralitaet/>. For a current comparison between Swiss and Austrian neutrality, see Werner Bartl, *Why Switzerland struggles with its neutrality and Austria does not*, SWI swissinfo.ch, 21 June 2022, https://www.swissinfo.ch/ger/business/schweiz-oesterreich-neutralitaet-ukraine-militaer-waffenlieferung_warum-die-schweiz-mit-ihrer-neutralitaet-hadert-und-oesterreich-nicht/47687576. Formularende

the re-export of war material.⁸ As a result of Russia's war against Ukraine, and the pressure exerted by various states, that have bought Swiss war material in the past, to permit re-export in order to strengthen Ukraine's defensive capabilities, the question has arisen as to how far the Swiss regime can be amended. This, in turn, raised fundamental questions about the scope of neutrality under both treaty law and customary international law.

While this debate is specific to Switzerland, the discussion surrounding the European Sky Shield missile defence system concerns both Austria and Switzerland, since both participate despite their neutrality. The positions advanced on whether such participation is compatible with each country's obligations under neutrality law once again raise fundamental questions about the content and interpretation of international neutrality law.

II. Fundamentals of general international law – with particular reference to Hague law

Immediately after the United Nations Charter came into force, the question arose as to what significance the institution of neutrality could still have in the UN system, which was characterised by an absolute prohibition of force and a monopoly on the use of force by the United Nations in the collective security system. Compared to the situation in 1907, when the two Hague Conventions (V and XIII) central to the regulation of neutrality under international law were concluded, the situation had changed fundamentally.⁹

8 For a detailed argument in favour of a more flexible Swiss practice on the re-export of war material, see *Thomas Cottier*, *Kriegsmaterial-Wiederausfuhr: Zeit für eine Praxisänderung*, *Vereinigung die Schweiz in Europa*, 8 August 2025, <https://suisse-en-europe.ch/kriegsmaterial-wiederausfuhr-zeit-fuer-eine-praxisaenderung-von-thomas-cottier/> (with the accompanying paper in PDF). *Cottier* also argues that, where the goods are already located abroad and are owned by a foreign state, their onward transfer does not fall under the statutory export regime and therefore does not require Swiss authorisation.

See also *René Rhinow*, *Plädoyer für eine offene Schweiz*, 2025, at 74 and 79. *Rhinow* contends that, in cases of aggression in breach of Article 2(4) of the UN Charter, a rigid wartime neutrality may undermine the UN's collective-security rationale and, from a legal perspective, conflict with mandatory international law. He further criticises export bans affecting items intended to protect the civilian population as "diametrically opposed to Switzerland's humanitarian role as guardian of the Geneva Conventions".

9 Hague Convention (V) of 18 October 1907 (Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land) and Hague Convention

Neutrality was widely regarded as incompatible with United Nations law.¹⁰ Added to this was strong political opposition to the neutral countries, given that the fight against the dictatorships that had threatened the central achievements of modern civilisation had not been won by standing aside and “quite”, but through courageous, self-sacrificing commitment. From today’s perspective, what is particularly striking is the massive Soviet opposition to the concept of neutrality, which they regarded as obsolete wherever it was still permissible and as impermissible within the United Nations.¹¹

(XIII) of 18 October 1907 (Convention Respecting the Rights and Duties of Neutral Powers in Naval War).

Thomas Cottier (note 7) is critical of the continuing relevance of the Hague Conventions under contemporary international law:

“The right to neutrality under the Hague Conventions of 1907 arose in an era of equal states and colonial power which were largely ideologically like-minded. Neutrality was superseded by the system of collective self-defense. This incompatibility is one of the reasons why neutral Switzerland joined the United Nations so late.” (Translation by this author).

The Hague Conventions were, in turn, strongly influenced by US neutrality law, which has its roots in the early years of US independence (Neutrality Act of 1794), when the United States was not yet militarily stabilized and therefore sought security in neutrality. That historical context, however, differs markedly from present conditions. See Paul Luif, *The European Union, a ‘Neutral’ Power?*, in Peter Hilpold et al. (eds.), *Österreich und die EU im Umbruch*, Vienna 2022, pp. 81–101, at 84.

- 10 See Peter Hilpold, *Solidarität und Neutralität im Vertrag von Lissabon*, 2010, p. 22 ff. See also Paul Guggenheim, *Völkerbund, Dumbarton Oaks und die schweizerische Neutralität* Europa Verlag Zurich: Zurich 1945, p. 84 ff., who as early as 1945 raised the question of the extent to which it should be possible for neutral countries to remain on the sidelines in a solidarity-based security system such as the one that had just been created with the collective security system. As will be shown, this remains a highly topical question, particularly with regard to Austria’s position in the context of the obligation to provide assistance under Article 42(7) TEU.

- 11 On Soviet criticism of neutrality, see Eugene A. Korovin, *The Second World War and International Law*, in: 40 AJIL 1946, pp. 742–755:
The concept of neutrality also requires serious modifications in our times. The previous World War confirmed the indisputable truth that both war and peace are indivisible, and that under contemporary international communications not only a weak country but a great power as well cannot remain outside the World War. Another step in the liquidation of neutrality was made by the Second World War. The neutrality of some states (Norway, Denmark, Holland, Belgium, Luxembourg) was trampled upon by the fascist aggressor; for others, like Spain, neutrality served as camouflage for the closest kind of collaboration with the aggressor; the third group of neutrals, like the republics of Central and South America, regarding themselves vitally interested in the defeat of the aggressor, broke off diplomatic relations with him and declared war.”
Ibid., p. 753 f.

The neutral states were not invited to the founding conference of the United Nations in San Francisco. They faced harsh criticism from the highest levels: UN Secretary-General *Trygve Lie* declared that international organisations and neutrality were conceptually incompatible, and the French delegation even proposed that this incompatibility be explicitly stated in the Charter.¹² Ultimately, however, the prevailing view was that it was not necessary to explicitly exclude neutral states from the United Nations, since the system itself was thought to leave no room for neutrality within the new peace order: Article 2(5), requiring all members to support United Nations measures, and Article 25, requiring implementation of Security Council decisions, were intended to remove any doubt on that point.

A highly nuanced analysis of this topic comes from *Hersch Lauterpacht*, widely regarded as one of the most influential international lawyers of the 20th century. In 1953, in a perceptive study,¹³ and against the background of an international legal order that, despite all efforts to create a "perfect" post-war system, still displayed considerable shortcomings, he argued that a distinction must be made between "those acting legally" (the victims) and "those acting unlawfully" (the aggressors) among the belligerents.¹⁴ There could be no neutrality towards "those acting unlawfully". At the same time, however, Lauterpacht acknowledges the many deficiencies of the international legal order and the unequal power relations between formally equal

Korovin believed that neutrality was only possible in relation to states that did not belong to the United Nations, which, with the continuous expansion of UN membership, would have led to the complete abolition of this institution over time:

"In the future, a member of the United Nations will be able to remain neutral only in the exceptional event that a war breaks out between two non-members and if the United Nations itself does not deem it necessary to take measures to stop this war. In all other cases the members of the United Nations are to render it every assistance in all its preventative or coercive actions against the eventual aggressor (paragraph 5, Article II). With aggression an international crime, neutrality becomes a form of connivance at this crime."

- 12 The following wording was proposed: "Participation in the organisation implies commitments that are incompatible with the status of neutrality." See *Helmut Türk*, *Neutralität und Mitgliedschaft bei den Vereinten Nationen*, in: Konrad Ginther et al. (eds.), *FS Karl Zemanek*, 1994, pp. 439–463.
- 13 See *Hersch Lauterpacht*, *Rules of Warfare in an Unlawful War*, in: *George A. Lipsky* (ed.), *Law and Politics in the World Community*, University of California Press: Berkeley/Los Angeles 1953, pp. 89–113.
- 14 *Ibid.*, p. 110. In this sense, see also *Thomas Cottier*, *Die Würde des Menschen steht im Mittelpunkt*, *NZZ*, 23 June 2023, p. 19, with reference to the primacy of UN law and human dignity.

parties, and therefore sees considerable scope for political compromise in this regard.¹⁵ More than 70 years later, this insight remains relevant in many respects. In the Ukraine conflict, with Russia as the clear aggressor, there is no longer any room for neutrality.

Although one cannot expect small states threatened by an aggressive great power to endanger themselves, such a situation is surely not given in the case of Austria and Switzerland.

This emerging framework of solidarity is also reflected, at least indirectly, in the International Law Commission's draft articles. Article 41, which is widely regarded as possessing considerable authority and is often said as reflecting customary international law¹⁶, requires states to cooperate in response to serious breaches of international law. An armed attack undoubtedly constitutes such a breach. Under Article 41(1), states must cooperate to bring the breach to an end; under Article 41(2), they must neither recognise as lawful the situation created by the breach nor render aid or assistance in maintaining it. Obligations of this kind sit in clear tension with a posture of neutrality.

When seeking for a justification for national neutrality obligations under international law, reference is regularly made to the Hague Convention of 1907.

However, their continuing validity as set of rules of customary international law has rightly been disputed.¹⁷ Nor does the fact that these conventions were never formally repealed, answer the more fundamental question of their compatibility with UN law, which, as has been shown, is doubtful.¹⁸ Ratification has always been limited: with 32 and 28 ratifications

15 See *Hersch Lauterpacht*, 1953, p. III.

16 See *Carlo Focarelli*, *Diritto Internazionale*, 8th ed. 2025, p. 593.

17 See *Karl Zemanek*, *Austria's Neutrality and the CFSP*, Europainstitut, Saarbrücken 1995, 13; and *Mark E. Villiger*, *Handbuch der schweizerischen Neutralität*, 2023, 40 ff. See also *Dietrich Schindler*, who notes that the Hague law of neutrality has largely fallen into oblivion:

"The two 1907 Hague Conventions on neutrality (Conventions V and XIII) have largely fallen into oblivion. There has hardly been any discussion on the problems of the law of neutrality outside the permanently neutral States."

Dietrich Schindler, *Transformations in the Law of Neutrality since 1945*, in *A.J. Delissen and G.J. Tanja* (eds.), *Humanitarian Law of Armed Conflict – Challenges Ahead* (Festschrift for Frits Kalshoven), Martinus Nijhoff, Leiden/Boston 1991, pp. 367–386, at 368.

18 As this author already pointed out in *Solidarität und Neutralität*, Vienna 2010, p. 18 f., it is not the (relatively small) number of contracting parties to the Hague Con-

respectively, the ratification process stalled after 1945, a stagnation that may itself be read as an additional indication of Charter-era concerns. Although one ratification was added in 2015, this does little to restore the conventions' present legal relevance. It was Ukraine that acceded, and, just over a year after Russia's annexation of Crimea and under an increasingly acute military threat, Ukraine could reasonably be expected to pursue every available avenue to reinforce its independence, even by resorting to an instrument that had largely fallen into disuse. The limited practical value of such ratifications became evident when Russia launched its aggression against Ukraine on 24 February 2022.¹⁹

References to neutrality²⁰ in various national and international instruments of international humanitarian law (IHL) do little to support the

ventions that raises doubts about their continued validity (possibly also as customary international law), but it is rather their structural incompatibility with UN law, which then also led to the termination of the ratification process (up to the ratification by Ukraine in 2015, an event, which, as shown, must be assessed separately).

- 19 If, conversely, one argues that Ukraine's ratification of the Hague Conventions (V) and (XIII) confirms the customary status of both instruments, that conclusion is likewise unpersuasive. The general and abrupt standstill in ratifications since 1945, particularly with respect to conventions that have attracted only a comparatively limited number of parties, tends rather to corroborate the fundamental paradigm shift brought about in 1945 by the entry into force of the Charter of the United Nations. It therefore remains doubtful to what extent subsequent ratifications can meaningfully contribute to the crystallisation or confirmation of these Conventions as customary international law, or to the transformation of their provisions into custom.

The relationship between treaty law and customary international law is complex. In particular, the ICJ held in *North Sea Continental Shelf* (1969) that the ratification of treaties does not, by itself, establish that their provisions reflect customary international law (para. 76). An isolated ratification occurring more than half a century after the most recent prior ratification may, if anything, point in the opposite direction: if the relevant rules were already customary law, ratification would be largely superfluous. See also Richard Baxter, "Treaties and Custom," 129 *RdC* (1970), 76 ff.

As Dietrich Schindler (note 17) has shown, post-1945 invocations of neutrality largely became a phenomenon associated with permanently neutral states, even though occasional references by other states did occur: "Nevertheless, states have not completely ceased to refer to the law of neutrality. Occasionally they declare themselves neutral or invoke specific rights or duties of neutrals." Ibid., 368. Ukraine's 2015 declaration of neutrality fits well within this uneven and inconsistent practice.

- 20 See, in particular, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994); the *HPCR Manual on International Law Applicable to Air and Missile Warfare* (2013); and Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013).

Although the ICJ refers to the principle of neutrality at several points in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (paras.

claim that the law of neutrality remains valid as a matter of international law. IHL simply draws on neutrality to the extent that the parties to a conflict recognize it as such; it cannot, in itself, constitute or establish the law of neutrality.

Moreover, a bare declaration of neutrality in a particular conflict may give rise to situations that can be taken advantage of for purposes of IHL, without supporting any broader legal inference as to the confirmation, “revival,” or re-establishment of permanent neutrality as a legal concept.

Finally, certain diplomatic conventions of deference toward Austrian and Swiss neutrality were wrongly taken as legal recognition. Swiss constitutional law scholar René Rhinow captured the point aptly: “When governments around the world respect our neutrality in a diplomatic and courteous manner, it does not mean much.”²¹

Even proponents of the continued validity of the international law of neutrality acknowledge that the Hague Conventions sit uneasily with contemporary legal realities: they are outdated, incomplete, and in many respects widely regarded as obsolete.²² If this observation directly calls into question the existence of an international law of neutrality, the dilemma is often addressed by turning to customary international law, which is then treated as the true legal basis for a continuing and valid law of neutrality.²³ On the other hand, this inevitably reopens the question whether there is any “general practice accepted as law” at all. Such practice would have to be extensive, consistent over time, and sufficiently uniform, and it would have

51, 74, 88–90, 93), these references must be read in their specific humanitarian-law context. In that setting, invoking neutrality as a traditional device for constraining the conduct of hostilities is not, in itself, surprising. At the same time, the Court’s formulation is of limited value for assessing the contemporary legal relevance of a “law of neutrality” more generally. In particular, the phrasing in para. 89 (“whatever its content” and “subject to the relevant provisions of the United Nations Charter”) tends to raise interpretive questions rather than provide clarification:

“The Court finds that, as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (*subject to the relevant provisions of the United Nations Charter*) to all international armed conflicts, whatever type of weapons might be used.” (Emphasis added by the author.).

21 See René Rhinow, Glaubwürdige Schweiz, nicht unglaubwürdige Neutralität, in: NZZ, 29 March 2022 (translation by this author).

22 See Manuel Rodríguez, Das Neutralitätsrecht und das umfassende Gewaltverbot gemäss Art. 2 Abs. 4 UNO-Charta, Helbing Lichtenhahn: Basel 2024, p. 10.

23 *Ibid.*

to be carried out in particular by those States whose interests are especially affected,²⁴ which would plainly include more than the permanently neutral States alone. It is therefore for those who maintain that customary rules of neutrality exist to produce concrete and detailed evidence. Repeated assertions in the literature, even when amplified through chains of cross-references, will hardly suffice.²⁵

This becomes particularly clear in the context of private individuals' exports of war material, which Article 7 of the Fifth Hague Convention (1907) does not prohibit. A "pragmatic" argument that extends the Convention's prohibition, directed at neutral states, to private individuals, for instance by invoking changes in international trade and the expansion of state export control powers, is unpersuasive where no specific legal basis can be demonstrated and the extension is merely asserted in general terms.

The conflict in Ukraine has prompted a range of scholarly efforts to analyse the dispute through the lens of the law of neutrality.²⁶ Yet, in the absence of significant state practice accompanied by consistent official statements, the claim that the law of neutrality remains operative, even beyond the group of "permanently neutral countries",²⁷ appears to offer limited analytical purchase. As shown above, the states supplying weapons to Ukraine have consistently refrained from invoking neutrality as a legal basis for their conduct.²⁸

24 See Bruno Simma/Stephan Wittich, *Das Völkergewohnheitsrecht*, in: A. Reinisch (ed.), *Österreichisches Handbuch des Völkerrechts*, Manz: Vienna 2021, para. 170.

25 As to this discussion see with further references Stephan Wittich, *Die Neutralität im Völkerrecht*, in: Martin Senn/Jodok Troy (Hrsg.), *Österreichs Neutralität: Recht, Politik und Gesellschaft – Eine Debatte*, Bielefeld: Transcript Verlag, 2025, pp. 77-96 (81 s.).

26 A few authors have subsequently taken the view that arms shipments to Ukraine violate neutrality law. For example, Kevin Jon Heller and Lena Trabucco argue in their article "The Legality of Weapons Transfers to Ukraine under International Law" (13 *Journal of International Humanitarian Legal Studies* 2022, pp. 251–274). However, they do not see these arms shipments as a breach of the prohibition of force and also assume that the states supplying weapons do not become parties to the conflict.

27 Further to this distinction, René Rhinow, *Permanence as a unique feature – Switzerland and its policy of neutrality*, in this volume, pp. 67-85.

28 For a detailed discussion, see Giulio Bartolini, *The Ukrainian–Russian Armed Conflict and the Law of Neutrality: Continuity, Discontinuity, or Irrelevance?*, 71 *NILR*, 2024, 281–298 (at 283 ff.), who points in particular to Switzerland as a notable outlier, given its strict position on arms exports and, especially, its re-export ban, and contrasts this with Russia's comparatively late and arguably instrumental invocation of neutrality. See also the response by State Secretary Susanne Baumann to a parliamentary question, BT-Drs. 20/1918, p. 39 (18 May 2022): "The Federal Republic of

For states supporting Ukraine in the exercise of its right of self-defence, the central concern was to avoid being classified as belligerent parties themselves. Accordingly, almost all of them also refrained from invoking the right of collective self-defence under Article 51 of the United Nations Charter, presumably so as not to venture into this grey area.²⁹

The practice of states supporting Ukraine, including their official statements, was therefore not a “revival” of a pre-Charter right of neutrality. Rather, it reflected an effort to avoid violating the prohibition on the use of force themselves and to prevent being characterised as a party to the conflict. The considerable legal uncertainties and practical indeterminacies in this area are illustrated by the Federal Republic of Germany’s approach to determining which arms deliveries could be made without crossing that threshold. After initially adopting a highly restrictive position, Germany gradually expanded the range of weapons it was prepared to supply³⁰ and ultimately, in the name of “strategic ambiguity”, opted to withhold details of further deliveries from public disclosure.³¹

In theory, reliance could also have been placed on the concept of “countermeasures” as reflected in the ILC’s 2001 Articles on State Responsibility. However, it remains uncertain whether countermeasures are available in response to breaches of obligations *erga omnes* in the sense contemplated by Article 48 of the ILC Articles.³² It was therefore prudent to refrain from advancing such a justification. In any event, framing the issue in terms of

Germany and its partners are supporting Ukraine by supplying weapons to enable it to exercise its individual right of self-defense against Russia’s war of aggression, which violates international law. These support measures, which are in conformity with international law, do not cross the threshold into a collective exercise of the right of self-defense.” See further *Alexander Wentker*, *The Armed Attack Exception to Neutrality in International Peace and Security Law*, 73 ICLQ, 2024, pp. 963–996 (at 985).

29 See *Giulio Bartolini* (note 28) as well as *Marco Pertile*, *Armed Conflict, Neutrality, and Disarmament*, in *IYIL* 2023, pp. 522–532 (532).

30 <https://www.bundesregierung.de/breg-de/service/archiv-bundesregierung/waffenlieferungen-ukraine-2054514>.

31 <https://de.euronews.com/2025/05/12/waffenlieferungen-ukraine-taurus>.

32 See the comments in the ILC commentary on the 2001 draft article, Part III, Chapter II, p. 129, para. 8:

"Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State."

countermeasures would risk misdirecting the analysis: the point is not law enforcement as such, but the provision of assistance to a state whose very existence is under threat and which is also seeking to avert the most serious violations of international humanitarian law.

Overall, the conflict in Ukraine has merely confirmed the obsolescence of the classical law of neutrality, while at the same time underscoring the centrality of the right of self-defence. On that basis, arms transfers to a state under armed attack are permissible under international law.³³ To resort to the justification of collective self-defence (requiring also the notifications foreseen in Article 51 of the UN Charter) appears necessary only where states go beyond material support and deploy their own troops, which has not occurred to date.

III. Austrian neutrality – justification and legal nature

1. Introduction

Seen from the highly specific circumstances of 1955, a commitment to neutrality, whatever its precise form, was a sensible means of advancing the negotiations for the restoration of Austrian sovereignty. That political calculus, however, must be kept distinct from the separate question whether a right to neutrality exists, and if so with what content, under international law, including customary international law. It was precisely this conflation of politics and law that remained a defining feature of Austrian neutrality law in the period that followed. It shaped both political and legal debate, often leaving it unclear which lens was being applied, or producing theses that shifted depending on the perspective adopted.

2. Moscow Memorandum and Vienna State Treaty – both from 1955

Historical research indicates that, immediately after the First World War, Austrian constitutional scholars and policymakers were already contem-

On the enforcement of Community interests by third countries, see *Paolo Palchetti*, *Consequences for Third States as a Result of an Unlawful Use of Force*, in: C. Weller (ed.), *The Oxford Handbook on the Use of Force*, OUP: Oxford 1124-1238.

33 This is also the view of *Alexander Wentker* (note 28), who, however, bases his argument on the assumption that a general right of neutrality continues to apply.

plating whether the constitution should be oriented toward a neutrality model.³⁴ The decisive commitment to neutrality, however, came only some time after the Second World War, as a strategically astute and highly effective means of breaking the deadlock in efforts to restore Austrian sovereignty, at a moment when Cold War tensions were escalating.

The thaw following Stalin's death in 1953 was used to secure the withdrawal of Soviet troops by offering a neutrality arrangement based on the Swiss model.³⁵ On 15 April 1955, an Austrian government delegation in Moscow issued a declaration of intent, undertaking to ensure that Austria would commit itself to perpetual neutrality of the kind practised by Switzerland.³⁶

These efforts culminated in the BVG Neutrality Act (*BVG Neutrality*), albeit with one notable difference: there was no longer any mention of the Swiss model.

Comprising a mere two articles, this statute is characterized by its concision and functional austerity. The relevant Article 1 reads as follows:

- (1) *For the purpose of the permanent maintenance of her external independence and for the purpose of the inviolability of her territory, Austria of her own free will declares herewith her permanent neutrality which she is resolved to maintain and defend with all the means at her disposal.*
- (2) *In order to secure these purposes Austria will never in the future accede to any military alliances nor permit the establishment of military bases of foreign States on her territory.*³⁷

Neutrality is thus not an end in itself, but a means of safeguarding territorial integrity and sovereignty. It is pursued through non-alignment and

34 Heinrich Lammasch in particular distinguished himself in this regard – efforts that were ultimately in vain, however. See Gerhard Oberkofler, 'Wird Österreich ein „willkürlicher Fetzen Landes“ im imperialistischen Europa?' *Zeitung der Arbeit*, 26 July 2023, <https://zeitungderarbeit.at/feuilleton/wird-oesterreich-ein-willkuerlicher-fetzen-landes-im-imperialistischen-europa/>.

35 On this process, see Christian Jenny, 'Konsensformel oder Vorbild? – Die Entstehung der österreichischen Neutralität und ihr Schweizer Muster', Haupt: Bern et al. 1995. On the advantages that the USSR expected to gain from Austria's neutrality, see Wolfgang Mueller, 'The USSR and Permanent Neutrality in the Cold War', in: *Journal of Cold War Studies* 2016, pp. 148–179 and idem, 'Wozu dient Österreich heute die Neutralität?', in: *Die Presse* of 29.10.2015.

36 At least, this is the prevailing interpretation of the Moscow Memorandum in Austria. See the literature in the footnote 38.

37 RIS, Federal Constitutional Law on the Neutrality of Austria.

by prohibiting the establishment of foreign military bases on Austrian territory. This, in turn, suggests that if the overarching objective of protecting independence can be more effectively achieved by other means, neutrality itself, and with it the self-imposed restrictions just described, may legitimately be reconsidered. This is all the more so because Austria was not “neutralised”, in the sense of having neutrality imposed upon it, but adopted neutrality “of its own free will”.

From a legal perspective, these statements give rise to a host of questions. The underlying tensions can scarcely be reduced to a common denominator, let alone reconciled. The undertakings given by the Austrian government delegation were undoubtedly a precondition for the conclusion of the State Treaty of 15 May 1955 and for the subsequent withdrawal of Soviet troops. To dismiss the Moscow Memorandum as a mere “gentlemen’s agreement” devoid of legal force, as has been common in Austrian international-law doctrine since Verdross,³⁸ seems overly reductive. At the same time, Moscow accommodated Austria’s insistence that the neutrality obligation not be incorporated into the State Treaty, an inclusion from which one might otherwise have inferred an international treaty obligation to maintain neutrality.

Austria’s commitment to neutrality rests on the Constitutional Law on Neutrality of 26 October 1955 (BVG Neutrality), which Austria notified to all states with which it maintained diplomatic relations at the time. The central question, however, is this: what is the international legal status of a neutrality commitment assumed “of one’s own free will”?

Austrian doctrine has developed a complex theory under which Austria’s notification of the BVG Neutrality, coupled with subsequent acknowledgements of receipt, gave rise to a network of interrelated unilateral legal acts producing corresponding binding effects, from which Austria could withdraw by way of a *contrarius actus*.³⁹ Leaving aside the fact that this view appears neither to have been endorsed outside Austria nor, so far as can be seen, to be widely known, the approach, even if it were accepted internationally, would not necessarily strengthen Austria’s freedom of action. What, for example, would happen if another state objected to the withdraw-

38 See on this discussion *Peter Hilpold*, *Solidarität und Neutralität im Vertrag von Lissabon*, 2010, p. 28ss. According to the renowned Austrian-American international lawyer *Josef L. Kunz* there can be no doubt that the Moscow Memorandum created binding international obligations. See *Josef L. Kunz*, *Austria’s Permanent Neutrality*, in: 50 AJIL 1956, pp. 418-425 (421).

39 According to *Stefan Verosta*, *Die dauernde Neutralität – ein Grundriss*, 1967, p. 65.

al of the notification, that is, to the *contrarius actus*? Would Austria then remain permanently bound by its neutrality declaration? From Austria's perspective, there is therefore little to be gained by relying on this elaborate construct.

Taken as a whole, this discussion alone already lays bare the structural weakness of Austrian neutrality from a legal and doctrinal standpoint: it is difficult to determine how much "hard law", and in particular how much "international law", this concept actually contains, since many of the formally elaborate interpretations advanced in this field are plainly interest-driven and rest on tenuous legal foundations.

3. The constitutional dimension

It should also be emphasised that the BVG Neutrality is a constitutional statute and that the obligations it contains, though formulated with deliberate brevity, established binding commitments under domestic law of a particularly stringent kind. As will be shown below, the BVG Neutrality in its original form is no longer applicable.

IV. The five phases of the development of Austrian neutrality law

The development of Austrian neutrality law can be divided into five phases. This trajectory was shaped, to a significant extent, by the Swiss neutrality debate⁴⁰ and, at times, was virtually determined by it.

The following phases may therefore be distinguished:⁴¹

1. Justification of neutrality (1955/1956)
2. Indifference (1956–1967)
3. Exaggeration (1967–1989)
4. End of the East–West conflict and rapprochement with the EEC/EU (1989–1993)
5. Uncertainty and the search for new substance and orientation following the broad erosion of traditional foundations

40 See Alois Riklin, *Neutralität am Ende – 500 Jahre Neutralität der Schweiz*, Zeitschrift für Schweizerisches Recht 5 (2006) I, p. 563, for a similar development in Switzerland.

41 See also Peter Hilpold, *Österreichs Neutralität nach Lissabon*, in: 13 ÖJZ 2010, pp. 590–598 (591).

The early period from 1955 onward was thus marked by the development in the literature of doctrinally refined lines of argument, alongside a widespread indifference to these debates among the broader population.

This situation changed abruptly in 1967, at a moment when accession to the EEC still seemed a remote prospect, creating another parallel with Switzerland.

In this period, Alois Riklin, then rector and professor of political science at the University of St. Gallen, argued that neutrality in Switzerland was “elevated to an all-encompassing state doctrine,” with “almost every foreign policy issue being measured against an exaggerated concept of neutrality.”⁴²

Comparable, though less pronounced, views began to gain ground in Austria as well. Austria embraced the so-called “Bindschedler” doctrine concerning the anticipatory effects of permanent neutrality.⁴³ The Swiss international-law scholar Rudolf Bindschedler (1915–1991) maintained that permanently neutral states should refrain from joining customs or economic unions if such arrangements could generate dependence on a stronger partner.⁴⁴

This line of argument aligned closely with Austria’s revised foreign trade policy. As noted above, Vienna was no longer pursuing EEC membership, in part because of Italian resistance, and instead sought alternatives such as EFTA and bilateral arrangements with the EEC. This convergence was not merely coincidental. Political economy research suggests that background forces were at work, rendering the underlying determinants more prosaic than the official neutrality discourse implied:⁴⁵

- The isolationist measures demanded by the politically influential agricultural sector could be presented as necessary to safeguard neutrality.

42 See Alois Riklin, 2006, p. 592.

43 As Dietrich Schindler (in FS Bindschedler 1980, p. 563) points out, this idea was originally conceived by Karl Strupp (Neutralisation, Befriedung, Entmilitarisierung, Stuttgart 1933, p. 207 ff.). Rudolf Bindschedler (fn. 43) further elaborated on this concept under the term “secondary obligations of permanent neutrality” and made it more widely known.

44 See Rudolf Bindschedler, Die Neutralität im modernen Völkerrecht, ZaöRV 1956/1957, pp. 1–37 (3 ss.).

45 See Paul Luif, Der Wandel der österreichischen Neutralität. Ist Österreich ein sicherheitspolitischer Trittbrettfahrer?, 2nd ext. version 1998, p. 23s as well as *idem*, in this book (p. 315–333). See also René Rhinow, Permanence as a unique feature – Switzerland and its policy of neutrality (in this book, pp. 67–85) who sees “anticipatory effects” of the policy of neutrality as largely constituting an “actually autonomous foreign policy”.

- Austria's relatively large nationalized industrial sector could likewise be protected, justified by the purported requirements of neutrality policy.
- At the same time, an assertive neutrality policy enabled the federal government to strengthen its foreign-policy profile.

The Austrian constitutional lawyer *Theo Öhlinger* captured this dynamic succinctly:

*“The danger was obvious and was not always avoided, namely to support this policy with legal arguments, i.e. to postulate that what proved to be a sensible and successful policy of neutrality was also legally required.”*⁴⁶

Switzerland experienced a similar exaggeration of neutrality, as the boundary between legal reasoning and political justification became increasingly blurred. Even the country's leading neutrality scholar, *Professor Dietrich Schindler*, denied that permanent neutrality possessed the legal character of customary international law. At the same time, however, the Swiss and Austrian debates on neutrality law and neutrality policy began to interact in revealing ways.

In its search for support for the legal character of permanent neutrality, Swiss scholarship has repeatedly invoked the Austrian Neutrality Act (*BVG Neutrality*). That law is widely understood to rest on the Moscow Memorandum, which itself refers to Switzerland's neutrality status.⁴⁷

Austria's accession to the EU fundamentally reshaped the debate. Since 1995, much of the discussion has revolved around clarifying what EU membership means for Austria's status of neutrality. The reluctance and, at times, inconsistency of political actors to assess these implications soberly can likely be attributed, at least in part, to tangible interests in preserving at least the appearance of neutrality. As a result, the legal arguments advanced, insofar as that label remains warranted, have often been adjusted to fit those interests. The terminological and conceptual confusion that followed is substantial.

46 See *Theo Öhlinger*, Kommentar zum Bundesverfassungsgesetz vom 26. Oktober 1955 über die Neutralität Österreichs, in: *Korinek/Holoubek* (Hrsg.), Österreichisches Bundesverfassungsrecht, I. instalment (*1. Lieferung*) 1999, para. 7 (translation by this author).

47 See *Peter Hilpold*, *Solidarität und Neutralität*, 2010, p. 45, with reference to *Dieter Schindler*, 1980, p. 579.

V. The effects of EU accession on Austrian neutrality law

Austria acceded to the EU on 1 January 1995 without any neutrality reservation, contrary to what had originally been planned and communicated domestically. The constitutional framework for reconciling EU membership with Austria's neutrality obligations was subsequently established through the insertion of Article 23f B-VG. Under the Treaty of Lisbon, the relevant provision is now set out in Article 23j B-VG, which provides:

"Austria participates in the Common Foreign and Security Policy of the European Union [...] as set out in the Treaty of Lisbon with [...]."

The Common Foreign and Security Policy (CFSP) also encompasses the gradual development of a Common Security and Defence Policy (CSDP).⁴⁸ In this context, the so-called "Petersberg tasks," defined in 1992 within the framework of the Western European Union and later incorporated into Article 43 TEU, are politically particularly sensitive from the perspective of neutrality.

The "Petersberg tasks" included the following:

- humanitarian tasks and rescue operations
- peacekeeping tasks
- combat missions in crisis management, including peacekeeping operations

The expanded version of Article 43 TEU now also mentions the following tasks:

- Military advice and support
- Conflict prevention and peacekeeping
- Operations to stabilise the situation after conflicts.

48 See Article 42 TEU:

"The common security and defense policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States."

On neutrality as a communicative tool for justifying a policy conditioned by the Cold War, see *Matthieu Gillibert/Pauline Milani, Communicating neutrality. Public diplomacy by neutral states at the beginning of the Cold War*, 27 *European Review of History* 2020, pp. 628–650.

Articles 23f B-VG and, subsequently, Article 23j B-VG, as *lex posterior* and *lex specialis*, have in substantive terms derogated from the Neutrality Act (BVG Neutrality) in key respects. As a result, as far as EU law applies, very little of constitutional neutrality remains.⁴⁹

In addition, Article 42(7) TEU must be considered. Its mutual assistance clause effectively commits the Union, in the event of an armed attack, to a form of collective military assistance, a commitment that sits uneasily with a central constitutional pillar, namely neutrality.

It was another neutral EU Member State, Ireland, which secured an explicit exemption to this clause, which reads as follows:

"This [the mutual assistance clause] shall not affect the specific character of the security and defence policy of certain Member States."

Interestingly, this "Irish clause" did not originate from an Austrian initiative. It was negotiated by Ireland, yet it subsequently became available for all neutral states, including Austria, to invoke.

To what extent the "Irish clause" establishes a right to opt out of any obligation to contribute to the European Defence Fund under Article 42(7) TEU is, however, contested. The claim that the provision imposes an obligation to provide assistance in a purely asymmetrical and non-reciprocal manner is hardly convincing. It is difficult to square with the EU law principles of solidarity and reciprocity to suggest that neutral Member States would enjoy only rights (namely, to receive assistance in the event of an armed attack), while all other Member States would bear only obligations towards them.

Looking at past practice, Austria has demonstrated solidarity in security matters and has also cooperated closely with NATO, as will be shown in detail below.

During the EU accession process, discussions took place about formally ending Austria's neutral status. However, the invasion of Iraq, dubbed "Iraqi Freedom", triggered a "rediscovery" of neutrality,⁵⁰ and the 2004 presidential election campaign, in which Heinz Fischer, a proponent of neutrality,

49 See also *Andreas Th. Müller*, Der rechtliche Rahmen der österreichischen Neutralität im Wandel, in: *M. Senn/J. Troy (eds.)*, Österreichs Neutralität, Bielefeld: Transcript Verlag 2025, pp. 97-112 (101).

50 See *Paul Luif*, Die Neutralität: Taugliche sicherheitspolitische Maxime?, in: *Waldemar Hummer (ed.)*, Staatsvertrag und immerwährende Neutralität Österreichs, 2007, pp. 363-389.

ultimately prevailed, was widely regarded as reflecting popular support for neutrality.⁵¹

VI. Current Austrian practice in the context of the EU and in relation to NATO

The mutual defence clause under Article 42(7) TEU was invoked for the first time by France in November 2015, albeit in a highly specific context that did not amount to a classic armed attack, namely in response to the Paris attacks of 13 November 2015.⁵² The Austrian government did not regard a declaration of solidarity as incompatible with neutrality, even though it remained unclear how far such solidarity would extend in practice.

Austria has increasingly committed itself to shaping the CSDP and does not view neutrality as an obstacle to doing so. This is clearly reflected in Austria's 2024 Security Strategy.⁵³ Moreover, through its participation in the development and implementation of the 2016 Global Strategy⁵⁴, which gave the CSDP considerable substantive concreteness, Austria has underscored its commitment to this approach. The "targeted engagement" as provided for in this strategy requires participation in peace operations, international crisis management and cooperative security.⁵⁵

51 Ibid., p. 383.

52 See *Peter Hilpold*, Terrorismus, Bündnisfall und die Frage der Neutralität, *Wirtschaftsblatt* v. 25.11.2013, p. 13 and idem, Die österreichische Neutralität und der Kampf gegen den Terrorismus, in: 24 JRP 2016, pp. 282-286. The classification of these attacks as acts of aggression was confirmed by SR Res. 2249 of 20 November 2015, although this resolution was, as a whole, rather ambivalent.

53 <https://www.bundestkanzleramt.gv.at/themen/sicherheitspolitik/sicherheitsstrategie.html>.

The same was true for the 2013 Security Strategy.

54 Shared Vision, Common Action: A Stronger Europe A Global Strategy for European Union's Foreign and Security Policy, June 2016. See *Gerhard Jandl*, Some Observations on the Neutrality of Austria, and its Participation in the European and Euro-Atlantic Security Structures, in: *Andreas J. Kumin et al. (eds.)*, Außen- und sicherheitspolitische Integration im Europäischen Rechtsraum, *Liber Amicorum Hubert Isak*, 2020, pp. 343-352 (349).

55 See Heinz Gärtner, Die "Global Strategy" der EU – eine Analyse, Policy Paper, Österreichisches Institut für Internationale Politik, Vienna: Österreichisches Institut für Internationale Politik (oiip) 2016, https://www.ssoar.info/ssoar/bitstream/handle/document/59074/ssoar-2016-gartner-Die_Global_Strategy_der_EU.pdf?sequence=3&isAllowed=y.

Austria participates in CARD and in Permanent Structured Cooperation (PESCO), established in 2017, particularly in the field of capability planning and development. When the European Defence Fund (EDF) is also taken into account, supporting both consortia of companies from different Member States engaged in the cooperative research and development of defence products and technologies and the development of supply chains, a “triangle” emerges that can, in turn, be specifically linked to corresponding NATO activities.⁵⁶

Austria also takes part in a large range of NATO working groups, with particular emphasis on the interoperability of the Austrian Armed Forces with the armed forces of other European countries.⁵⁷

Special mention should also be made of the European Peace Facility, which was established in 2021, largely unnoticed by the public due to the COVID crisis. It is an international organisation with its own budget of €5.692 billion. The ceiling for this was set by a Council decision on 13 March 2023 to €7.979 billion by 2027. This “peace facility” is intended to finance operational military measures in the field of CFSP, thereby improving the Union's capacity for conflict prevention, peace-building and strengthening international security.⁵⁸ A separate budget was therefore necessary, since, pursuant to Article 41(2) TEU, expenditure arising from operations with military or defence implications may not be charged to the EU budget.

From the perspective of neutrality law, it is particularly significant that contributions to the budget are calculated on the basis of gross national income (GNI). As a result, neutral Member States also contribute, without any general exemption, to financing activities carried out under the Peace Facility. Formally, this issue has been addressed by providing that “Member States with a specific security and defence policy” (that is, typically the neutral states) are not required to co-finance measures involving the use of

⁵⁶ Ibid.

⁵⁷ This is also reflected in a written statement by *Bernhard Christandl* from the Austrian Ministry of Defense to the present author (on file with author).

⁵⁸ See European Council, European Peace Facility, Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility and repealing Decision (CFSP) 2015/528, <https://www.consilium.europa.eu/de/policies/european-peace-facility/>. Its predecessors were the Athena mechanism and the African Peace Facility. Ibid.

“lethal force”.⁵⁹ At the same time, however, the Member States concerned are not relieved of their solidarity obligations: they must contribute to “other support measures”⁶⁰ that are not geared towards the use of lethal force. In overall terms, the financial contribution remains unchanged; any reduction in one category is offset by a correspondingly higher contribution in another. The Council Decision establishing the European Peace Facility is explicit on this point and addresses the linkage in notably clear terms:

*The additional amount to be contributed by a Member State abstaining from the adoption of an assistance measure which provides for the supply of military equipment, or platforms, designed to deliver lethal force will ensure that the overall contribution of that Member State to assistance measures will be in accordance with its share of GNI in the total GNI aggregate of the Member States. The amount of the contributions due from the other Member States to the measures to which such additional contributions are made will not be affected by those additional contributions. The proportion of costs for assistance measures concerning the supply of military equipment, or platforms, designed to deliver lethal force will therefore decrease as a result of such abstentions, compared with that of the other assistance measures funded under the Facility. As a result of the abstention, the appropriations potentially available for assistance measures concerning the supply of such equipment or platforms will decrease.*⁶¹

The functioning of this mechanism became particularly clear on 28 February 2022, when two separate CFSP decisions were adopted to impose sanctions on Russia in response to its invasion of Ukraine. One decision allocated €450 million for military equipment and platforms intended for the use of lethal force⁶², while the other provided €50 million for additional support measures for the Ukrainian armed forces.⁶³ Austria was bound only

59 See recitals 4 and 21 as well as Article 56(2)(c) of Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility and repealing Decision (CFSP) 2015/528. To this end, Member States may submit a formal declaration pursuant to Article 31(1), second subparagraph, stating that, for “essential reasons of national policy [which must be specified],” they oppose a decision.

60 Ibid., recital 21.

61 Ibid., recital 22.

62 Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force.

63 Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces.

by the second decision, yet this did not alter its proportional share of the overall support package.

In a lucid critique of Switzerland's traditional concept of neutrality, the Basel constitutional law scholar René Rhinow⁶⁴ captured this core point from a broader perspective:

*“How can it be justified that bulletproof vests are considered relevant to war, but overflights by military aircraft serving a humanitarian purpose are not? Can it seriously be argued that bandages are not war-related? Why is the export of war material not confined to weapons in the strict sense? Items intended to protect life and limb are not covered by the Hague Convention. The term ‘war-related’ should be abandoned altogether, because what, in modern warfare, is not relevant?”*⁶⁵

There is a risk that political correctness and a feel-good mentality will replace rigorous legal reasoning, with everything ultimately folded into a vague notion of “neutrality.” At the same time, Austria has authorized the transit of weapons to Ukraine, invoking EU law as its legal basis.⁶⁶

However, it is not only military cooperation within the CFSP and CSDP that is incompatible with the obligations of a neutral country – according to the traditional concept – but also, in particular, close cooperation with NATO, which occurs in two ways: at the EU level through the CFSP and bilaterally in Austria's direct relationship with this military alliance.

Accordingly, Permanent Structured Cooperation (PESCO) under Articles 42(6) and 46 TEU and Protocol No. 10, in which 25 of the 27 EU

64 See René Rhinow, *Wie weiter mit der Neutralität?*, Die Schweiz in Europa, 28 June 2022, <https://suisse-en-europe.ch/rene-rhinow-wie-weiter-mit-der-neutralitaet/> (translation by this author).

65 Even under traditional neutrality law, the continued applicability of which is, as argued above, doubtful, the sustained provision of financial support to a belligerent would, in itself, be incompatible with neutrality. See Michael Bothe, *Neutrality, Concept and General Rules*, in: *Max Planck Encyclopedia of Public International Law* (online ed.), para. 36. See also Michael Schilchegger, *Die österreichische Neutralität nach Lissabon*, 66 ZÖR (2011), pp. 5–24, at 20, who characterizes “any financial assistance” to one of the parties to an armed conflict as contrary to neutrality. On this basis alone, Austria would have breached its neutrality by participating in the European Peace Facility, assuming that neutrality in the traditional sense remains applicable.

The practical impossibility of drawing a clear line between military and civilian goods is also noted by Stephan Wittich (note 25), at 82.

66 See Ralph Janik, *Austrian Neutrality amid Russia's War on Ukraine*, in: 26 ARIEL 2021 (2023), pp. 147–160 (154).

Member States participate (Malta and Denmark do not, whereas Austria and Ireland do), is not only designed to align and jointly develop the participating states' defence capabilities within the EU. It also entails parallel coordination with NATO, for example on standards.⁶⁷

Austria has been cooperating directly with NATO since 1995 through the Partnership for Peace platform, which was established in 1994 and currently involves a total of 18 European and Asian countries working with this defence alliance to varying degrees.⁶⁸ This affects peace preservation operations, humanitarian and disaster relief, and search and rescue services. In addition, there is political dialogue and military and civilian cooperation within the Euro-Atlantic Partnership Council (EAPC)⁶⁹, which has been in existence since 1997. While this does not constitute a traditional defence alliance, it nevertheless represents a contractually anchored form of military cooperation. In addition, Austrian officers are assigned to various NATO staffs in so-called "partner staff posts," and Austrian personnel also participate in numerous NATO working groups, particularly those focused on interoperability.⁷⁰

Austria's cooperation with NATO entered a new phase with its participation in the Individually Tailored Partnership Programme (ITPP) since its launch in 2022. The programme defines "security" in very broad terms, encompassing, for example, climate protection, while also covering traditional core areas of military cooperation such as electronic warfare, mine detection, and airspace surveillance.⁷¹

67 See, for example, *Lorenzo Giuglietti*, The EU's Permanent Structured Cooperation, NATO, and the US: beyond a zero-sum game, CEPOB 5/2021, May 2021, https://intra.net.eulacfoundation.org/en/system/files/giuglietti_cepob_5.pdf.

68 See *Gerhard Jandl*, 20 Years of Austrian Partnership with NATO, in: 61 *Politörbis* 1/2016, pp. 75-80. Switzerland has also been participating in this partnership since 1996. The membership of Russia and Belarus was suspended after Russia's invasion of Ukraine on 24 February 2022. With Finland (2023) and Sweden (2024) joining NATO, the number of members fell from 20 to 18.

69 See Österreichisches Bundeskanzleramt, Zusammenarbeit mit der NATO, <https://www.bundeskanzleramt.gv.at/themen/sicherheitspolitik/zusammenarbeit-mit-der-nato.html?lang=en>.

70 This is reflected in the written reply of the Directorate-General for Defense Policy in the Austrian Federal Ministry of Defense, provided in response to an inquiry by the author.

71 See *D. Bischof/J. Streithammer*, Wie Österreichs Neutralität fast unbemerkt geschrumpft ist, in: *Die Presse*, 7 July 2023, <https://www.diepresse.com/13441550/wie-oesterreichs-neutralitaet-fast-unbemerkt-geschrumpft-ist>.

As will be explained in more detail below, accession to the Sky Shield missile defence system presents a new challenge, as it implicates fundamental questions of neutrality law, including those relevant to Switzerland.

VII. Swiss neutrality

Compared with Austria, Switzerland arguably faces even greater uncertainty regarding the legal nature of neutrality obligations. While Swiss neutrality is, of course, not governed by EU law, similar doubts as in Austria arise as to whether binding neutrality obligations continue to exist under international law. The central issue is the extent to which the traditional right to neutrality retains legal significance after the entry into force of the UN Charter, and in any event after Switzerland's accession to the United Nations in 2002. The establishment of a general prohibition on the use of force, together with the introduction of a limited right of self-defence, including, however, collective self-defence, marked a radical paradigm shift from the previous legal order, which presupposed strict compliance with the law of neutrality. Switzerland's neutrality reservation upon accession to the United Nations does little to alter this conclusion, while the official narrative of Swiss neutrality – like that of Austria – regularly paints an exaggerated, idealised picture of neutrality,⁷² highly qualified sources⁷³ have recently published very nuanced and fundamentally critical analyses of the

72 However, there have long been notable exceptions to this view. See, for example, Hans-Ulrich Jost's sustained critical engagement with Swiss neutrality, including: "Origines, interprétations et usages de la 'neutralité helvétique'," *Matériaux pour l'histoire de notre temps* 93 (2009), 1–12; "No money, no Switzerland: a realistic history of Swiss neutrality," in *Nor good nor bad nor neutral*, Colloquium, 9 September 2009, Berkeley Center for New Media; "Le double jeu de la neutralité," *L'Hebdo*, 2 June 2010; and "Neutralité helvétique: Saisir les opportunités," in *L'Europe. Encyclopédie historique*, ed. Christophe Charle and Daniel Roche (2018), 1632–1640.

For the legend portraying the Battle of Marignano (13–14 September 1515) as the "birth" of Swiss neutrality, see Marco Jorio, *Die Schweiz und ihre Neutralität: eine 400jährige Geschichte, Hier und Jetzt*: Zurich 2023, 35ss. For the development of the law of neutrality more generally, see Mark E. Villiger, *Handbuch der Schweizer Neutralität*, 2023, 21ss.

73 See Thomas Cottier, note 7, as well as *idem*, *Das Ende der Neutralität*, in: *NZZ*, 15 June 2022, p. 19.

subject. Two monographs published in 2023 have also greatly enriched the Swiss debate on neutrality law.⁷⁴

Swiss neutrality thus emerged historically from a position of weakness and was accepted by the major European powers primarily for their own interests, as it created a buffer between France and Austria (Austria-Hungary from 1867).⁷⁵ It was not neutrality as such, but rather favourable circumstances, that spared Switzerland from the world wars. Switzerland leveraged its neutral status with considerable commercial acumen, yet today that same status is increasingly proving a disadvantage in economic, political, and security terms.⁷⁶

A hallmark of Swiss neutrality has long been its capacity to adapt to changing circumstances.⁷⁷ Thus, reliance on “differential” neutrality enabled Switzerland to join the League of Nations in 1920.⁷⁸ More recently, the notion of “cooperative neutrality” has been advanced not only to avoid Switzerland being entirely sidelined in the context of the war in Ukraine, a stance widely viewed unfavourably internationally, but also to modernise

74 See Marco Jorio, *Die Schweiz und ihre Neutralität – Eine 400jährige Geschichte, Hier und Jetzt*: Zurich 2023 and Mark E. Villiger, *Handbuch der schweizerischen Neutralität*, 2023. See also Astrid Epiney/David Kläui/Sophie Dukarm, *Die Neutralität der Schweiz – status quo und Perspektiven*, in: 144 *Zeitschrift für Schweizerisches Recht* 2025, II, pp. 5–94.

75 See Thomas Cottier (note 7). As has been emphasised many times in the literature – see most recently Marco Jorio (note 72) in particular – neutrality was also a valuable instrument for holding together a country divided by political and religious conflicts.

76 See Thomas Cottier (note 7).

77 See Anna Petrig, *Flexible Neutralität: Eine neutralitätsrechtliche und –politische Verortung der Sanktionen der Schweiz gegen Russland*, in: *VerfBlog* 2022/3/04, under *Neutrality Law*, <https://verfassungsblog.de/flexible-neutralitat/>: “The policy of neutrality is an instrument that Switzerland has always handled flexibly (and at times quite opportunistically)” (translated from German). See also Marco Sassòli, in: Peter Hilpold, Matthieu Gillibert, Johanna Rainio-Niemi and Marco Sassòli, *Neutrality Law In A Comparative Perspective: Austria, Switzerland, Finland, The Defense Horizon Journal*, 2023, <https://www.thedefensehorizon.org/post/neutrality-law-comparis-on-austria-switzerland-finland> (10 August 2023).

78 In 1938, Switzerland reverted to “integral” neutrality, in part because of the League of Nations’ evident failure as a system of collective security, and in the hope that this stance would better serve Switzerland’s own security interests.

Switzerland's official understanding of neutrality more generally.⁷⁹ To date, however, these initiatives have not succeeded.⁸⁰

Whether Switzerland's commitment to perpetual neutrality, undertaken at the Congress of Vienna, can still be maintained in today's fundamentally altered landscape of international law and politics in Europe is highly questionable. There is likewise little convincing justification for the frequently asserted claim that Swiss neutrality has the status of customary international law, or any adequate explanation of it. Mere factual acknowledgment of Switzerland's neutral status can hardly be taken to establish state practice and *opinio juris*; and even if one were to attempt to do so, it would remain unclear who would be entitled or bound under such "customary law."

As noted above, modern international humanitarian law, in particular the four Geneva Conventions of 1949 and Additional Protocol I of 1977, does presuppose the existence of neutral States.⁸¹ Nevertheless, this does not amount to a right to neutrality under international law. Rather, it simply presupposes neutrality, where it exists, without examining its precise legal basis, in order to serve humanitarian objectives.

Even the enshrinement of neutrality in the Swiss Constitution is comparatively weak, and the obligations that flow from it are correspondingly limited. Swiss legal scholarship regularly stresses the primarily internal character of the Constitution's neutrality-related provisions.⁸² The Federal Constitution of 1999 mainly allocates competence over neutrality matters, entrusting constitutional responsibility to the Federal Assembly (Art. 173) and the Federal Council (Art. 185). It does not, however, express any normative preference for neutrality or accord it elevated constitutional rank: neutrality is absent from the purpose clause (Art. 2), the foreign policy objectives (Art. 54), and the security policy framework (Art. 57).⁸³

79 See "Die Presse", 25 August 2022, p. 1. The efforts of Swiss Federal President *Ignazio Cassis* in this regard must be regarded as having failed, given the rejection of the preparatory report on 7 September 2022.

80 For a very clear statement in this regard, see *Marco Jorio*, 2023, p. 468: "Under international law, there should no longer be any neutrality in the case of aggression." (Translation by this author).

81 See *Manfred Rotter*, *Begründung und Ausgestaltung der immerwährenden Neutralität*, 2007, p. 182. See also *Peter Hilpold*, *Solidarität und Neutralität*, 2010, p. 19.

82 See *Urs Saxer*, Art. 185, para. 35, in: *Ehrenzeller/Schindler/Schweizer/Vallender*, *Die schweizerische Bundesverfassung – St. Galler Kommentar*, 3rd ed. 2014.

83 See *Alois Riklin*, *Checkliste zur Neutralität der Schweiz*, September 2022, <https://unrecht.ch/2022/08/04/aloes-riklin-checkliste-zur-neutralitaet-der-schweiz/>.

It has been argued that Swiss neutrality, in its form as “permanent neutrality”, has crystallised into customary constitutional law, with the consequence that any renunciation would require a referendum.⁸⁴ This is an acceptable position on an issue that is, in the end, largely political. However, as set out above, the evidence for the existence of such a rule of customary international law is thin, if it exists at all. Of decisive importance in this regard is, what is meant by “neutrality”. As the historical literature on Swiss neutrality shows, the content of the concept has been continuously reinterpreted and has evolved over time.⁸⁵

Moreover, in some instances theory and practice diverged to a very substantial degree.⁸⁶ This raises a further question: which understanding of neutrality could plausibly have crystallised into customary international law? The strict provisions of the Swiss War Material Act, which, until recently, also prohibit the re-export of Swiss weapons by the purchasing state, are difficult to derive from international law,⁸⁷ as will be discussed in detail below. A related difficulty is that classical neutrality law was developed with inter-state wars in mind, whereas most contemporary conflicts are internal.⁸⁸ Dietrich Schindler therefore also cautioned against characterising “permanent neutrality” as customary international law.⁸⁹

84 Ibid.

85 See in particular the contributions by *Hans-Ulrich Jost*, note 72.

86 Ibid.

87 See Art. 18 Swiss War Material Act of 13 December 1996 (*Kriegsmaterialgesetz – KMG*), in force since 1 April 1998, AS 1998 794. Section 3 of the Austrian KMG of 18 October 1977 prohibits exports to conflict zones and to countries where there is a risk that the weapons will be used to suppress human rights, and provides for the possibility of imposing conditions and requirements to prevent these prohibitions from being circumvented (e.g. the submission of an “end-user certificate” with regard to the aforementioned export bans; Section 3(2) KMG). In this sense, the Swiss KMG is much more restrictive and less flexible in its application than the Austrian one. See also, however, the recent reform attempts relating to the Swiss KMG of December 2025.

88 See *Urs Saxer* (note 82), para. 33 as well as *Peter Hilpold*, *Die österreichische Neutralität und der Kampf gegen den Terrorismus*, 24 JRP 2016, pp. 282–286.

89 See *Dietrich Schindler*, *Die Lehre von den Vorwirkungen der Neutralität*, in: E. Diez et al., FS Rudolf Bindschedler, Stämpfli: Bern 1980, pp. 563–582 (574). *Dietrich Schindler's* studies on neutrality law reflect very well the changing views on this subject in academia over the decades. While Schindler still held the view in 1969 that Swiss neutrality was customary international law (see: “Aspects contemporains de la neutralité”, in: *Recueil des cours* 1967 II, pp. 226–319, 302), by 1996 he had adopted the following position, which remains highly convincing today: “*This [...] means that traditional neutrality law has evolved from law with generally binding force into little*

In Austria, by contrast, the question whether neutrality forms part of the constitution's "fundamental provisions" (Baugesetze), such that any amendment would require a referendum, has been answered in the negative.⁹⁰ In Switzerland, however, accession to NATO would in any event require a referendum pursuant to Article 140 of the Federal Constitution.⁹¹

Traditionally, Switzerland and Austria were seen as markedly different in terms of defence capability. Switzerland was long regarded as highly capable of self-defence ("Switzerland does not have an army; Switzerland is an army")⁹², but this assessment has recently been questioned. Switzerland's autonomous defence capacity is now often rated almost as poorly as Austria's has long been: with defence spending of around 0.7% of GDP, Switzerland is said to be no longer able to defend itself independently and instead to free-ride, in particular on the defence efforts of NATO countries.⁹³ Austria's defence budget, at roughly 0.8% of GDP, is only marginally higher.⁹⁴

Thomas Cottier has recently offered a particularly pointed assessment of the current status of Swiss neutrality:

"Switzerland will also have to rethink its right to neutrality and its policy of neutrality. Slogans such as active neutrality, peace promotion, good offices, mediation and upholding international law are not enough in this context. Switzerland's right to neutrality is proving to be an obstacle

more than a set of guidelines for states that place value on being regarded as neutral or that have committed themselves to permanent neutrality." (Translation by this author). See Dietrich Schindler, Die politischen Änderungen in Europa und die dauernde Neutralität, in: H. Neuhold/B. Simma (eds.), Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konfliktes?, 1996, pp. 141–145 (143).

90 See Walter Berka, Verfassungsrecht, 8th ed. 2021, para. 215.

91 See Alois Riklin, Checkliste zur Neutralität der Schweiz, September 2022, <https://unserrecht.ch/2022/08/04/aloes-riklin-checkliste-zur-neutralitaet-der-schweiz/>.

92 In this sense Wolfgang Mueller (University of Vienna), echoing the well-known dictum. Cited according to Werner Bartl (note 7).

93 See statista 2022 with reference to SIPRI April 2022.

94 See Thomas Cottier, Der Krieg in der Ukraine: Ein Wendepunkt in den Beziehungen der Schweiz zur Europäischen Union und zur NATO?, in: 32 SRIEL 2022, pp. 547–555 (554, translation by this author). See also Marco Jorio, 2023, p. 467:

"The classic law of neutrality laid down in the Hague Convention of 1907, which Switzerland is currently the only country to stick to obsessively, is outdated and has now been superseded by other rules of international law." And further: "Switzerland could [...] abandon its neutrality without harm due to its geopolitical, historical and international legal situation." Ibid., p. 468.

to effectively supporting a people's struggle for democracy and freedom beyond humanitarian aid.”⁹⁵

The tightening of the War Material Act (KMG) in 1996⁹⁶ has triggered renewed and intense debate in 2021, culminating in a reform that entered into force on 1 May 2022.⁹⁷ Under Art. 18 KMG, the re-export of war material supplied to foreign governments, or to companies acting on their behalf, is generally prohibited. To secure compliance, the recipient states must provide “non-re-export declarations”. While the Federal Council may still authorise such “foreign transactions” under Art. 22a KMG, the 2021 reform (effective 1 May 2022) added a further limitation in Art. 22a(1): re-export to war zones is categorically excluded, irrespective of whether the end user is the aggressor or the victim of an attack.⁹⁸

Because the ban applies without any temporal limitation, Switzerland is, in a key respect, placed outside the international solidarity coalition supporting Ukraine. It also imposes a lasting constraint on Swiss arms exports. This stringent re-export prohibition, which lacks any basis in international law, has drawn substantial criticism both internationally and domestically. In December 2025, it was decided to soften the ban. It is still unclear, however, whether this amendment will enter into force and what its practical implications will be.

Already Parliamentary initiative 23.403 of 21 February 2023 was intended to provide at least a partial remedy by permitting re-export after five years, even where the destination state is involved in an internal or international

95 See *Thomas Cottier* (footnote 7). Basically, this judgement is very similar to the one made regarding Austria's policy of neutrality. See *Peter Hilpold*, *Die Made im Speck – Die österreichische Neutralität im Kontext der Ukraine-Krise*, *VerfBlog*, 14 March 2022, <https://verfassungsblog.de/die-made-im-nato-speck/>.

96 *Kriegsmaterialgesetz* of 13 December 1996, in force since 1 April 1998, AS 998 794.

97 Amendment of 1 October 2021, AS 2022 226. For more details, see *Thomas Cottier*, *Neutralität, Kriegsmaterial und das Gewaltverbot*, in this volume pp. 241–283.

98 “Foreign transactions pursuant to Article 22 and the conclusion of contracts pursuant to Article 20 shall not be authorised if:

“the country of destination is involved in an internal or international armed conflict; [...]”

See *Marco Jorio*, 2023, p. 456. According to *Thomas Cottier*, this practice of the Swiss authorities is not directly based on the KMG, as Articles 22 and 22a KMG expressly refer to goods “for recipients abroad”, but not to goods that are already abroad and are owned by a foreign state for its benefit and use. See *Thomas Cottier*, *Die Wiederausfuhr von Kriegsmaterial: Die Zeit ist reif für eine Praxisänderung*, in: *Die Schweiz in Europa, Kriegsmaterial-Wiederausfuhr: Zeit für eine Praxisänderung von Thomas Cottier - Vereinigung die Schweiz in Europa*.

armed conflict, provided that it is exercising its right of self-defence under international law. If the UN Security Council were unable to reach agreement, a two-thirds majority vote of the UN General Assembly finding a breach of the prohibition on the use of force under Article 2(4) of the UN Charter would suffice.

This would have been an innovative and original approach, drawing on the 1950 *Uniting for Peace* resolution.⁹⁹ Although that resolution has been invoked only intermittently over the decades and the resulting practice is not especially extensive, it nonetheless exhibits a degree of consistency.¹⁰⁰ The proposal, however, did not succeed.

Even if one were to assume that a right of neutrality under international law continues to exist, a proposition that, as shown, is far from compelling, priority must, as Hersch Lauterpacht made clear in 1953¹⁰¹, be accorded to UN peacekeeping law. It must therefore be possible to provide assistance to the victim of an act of aggression without such assistance necessarily constituting an act of aggression, or having to be characterised as “collective self-defence”. This was a central concern for states supporting Ukraine, which sought to avoid being regarded as parties to the conflict.¹⁰² Where, as in the case of Ukraine, the UN General Assembly has determined that aggression, in this instance by Russia, has occurred,¹⁰³ the conditions for UN-legitimised self-defence pursuant to the “Uniting for Peace” resolution are fulfilled.

99 UNA Res. 77 (V) of 3 November 1950.

100 For more details, see *Christian Tomuschat*, “Uniting for Peace” – A Review After 50 Years, in: 76 *Die Friedenswarte* 2-3/2001, pp. 289-303; *Andrew J. Carswell*, Unblocking the UN Security Council: The Uniting for Peace Resolution, in: 18 *JCSL* 3/2013, pp. 453–480; *Larry D. Johnson*, “Uniting for Peace”: Does it Still Serve any Useful Purpose?, in: *AJIL Unbound* 2014, pp. 106–117; *Stefan Talmon*, The Legalising and Legitimising Function of UN General Assembly Resolution, in: *AJIL Unbound* 2014, pp. 123–128; and *Michael P. Scharf*, Power Shift: The Return of the Uniting for Peace Resolution, in: 55 *Case Western Reserve Journal of International Law* 2023, pp. 1–29.

101 See *Hersch Lauterpacht*, 1953.

102 This question remained largely unaddressed. Only a few states referred explicitly (Albania) or implicitly (Poland) to the right of collective self-defence. Germany, on the other hand, explicitly ruled out the existence of a situation of collective self-defence. For more details, see *Giulio Bartolini*, The provision of belligerent materials in the Russia-Ukraine conflict: Beyond the law of neutrality?, in: *Questions of International Law, Zoom-out* 99, 2023, pp. 3–21, referring to UN Doc S/PV.9256, UN Doc S/PV.9126 and Bundestag-Drucksache 20/1918 of 18 May 2022.

103 UNGA Res. ES-11/1 of 2 March 2022 (adopted with 141 votes in favour, 5 against and 35 abstentions).

Even if one were to disregard the primacy of UN law under Article 103 of the UN Charter and, more generally, ignore the prevailing authority of UN peacekeeping law, the concern that curtailing the re-export ban would violate the law of neutrality was entirely unfounded. Even the remaining proponents of a right of neutrality under international law concede that there is no evidence of any corresponding requirement under customary international law.¹⁰⁴

Although this proposed amendment did not receive majority support, the political mood in Switzerland has shifted in the meantime: The willingness to rearm, which has been evident throughout Europe since at least the beginning of 2025, has led to a strong upswing in the European arms industry, from which the Swiss arms industry would hardly benefit with the restrictive version of the KMG from 2021. On this basis, there are now strong tendencies towards liberalisation of arms exports, with the creation of legal regulations that pay lip service to neutrality but make the underlying concept of neutrality appear even more incoherent.¹⁰⁵

The "Manifesto Neutrality 21" (29 May 2024)¹⁰⁶ offers an approach that, in conformity with international law, seeks to preserve neutrality as a foreign-policy instrument while remaining firmly anchored in UN law. Framed in ten points, it calls for strict adherence to UN law and, at the same time, highlights the scope that this legal order affords for a credible policy of neutrality. It argues that Switzerland should define the content

104 See *James Upcher*, *Neutrality in Contemporary International Law*, OUP: Oxford 2020, p. 85. In this sense, see also *Thomas Cottier*, *Die Würde des Menschen steht im Mittelpunkt*, NZZ 23 June 2023, p. 19.

105 See www.srf.ch/news/schweiz/kriegsmaterial-export-diese-lockerungen-hat-der-staenderat-beschlossen-die-uebersicht.

In addition, efforts have recently been made to further expand the right to neutrality, in particular through the "Neutrality Initiative" (<https://neutralitaet-ja.ch/>). According to this initiative, an Article 54a should be added to the Swiss Federal Constitution, which should contain the following provision in paragraph 3:

"Switzerland does not take part in military conflicts between third countries and does not adopt non-military coercive measures against belligerent states." (Translation by this author). Under this concept, Switzerland would continue to implement UN sanctions, but would generally refrain from adopting EU sanctions. In practice, this would preclude Swiss participation in EU restrictive measures against Russia in response to its attack on Ukraine. In the longer term, accession to a military or defense alliance would be ruled out; cooperation with such alliances would be envisaged only in the event of a direct military attack on Switzerland. How such a far-reaching retrenchment of solidarity could be translated into workable policy, however, remains uncertain.

106 <https://suisse-en-europe.ch/neutralitaet-21/>.

and modalities of its neutrality autonomously and should refrain from codifying its neutrality policy in binding legal form (point 3). The manifesto is clearly oriented towards contemporary challenges, including the war in Ukraine. This focus is articulated with particular clarity in points 9 and 10:

9. The exercise of neutrality is subordinate to the requirements of collective security and to humanitarian interventions, including under the Responsibility to Protect (R2P). It therefore permits Switzerland to provide appropriate support, for example by granting overflight rights or authorising the transit of troops and matériel in support of a victim of aggression and the affected civilian population.

*10. Switzerland should amend the War Material Act. The export of war material should be regulated anew in light of Switzerland's security and foreign policy interests. The structure and modalities of arms exports should be determined autonomously, and not be dictated by considerations of neutrality.*¹⁰⁷

On this basis, it remains uncertain whether Switzerland could provide support in the form of collective self-defence. The exercise of the Responsibility to Protect typically presupposes Security Council authorisation, and Article 7 of the “Manifesto” appears to formulate only a negative obligation with respect to self-defence, namely that Switzerland must refrain from any conduct that would favour the aggressor.¹⁰⁸ However, as shown, there are several arguments that collective self-defence is, in any event, compatible with UN law; and under the manifesto, neutrality is framed merely as an instrument of foreign policy rather than as a legal entitlement. A complete decoupling of arms export law from neutrality considerations would, accordingly, give Switzerland a broad margin of manoeuvre, comparable to that enjoyed by other states with similarly developed defence industries.

VIII. The Sky Shield Initiative (European Sky Shield Initiative – ESSI)

The war in Ukraine has once again underscored that the principal military threat is increasingly airborne, posed by aircraft and, in particular, by

¹⁰⁷ Translation by this author.

¹⁰⁸ See P. Hilpold (ed.), *Responsibility to Protect (R2P) – A New Paradigm of International Law?*, Brill/Martinus Nijhoff: Leiden/Boston 2015 and *idem*, *Intervening in the Name of Humanity: R2P and the Power of Ideas*, in: 17 *Journal of Conflict and Security Law* 1/2012, pp. 49-79.

missiles and remotely piloted drones. Even “neutral” states must respond to this challenge. Yet this war also illustrates, in especially stark and practical terms, how difficult it has become to maintain neutrality as a workable and meaningful concept. For European states with comparatively small territories, effective protection against aerial threats is, in practical terms, achievable only through cooperation. This, however, raises questions about the compatibility of such arrangements with the traditional prohibition on alliances.

On 7 July 2023, Austria and Switzerland announced their intention to participate in “Sky Shield” and signed a corresponding declaration, accompanied by an additional declaration stating that the neutrality of both states would be preserved.¹⁰⁹ At the same time, it remains unclear, or at least not publicly known in sufficient detail, what concrete forms cooperation within the “Sky Shield” framework will take. In various quarters it has been suggested that the initiative primarily functions as a joint procurement platform. Participation in such a mechanism would not be problematic, at least according to a neutrality that is not too demanding. However, a number of statements indicate that “Sky Shield” may extend beyond procurement to include coordinated defence measures, potentially involving joint operational responses. Such a development would constitute a military alliance—an arrangement prohibited by Austrian constitutional law and incompatible with the traditional Swiss conception of neutrality.¹¹⁰ How assurances derived from neutrality law could be squared with an integrated air-defence system of this kind therefore remains, for the time being, an open question.

109 See “Austria and Switzerland join European air defense,” *Der Spiegel*, 7 July 2023, <https://www.spiegel.de/ausland/sky-shield-oesterreich-und-schweiz-schliessen-sich-europaeischer-luftverteidigung-an-a-85e65733-5c7f-4acf-a182-33d451dc471d>. The following considerations are based on *P. Hilpold*, The compatibility of the “Sky Shield” initiative with Austrian neutrality law: “You cannot have it both ways,” *Legal opinion* 2024, <https://unzensuriert.at/280458-gutachten-bestaetigen-sky-shield-mit-neutralitaet-nicht-zu-vereinbaren/>.

110 Former Austrian Vice-Chancellor *Kogler* sought to redefine the boundaries of security cooperation by asserting that the ‘Sky Shield’ initiative does not constitute a ‘military alliance in the strict sense.’ However, it remains legally opaque how a neutrality exception can be derived from constitutional jurisprudence for joint defense efforts based on such a distinction. The practical implications and precise legal definition of an alliance that is not one ‘in the strict sense’ remain fundamentally unclear.” See „Sky Shield: Teilnahme Österreichs für Kogler ‘logisch’“, in: *Die Presse* v. 31.7.2023, https://www.diepresse.com/13494512/sky-shield-teilnahme-oesterreichs-fuer-kogler-logisch?ref=ues_a.

The European Sky Shield Initiative (ESSI) originated as a German proposal and quickly attracted the support of fifteen European states. These were all NATO members, with the exception of Finland, which had not yet joined the Alliance at the time. On 13 October 2022, participating states signed a Letter of Intent 'to strengthen the European pillar in NATO's Integrated Air and Missile Defence (IAMD) through the European Sky Shield Initiative (ESSI)'.

The circle of participants subsequently expanded: Denmark and Sweden joined in February 2023, followed one year later by Greece and Turkey. Austria and Switzerland acceded in July 2023, albeit subject to the aforementioned "neutrality reservation", the implications of which will be examined below.

In principle, the final sentence of Article 23j(1) of the Federal Constitutional Law already permits the establishment of an EU "common defence" with Austrian participation. Constitutionally, however, this requires the analogous application of Article 50(4) B-VG on the approval of international treaties, and thus a constitutional majority in both the National Council and the Federal Council.¹¹¹

However, the Sky Shield initiative does not appear to be taking this route. Despite its label as "European", it is neither an EU initiative nor an endeavour embraced by the EU Member States as a whole. On the contrary, several key economic, political, and military actors within the Union, including France, Italy, Spain, and Poland, are not among its supporters. Precisely because the initiative has exposed and reinforced divergences within the EU, it is unlikely that the Union as an institution will adopt or "communitarise" Sky Shield in the foreseeable future.

The Memorandum of Understanding dated 13 October 2022 explicitly situates this initiative within a NATO framework, specifically citing the goal of 'strengthening the European pillar in NATO's Integrated Air and Missile Defence (IAMD)'. Consequently, the ESSI serves as a foundational element of European defence that maintains, at the very least, a functional and factual integration into the NATO system.

If the prohibition against joining a military alliance is to remain meaningful, it must encompass modern security architectures like the ESSI.

111 See *Th. Öhlinger*, Austria's neutrality in the European Union, in: 73 ZÖR 2018, pp. 621-634 (630) and *S. Griller/W. Obwexer*, Völker-, unions- und verfassungsrechtliche Rahmenbedingungen für militärische Kooperationen Österreichs, in: 145 JBl. 10/2023, pp. 617-636 (629).

From this perspective, the BVG Neutrality extends beyond a mere ban on formal NATO membership; it must also preclude agreements designed to fulfill NATO objectives in a broader capacity. That such an alignment is intended, is made explicit by the title of the October 13, 2022, agreement, which defines the initiative as a “pillar in NATO’s integrated air and missile defence”.

It is noteworthy that Austria and Switzerland issued a joint “neutrality reservation” upon signing the Letter of Intent with the following wording:

‘The Signatories will abstain from any measures operational or otherwise that could be construed as an establishment of or participation in a military alliance or as an acceptance of a permanent military presence on their territory.’

This raises a number of issues, in particular:

- Verification: Who would be competent to verify compliance with these voluntary commitments, and by what mechanisms?
- Enforcement: What legal or practical consequences would follow from a breach of the commitments?
- Authoritative interpretation: Who would have the power to interpret, in a binding manner, terms such as “operational measures”, “participation in a military alliance”, or “permanent military presence”?
- Structural compatibility: Are these commitments, as formulated, structurally compatible with the European “Sky Shield” initiative at all?

Under point 4, the signatories also insist on a right of withdrawal should a participating state become involved in a military conflict. This immediately raises the question whether such a withdrawal clause is structurally compatible with the obligations inherent in ESSI and, given the nature and tempo of the military operations at issue, whether it would be practicable at all in a conflict scenario.

Moreover, the signatories expressly contemplate participation in joint training and exercises “for the purposes of ESSI” (point 3 of the reservation clause). In doing so, they are not merely aligning themselves with a technical framework; they are, in substance, affirming the initiative’s aims and its operational direction.

They further insist, under point 4, on a right of withdrawal should a participating member become involved in a military conflict. This raises the question whether such a withdrawal is structurally compatible with

ESSI-related commitments and, given the character of the operations at issue, whether it would be practically feasible once a conflict has begun.

In other words, by committing to joint training and exercises “for the purposes of ESSI” (point 3 of the reservation clause), the signatories are ultimately endorsing ESSI’s purposes themselves. This concern is compounded by a further issue that remains unresolved: the precise institutional and operational design of ESSI.

Is ESSI in fact merely a “procurement platform”, as widely reported in the media? If so, the initiative could plausibly be regarded as compatible with neutrality, and a right of withdrawal in the event of war could also be safeguarded. Yet in that case, the initiative would not only be a striking misnomer (what, precisely, does a joint procurement arrangement have to do with a “shield”?), but it would also stand in open tension with the text of the Letter of Intent of 13 October 2022, notwithstanding the document’s vague phrasing.

If, however, the objective is to establish an air-defence shield over the airspace of participating states, modelled on international examples such as Israel’s “Iron Dome” or the “Golden Dome” planned for the United States, and if this includes joint command structures, then several considerations point in a different direction. The character of aerial threats, the short response times involved, the limited territorial size of many of the areas to be protected (particularly Austria’s), and the economies of scale inherent in the relevant technology (which would make separate national command centres economically unrealistic) strongly suggest that the initiative’s true purpose is the creation of a military alliance, albeit one with a limited scope. Such an outcome would amount to a clear breach of neutrality.

Even assuming that nationally autonomous command centres could be established, thereby enabling Austria in particular to retain the final decision on the employment of defensive weapons against airborne threats (and leaving aside that no one has yet provided a convincing explanation of how this could be achieved technically, quite apart from the costs), the decisive point remains: the interconnection between the upstream structures that feed into the national command centres and, above all, the interoperability of the weapons systems involved would in itself already amount to a military alliance.

On any understanding of “military alliance” that is attentive to contemporary operational realities, the case for classifying such arrangements as an alliance is compelling. Consequently, even under the more autonomy-

friendly assumption described above, the conclusion remains that neutrality would be infringed.

A further aspect concerns the provision of radar equipment and radar data to other participants in Sky Shield. In this context, it has been suggested that Austria's Goldhaube system could be made available for use within Sky Shield.¹¹²

There can be no doubt that such a step would have nothing to do with a mere "procurement platform". Rather, a contribution of this kind would, at minimum, constitute an element of a military alliance. This alone illustrates how unrealistic it is to assume that a right of withdrawal could be meaningfully exercised in the event of an attack on a member of this system, as asserted in the Declaration of Intent of 7 July 2023.¹¹³

IX. Conclusions: Austria and Switzerland's neutrality is currently less a matter of international law than of autopoietic nature.

The legal binding force—and indeed the very relevance—of Austrian neutrality remains a recurring theme within domestic academic discourse.¹¹⁴ However, at the level of formal legal policy, these scholarly debates are often overlooked or inadequately addressed. For the political establishment, neutrality has evolved into an entrenched principle presented as a binding mandate, even if such assertions frequently fail to withstand rigorous legal scrutiny.

It is widely acknowledged that the traditional concept of neutrality, insofar as it can be captured in a single definition at all, is increasingly

112 <https://www.bundesheer.at/aktuelles/detail/skyshield-faq>.

113 If, for example, the "Goldhaube" system identifies an attack against a member, can this information still be forwarded to the member concerned? Doing so could constitute a breach of neutrality; however, failing to do so calls into question the very purpose of the system. For a "permanently neutral state" in particular, the exchange of radar data would therefore be highly problematic even in peacetime (always on the condition, of course, that "permanent neutrality" is given substantial content).

114 See, for example, the numerous articles by *Gerhard Jandl*, who over many years has followed and commented on the legal debate surrounding Austrian neutrality. See, for example, *Gerhard Jandl*, *Neutralität und österreichische Sicherheitspolitik*, in: *Gerald Schöpfer* (ed.), *Die österreichische Neutralität – Chimäre oder Wirklichkeit?* Graz 2015, p. 199 ff. See also *Peter Hilpold*, *How to Construe a Myth: Neutrality Within the United Nations System Under Special Consideration of the Austrian Case*, in: 18 ChJIntL 2019, p. 247-279.

difficult to reconcile with contemporary geopolitical realities. Recent efforts at “adjectival” reconfiguration, such as “differential neutrality,” “dynamic neutrality,” “neutrality with variable geometry,” or “neutrality reduced to its core,” may suggest adaptability, but often amount to little more than a rhetorical gloss. On closer examination, these formulations tend to falter because they are inherently vague and applied inconsistently.

The same skepticism extends to collective defence commitments, including those associated with the “Sky Shield Initiative.” In the end, the decisive issue is technical feasibility. Absent credible operational viability, such commitments risk being perceived as political appeasement or even serves as a convenient fig leaf.

The political leadership’s targeted efforts at persuasion, driven in part by less than noble motives, have borne fruit, and the broader public now expects this promise to be honoured.¹¹⁵ Most of the population no longer anticipates, let alone demands, a legal justification for it. A utopian idea has acquired a momentum of its own.

There are numerous parallels between the Swiss debate on neutrality law and the Austrian one, but also significant divergences. What is particularly striking in Switzerland is the firm stance taken by established international law scholars in favor of a fundamental rethinking of Swiss neutrality¹¹⁶, even though there have recently been various attempts to defend the concept of neutrality, albeit on grounds that this author finds less persuasive.

The debate on neutrality within Austrian academia appears less intense today than it was in the past. In both periods, however, the same question arises: to what extent do academic discussions reach the wider public and thereby shape democratic decision-making? The repeated reappearance of

115 See with regard to the debate on neutrality policy, the very apt remarks by *Heinrich Neisser*:

“Austria’s conduct during the accession phase already reveals the duplicity that would later characterize the debate on Austrian neutrality. Unlike the other neutral applicants for the 1995 enlargement—namely Sweden and Finland—Austrian neutrality was frequently addressed throughout the accession process. In the Treaty of Accession itself, however, it was omitted entirely. To this day, Austrian political figures profess their commitment to neutrality in a largely undifferentiated manner. In doing so, they reinforce a fundamental sentiment among the public, many of whom view neutrality as a core element of Austrian identity and perceive no inherent conflict between neutrality and EU membership.” (Translation by this author). See *Heinrich Neisser*, 25 Jahre Mitgliedschaft Österreichs in der Europäischen Union, ÖGIE Policy Brief 23/2020, p. 4.

116 As stated in the manifesto “Neutrality 21”.

political notions of neutrality that have long been discredited in scholarly debate, and their subsequent uptake by media discourse, suggests that this “transmission belt” between academia, public debate, and political practice is weak or malfunctioning.

Politics, by contrast, often approaches neutrality differently, at least in part. If political parties are viewed through the lens of the new political economy (*public choice theory*) as vote maximisers,¹¹⁷ they will tend to adopt the position most likely to increase electoral support. Once an inflated or absolutist concept of neutrality becomes embedded in public discourse, it can develop into a self-reinforcing dynamic. Over time, this may produce escalating competition among parties to outbid one another with increasingly far-reaching legal and political demands framed as “defence of neutrality.” In Switzerland and Austria, there are indications of such a trend, including demands that are largely insulated from empirical or scientific scrutiny.¹¹⁸

As the literature has shown,¹¹⁹ the interests of neighbouring states and not necessarily those of the relevant “world powers” were decisive in the emergence of both Swiss and Austrian neutrality. Initially, there was no sign of any “neutrality euphoria” in either country.¹²⁰ Over time, however,

117 See *Anthony Downs, An Economic Theory of Democracy*, Harper & Brothers: New York 1957. As is well-known, the basic concepts of this idea can be traced back to Joseph Schumpeter.

118 In August 2023, it was announced that representatives of the Austrian Armed Forces would play a more prominent role in schools, with the stated aim of promoting “comprehensive national defense” and addressing neutrality in education. The Austrian National Union of Students (ÖH) criticised this initiative as a “militarisation of education” (*Der Standard*, 6 August 2023, citing a statement by ÖH Chair *Nina Mathies*).

Against the backdrop of an ongoing and largely unresolved debate about the legal meaning and scope of neutrality, and given the frequent political disregard for well-established principles of international and EU law, it is reasonable to ask which “law of neutrality” is actually being taught. From a logical and pedagogical standpoint, it would seem preferable to first establish a solid, evidence-based consensus between academia and policymakers before passing “simplified summaries” on to pupils, especially where the underlying premises and authorship of those summaries remain unclear.

119 See, for example, the contributions by *H.-U. Jost*, note 72, and *M. Jorio*, *Die Schweiz und ihre Neutralität – Eine 400jährige Geschichte, Hier und Jetzt*: Zurich 2023, for Switzerland. On the history of the Austrian neutrality, see, for example, *Michael Gehler*, *From Saint-Germain to Lisbon*, Vienna 2020, p. 235 ff.

120 For further discussion of the myth that the Battle of Marignano provided the foundation for Swiss neutrality, see *Marco Jorio*, note 119, p. 35 ff.

attitudes toward neutrality shifted: key stakeholders recognised that a flexibly interpreted concept could deliver substantial political and economic benefits on the international stage. Neutrality thus developed into an “autopoietic” concept, morally and politically exalted in ways that also served to shield its interest-driven and, at times, unsolidary use from criticism.

In Switzerland, this development was accompanied by a corresponding adjustment in historiography, moving from an “invented tradition” in which the idea of neutrality was projected ahistorically far into the past, thereby rendering it effectively unassailable.¹²¹ In both Austria and Switzerland, neutrality has been mystified to such an extent that, within democratic political debate, it is now treated as a settled and immovable fixture.

Debates on the law and policy of neutrality have consistently been shaped by efforts to secure a more advantageous position within the broader structure of international relations. So long as the international system was defined by a largely unfettered right to wage war, neutrality could generate added value for all participating states. With the advent of United Nations law and the general prohibition on the use of force, that foundational premise fell away.

The incentive to invoke purported special rules of international law, often by further stretching the concept of neutrality, nevertheless persisted. Yet this tendency only underscored the opportunism underpinning such claims, which ultimately lacked any plausible legal justification.¹²²

What makes this debate even more complex is that neutrality originated as a concept of international law, yet today it must also be assessed through the lens of EU law. In many countries, unfortunately including Austria, it is often difficult to conduct discussions at the intersection of international and EU law, because many lawyers, let alone non-lawyers, are insufficiently familiar with international law and struggle to grasp its nature and effects. This creates a risk that a concept of neutrality will be incorporated into national law on the basis of assumptions about international law that do not exist in that form and may never have existed.

121 See *Hans-Ulrich Jost*, note 72.

122 See *Hans-Ulrich Jost*, note 72. According to *Alois Riklin*, the Swiss myth of neutrality did not grow “from the bottom up” but “from the top down”. The same can probably be said of the concept of neutrality in Austria. See *Alois Riklin*, *Isolierte Schweiz. Eine europa- und innenpolitische Lagebeurteilung*, in: 1 *Schweizerische Zeitschrift für Politische Wissenschaft*, 2-3/1995, pp. 25-36 (31).

At the same time, it should not be denied that a policy of neutrality can serve a wide range of interests successfully, even where international-law justifications are advanced incorrectly¹²³. A candid and technically sound approach would require acknowledging such arguments as political rather than legal, and not shifting responsibility for contested choices onto an imagined body of international law. As discussed above, the debate on neutrality law in the context of the war in Ukraine, particularly in academic circles, has not altered the conclusion that the law of neutrality is obsolete. From the standpoint of international law, invoking the concepts of neutrality law is therefore of no relevance.

A reference to concepts of neutrality law is neither useful nor necessary for the assessment of arms deliveries to Ukraine under the perspective of international law.

What remains is merely a vestigial “right of neutrality” limited to a few specific nations, notably Austria and Switzerland. Even this remnant lacks solid legal footing; to the extent it ever existed, it has since withered away.

At the political level, neutrality nevertheless remains a serious and influential factor in both countries. Greater clarity would be achieved if the issue were addressed explicitly as a political question rather than framed as a legal debate. That shift would also enable a more sober comparison between the situation in Austria and that in Switzerland. Making transparent the markedly divergent foreign-policy objectives at stake would underscore how context-dependent neutrality discourse is: Austrian neutrality was shaped primarily by the aim of accommodating the USSR, whereas Swiss neutrality, though largely imposed from outside, ultimately fostered cohesion among the country’s linguistically and culturally diverse communities. These differences illustrate that debates about “neutrality law” are driven less by international law than by the particular needs of each national setting. References to international law therefore often function as little more than a legitimising device, invoked to cloak national interests in the authority of a legal order to which, it is assumed, almost any content can be attributed with little risk.

The conflict in Ukraine has compelled both Switzerland and Austria to confront an uncomfortable question: what degree of solidarity are they prepared to demonstrate in the face of an existential threat to the Ukrainian

123 For the significance of Switzerland’s policy of neutrality, see *Didier Pfirter*, *Die Neutralitätspolitik als Kern der schweizerischen Neutralität*, in: FS Stephan Breitenmoser, Basel 2022, pp. 1293–1299.66.

nation, which has become the victim of aggression on a scale unseen in Europe since the Second World War? Against this backdrop, how credible is an appeal to neutrality whose contours are increasingly indeterminate and which can scarcely be reconciled with the UN's peace and security framework, which also entails duties of solidarity?¹²⁴ In this context, the debate over participation in the European Sky Shield Initiative has once again exposed how inconsistent and internally contradictory neutrality discourse often is.

Austria's parallel refusal to participate in mine-clearance operations in Ukraine, justified by reference to neutrality law, further reinforces this perception of incoherence and raises serious moral and humanitarian concerns.¹²⁵ The growing engagement of academia with these questions, plainly visible in Switzerland and to a lesser extent in Austria, offers some grounds for optimism that, over time, public debate will shift from short-term political positioning toward a more objective and legally rigorous examination of neutrality, informed by a spirit of European solidarity, which the international community is increasingly calling for.

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124 On the subject of "credibility" as an essential factor in a policy of neutrality (or a corresponding foreign policy), see also *René Rhinow* in this volume, pp. 69-89, as well as *Ove Bring*, The Changing Law of Neutrality, in: idem/Said Mahmoudi (eds.), FS Sztucki (ed.), Current International Law Issues, Martinus Nijhoff: Dordrecht et al. 1994, pp. 25-50 (25).

125 See „Fachleute sehen Österreichs Neutralität nicht als Hindernis für humanitäre Entminung in der Ukraine“, in: Der Standard v. 11. Mai 2023, <https://www.derstandard.at/story/2000146299719/oesterreichs-neutralitaet-verhindert-fachleuten-zufolge-keine-humanitaere-entminung-in-der> as well as *Peter Hilpold*, Unbehagen im Rechtsstaat, in: Die Presse v. 1. Juni 2023, <https://www.diepresse.com/6294329/unbehagen-im-rechtsstaat>.

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Permanence as a unique feature – Switzerland and its policy of neutral

René Rhinow

Abstract

A special feature of Swiss neutrality is its permanence. However, Switzerland can in principle renounce its neutrality. This also applies to its permanence and the transition to situational neutrality. Neutrality is based on a triangular relationship between the neutral party and the warring parties characterised by the principle of protection of good faith under international law. Permanent neutrality presupposes that all warring parties recognise neutrality in the event of a possible future war and can be trusted in. However, this cannot be assumed. The transition to situational neutrality eliminates the need for an ambiguous neutrality policy that restricts the freedom of a sovereign state to shape its foreign and security policy.

"We are neutral because we have always been neutral"

"It will be a long time before we find a new concept of neutrality."

1. Introduction¹²

When we focus below on the nature and the issue of Switzerland's "permanent" neutrality, we are not referring to the long historical duration of neutrality, nor to the time it will take to dispel the mythological notions surrounding neutrality. Rather, we will examine the salient feature of Swiss neutrality, namely its permanence. Neutrality is certainly garnished with

1 The following thoughts are largely based on my study "Peace neutrality – a concept for the future", in: *Plädoyer für eine offene Schweiz* (A plea for an open Switzerland), Zurich 2025, 37 ff. Individual passages are taken verbatim from this study. Further evidence for the theses presented here can also be found there.

2 I would like to thank Dr Paul Seger for critically reviewing a draft version and for further discussion.

other additions. In the traditional description it is "armed"³ – indicating that Switzerland does everything in its power to defend its territory. Since the First World War, it has been sometimes called integral, sometimes differential, comprehensive, active or cooperative.⁴ However, its dominant feature is its permanence, especially in international comparison. This is because Switzerland has maintained a permanent neutral status since 1815. As unchallenged as this permanent neutrality is in this country, the concepts of neutrality and permanence appear vague and complex. Generally, only few are aware within the Swiss public what legal and political neutrality means. Ultimately, Switzerland is simply neutral, as expressed in the first popular quote.

The permanence of Switzerland's neutrality is accepted as an unalterable fact of life and is not questioned. This may be because the exceptional nature of this permanence is not widely known and neutrality is therefore necessarily seen as permanent. Or it may be because it is precisely in this permanence that the true protective nature of neutrality is (still) seen. In the view of the general public, there is *one* neutrality, even if ideas may vary considerably what neutrality means today. The following thoughts are devoted to this enduring neutrality.

2. Neutrality as a triangular relationship

Before examining the precarious state of ordinary neutrality and the phenomenon of the permanence of neutrality in more detail, it is worth taking a look at the often overlooked external functions of neutrality.⁵ These are

3 This addition is both unnecessary and incorrect. It is the Federal Constitution, not primarily neutrality, that obliges Switzerland to maintain credible national defence. And it is the army that is armed, not an institution under international law.

4 When Switzerland joined the League of Nations in 1920, its neutrality was 'differential' in that it committed itself to participating in economic sanctions, but not in military sanctions imposed by the League. Before joining the League of Nations and from 1938 to 2002, Swiss neutrality was "integral" (without any obligation to participate in international economic sanctions). Upon joining the UN in 2002, Switzerland agreed to adopt the sanctions decided by the Security Council. After the Second World War, new adjectives were added, such as the "active" neutrality of former Federal Councillor Micheline Calmy-Rey, the "comprehensive" neutrality of former Federal Councillor Christoph Blocher and the "cooperative" neutrality of Federal Councillor Ignazio Cassis.

5 For internal and systemic functions, see Rhinow, *Friedensneutralität*, 52 ff.

often disregarded in international law studies on neutrality, and are hardly mentioned in political discussions on neutrality. A look at the history of Swiss neutrality shows that it arose in a Europe of warring powers. It essentially consisted of abstaining from wars between others, especially between the states surrounding Switzerland. These were mainly the European great powers, at that time the Habsburg monarchies of Austria, Spain and France, and in the 19th and 20th centuries Germany, Italy, Austria-Hungary and France. Neutrality emerged in a Europe where monarchies dominated the continent with their power politics. It served the great powers to shelter the territories of small states from enemy encroachment, and for the small states it appeared to be a kind of insurance for their continued existence. Neutrality "thrives" on a certain constellation of power. To be politically effective it requires a lasting and stable balance between rival powers, and it is determined by a definable and delimitable conflict.⁶ Neutral states depend on the structural stability of their political environment. The American international lawyer *Hans J. Morgenthau* succinctly expressed the legitimising function of this interlinked set of interests: "As long as these antagonistic interests are in balance, the rules of international law referring to the rights and obligations of neutrality may safeguard the legal status."⁷

This (passive) neutrality in wartime was not only in Switzerland's security interests, but also in those of the European powers. Switzerland was always keen not to be drawn into any war, primarily in order to protect its independence and to safeguard the country's cohesion. The European states, on the other hand, were keen to ensure that Switzerland did not support any other party to the conflict and that no other power occupied Swiss territory, used it as a military assembly area or controlled the Alpine and Jura passes. This is crucial and is often overlooked today: neutrality in war cannot be limited to an autonomous decision by the neutral party, but is a matter of mutual agreement. That is why the preamble to the Swiss Declaration at the Congress of Vienna in 1815 stated that the neutrality of centrally located Switzerland was in the interests of Europe. The signatory powers recognised that "the neutrality and inviolability of Switzerland and its independence from all foreign influence are in the true interests of the politics of Europe as a whole". These "vrais intérêts" of 1815 represented interests that were specific to that time. But what if these "vrais intérêts"

6 Batz, 241 ff.

7 Morgenthau, 483. See also El-Zein, 35.

no longer exist, as is the case today? In Switzerland, however, neutrality is discussed as if the surrounding world had to conform itself to our ideas about neutrality in war, as if neutrality was exclusively an expression of our sovereignty. Critical contemporaries such as the Bernese historian *Sacha Zala* diagnose a Helvetic "sovereignty complex": "We see ourselves as Asterix, successfully defending ourselves against Roman superiority. We believe that sheer willpower and the magic potion of neutrality are enough to ward off external pressure. But when the power exerted on the other side of the table becomes too heavy, Switzerland can really only capitulate and pay a ransom."⁸ *Zala* describes this as a fundamental pattern of Swiss foreign policy.⁹

Neutrality is actually based on a triangular relationship, which is often overlooked in purely legal studies. However, *Stephan Verosta* has highlighted this reciprocal legal obligation: "The rights and obligations of the permanently neutral state correspond to the obligations and rights of the other states [...] through the treaty-like relationship of accepting and recognising the declaration of permanent neutrality."¹⁰ The safety interests of the neutral party are counterbalanced by the interests of the warring parties in the neutral party's abstinence and impartiality.

3. Neutrality is based on trust

The neutral state which is faced with at least two warring parties trusts that it will not be attacked. The protective idea of neutrality relies on this confidence. The protection of good faith is enshrined in international law and means that a state can rely on the lawful and consistent behaviour of another state or an international organisation.¹¹ This protection may be based on an obligation under international law, on implied conduct, on declarations or on concrete actions. The prerequisite of trust is justified good faith. It is often forgotten to recall that the neutral party must check whether its faith

⁸ NZZ am Sonntag, 24 March 2024.

⁹ For example, in 2024, the Federal Council described joining the G7 multinational task force, which aims to track down the assets of Russian oligarchs and enforce the full implementation of sanctions against Moscow, as a real threat to neutrality and rejected it because it could be interpreted as Switzerland's participation in a Western "coalition of the willing".

¹⁰ Verosta, 13.

¹¹ Fundamental to the protection of legitimate expectations in international law Müller, *passim*.

that all warring parties are willing to respect its independence is justified. Can a state that massively violates international law be trusted to honor neutrality? Diplomatic declarations and promises to respect neutrality are not in themselves a guarantee that neutrality obligations will be upheld during an armed conflict. This trust inherent in neutrality can only come into play in a specific conflict situation, not abstractly in all future conflicts. And trust presupposes that the belligerents expressly recognise neutrality in the event of a conflict.

Trust also plays an important role on the part of the belligerents. They rely on the expectation that the neutral party will fulfil its obligations, namely not to favour any party to the conflict militarily and to prevent violations of neutrality. Even the slightest violation of neutrality obligations can be taken by a warring party as an opportunity to deviate from its own neutrality duties – at the expense of the neutral party. Finally, there is also a relationship of trust between the warring parties. Each warring party must be able to rely on the other warring party to respect the integrity of neutral territory and its airspace.

Without this mutual trust, neutrality cannot fulfil its protective function! The dependence on this mutual trust relationship is rarely ever mentioned in Switzerland. If one party concludes that the other party to the conflict is not respecting neutrality, it will not feel bound by it either – again to the detriment of the neutral party. For example, Russia no longer recognises Switzerland as a neutral country because it has adopted the sanctions imposed by the EU after the attack against Ukraine. Interestingly, when discussing the Fifth Hague Convention in academia and practice, the focus is primarily on the rights and obligations of neutral parties, with little or no mention of those of the warring parties to respect neutrality. This said basis of trust inherent in neutrality must remain in place for the entire duration of an armed conflict. All parties involved must be able to rely on all others to comply with their neutrality obligations until the end of the war. This is an expectation that cannot be fulfilled in the reality of modern warfare. As examples from the Second World War show, the interests of war can change in the course of a conflict. This is a highly uncomfortable situation for neutral parties. Realistically, they must anticipate this situation and prepare for such developments before the war begins – in plain language: they cannot rely on the protection of their neutrality.

In the 20th century, The Hague neutrality failed on several occasions, for example in the First World War, when Germany invaded neutral Belgium

in the first days of the war. According to the Bernese historian *Walter Hofer*, the Second World War saw the "greatest demise of neutrality in world history". The Axis powers, but also the USSR, invaded neutral states without restraint because it was in their war interests. For the same reason, the Allies did not always respect neutrality (Azores, Iceland) – albeit in the interest of liberating Europe from totalitarianism. History clearly shows that neutrality in war is only respected as long as it is in the interests of the belligerents – regardless of any signing of the Hague Convention or previous promises made to the neutral parties.¹²

In addition, governments can be replaced by other governments during a war. Even if such a process does not affect the international legal responsibility of a state, it cannot be ruled out that its foreign policy and war interests may change as a result, possibly to the detriment of the neutral party. In this respect, too, the neutral party is in a highly uncertain situation because its confidence in neutrality is built on shaky foundations. In summary, as a result of possible changes in the behaviour of the warring parties, the protective function of neutrality is reduced to the principle of hope – a poor basis for a security policy that safeguards national existence.

4. The precarious situation of ordinary neutrality

In the international arena, neutrality has always been and continues to be primarily a matter of ordinary, occasional or situational neutrality.¹³ It only comes into play after the outbreak of war. On the one hand, it presupposes that the neutral party is fundamentally capable of defending its independence militarily – which is not the case for Switzerland today, not least because of its international economic ties and dependencies. Recently, namely Thomas Cottier has put his finger on this fact. On the other hand, neutrality requires the explicit recognition of all belligerent states which presupposes a certain constellation of interests. In international law, neutrality is traditionally based on the Hague Conventions of 1907. Ordinary

12 We owe Marco Jorio an excellent, fact-based and ideology-free account of the history of Swiss neutrality; cf. Jorio, *passim*.

13 From the extensive literature on ordinary neutrality, reference should be made to the more recent works listed in the bibliography (each with further references), in particular Cottier, Maissen, Mohler, Hilpold, Riklin, Rodrigues, Schaub, Schmid, Seger, Villiger and El-Zein.

neutrality is an instrument of abstinence, characterised by an obligation not to participate in a war between other states and an obligation to remain impartial which primarily means a prohibition to cooperate with warring parties. Neutrality applies when an international armed conflict breaks out.¹⁴ Behind it there is a double distinction: between war and peace on the one hand and between neutrality and warfare on the other. If a state does not participate in the war, it is in principle neutral.

Today, however, two things are controversial: firstly, whether the status of neutrality comes into effect automatically or is merely a right of a non-belligerent state.¹⁵ In practice, non-belligerent states are unlikely to be aware that they automatically assume neutrality status under international law with all its rights and obligations. Besides, further forms of "neutrality" have been added to the classical doctrine of neutrality in international law¹⁶ : so-called qualified neutrality allows a neutral state to support a victim state that has been attacked in flagrant violation of the UN Charter with military supplies. Non-belligerent states retain their neutrality status ("non-belligerency") without, however, being bound by the law of neutrality.

Dietrich Schindler noted 36 years ago that the law of neutrality had largely fallen into oblivion and is now regarded as a special rule of the permanently neutral states of Europe.¹⁷ In any case, the law of neutrality is generally only applied by permanently neutral states.¹⁸ Powers not involved in conflicts, namely the major powers, ignored the law of neutrality and felt free to support one or the other warring party with war material or other goods. Neutrality has always been understood as mere non-participation in armed conflicts. In the war in Ukraine, many states, especially the USA, are providing the victim of the attack with massive aid, despite their neutral,

14 The question of the "beginning of war" is not addressed here, given the complex nature of modern conflicts and the fact that wars are no longer "declared".

15 Rodrigues, 8.

16 Rodrigues, 7.

17 According to Schindler, no state has acceded to the Hague Neutrality Convention since 1945, not even those that describe themselves as "neutral", such as Ireland, Laos or Malta. The fact that Ukraine acceded to the convention "in an emergency" in 2015 does not alter the chaotic state of neutrality law. According to Thürer, "neutrality has fallen silent" in international law literature. As a keyword in textbooks, it has "practically disappeared". When it joined the UN in 2002, Switzerland no longer sought a neutrality reservation, but merely deposited a declaration of neutrality.

18 Schindler, *Vorwirkungen*, 579.

"non-belligerent" stance. Both positions restrict the principle of impartiality, but their relationship to neutrality remains unclear.¹⁹

Do these controversial extensions of the law of neutrality also affect the specific permanence of neutrality? One is inclined to answer this question in the negative as they concern the period after the outbreak of war. However, since permanent neutrals have the same obligations in a war between third parties as those who are occasionally neutral it does not appear to be irrelevant to which type of neutrality the permanence refers. Moreover, since the Second World War, neutrality has primarily been measured on the basis of behaviour in peacetime.

Until the First World War, wars of aggression were not prohibited by international law. The Hague Convention changed this situation insofar as neutrality applied. Thus, the new law was of great importance to neutral countries. By recognising neutrality, the warring parties undertook to respect the independence of neutral countries and not to attack neutral territory. This gain in protection was the fundamental *raison d'être* of neutrality. However, the protective factor of neutrality, the prohibition of attacks on neutral countries, has not only been lost as a result of the fragile basis of trust. Since the Briand-Kellogg Pact of 1928 international law has prohibited any forcible attack on sovereign states and recognises the sovereignty of all states. In modern international law, the concept of war has also lost its meaning. The UN Charter uses the terms "force" and "international armed conflict".

According to Article 2(4) of the UN Charter, "any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations" is prohibited. The prohibition of force under international law does not apply to the right of individual or collective self-defence. This right is not dependent on a decision by the UN under Chapter VII of the Charter, but may be invoked and exercised independently by any UN member state in accordance with Article 51 of the Charter, as long as there are no decisions or obligations under Chapter VII of the Charter. It allows states which haven't been attacked to support the victim state. According to Article 2(5) of the Charter, the members shall support the United Nations in all measures taken in accordance with the Charter and shall refrain from granting

19 In both legal situations, a state does not participate in an armed conflict, but it does support one of the warring parties.

support to any state against which the United Nations takes preventive or coercive measures. Both the right to neutrality and collective security are motivated by the desire to limit the extent and adverse effects of armed conflicts. However, they are based on different stages of development of the international order. The system of collective security created tension with the concept of neutrality under international law. Accordingly, the relationship between the Hague Conventions of 1907 and the UN Charter of 1945 is controversial in international law literature, and thus also the validity and content of neutrality in international law today.²⁰ According to the view expressed here, it follows from Article 103 of the UN Charter that the obligations of members under the Charter take precedence over obligations under other international agreements, including older customary law on neutrality.

Today, it can therefore be assumed that the protective function of neutrality in wartime has ceased to exist, both because of Switzerland's geopolitical situation and the precarious basis of trust in the international community as well as a consequence of the prohibition of aggression in the UN Charter. However, it cannot be completely ruled out that a situational neutrality, based on the UN Charter, may one day be a useful tool for Swiss foreign and security policy.

5. Lonely permanent neutrality

In Switzerland, the fixation on the permanence of neutrality obnubilated the fact that it was not this Swiss type of neutrality that was and is the norm, but rather temporary neutrality related to a specific war. Switzerland's permanent neutrality is unique. No other neutral country comparable to Switzerland except Austria – which has to follow Swiss neutrality and

20 For more on this, see Rhinow, *Friedensneutralität*; Rodriguez, 29ff., 43 ff. The internationally renowned Austrian international law expert Peter Hilpold concludes that the law of neutrality as defined by the Hague Convention no longer exists in this form. In any case, it is hardly compatible with the peace law of the UN Charter. In a detailed study of international law from 2024, *El-Zein* argues that the right of neutrality has become obsolete today. According to *Adrian Schaub*, the prohibition of violence under international law gives rise to a right of the neutral party to discriminate against the aggressor. The principle of equal treatment should be considered derogated, so that there is no longer any obligation to comply with the law of neutrality.

is in a different position as a member of the EU – is permanently neutral.²¹ Isn't the very idea of a permanent commitment irritating in view of the rapidly changing environment? How can Switzerland promise to remain neutral for ever after, regardless of military conflicts and its own security interests? How can it assume that its neutrality will be recognised by all sides in any future armed conflict? According to *Verosta*, Switzerland's permanent neutrality is still under the collective guarantee of the former great powers France, Great Britain, Italy, Sweden and Spain, while this does not apply to the USA and Russia.²² Are these "great powers" of 1815 still aware of their responsibility?

If we take the word "permanent" seriously, Switzerland committed itself in 1815 to remain neutral for all time, indeed for all eternity, regardless of developments in international law, the parties to conflicts and geopolitical circumstances. As far as I can see, the term "permanence" has hardly been discussed in international law doctrine. The phrase "neutralité perpétuelle"²³ used at the Congress of Vienna referred to the constellation of powers in 19th-century Europe and does not mean "forever and ever" but "for an indefinite period", i.e. without a specific expiry date. It would be more accurate to speak of neutrality "until revoked" or "until further notice" – until the autonomous renunciation of neutrality. In those days, it was in the interest of the European great powers that the Alpine country in the middle of Europe stays out of wars and does not support any warring parties, even in future wars in Europe. The term "perpetual neutrality", used in the past and currently again in the Swiss People's Party's 's neutrality initiative, is misleading. Nothing lasts forever, especially in law. In the current global environment with its enormous geopolitical, power-political and military-technical upheavals a perspective going beyond temporary permanence would represent an unfulfillable obligation. The fact that Switzerland is entitled to give up its neutrality also indicates that it is a "terminable" legal status, i.e. it cannot be "perpetual" by no means.

The term "permanence" can be better understood when it is distinguished from ordinary neutrality on the one hand, and when its future dimension is examined more closely on the other.

21 In Europe, Liechtenstein and Vatican City (both without armies) and Ireland (no permanent neutrality in the sense of international law) have permanent neutrality status; outside Europe, as far as I am aware, Costa Rica and Turkmenistan.

22 *Verosta*, 105.

23 *Denis de Rougemont* has convincingly demonstrated that Swiss neutrality is perpetual, not eternal.

6. A colourful policy of neutrality

Ordinary neutrality differs from permanent neutrality primarily in terms of its preliminary effects. An ordinarily neutral state is completely free in its foreign policy in times of peace, whereas permanent neutrality entails additional obligations, known as preliminary effects. The foreign policy of a permanently neutral state must be aimed at avoiding anything that would make it a party to an armed conflict between other states. These obligations whose legal nature is controversial²⁴ require, in Switzerland's view, a credible policy of neutrality. These include, first and foremost, the prohibition of waging a war of aggression – which today is covered by the UN Charter – the ability and willingness to defend one's own territory, and the prohibition of joining a military alliance. Since the obligations of a permanently neutral state must be fulfilled in times of peace, it is referred to as peace neutrality²⁵ and considered part of international peace law. These "obligations" can also be observed by an occasionally neutral state within the framework of its foreign policy without the need to be permanently neutral.

For centuries, Switzerland and, earlier, the cantons used to pursue a flexible policy of neutrality in response to threats. Neutrality policy was 'the' foreign policy of the time. It extended far beyond security policy to all areas of foreign policy such as trade, financial policy and participation in multilateral organisations. The Basel history professor *Edgar Bonjour* entitled his history of Switzerland from 1933 to 1945 "History of Neutrality" and subsumed the entire foreign policy and parts of domestic policy under the broad concept of neutrality.

With Switzerland's accession to the Hague Convention that does not prescribe permanence and therefore neither prescribes a policy of neutrality, neutrality became essentially a legal concept. From then on, both the protective purpose as well the various underlying interests of neutrality receded into the background. The main task for lawyers was to examine what international law prohibits or permits in terms of neutrality. In addition, the concept of neutrality policy took on an additional meaning. From an official point of view, neutrality policy now means doing everything

24 For more details, see *Schindler, Vorwirkungen*, passim.

25 In my study "Friedensneutralität", I see the primary function of Swiss neutrality today as being active peace promotion and the provision of so-called good offices; *Rhinow, Friedensneutralität*, 91 ff.

possible to maintain the credibility of neutrality in the event of war and refraining from anything that could call that into question. In this way, neutrality continued to find its way into foreign policy as a whole because one would always examine whether a particular foreign policy action could be detrimental to neutrality's credibility in the future. This created a playground for different opinions on what could be beneficial or harmful to its credibility.²⁶ To that the fatal belief was added that this type of "obedience" served Switzerland's security interests. Doesn't it seem strange that this focus on a vague credibility "into the blue" is hardly recognised as such and questioned as a self-imposed restriction of Swiss autonomy? The belief that striving for credible neutrality will secure recognition of Switzerland's neutral status also seems fatal.²⁷ Switzerland's foreign policy must be credible in general.²⁸ But others, not Switzerland, decide on the success or failure of credibility efforts! Basically, the "credibility policy" represents a considerable, autonomously decided loss of sovereignty. Isn't it surprising that political circles, which otherwise praise Switzerland's sovereignty above all else, hardly criticise this dependence?

The policy of neutrality has an ambivalent relationship with the law of neutrality. Although the two are clearly separated in theory they often blur in the federal government's foreign policy.²⁹ According to *Sacha Zala*, the distinction between the law of neutrality and the policy of neutrality is a Swiss invention that belongs to the arsenal of diplomatic tricks, as does the distinction between technical and political international organisations. It is easy to join the former (e.g. the European Broadcasting Union), but not the latter deemed to be non-compatible with neutrality. Switzerland's accession to the Council of Europe is a good example how arbitrary this distinction could be. For a long time the Council was classified as political and accession therefore rejected. Only after the EEC was founded it was approved after all.

In addition, the policy of neutrality has long been drastically exaggerated, even mythologised. Much of what is presented as a policy of neutrality,

26 For example, in 2024, the Federal Council rejected joining the multinational task force of G7 countries, which aims to track down the assets of Russian oligarchs and enforce the full implementation of sanctions against Moscow, as a real threat to neutrality because it could be interpreted as Switzerland's participation in a Western "coalition of the willing".

27 Maissen, *Neutralität*, 52.

28 Rhinow, *Glaubwürdige Schweiz*, *passim*.

29 See the article by *Mohler*, *Vermischung*, *passim*.

especially in the context of the so-called preliminary effects, is actually autonomous foreign policy. The aforementioned prohibition of aggression is now enshrined in the UN Charter, while "armament" and the requirement for credible national defence are anchored in the Federal Constitution (Art. 2, 58 FC). This obliges Switzerland to do everything in its power to preserve the independence of the country as best it can (Art. 54 para. 2 FC). The extensive use of the concept of neutrality may also suggest a kind of "remote control" in order to disguise Switzerland's freedom of action in foreign policy freedom and its corresponding responsibility. It is also questionable whether it makes sense to restrict Switzerland's autonomy in foreign policy to such a drastic extent, thereby tying the hands of Swiss security policy.

7. Renunciation of permanent neutrality

One can examine the "essence" of permanence not only in contrast to ordinary neutrality, but also in terms of its temporal dimension. Switzerland has beyond doubt the right to renounce its neutrality, but not at an "inopportune moment". This is the unanimous opinion of official Switzerland and the majority of Swiss international law scholars. What is rarely considered: The renunciation could either refer to neutrality as a whole or to the permanence of neutrality alone. The first case occurs, for example, if Switzerland actively supports one of the warring parties during a war or joins a military alliance such as NATO. This would be accompanied by a definitive departure from neutrality. In the case of a mere abandonment of permanence "in peacetime", which has hardly been discussed to date, Switzerland could in principle remain politically neutral, but reserve the right to depart from this status according to its own foreign and security policy interests. A mere renunciation of the permanence of neutrality, without abandoning it, has never been discussed in detail in doctrine or practice, as far as can be seen.

Once war breaks out the warring parties must be able to rely on Switzerland's permanently neutral stance. However, only a state rightfully relying on neutrality in good faith, and whose trust therefore appears worthy of protection, can claim protection of legitimate expectations. In respect to Switzerland this principle applies above all in relation to states that are involved in wars in Europe and want to and can count on Switzerland's impartiality. It is difficult to imagine that states from more distant regions

would have a legitimate interest in Swiss neutrality in the event of war. Furthermore, a state that massively violates international law by waging a war of aggression will not respect the right to neutrality either and does not deserve to have its good faith protected to begin with.

But what about waiving the mere permanence? Which state today and tomorrow is so interested in Swiss neutrality in war that it is prepared to respect it in an eventual war – and for the entire duration of the war? What value does such a promise have also in the perspective of future changes of government? The states that surround Switzerland and with which our country has diverse ties, both in terms of values and economically, are critical of neutrality, despite all diplomatic courtesies. As the war in Ukraine clearly shows, they would prefer to see more engagement and solidarity. Formal recognition or confirmation of neutrality by organisations, international agreements or individual states in peacetime says nothing about whether the neutral state will be effectively protected in the event of a future war.³⁰ "Abstract" diplomatic recognition is cheap to obtain. The decisive factor is how the parties to the conflict will behave in a future war, still unknown at the time of abstract recognition, and whether they will still be interested in neutrality at that time. It cannot be repeated often enough: if a warring party loses interest in neutrality it becomes useless. In addition to the examples of Belgium and the Netherlands mentioned above, we can point to Russia's current invasion of non-aligned Ukraine. After Russia had already broken the 1994 Budapest Memorandum with its annexation of Crimea in 2014 in which Ukraine's territorial integrity, sovereignty and protection were guaranteed – including by Russia – Ukraine's ratification of the Hague Conventions in 2015, backdated to 1991, was of no use – a striking example for the loss of neutrality's protective function when war interests are at stake. Permanent neutrality consists primarily of the principle of hope: namely, that one day all future warring parties in the world will have a fundamental interest in Switzerland's neutrality. However, trust can

30 There is no shortage of confirmations of Swiss neutrality. These can be found, for example, in Article 435 of the Treaty of Versailles of 1919, in the London Declaration of the League of Nations of 13 February 1920, which exempted Switzerland from all military coercive measures of the League of Nations, and in the decision of the League of Nations of 1 May 1938. Swiss neutrality has also been indirectly recognised on various occasions, for example in the Moscow Memorandum of 1955, which held it up as a model for the Austrian neutrality that was to be established. Finally, in 2002, Switzerland joined the United Nations without a neutrality reservation, but with an accompanying declaration of neutrality.

only be realised in relation to specific actors, not in the abstract. What was conceivable at times in a conflict-ridden Europe is likely to prove illusory today, especially in view of the dwindling willingness to abide by the rules of international law.

How far does the protection of trust extend in so-called times of peace? Is there also an 'inopportune time' when the permanence of neutrality cannot be waived? Generally, the principle of good faith under international law applies. The permanence of neutrality and the possibility of waiving it are in a peculiar tension with each other. Can all states rely on Switzerland being and remaining neutral in the event of a future war? Or does this only apply to states that formally commit to it? Could there be cases in which Switzerland would be obliged to maintain its neutrality against its will and continue to observe the preliminary effects of neutrality? This would amount to an excessive restriction of Switzerland's sovereignty and, under certain circumstances, a massive disregard for its own security interests. A permanently neutral state must have the right, in good faith, to depart from permanent neutrality in times of peace, at its own political discretion, and to switch to situational neutrality or to renounce neutrality altogether. Whether and when such a waiver may be appropriate is determined by the autonomous foreign and security policy of the permanently neutral state. In my opinion, given the massive changes in the geopolitical and security environment, there is nothing to prevent Switzerland from transitioning to situational neutrality today.

The policy of neutrality as a "policy of credibility" is a consequence of the permanence of neutrality. If the latter is no longer the case Switzerland will switch to situational neutrality, and a specific policy of neutrality in peacetime will also become unnecessary.³¹ This does not, of course, release Switzerland from its obligation to pursue a forward-looking, situation-oriented foreign and security policy based on the Federal Constitution and tailored to its defence capabilities.

The legal requirements for Switzerland to renounce its permanent neutrality will not be discussed in detail here. Although neutrality is anchored in the Federal Constitution, it is not defined as a foreign policy objective, but (only) in the provisions governing the powers of the Federal Assem-

31 In Switzerland, the handling of neutrality "in wartime" is also referred to as neutrality policy. If wartime neutrality is based on the UN Charter, a special category of neutrality policy should be superfluous. It is a matter of autonomous foreign policy within the limits of international law.

bly and the Federal Council (Art. 173 para. 1 lit. a and Art. 185 para. 1 FC). A complete renunciation of neutrality would undoubtedly require an amendment of the Federal Constitution. However, since a departure from neutrality in peacetime only makes sense if it is accompanied by joining a military alliance, it would in any case be subject to a vote by the people and the cantons in accordance with Art. 140 para. 1 lit. b of the Federal Constitution (accession to collective security organisations). However, this provision presupposes that Switzerland has sufficient time to go through the lengthy procedure for amending the Constitution which is only likely in peacetime. If Switzerland were to renounce its neutrality due to a disastrous change in circumstances, possibly even before the actual outbreak of war, the only recourse would be to invoke emergency powers in the sense of Art. 165 of the Federal Constitution and emergency provisions to safeguard the external security of the nation in the sense of Art. 17 para. 1 lit. a.

In my opinion, however, simply renouncing to permanent neutrality and transitioning to situational neutrality does not require a constitutional amendment. Even though the Federal Constitution does indeed contain a neutrality clause it does not prescribe a specific form.³² Besides, it does not express itself on the relationship between the UN Charter and the Hague Convention. It would therefore be permissible to switch to situational neutrality by a decision of the Federal Assembly.

8. Conclusion

Neutrality does not have to be permanent. For Switzerland, a transition to a situational war-time neutrality is recommended. Switzerland should decide on its application according to its foreign and security policy goals and interests in a conflict-related situation, based on the Federal Constitution and within the framework of the UN Charter. It is to be hoped that the debate on neutrality will focus on its real functions today and tomorrow as well as on the foreign and security policy dimensions of neutrality, rather than on the dispute over its international law foundation. For once, the principle of "law follows function" must apply.

32 Biaggini, BV.

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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-c-h-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 recipi-

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 back-flip 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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The long road of Swiss neutrality into a dead end ¹

Marco Jorio

Abstract

Switzerland is the longest continuously neutral country. With the exception of the “French period” (1798-1813), it has been able to maintain its neutrality since the 17th century and stay out of the wars between its neighbors. This success story led to the mythical elevation of Swiss neutrality; indeed, it became a central factor in national identity. Since 1945, Switzerland has been surrounded by peaceful democracies. Nevertheless, Switzerland is the only country that still clings to the Hague Convention of 1907. Neutrality – formerly an instrument of foreign and security policy – is now dictated by a supposedly binding “right to neutrality.” Since Russia’s invasion of Ukraine, this Swiss position has been met with incomprehension both at home and abroad: it has reached an impasse and needs to be rethought.

I. Introduction

In 1997, political scientist Jürg Martin Gabriel, who taught at the University of St. Gallen and the Swiss Federal Institute of Technology Zurich, wrote a study on what had until then been an untouchable maxim of Swiss foreign policy. His title: “The Dead End of Neutrality.” Together with other political scientists and lawyers he saw neutrality as being in crisis after the fall of communism in 1991 and called for traditional neutrality to be overcome, as it was an obstacle to relevant engagement with the contemporary geostrategic environment, which was necessary for security policy. “Neutrality is therefore no longer a useful instrument for optimizing security; it hinders our interests and is therefore an anachronism.” He called for a security policy “beyond neutrality” for the “security-policy hinterland” protected by

1 This article is based on my publication: Marco Jorio, *Die Schweiz und ihre Neutralität. Eine 400-jährige Geschichte*. Zurich 2023. The footnotes only list quotations and refer to publications that are not included in my book.

NATO and the EU.² This negative view of neutrality has since been adopted by other countries, or as US Ambassador Scott Miller put it undiplomatically in March 2023: “NATO is, in a sense, a doughnut – and Switzerland is the hole in the middle.”³ There is a widespread accusation of being a “security policy free rider,” which is often also extended to Austria in the same breath.⁴

While other European countries in particular view the Swiss and their dogged pursuit of neutrality with incomprehension and disbelief, a bitter battle of opinions has been raging domestically since Russia’s attack against Ukraine in February 2022, as to whether Switzerland’s traditional foreign policy stance makes sense. In the meantime, five currents have emerged, some of which are not sharply delineated from one another. The first would like to see neutrality consigned to history. Its supporters would prefer to abandon neutrality right away, following the example of Finland and Sweden, and march straight into NATO. A second strand of opinion does not want to abandon neutrality entirely, but would like to suspend it temporarily and thus adopt a policy of “occasional neutrality,” as practiced by almost all countries in the world – including by the Swiss Confederation, before it adopted permanent neutrality in the 17th century. A third group wants to preserve neutrality, yet to do so no longer with reference to the Hague Convention of 1907 but based on the United Nations Charter and other human rights-based international treaties. Above all, the principle of equal treatment, which is now contrary to international law, should be abolished. The fourth trend is represented by the majority in the Federal Council (government) and in parliament, as well as by the federal administration offices responsible for foreign policy and foreign trade. According to this view, Switzerland should stick to its current course, continue to be guided by the Hague Convention, and deviate from its traditional policy of neutrality only on the basis of legally binding resolutions of the UN Security Council. It should furthermore treat equally the warring parties, whether aggressors or victims, in the military sphere (e.g., in the case of transit and overflight permits) and in the supply of weapons, if not in the case of economic sanctions. Finally. The fifth group wants to cement Swiss

2 Jürg Martin Gabriel, *Sackgasse Neutralität*, Zurich 1997, p. 159f.

3 <https://www.srf.ch/news/schweiz/schweiz-mit-imageproblem-das-donut-loch-im-neu-en-kalten-krieg> (March 17, 2023), last accessed May 16, 2026.

4 For example, in the FAZ on May 9, 2022 (“Die Schweiz macht es sich zu bequem”) or the NZZ on March 6, 2025 (“Neutrale Trittbrettfahrer – so blickt Deutschland auf die Schweizer Sicherheitspolitik”).

neutrality and even extend it beyond the provisions of the Hague Convention and current practice: no economic sanctions, no military cooperation with anyone, no arms exports to warring parties, whether aggressors or victims. This group, which is more interested in self-isolation than neutrality, is located at both ends of the political spectrum: among the national conservatives (SVP and affiliates) and among the dogmatic anti-NATO pacifists on the left.

But there is great uncertainty in the heated debate about what neutrality is and can be today. As early as 2007, St. Gallen political scientist Alois Riklin noted a general “confusion about neutrality”,⁵ which has grown into a collective cacophony since February 2022. Everyone feels called upon to express their opinion on neutrality, or as Paul Seger, Swiss ambassador to Germany, sarcastically put it in 2000: “[...] we have two things in abundance: soccer coaches and neutrality experts. We have 8 million of them. Everyone knows the best lineup for the national soccer team, and every Swiss citizen has a clear opinion on what is neutral and what is not. We have absorbed neutrality with our mother’s milk, so to speak, from birth.”⁶

Riklin’s “general confusion” came to light in 2024 when the Military Academy (MILAK) and the Center for Security Studies (CSS), both based at the Swiss Federal Institute of Technology (ETH Zurich), found that, as in previous years, over 90% of respondents were in favor of maintaining neutrality. But for once, the researchers were not satisfied with this and wanted to know in more detail what neutrality actually meant to those surveyed. The result was sobering: around 30% were in favor of Switzerland joining NATO. This means that at least one-fifth of those surveyed believe that Switzerland can be both neutral and a member of NATO at the same time – two positions that are completely incompatible with one another.⁷

When defending or condemning neutrality, people often resort to historical arguments. However, depending on their political stance, they tend to bend history to suit their own agenda, sometimes even distorting the facts. Neutrality has become shrouded in a web of legends and half-truths that are thrown into the discussion depending on the situation. A scientific look back provides clarity on where Swiss neutrality comes from and how

5 This is the title of his contribution in Georg Kreis (ed.), *Die Schweizer Neutralität. Beibehalten, umstellen oder doch abschaffen?* Zurich 2007, pp. 111-136.

6 Paul Seger, *Neutralität: für Krieg geschaffen – wie geschaffen für den Frieden*. Micheline Calmy-Rey, *Die Neutralität: Zwischen Mythos und Vorbild*. Basel 2020, p. 95.

7 Tibor Szvircsev Tresch, Andreas Wenger et al., *Sicherheit 2024. Aussen-, sicherheits- und verteidigungspolitische Meinungsbildung im Trend*. Zurich 2024, pp. 255 and 191.

it has changed, and perhaps even clears the way for credible and realistic neutrality in the 21st century.

II. The beginnings of neutrality

Many Swiss citizens believe that Switzerland invented neutrality, or at least that it has a monopoly on it. Yet, the non-participation of a prince, a ruling class or later a state in the wars of third parties has existed ever since wars have been documented – for over 3,000 years! Well-known from antiquity are the neutral Greek cities that did not want to participate in the constant wars within Greece: “*hoi poleis hoi metousin*,” the cities that stood in between, that is, between the warring parties (and not uninvolvement on the sidelines). Famous in this regard is the historian Thucydides’ so-called Melian Dialogue, in which the island of Melos defends its right to independence and neutrality against the imperialist claims of the great power Athens in 416 BC during the Peloponnesian War and is ultimately defeated militarily and enslaved.⁸ The Romans rejected neutrality. They called neutral behavior, analogous to the Greeks, “*medium esse*,” meaning “to be in the middle,” or “*quiescere*,” meaning “to behave calmly.” This is very close to the old Swiss concept of “*Stillesitzen*” (sitting quietly) for neutrality. However, the Romans rejected neutrality: anyone who was not *for* Rome was *against* it and would be cruelly punished if they could not defend themselves.

In the Old Testament, the prophet Isaiah puts into his God’s mouth the advice to his people that salvation lies only in peace and quiet, which is interpreted as a call for neutrality. In the New Testament, the tone is harsher. Jesus’ statement translated into Latin as “*qui non est mecum, contra me est*” (“whoever is not with me is against me”) was intended as a personal call to each individual to follow him, and was not a political concept. However, in the Middle Ages, and then especially during the religious wars of the 16th and 17th centuries, it was misused as a weapon against any kind of neutrality and, above all, against members of other denominations. In 1633-34, a clique of Zurich pastors and politicians wanted to bring their government and the other Reformed cantons (Berne, Basel and Schaffhausen) over to the side of the victorious Swedish King Gustav Adolf in order to strike

8 On the Melian Dialogue, see Wolfgang Will, *Die Untergang von Melos. Machtpolitik im Urteil vom Thukydides und einiger Zeitgenossen*. Bonn 2006.

against their Catholic confederates. The clerical warmongers railed against the “false delusion of shameful and abominable false neutrality [...] since God spurns the lukewarm, that is, the neutralists, because they are neither cold nor hot [...] The middle or neutral way is not good Christian, but the most miserable of all.” But in the end, the “abominable neutralists” prevailed in Zurich as well, and the leader of the war party, the senior pastor of the Zurich church, Antistes Johann Jakob Breitingner, was neutralized by the neutralist party in the truest sense of the word.⁹

In Western civilization, with the exception of periods of euphoric enthusiasm for war, war has been regarded as evil and peace as ideal, by philosophers and theologian. This contrast between good and evil gave rise to the concept of *bellum iustum*, or “just war,” whose roots can be traced back to Plato, Cicero, and Augustine and which is once again highly relevant today.¹⁰ According to medieval thinking, a war was “just” if it met certain criteria: it had to be ordered by a legitimate authority; there had to be permissible reasons for war, above all a response to an injustice; the belligerents had to wage war with just intentions and strive to restore peace; and the warfare had to be proportionate. Above all, a party that was arbitrarily attacked was waging a just war, while the aggressor was waging a “*bellum iniustum*,” an unjust war. For this reason, neutrality was not actually permitted in the Middle Ages from a moral-theological and canon-law perspective, but it was practiced nonetheless. The Holy Father, as the highest moral authority, decided whether a war was just or unjust. And he did so! With interdict and excommunication, he tried (with little success) to tame the monster of war.

The Latin term “*neutralitas*” did not yet exist in a political or military sense in Roman antiquity. It first appeared in the Middle Ages, initially in medicine as a state between “*egritudo*”/illness and “*sanitas*”/health. In 1394, it appeared for the first time in a military sense: “*Francigenae facti fuerunt neutrales*” (“the Franks remained neutral”). In the 15th century, the term spread throughout the European languages and there began the codification of neutrality. In 1494, the judges of the Maritime Court in Barcelona compiled the legal principles of customary maritime law for trade in times of war in the “*Consolat de mar*.” This gave a special legal status to ships

9 On the Zurich war party, see Paul Schweizer, *Geschichte der schweizerischen Neutralität*. 2 volumes. Frauenfeld 1895, pp. 221-254 (cited on pp. 227/228).

10 On the doctrine of just war, see: Georg Kreis, *Der “gerechte Krieg”*. Zur Geschichte einer aktuellen Denkfigur. Basel 2006. See also the corresponding Wikipedia article with a detailed bibliography.

belonging to non-belligerents and their cargo. And in general, neutrality at sea has always been much more important in history than neutrality on land.

With the emergence of early modern territorial states, a body of literature on state theory, law, and morality developed from 1500 onwards, starting in Italy. It initially treated neutrality as a political concept in the event of war, and ultimately led to the establishment of international law in the 17th century, with the development of the law of war. The discussions went hand in hand with the increasing rejection of the concept of *bellum iustum*. In view of the denominational warfare, in which both parties claimed to have God on their side, doubts arose as to who could determine whether a war was just. There was no longer any authority above princes and states when, after the Reformation, the Pope was rejected as the supreme authority and judge by part of Western Christianity.

The principle of political and military action was now the “*ragione di stato*” – reason of state, or interest of state. However, the sovereign state’s right to wage war (the “*jus ad bellum*”) also entailed the freedom not to have to choose one side or the other and to remain neutral. This gave rise to the “*ius ad neutralitatem*,” the right to neutrality. But since every state had the right to wage war, the neutral party no longer had the right to judge the legitimacy of a war, even in the case of an obvious war of aggression. It had to be impartial and treat both warring parties equally. The principle of equal treatment was born.

If neutrality had been seen negatively in the Middle Ages, views of it now became more favorable. In his 1513 work “*Il principe*,” the Florentine political philosopher Niccolò Machiavelli advised princes not to remain neutral and to wage war. For him, neutrality was an instrument of power politics that the powerful could use. The weak neutral, however, would be despised by the victor after the war as an unreliable friend and by the vanquished for failing to provide support in times of need. These were surely prophetic words, considering the rude treatment of neutral Switzerland and other neutral countries by the Entente powers at the Paris Peace Conference in 1919–20 and by the Allies in 1945 [...].

III. Switzerland does not maintain neutrality (14th-17th century)

“Neutral since Marignano 1515,” says a schoolbook truism. Edgar Bonjour, the old master of the history of Swiss neutrality, takes a different and more colorful view: “Rather, neutrality developed very slowly and organically from the old confederation’s alliance policy, and only gradually emerged from the twilight of international legal entanglements to a clear awareness of its essence.”¹¹ In his great history of neutrality, published in 1895, Zurich state archivist Paul Schweizer believed that neutrality was already evident in the founding years of the Swiss Confederation at the beginning of the 14th century.¹² So what is the truth? Was neutrality invoked on the Rütli at the same time as the alleged founding of the Swiss Confederation, or did it arise on that terrible day of September 14, 1515, from the blood of the 10,000 young Swiss who were slaughtered? Neither! The emergence of Swiss neutrality and its eventful history can be traced fairly well today. Numerous historians have researched this topic. “The history of the origins of neutrality is more than a myth,” said diplomat and historian Paul Widmer in 2016.¹³

In the early centuries, the Swiss Confederates were anything but neutral. Otherwise, the Confederation would never have come into being. There were, however, early forms of neutral behavior in war: monasteries and churches, as well as groups of people such as women and children, were to be spared, effectively “rendered neutral.” In addition, the cantons that joined the Confederation after 1481 – Solothurn, Fribourg, Basel, Schaffhausen and Appenzell – did not have full equality, but were obliged to “sit quietly” and mediate in conflicts between the eight old cantons. However, there is no direct link between this “internal neutrality” and later Swiss foreign policy neutrality.

The national saint Niklaus von Flüe also has nothing to do with neutrality. The President of the Swiss Confederation Pilet-Golaz, like many before and after him, celebrated him as a visionary and advocate of Swiss neutrality in his August 1 speech in 1941 on the occasion of the 650th anniversary of the Swiss Confederation. In 1981, upon the 500th anniversary of the agreement of Stans (Stanser Verkommnis), President Kurt Furgler praised his two alleged sayings, “Machet den Zuun nit zu wiit” (Don’t go too far)

11 Edgar Bonjour, *Geschichte der schweizerischen Neutralität. Vier Jahrhunderte eidgenössischer Aussenpolitik*. 9 volumes. Basel 1970-1976, vol. 1, p. 19.

12 Schweizer (note 9), pp. 24/25.

13 NZZ, June 6, 2016.

and “Mischt euch nicht in fremde Händel” (Don’t get involved in foreign conflicts), as “simple statesmanlike wisdom of timeless value.” Except that Brother Klaus never said that. It was the Catholic Lucerne historian Hans Salat who put these words into the mouth of the hermit in Ranft in 1537, in order to dissuade the Reformed Bernese from occupying what was then still Catholic Vaud (and subsequently introducing the Reformation). Even today, national conservative advocates of “integral” neutrality refer to national saint Niklaus von Flüe as a forefather and patron saint for their traditional concept of neutrality.

Neutrality did not originate in the Battle of Marignano in 1515, either. In fact, the Swiss Confederates became involved in European politics shortly after 1500. But they were not a great power. Apart from their military prowess and cruelty, they lacked all the characteristics of a great power compared to real ones such as France, the Habsburgs, or Venice: central leadership, economic resources, professional diplomacy. At best, the Swiss Confederation was a regional military power in its own backyard – in northern Italy and Burgundy. With the defeat of 1515, the Swiss did not “reflect” on neutrality, as Edgar Bonjour claimed. They continued to fight battles in northern Italy, but now as mercenaries of the French king or the Habsburg emperor. Until shortly before 1900, Marignano was not even a topic in the history of neutrality. It was only Ferdinand Hodler’s battle painting from 1900 and the young Basel historian Emil Dürr in 1915 that popularized Marignano as a major turning point for the Swiss Confederation towards beneficial neutrality: “Ex clade salus”, salvation comes from defeat, i.e. salutary neutrality, has been engraved on the battle monument in Marignano since 1965.¹⁴

The peace treaties concluded by the Swiss Confederates with the House of Habsburg (the “Erbeinung” of 1511) and with their southern neighbor France, victorious in northern Italy, in the “Eternal Peace” of Fribourg in 1516, were important for the later development of neutrality. In these treaties, the Swiss Confederates undertook not to come to the aid of the respective enemies of the other party to the treaty. Since the two Catholic world powers, i.e. the Habsburgs and France, waged war against each other repeatedly for 250 years, the Swiss Confederates had no choice but to “sit

14 Just a few years ago, Marignano was celebrated as the great turning point on the occasion of its 500th anniversary. See Markus Somm, *Marignano: Warum die Schweiz keine Grossmacht wurde*. Bern 2016 (3rd ed.). Older: Georg Thürer, *Die Wende von Marignano*, Zurich 1965.

quietly” during the wars between these two powers – but not in all other wars. The Treaty of 1516 only ended Switzerland’s southern expansion and not territorial expansion in general, as traditional historiography claims. Indeed, it was in the 16th century that its western expansion began. This was driven primarily by the western cantons, above all Bern, and was directed against the Duchy of Savoy and the various smaller principalities in what is now French-speaking Switzerland (the counties of Gruyère and Neuchâtel, the Prince-Bishopric of Basel). In 1536, Bern, Fribourg, and Valais conquered Vaud and other Savoyard territories across denominational lines. And as late as 1602, Swiss troops, together with their allies from Geneva, pillaged the Savoy-owned neighborhood of this same city. There was no neutrality.

However, the Swiss Confederation was already confronted with specific foreign policy neutrality issues in the 16th century. In 1522, Margaret of Austria, as governor of the Habsburg Free County of Burgundy, and King Francis I of France, as Duke of Burgundy, granted the two Burgundian territories “bonne et sûre neutralité” (good and secure neutrality). In this neutrality treaty, the Swiss Confederates were appointed as guarantors – without being asked, and rather reluctantly. However, they never exercised their guarantee obligation until the annexation of the Free County by France in 1668. In 1536, the Zurich delegate to the Federal Diet (the congress of cantonal envoys) demanded that the Swiss Confederation heed “unpartung und neutralitet” (impartiality and neutrality) in the war that had broken out again between Habsburg and France, marking the first use of the term neutrality in Switzerland. Even during the Schmalkaldic War from 1545 to 1547, the Reformed cantons refused to come to the aid of the Protestant imperial estates, pointing to the danger of civil war with the Catholic cantons. For the first time, the Diet prohibited the passage of troops and the transport of foreign war material through the Swiss Confederation for the duration of the war. And as late as 1610, the four Reformed cantons of Zurich, Bern, Schaffhausen, and Basel refused to join the Protestant Union in the Holy Roman Empire, arguing that “this would give our other confederates cause to sit still and remain neutral.”¹⁵ In all these cases, it was a matter of so-called “occasional” neutrality in a specific war. There was still no question of permanent neutrality.

15 Schweizer (note 9) p. 212.

IV. Switzerland discovers permanent neutrality (1618-1714)

Switzerland's permanent neutrality only came about in the 17th century, during the Thirty Years' War and the numerous wars instigated by Louis XIV. Modern international law emerged in the same century, for example through the Dutchman Hugo Grotius, who also addressed the issue of neutrality in his seminal work "*De jure belli ac pacis*" from 1625. In it, he obliged the neutral parties to allow both warring parties to pass through their territory peacefully. In 1648, the Swiss Confederation gained recognition as a sovereign state under international law in the Peace of Westphalia. This paved the way for the development of neutrality, as only sovereign states can be neutral. The path to neutrality was not straightforward during the Thirty Years' War. At the moment that the war broke out, the Catholic cantons had been in an alliance with Spain since 1585. Small detachments of Spanish troops were allowed to march through Switzerland on the "*Camino de Suizos*." Zurich and Bern had formed a military alliance with the Protestant Margrave of Baden in 1612.

In the early years of the war, however, the Swiss cantons shifted to a policy of neutrality, not least under the impression of the bloody turmoil in the Grisons (Graubünden). Alliances were no longer renewed; military passage was no longer granted; warring parties, such as the aforementioned "Swedish Party" in Zurich in 1633–34, were "neutralized." There were isolated incidents of massive border violations in the Basel and Lake Constance areas, which led to the conclusion of the Swiss Confederation's *Defensionales von Wil* in 1647. This and the subsequent federalist-inspired *Defensional* ordinances created a common national defense for the first time and formed a kind of precursor to the Swiss Army. However, not all cantons participated with equal enthusiasm. Nevertheless, there were repeated border occupations by Swiss troops over the next 150 years, mainly to protect the exposed north-western part of Switzerland.

After the Thirty Years' War – and this was new – the Swiss Confederation continued its policy of neutrality, which was limited to war, even though it was politically and economically heavily dependent on France. France increasingly exercised a kind of protectorate over Switzerland and for decades had the sole right to recruit up to 16,000 men in Switzerland. When Louis XIV occupied the neutralized Free County of Burgundy in 1674, the Swiss Confederation preferred to remain neutral and not exercise its protective function for the Spanish Free County. It issued its first official declaration of neutrality. Some historians thus date the beginning of neutrality to 1674.

Switzerland's decision to remain neutral, or to "sit quietly," was based firstly on the structural inability of the confederation of cantons to pursue a coherent and power-based foreign policy (in a rather striking analogy with today's European Union!), secondly, to internal political and religious disputes, and thirdly, to its geopolitically exposed location between the permanently warring French and Habsburg great powers. The Swiss, but also other countries, increasingly began to perceive Switzerland as neutral. As early as 1659, the Basel Antistes (senior pastor) Lucas Gernler spoke in a funeral sermon of the "well-established old Swiss neutrality and impartiality." In 1668, the German writer Hans Jakob Christoffel von Grimmelshausen praised Switzerland in *Simplicissimus* as an island of peace, and as early as 1690, Dutch ambassador Pieter Valkenier spoke of the "absolute, independent, sovereign and at the same time neutral republic."¹⁶

Once the Swiss Confederation had adopted a policy of neutrality, it also began to perform "good services" (although this term did not yet exist). As early as 1636, the Diet approached the warring parties with a peace initiative "out of Christian compassion." In 1642, the Reformed cantons attempted to mediate peace between Protestant powers, as did the Catholic cantons in the War of the Spanish Succession in 1705 between Catholics. The warring parties reacted negatively to these peace negotiations, seeing them as favoritism toward the enemy on the part of the Swiss Confederation. Peace negotiations are always delicate – even today.¹⁷ Nevertheless, Swiss neutrality achieved its first international recognition when the French king and the Holy Roman emperor decided to hold the third and final peace congress to end the War of the Spanish Succession in 1714 in neutral Switzerland, in Baden in the now canton of Aargau, following Utrecht and Rastatt – although the Swiss authorities were not consulted. It was during this period that the first pictorial representations of neutrality emerged.

16 On neutrality in the second half of the 17th century, see Thomas Maissen, *Wie die Eidgenossen ihre Neutralität entdeckten. Frühneuzeitliche Anpassungen an eine veränderte Staatenwelt*. In: Kreis (note 5) 51-65.

17 See also my article in the NZZ of May 6, 2024, *Die Schweiz vermittelt wieder – über die Versuche der eidgenössischen Politik im kriegsgeschüttelten Europa Frieden zu schaffen*, on the occasion of the Ukraine conference at Bürgenstock on June 15-16, 2024.

V. Switzerland enjoys its neutrality (1714-1798)

The short 18th century from 1714 to 1789 was a peaceful time for Switzerland. There were numerous wars abroad: the War of the Polish Succession (1733-1738), the War of the Austrian Succession (1740-1748), and the Seven Years' War (1756-1763). At the start of each such conflict, the Federal Diet notified all warring parties of Switzerland's neutrality, which they more or less willingly confirmed. This gave neutrality a contractual character for the duration of the war. As soon as the events of war approached the Swiss border – and this was always on the Upper Rhine – the Diet sent troops to what is now northwestern Switzerland. It included the regions just beyond the border, such as the Habsburg Fricktal and the four forest towns on the Upper Rhine (Rheinfelden, Säckingen, Laufenburg, and Waldshut) as well as the imperial part of the Prince-Bishopric of Basel (today's canton of Jura) in Swiss neutrality. These neutralized imperial territories were called “security districts” or “bulwarks.”

In the 18th century, Prussia and Great Britain rose to become great powers. They weakened the hegemony of the two Catholic great powers, France and Habsburg. Surprisingly, the two “hereditary enemies” allied themselves in 1756 in the so-called “renversement des alliances”, i.e. reversal of alliances or diplomatic revolution. For the first time, the Swiss Confederation was almost completely surrounded by a single alliance. Switzerland feared that it could suffer the same fate as Poland, which was later divided among its neighbors. A Bern councilor said some years later: “Nous nous trouvâmes mieux entre deux nations ennemies qu'entre deux qui sont amies” (We are better off between two enemy nations than between two that are friends).¹⁸

Two new issues relating to neutrality policy arose during the wars of the 18th century: economic neutrality and ideological neutrality. Following protests from the warring parties, the Diet decided that private individuals were allowed to supply foreign armies with provisions, provided that both sides were treated equally. The press also flourished in Switzerland in the 18th century, especially in the Reformed cities. During the Seven Years' War, some of them openly sided with Protestant Prussia, prompting protests from France and Austria, who insisted on neutral reporting. The Reformed authorities made little intervention in terms of press censorship, but they did ban public celebrations of Prussian victories.

18 Bonjour, *Geschichte der schweizerischen Neutralität I* (note 11) pp. 36 and 39.

Until the 18th century, the Swiss Confederation contributed little to the theoretical development of the law of neutrality within the framework of international law. Its neutrality policy was pragmatic, almost artisanal. It was not until Emer de Vattel of Neuchâtel published his epoch-making work “*Le droit des gens*” in 1758 that modern neutrality law was presented in a separate chapter, which he developed on the basis of Swiss neutrality practice. Although he adhered to the concept of just war in principle, he effectively abolished it by granting all states an almost unrestricted right to war – and to neutrality.

VI. Switzerland loses its neutrality and then regains it (1798-1815)

The old Swiss neutrality came to an end during the Revolutionary Wars. The Swiss Confederation survived the War of the First Coalition (1792-1797) unscathed. On the basis of defensive regulations, there was even a large-scale occupation of the border in northwestern Switzerland. This was also when the term “armed neutrality” first appeared. However, when Austria, following the victories of the young General Bonaparte in northern Italy, gave revolutionary France free rein in Switzerland in the Treaty of Campoformio in October 1797, this meant the demise of the Old Swiss Confederacy and with it the old Swiss neutrality. Switzerland was occupied by French troops in 1798 (not, as is commonly claimed, by Napoleon, who was in France preparing for the Egyptian campaign). The occupying power transformed Switzerland into a centralized satellite state based on the French model and, like other “daughter republics”, created the Helvetic Republic. But the idea, indeed the dream of neutrality, lived on in mythical exaggeration as the lost “peaceful security of the fatherland.” In courageous, even bold advances, Swiss politicians first attempted to restore neutrality with the Directory (as early as 1798) and then twice with Napoleon in 1803 and 1812. The term neutrality did appear in the treaties imposed by the victorious Grande Nation, but on its own terms. The two eminent historians of neutrality, Paul Schweizer and Edgar Bonjour, called this “pseudo-neutrality”.

Today’s neutrality came about after Napoleon’s fall between 1813 and 1815 and was not, as a recent legend claims, imposed on Switzerland at the Congress of Vienna. After Napoleon’s defeat in the Battle of Leipzig, the Diet declared Switzerland’s independence and neutrality on November 18, 1813. Over the next two years, Swiss politicians stubbornly attempted

to obtain recognition of their freely chosen neutrality from the victorious powers. The latter were initially angered by the declaration of neutrality, with Metternich raging, or they were simply uninterested. They wanted to win Switzerland as an ally and a transit country – not as a neutral spectator. They ignored the decision of the Diet and, despite its protests, marched unperturbed through Switzerland and over the Jura passes into the interior of France at the turn of 1813-14.

After Napoleon's first abdication, the First Peace of Paris on May 30, 1814, stipulated that Switzerland should regain its independence and govern itself. There was no mention of neutrality. Switzerland was not represented at the peace negotiations in Paris. The great powers decided on Swiss independence over the heads of the Swiss people – in their own interests. They were interested in a sovereign Switzerland. Their aim was to create a cordon sanitaire around France, where “the embers of revolution were still smoldering”. To this end, they strengthened the neighboring states: the United Netherlands (including the former southern Habsburg Netherlands, now Belgium) was created. The victorious Prussia received the Rhine provinces and took over the “guard of the Rhine.” The new southern German states created by Napoleon, such as the Grand Duchy of Baden and the Kingdom of Württemberg, remained in place. And the Kingdom of Sardinia-Piedmont regained the neutralized Duchy of Savoy on the other side of the Alps, with the victorious powers forcing Switzerland, without asking, to guarantee Savoy's neutrality. The Swiss Confederation also played a central role in this overall geostrategic concept. The great powers, led by Austria under Metternich, which was responsible for Switzerland, sought to provide it with a secure and easily defensible border in the Jura and to replace pre-revolutionary French influence with allied, particularly Austrian, dominance.

In September 1814, at the invitation of the victorious powers, Switzerland sent a three-member delegation to Vienna with the primary goal of securing recognition of its independence and neutrality, in addition to territorial expansion. The official delegation consisted of the mayor of Zurich, Hans von Reinhard, as head of delegation, the chief guild master of Basel, Johann Heinrich Wieland, and the Fribourg State Councillor Jean de Montenach. Right at the outset, the Congress immediately formed a Swiss committee chaired by the Austrian diplomat with Swiss roots, Johann von Wessenberg. The Russian representative, Johannes Kapodistrias from the Greek island of Corfu, played an important role, taking on a kind of advisory function. The high-profile committee demonstrates the great importance that the vic-

torious powers attached to Switzerland as state on the frontline of France, alongside the German, Polish, and Italian questions.

The ministers initially did not respond to the Swiss delegates' insistence on recognition of neutrality. After Napoleon's surprise return from Elba, the Congress of Vienna hastily acceded to Switzerland's wishes. In the preamble to the Swiss Declaration of March 20, 1815, it stated that neutrality was in the "general interest of Europe." However, it made formal recognition contingent upon the ratification of the Vienna Congress acts by the Swiss Confederation. The great powers, which considered Switzerland unreliable due to its internal divisions and the autonomy of its cantons, effectively put it in a headlock. It was only when ratification was obtained – and after Switzerland (not very neutrally) even participated militarily in the campaign against Napoleon in July-August 1815, after massive allied pressure – that Switzerland received the long-awaited recognition at the Second Congress of Paris on November 20, 1815. Even then, however, the great powers were still not interested in Swiss neutrality. The Swiss delegate Charles Pictet de Rochemont had to draft the declaration himself.

VII. Switzerland develops its neutrality (1815-1914)

From 1815 onwards, the Swiss Confederation was recognized as a neutral state under international law – the first state ever to receive such recognition. But what this meant in concrete terms was not clear. Switzerland had to develop its neutrality itself in the newly organized Europe. The period between 1815 and 1848 was relatively peaceful. However, the great powers continued to think little of Swiss neutrality and in 1817 forced the Swiss Confederation into the Holy Alliance, a conservative Christian pact against revolution and liberalism. It was not until around 1830 that Switzerland extricated itself from this situation, which was contrary to its neutrality, and left the Holy Alliance.

Neutrality was an issue when the federal state was created. The fathers of the 1848 Federal Constitution rejected the inclusion of neutrality in the objectives (purpose articles?) of the new federal state, as it is "not a constitutional and political principle that belonged in a federal constitution, since it was impossible to know whether it might not have to be abandoned in the interests of the country's own independence [...]. Neutrality was a means to an end [...] to secure Switzerland's independence; the Confederation

alone had to reserve the right, under certain circumstances, to abandon its neutral position.”¹⁹ However, in the so-called competence articles (Art. 74.6 and 90.9), they transferred the maintaining of neutrality to the Federal Council and the Federal Assembly (Swiss Parliament). Neutrality has been enshrined in the Federal Constitution since 1848, but its implementation is not defined. This was also the case in the Federal Constitutions of 1874 (Art. 85.6 and 102.9) and 1999 (Art. 173.1a and 185.1). The “neutrality initiative” submitted in 2024 and the more moderate counterproposal of the Council of States of June 19, 2025 (already rejected), therefore represent a break with the Swiss tradition of neutrality.

It was not until the second half of the 19th century that Switzerland’s neutrality was challenged. The army was mobilized several times. In doing so, it pioneered the development of internment. During the Second Italian War of Independence in 1859, Switzerland had to intern thousands of soldiers, including several warships, on Lake Maggiore on its southern border. This was essentially a dress rehearsal for the internment of 88,000 soldiers from Bourbaki’s army in 1871 during the Franco-Prussian War, when the French Eastern Army was pushed back to the Swiss western border in a pitiful state by the German advance. This was the first time the Red Cross had been deployed, just a few years after its founding in 1863. This created the image of Switzerland as the good Samaritan of Europe. Neutrality was now associated with humanitarianism.

The emergence of warring nation states sparked an international debate on neutrality under international law, which culminated in two conferences in The Hague, resulting in a first “Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land” in 1899 and a second in 1907. The Federal Council was initially opposed to codification under international law, as it believed (rightly, as history would show) that this would restrict its ability to shape its neutrality policy. The Hague Convention was still based on the now outlawed “*jus ad bellum*,” the right of every state to wage war, whether as an aggressor or a defender. Furthermore, it was tailored to warfare between two armies or two navies and was not designed for modern forms of warfare. It did not cover aerial warfare, economic warfare, terrorist warfare, propaganda and espionage

19 Auszug aus dem Abschiede der ordentlichen eidgenössischen Tagsatzung des Jahres 1847. IV. Theil, Verhandlungen, betr. die Revision des Bundesvertrages [Bern 1848]. Excerpt from the recess of the ordinary federal assembly of 1847. Part IV. Negotiations concerning the revision of the federal treaty (Bern 1848), pp. 51 ff.

warfare, and, of course, cyber warfare. In 1907, warfare was still considered a legitimate continuation of politics by other means, as the Prussian military strategist Clausewitz put it.

Switzerland is still the only country that applies this agreement from the age of imperialism and colonialism to the letter and, as a journalist recently put it, “preaches it like the gospel.” One of the main points of contention in today’s debate on neutrality revolves precisely around this question: to what extent is the Hague Convention still valid in the context of the UN Charter and other more recent international conventions, and does it even contradict current international law?²⁰

VIII. Switzerland oscillates between integral and differential neutrality (1914-1938)

During the First World War (1914-1918), neutrality ensured internal national cohesion, which was threatened by class struggle and the language conflict between German and French. It was respected by the warring parties in their own interests. The four warring neighbors lacked the military strength to extend the two fronts from the Swiss border to the North Sea and the Adriatic Sea by a further 350 km across Switzerland. Moreover, none of the parties had any interest in driving Switzerland, with its army of over 200,000 men, into the arms of the enemy. With two neighbors on each side of the war and two stable fronts on its borders, Switzerland enjoyed virtually “ideal” neutrality for four years. However, there was always the latent danger of bypass operations across neutral territory. Switzerland developed a lively humanitarian activity, positioning itself as a beacon of light in turbulent times.

Nevertheless, the nature of the war changed, and with it neutrality. For the first time, the war was not only fought as a military conflict, but as a total war that affected all areas of society and government: the economy, culture, diplomacy, and propaganda. The neutral countries felt the effects immediately. Both sides courted Switzerland with elaborate propaganda campaigns. They tried to win over public opinion by acquiring newspapers or attempting to place favorable articles in the Swiss media. They also organized elaborate cultural exhibitions to demonstrate their cultural supe-

20 On Switzerland and the Hague Convention, see Marco Jorio, *Die schweizerische Neutralität stösst im Ausland heute auf Unverständnis*, NZZ, May 27, 2025. See the article by Markus Mohler in this book.

riority over the enemy. Above all, however, Switzerland was drawn into economic warfare. Fearing that goods vital to the war effort would reach enemy territory via Switzerland, the country, like the neutral Netherlands before it, had to allow its entire foreign trade to be controlled by the belligerents. Otherwise, it ran the risk of falling under sanctions. From May 1915, trade with Germany was controlled by the Swiss Trust Agency in Zurich, and from October 1915, trade with the Entente powers was controlled by the Swiss Economic Surveillance Society (*Société Suisse de Surveillance économique SSS*) in Bern (popularly known as “*Souveraineté Suisse Suspendue*” or “*Swiss sovereignty suspended*”). Nevertheless, in the second half of the war, Switzerland slid into an economic and supply crisis, which ultimately led to the failed national strike of 1918.

As part of the Europe-wide “Never Again War” movement, Switzerland joined the newly founded League of Nations in 1920 after a heated referendum campaign. Opponents focused on the argument of neutrality (as they did again at the end of the 20th century when Switzerland joined the UN). The League of Nations was the first collective security organization in history that did not allow for neutrality. However, at Switzerland’s insistence, 27 states confirmed Swiss neutrality as a special case in the London Declaration of February 13, 1920. They exempted Switzerland as the only member state free from the obligation to participate in military sanctions, as provided for in the League’s statutes, but not from economic sanctions. The country’s neutrality, which had previously been practiced without adjectives, now became “differential” neutrality. In 1928, the big thunderbolt against war struck: an international convention, the Briand-Kellogg Pact, prohibited wars of aggression. This meant that there was no longer a right to wage war; the medieval concept of “just war” was back. Once again, there were victims and perpetrators who could not be treated equally, not even by neutral countries. Switzerland also ratified this convention, but did not draw any conclusions for its neutrality policy.

During this era under Federal Councilor Giuseppe Motta from Italian speaking Ticino, Switzerland had its first experiences with economic sanctions and the conflict between neutrality as per the Hague Convention and the doctrine of collective security. After Italy’s invasion of Abyssinia (Ethiopia) in 1935, Switzerland reluctantly and incompletely adopted the economic sanctions imposed by the League of Nations. As demanded by the League, it banned the export of arms and ammunition to Italy. It also imposed an arms export ban on the victim, Abyssinia, invoking Article 9

of the Hague Convention – just as it is doing today in the case of Ukraine. This article requires equal treatment of both warring parties in the supply of war material from private production. Switzerland's interpretation was met with fierce opposition in the League of Nations. On November 2, 1935, several representatives in the League Council accused Federal Councilor Motta, who was present, of violating international law by invoking the Hague Convention, citing the statutes of the League of Nations. They argued that international law had since evolved with the League's condemnation of war and the Briand-Kellogg Pact of 1928. In doing so, they were following the lead of the star among international lawyers at the time, the Greek representative Nikolaos Politis, who in his book "*La neutralité et la paix*" published that same year rejected neutrality altogether.²¹ A neutral party should no longer treat the aggressor in the same way as the victim.

Motta and his international-law advisors were not impressed by this. Since the League of Nations had failed to fulfill its peacekeeping mission, Switzerland obtained an agreement from the League in 1938 that it would no longer have to impose economic sanctions. Switzerland thus effectively withdrew from the League and moved from "differential neutrality" to an "integral neutrality." But this term was also new, as it did not exist before 1920.²²

IX. "Switzerland has maintained its neutrality to a reasonable extent"²³

The Second World War was the greatest test of Swiss neutrality. On August 31, 1939, the Federal Council issued a declaration of neutrality, as it had done in previous wars, which the belligerent states recognized but did not respect. The outbreak of war marked the beginning of the greatest "death of neutrality" in world history, as the Bern historian Walter Hofer called

21 Nicolas Politis, *La neutralité et la paix*, Paris 1935.

22 It is thus an anachronism when, for example, the "Security 2025" report, based on official documents, refers to the years from 1815 to 1920 as a period of "absolute and integral" neutrality and even asserts a policy of neutrality in the case of economic sanctions, which did not in fact exist before 1920. See Tibor Szvircsev Tresch, Andreas Wenger et al., *Sicherheit 2025. Aussen-, sicherheits- und verteidigungspolitische Meinungsbildung im Trend*. Zurich 2025, p. 156.

23 Kaspar Villiger, *Auch die Schweiz hat Schuld auf sich geladen*. In: Kenneth Angst, *Der Zweite Weltkrieg und die Schweiz. Reden und Analysen*. Zurich 1997, p. 17.

it.²⁴ The worst offenders were the Axis powers, which occupied one neutral country after another, especially Germany (Denmark, Norway, the Benelux countries, Yugoslavia, Greece) and Italy (Albania, Greece, Yugoslavia), but also the Soviet Union (Finland, the three Baltic states). Even the Allies, who liberated the world (and Switzerland) from the Nazi and fascist threat, disregarded neutrality when it suited their war efforts (Iceland, Portuguese Azores). Like the Germans before them, the Western Allies did not respect Switzerland's air neutrality and, despite all protests from Bern, carried out air warfare in Swiss airspace, including bombings that ultimately left around 100 people dead, hundreds injured, and caused extensive property damage. Swiss airspace was a war zone.

Both sides in the war also waged a ruthless economic war against Switzerland (and other neutral countries) in violation of international law, imposing a double blockade around the country. This brought Switzerland to the brink of existential crisis. After France's defeat in June 1940, the country was almost completely surrounded by the two Axis powers and largely cut off from the world market. It was now integrated into the new European economic space dominated by Hitler's Germany and forced to make a number of economic concessions that violated its neutrality, such as granting loans to Germany and Italy, the so-called clearing billion.

At the start of the war, as in previous wars, the Federal Council had imposed an arms export ban, but this was lifted on September 8. France made its recognition of Switzerland's neutrality conditional on the delivery of the weapons it had ordered. For the Federal Council, formal recognition by France was more important than the arms export ban. It was outright blackmail. By lifting the arms export ban, Switzerland maneuvered itself into a trap under neutrality law: due to the principle of equal treatment under the Hague Convention (Art. 9), which was already dubious at the time, Switzerland had to allow arms deliveries from private production to the German Reich and Italy from 1940 onwards, as it did to the Western Allies. The Federal Council adhered, as far as possible, to the formalistic and highly legalistic principles of neutrality under the Hague Convention. In 2000, Zurich-based international law expert Daniel Thürer, like former

24 Walther Hofer, *Neutralität als Maxime der schweizerischen Aussenpolitik*, Berlin 1956, p. 172.

President Villiger before him, attested that Switzerland had “essentially complied” with the principles of neutrality.²⁵

Even during the war, but especially after it ended, people in Switzerland wondered whether and to what extent neutrality had saved Switzerland from a German and Italian invasion. Extensive research, mainly conducted abroad, into the objectives and warfare of the Axis powers has revealed the reasons for Switzerland’s “sparing.” It was not economic reasons, as is currently assumed by the mainstream in Switzerland. Neither Swiss arms exports nor the Swiss National Bank’s gold trading were decisive in deterring Hitler and Mussolini from attacking, but rather (changing) geostrategic and military reasons, which were determined by the current war situation and warfare. In the first months of the war, Hitler ordered that the neutrality of Switzerland and other states be respected because he could not afford another campaign after Poland. After the encirclement at the end of June 1940, when neutrality actually became obsolete, neutral Switzerland unwittingly took on a new role as a neutral buffer between the two “allied” Axis powers, which were also strategic rivals. Ultimately, it was Italy that saved Switzerland from a German invasion, especially in the critical year of 1940. The Italians did not want the Germans to be on the Gotthard Pass or, even worse, in Chiasso, not far from Milan. The two Axis powers were also unable to agree on a division of Switzerland and did not want a “dispute over spoils.” *“L’attitude de l’Italie et les relations germano-italiennes sont certainement des facteurs clés, sinon les facteurs clés, dans le maintien de l’indépendance suisse”* (Italy’s attitude and German-Italian relations were certainly key factors, if not the key factors, in maintaining Switzerland’s independence), as Daniel Bourgeois noted back in 1974.²⁶

X. Switzerland exaggerates its neutrality (1945-1990)

Even more than after the First World War, neutrality was internationally discredited in 1945. Whereas neutrality had been a legitimate policy for

25 Daniel Thürer, *Über die Schweiz im Zweiten Weltkrieg. Bewährung der Neutralität? Folgerungen für die Zukunft.* In: *Zeitschrift für schweizerisches Recht* 119 (2000), p. 416.

26 Daniel Bourgeois, *Le Troisième Reich et la Suisse, 1933-1941*, Neuchâtel 1973, p. 295. See also Marco Jorio, *Retter Mussolini?* In: *NZZ Geschichte* 28 (2020) pp. 110-113 and the same author, *Mussolinis Botschafter in Bern: Tagebuch des Attilio Tamaro.* In: *NZZ* 17.9.2023.

sovereign states before 1914, the two world wars were fought by the victors – led by the USA, which had itself been neutral at times – as “just wars,” and the neutral countries were accused of moral wrongdoing for their non-participation. The medieval concept of *bellum justum* was back. It took years for Swiss neutrality to be appreciated again in international politics, for example in 1953 as a neutral member of the Armistice Commission in Korea or in 1955 as a model for Austrian neutrality. Due to its traumatic experiences with the League of Nations and during the Second World War, Switzerland pursued a rigid policy of neutrality between the two blocs after 1945. Although it saw itself as ideologically and economically firmly anchored in the Western camp, it avoided any participation in multilateral institutions in which it sensed a political or even military dimension.

The senior official of the Federal Department of Foreign Affairs Rudolf Bindschedler turned this narrow, even fearful interpretation of neutrality into an actual doctrine, which continues to have an impact today under the name of the Bindschedler Doctrine. This is why Switzerland did not join the United Nations like other neutral countries, such as Sweden (1945), as this new body, unlike the League of Nations, did not want to grant Switzerland an exemption clause. Britain’s Gladwyn Jebb, acting UN Secretary-General for the years 1945–46, stated clearly: “Neutrality is a word I cannot find in the Charter.”²⁷ Switzerland also kept its distance from the European unification process. However, this did not prevent it from yielding to Western, especially American, pressure around 1950 and having to support the embargo policy against the communist Soviet Union and its satellites (CoCom). Otherwise, it would have been sanctioned itself and cut off from imports of modern technology. Neutrality was and is not always conducive to business, as is often claimed today.

From 1960 onwards, the Federal Council relaxed its strict policy of neutrality. Switzerland joined the Council of Europe in 1963. From the 1970s onwards, it became involved in the Conference on Security and Cooperation in Europe (CSCE, OSCE from 1995) alongside other neutral and non-aligned states. In addition, although not a member of the UN, the country began to adopt some or all of the sanctions imposed by the UN from the mid-1960s onwards, for example in the cases of South Africa (from 1962) and Southern Rhodesia (from 1965). At the end of the 1960s, a laborious debate about joining the UN began that lasted for almost half a

27 Quoted from Josef Köpfer, *Die Neutralität im Wandel der Erscheinungsformen militärischer Auseinandersetzungen*. Munich 1975, p. 26.

century – a bizarre perpetual motion machine, as if joining the UN would mean the end of neutrality and the downfall of Switzerland. In 1986, the people and the cantons rejected the first UN proposal, citing neutrality, the powerlessness of the UN, and “useless” expenditure as arguments.

XI. Switzerland doubts its neutrality

The collapse of the communist Eastern Bloc and the dissolution of the Soviet Union at the turn of the 1990s finally removed the geopolitical foundations of neutrality in Europe. Since the 17th century, neutrality had been based on wars between neighboring states that threatened Switzerland’s existence and from which Switzerland protected itself in its own interest by not participating in the war. But after 1945, these reasons no longer existed: Switzerland’s neighbors had now become friends, or as one *bon mot* put it: “Switzerland is now encircled by friends.” During the Cold War, Switzerland maintained its neutrality by citing the argument that it was still a kind of frontline state between the two newly formed blocs. Switzerland, Austria, and non-aligned Yugoslavia would form a neutral corridor through which the troops of the Warsaw Pact states could advance to the Burgundian Gate into France. After 1990, however, this argument no longer held water: there were no more blocs; there was a general euphoria of peace; the European states – including Switzerland – reduced their armed forces and reaped billions in peace dividends. The Federal Council reacted quickly and realigned Swiss neutrality in 1993. From then on, it was to be limited to the military core. “Security through cooperation” was the new slogan.

The call to abandon neutrality, now deemed obsolete, was particularly loud in academic circles. In addition to Jürg M. Gabriel, quoted at the beginning of this article, numerous other intellectuals joined the chorus of “neutrality abolitionists” – as they were disparagingly called by national conservatives around SVP tribune Christoph Blocher. In 1998, Daniel Thürer showered neutrality with all sorts of unflattering attributes: bloated, dogmatic, degenerated into fiction, illusion, and self-deception. “The special status of permanent neutrality has become largely obsolete. Neutrality as a concept of Swiss foreign policy has had its day.”²⁸ As in most other countries, there was a general conviction that there would be no more

28 Daniel Thürer, Vom Sinn der Neutralität heute. In: Bernhard, Roberto (ed.), Nationalismen. Hinweise für die Zukunft. Aarau: Sauerländer, 1998, 217-221, p. 219 f.

wars between states in Europe. However, regular surveys showed that the vast majority of the Swiss population remained steadfastly committed to traditional neutrality. In 1994, voters rejected a proposal, which would have allowed Switzerland to provide UN Blue Helmet soldiers. It was not until a referendum held in 2002 that there was a narrow yes to Switzerland's membership of the UN – as one of the last countries in the world to join. When it joined the UN, Switzerland did raise a reservation of neutrality, which was merely noted by the UN. There were no special arrangements for neutral Switzerland, as there had been in 1920 when it joined the League of Nations. With the Embargo Act of 2002, the federal government established the legal basis for imposing economic sanctions imposed by the UN, the OSCE, and now also by its “most important trading partners,” i.e., the EU, as has been the case in various instances since then.

The heated debates on neutrality in the 1990s died down with Switzerland's accession to the UN and, above all, with the emergence of new forms of threat, such as Islamist terrorism, which could not be dealt with by traditional neutrality. The restriction of neutrality to its military core, as envisaged in the 1993 neutrality report, failed spectacularly, as the 2000 security policy report noted with some resignation. Switzerland – that is, its political elite and the majority of its people – remained stuck in the Cold War concept of neutrality. The only new thing after Switzerland joined the UN was that it complied with the decisions of the Security Council, insofar as this dysfunctional body was able to make decisions at all, as was often the case in the 1990s, for example in the Yugoslav conflicts, the Gulf Wars, and in Libya. But neither politicians nor international law experts made any effort to devise a form of neutrality for the 21st century that was compatible with the UN Charter. National conservative circles, such as those around the SVP, stubbornly clung to traditional neutrality. Neutrality largely disappeared from public discussion in the 2000s and 2010s. Somewhat surprisingly, in 2020, former Foreign Minister and Federal Councilor Micheline Calmy-Rey was one of the few to speak out in favor of a renewed “active neutrality” in her book on neutrality.²⁹

The outbreak of war in Ukraine in 2014 did not change much in Swiss neutrality policy. Switzerland did not adopt the EU sanctions because of its chairmanship of the OSCE, but prevented circumvention transactions (“courant normal”). The argument of neutrality did arise in public discussions, for example on the fight against piracy off the coast of Somalia, the

29 Micheline Calmy-Rey, *Die Neutralität: Zwischen Mythos und Vorbild*. Basel 2020.

French spy satellite, and the Crypto affair. But the debate was largely fought out using arguments unrelated to neutrality, showing that Switzerland was no longer clear about what neutrality actually meant.

Then came the fateful day of February 24, 2022. The illusion that wars between states in Europe were a thing of the past was shattered. And there it was again: neutrality. A confusion over neutrality ensued at the political, scientific, and journalistic levels. Switzerland had forgotten how to be neutral. The federal government in Bern reflexively reactivated the old patterns of neutrality. Switzerland fell back on an outdated policy of neutrality based on the Hague Convention of 1907. The rigorous Arms Export Act quickly took center stage, which was even tightened on May 1, 2022, and took away all freedom of action from the Federal Council. In the Ukraine Ordinance of March 4, 2022, with the scandalous title “on measures in connection with the situation (!) in Ukraine,” Ukraine, the victim of aggression, was treated in the same way as Russia, the aggressor, just as Abyssinia, the victim of aggression, had been treated in 1935. On the basis of the tightened Arms Export Act, the Federal Council prohibited countries such as Germany, Denmark, and Spain from passing on military equipment purchased in Switzerland. Reference was also made to the right of neutrality under the Hague Convention of 1907. However, the Hague Convention did not provide for such export bans, let alone transfer bans. Swiss neutrality, especially in the area of exports, had become detached from its historical and international legal foundations and developed a momentum of its own that was met with incomprehension both at home and abroad.

XII. What next?

The regression in neutrality policy since 2022 has astonished political observers. In the federal government in Bern, in the Federal Council, in parliament, and in the federal offices responsible for neutrality, there is a fossilized idea of neutrality. It seems that some of those in positions of responsibility remain stuck in 1907. The revolution in international law that has taken place since then has not been recognized and is still not being recognized. Members of the Federal Council and the Federal Assembly have made and continue to make staggering, outdated statements on neutrality, such as on June 19, 2025, in the Council of States during the debate

on the “neutrality initiative.” In it, the outdated Hague Convention, with its principle of equal treatment that is now obsolete under international law, lives on unreflectively. Remarkably, even some international law experts have fallen far behind their teachers. The last true expert on neutrality law, Zurich’s Dietrich Schindler Jr., who died in 2018, already stated in 1993 that parts of classical neutrality law, such as the principle of equal treatment, no longer apply.³⁰ Incidentally, the Federal Council already expressed doubts about the principle of equal treatment in its first UN report in 1969. But that has been forgotten in the meantime.

So now Switzerland, with its mythically charged and inflated concept of neutrality, finds itself in a rough international storm. The individual elements of neutrality no longer fit together. Foreigners have been quicker to realize this in some cases. For example, in his farewell article from his post as Swiss correspondent for the *Financial Times* and the *Tages-Anzeiger* at the end of 2023, English journalist Sam Jones noted that neutrality “can lead to grotesque situations. For example, politicians impose economic sanctions on Russia. At the same time, they refuse to provide even the slightest military aid to the Ukrainian victims of the aggression. The result of this muddle: Russia considers Switzerland an enemy. And the West considers it a coward.”³¹

With its neo-orthodox understanding of neutrality and its rigorous arms export law, Switzerland has caused itself a lot of trouble over the past four years. Today’s arms export bans, which go far beyond the rudimentary neutrality law of 1907, are a Swiss invention and not the product of neutrality. They are the result of a pacifist and moral mainstream that has been reflected in five (rejected) arms export initiatives since 1936 and is formed by left-wing, pacifist, feminist, church, but also broad bourgeois circles. Despite being rejected five times, the initiators’ demands were largely incorporated into law. By adhering to Article 9 of the Hague Convention of 1907 (principle of equal treatment), Switzerland is also sabotaging Article 51 of the UN Charter. This article gives only the victim of aggression the right to wage war, alongside the Security Council. The Federal Council and, above all, Parliament are practicing a form of neutrality that does not comply with current international law, isolates Switzerland internationally,

30 Dietrich Schindler, *Ist das Neutralitätsrecht noch Teil des universellen Völkerrechts?* In: Konrad Ginther et al. (eds.), *Völkerrecht zwischen normativem Anspruch und politischer Realität*. Festschrift Karl Zemanek. Berlin: Duncker & Humblot, 1994, 385-399.

31 Sam Jones, *Dieses geradezu magische System*. In: *Tages-Anzeiger*, October 28, 2023.

damages Switzerland's security policy and reputation, and, above all, ruins its own arms industry.

However, there is no reason to abandon neutrality headlong. Switzerland is in a different geopolitical situation than Sweden and Finland. Nevertheless, a new concept or update is urgently needed. The much-maligned Federal Council and Foreign Minister Ignazio Cassis was the first to realize this. Immediately after Russia's invasion of Ukraine, he had a new concept of neutrality ("cooperative neutrality") drawn up, though it failed to pass the Federal Council in September 2022. Since then, heated debates have been raging between representatives of the various "schools of neutrality" outlined above. In May 2024, a group of seven intellectuals (including myself) published a manifesto for neutrality in the 21st century.³²

The manifesto does not call for the abolition of neutrality, but rather for its updating on the basis of current international and constitutional law (not that of 1907) and new forms of threat and warfare. Therefore, 21st-century neutrality must be based on the UN Charter, other international agreements ratified by Switzerland (e.g., the prohibition of genocide), the Federal Constitution, the history of neutrality, ethical principles, and, above all, Switzerland's security interests. In concrete terms, this means that Switzerland is abandoning the idea that neutrality is an institution of international law and returning to the wise pragmatism of the constitutional fathers of 1848 and the Federal Council of 1900. Neutrality must not be codified in domestic law, either. Therefore, a constitutional article with provisions for implementation must be rejected. In future, neutrality must be handled by the Federal Council on a case-by-case basis in the interests of the country. Although Switzerland does not intervene militarily in inter-state conflicts, it supports the victims of aggression in accordance with Article 51 of the UN Charter, if necessary also with arms exports, especially for the protection of the civilian population, if the aggressor is waging a war of terror, as is currently the case in Ukraine. In doing so, it no longer accepts the outdated principle of equal treatment (which has repeatedly caused it problems in the past). It works with its neighbors and also with NATO to defend against attacks on democratic, rule-of-law-based Europe, without immediately joining military alliances. Above all, however, it is rebuilding its civil and military national defense in such a way that it

32 Manifest. Eine Neutralität für das 21. Jahrhundert (<https://suisse-en-europe.ch/neutralitaet-21/>).

can withstand the threat independently up to the highest possible level, but beyond that, it can do so together with friendly states.

It follows that the Hague Convention must finally be laid to rest as a fixed point of reference. There are provisions in it that are still valid because they are part of the essence of neutrality, e.g., that a neutral state does not participate in war with its army. It is thus still useful as a historical source of law. In addition, Parliament must return to the Federal Council all the powers it took away from it with the excessive Arms Export Act. The Federal Council must conduct foreign policy, not Parliament. For three centuries, politicians developed a pragmatic and flexible policy of neutrality. It was only after 1907 that international lawyers – urged on by politicians who were reluctant to make decisions – took over the authority to interpret the neutrality. Since then, neutrality policy has been implemented in a doctrinaire and legalistic manner. Today, there is no longer a generally accepted view of what neutrality is or, as the June 2023 issue of the US magazine *Foreign Policy* stated: “As a political concept, there is no universally accepted definition of what neutrality actually means.”³³ As a result, there is no longer any internationally recognized law of neutrality, or as the title of a recently published dissertation in Cologne puts it (without any question mark): “The End of the Law of Neutrality.”³⁴ Since the beginning of the Cold War, neutrality has been reduced to non-alignment (in times of peace) and non-participation in war, mainly under the influence of the Third World, now known as the Global South. It is high time for Switzerland to consider what neutrality means for it in the 21st century and how it intends to implement it in accordance with international law.

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33 Pascal Lottaz, In Defense of Neutrals. Why they're more than just fence sitters. In: *Foreign Policy*, June 6, 223 (<https://foreignpolicy.com/2023/06/06/ukraine-russia-war-neutrality-nonalignment/>). Last accessed June 8, 2025.

34 Jamal El-Zein, *Das Ende des Neutralitätsrechts*, Baden-Baden 2024 (=Kölner Schriften zum Friedenssicherungsrecht, Volume 26).

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The dwindling importance of Swiss neutrality in the international context – practical experiences of a former Swiss ambassador

Daniel Woker

Abstract

With President Trump's embrace of Putin's autocratic oligarchy, abandoning the sovereignty of the entire territory of Ukraine as enshrined in international law and tolerating Russian aggression despite the prohibition of violence in the UN Charter, the need to move away from Switzerland's traditional neutrality has once again accelerated decisively. The stages of the departure from traditional neutrality in the context of contemporary Swiss diplomacy since the 1975 Helsinki Conference are traced through personal experience. International acceptance of traditional Swiss neutrality no longer exists today.

Neutrality, supposedly anchored in the DNA of the Swiss people, is a purely domestic political issue with no bearing on the conduct of Swiss foreign policy.

1. Introduction

'Everything has already been said about neutrality'. This was the reaction of my doctoral supervisor at the University of Zurich, Professor of International Law Dietrich Schindler Jr., a good 50 years ago, when I told him of my desire to write a dissertation on a topic related to neutrality. Fortunately, it turned out that there was hardly any German literature on the practice of Swedish and Finnish neutrality, which allowed me to write a corresponding doctoral thesis, which was published by the Swiss Society for Foreign Policy.¹ Even then, everything had already been said about neutrality in Europe. Nevertheless, much of what was thus already known has been repeated endlessly, not least in Swiss and other official statements

1 *Daniel Woker*, *Die Skandinavischen Neutralen, Prinzip und Praxis der finnischen und der schwedischen Neutralität* (The Scandinavian Neutrals: Principle and Practice of

– currently only Austrian ones. The following account by a Swiss diplomat shows that classic Swiss neutrality has continued to die out in the reality of international politics and can now be laid to rest once and for all.

2. The neutral countries in the CSCE

While still a diplomatic trainee and thanks to kind older colleagues in the Swiss Federal Department of Foreign Affairs (FDFA), I was fortunate enough to be able to participate in an international conference (CSCE, Conference on Security and Co-operation in Europe, since 1990 the OSCE) where neutrality still played a certain role in practical diplomacy. At that time, the N+N group (Neutrals and Non-aligneds) acted as a kind of bridge, which concerned one – and only one – aspect of the first review conference of the 1975 Helsinki Accords, held in Belgrade in 1976/77. The N+N were tasked with drawing up the conference programme each week in order to avoid blockages between the two blocs at the time, NATO and the Warsaw Pact, at an early stage of the proceedings.

This function was purely formal and did not concern the actual substance of the conference, which for the Western side primarily concerned human rights and for the Soviet bloc the codification in international law of the balance of power as it had been created in Europe by the Second World War. The Western neutrals – Austria, Finland, Sweden and Switzerland, with their smaller partner Liechtenstein – felt free to introduce provisions on individual freedom, such as the Swiss proposal for freedom of expression in the media. These provisions are still part of the Helsinki Final Act today. Among the non-aligned countries, the former Yugoslavia under Tito was lukewarm towards such provisions, while Ceausescu's Romania was resolutely opposed. Therefore the N+N was a purely formal alliance with no common basis for the substance of the conference. For me, this was the first clear lesson that ideological neutrality in post-war Europe neither existed nor was sought in any way. If such an N+N group, created to make the conference mechanics work, had not existed at the time, this bridging function would have been assigned to another 'neutral' party.²

Finnish and Swedish Neutrality), Volume 5 in the series published by the Swiss Society for Foreign Policy, Paul Haupt, 1976.

2 More on N+N in: Hans-Jörg Renk, *Der Weg der Schweiz nach Helsinki*, Paul Haupt, 1996, and

This also shows the absurdity of the Russian accusation that 'Switzerland has abandoned its neutrality' when Bern in 2022 adopted the EU sanctions against the Putin regime because of the aggression against Ukraine. The corresponding accusation by AM Sergei Lavrov – whom I later met and got to know personally – shows that 'neutrality' often only exists for an international actor as long as it serves his interests.

3. CoCom and neutrality

'Everything verbal, nothing in writing.' That was the instruction from Bern during the Cold War to the economic section of the Swiss embassy in Washington, which had to inform the American administration about the export of potentially sensitive technology by Swiss companies to customers in the Soviet bloc. Within the then Federal Office for Foreign Economic Affairs, de facto the Swiss Ministry of Trade, where I was seconded from the Foreign Ministry for four years, this was no secret, but it was unknown to the wider public.

The CoCom (*Coordinating Committee for Multilateral Export Controls*) was a committee of NATO countries plus Japan set up to prevent exports to the then adversary, the Warsaw Pact, which could have helped it with its military. Switzerland participated informally but comprehensively by submitting relevant exports, which were subject to state approval, to the American control authorities for review. This took place in an oral presentation by the head of the economic section at our embassy in Washington. De facto, this constituted cooperation between 'neutral Switzerland' and NATO. To do so was sensible in terms of foreign policy – otherwise US measures would have been threatened – and was also in Switzerland's own interests, as the American nuclear umbrella, the most important Western defence against Soviet expansionist ambitions, stretched across the whole of Western Europe.

For me, this was the second clear lesson that even back then, neutrality was only one possible means among many to an end – maintaining the country's position in an uncertain world – and could never be the goal of all foreign policy. In this particular case, neutrality was simply not the appropriate means.

'Die N+N in der KSZE-Folgekonferenz in Belgrad', internal document, available in DODIS, Diplomatic Documents of Switzerland.

4. At the UN, inside and yet outside, 1978-82.

All states, not only member states, the mantra of all Swiss diplomats at the UN mission in the context of drafting UN resolutions, repeated *ad nauseam* until Switzerland's final accession to the world organisation in 2002, still echoes in my ears. During a fascinating multilateral assignment in New York, I was actually working in the economic and development section where neutrality played no direct role. The decisive factor was who paid how much to the UN's multilateral development agencies. Switzerland was in a respectable position in this regard and was treated like any other representative of comparable Western donor countries.

Indirectly, however, neutrality did play a role in Switzerland's special status within the UN at the time – it was the only country that was not a member and therefore had to sit on a side bench in the plenary hall alongside the PLO and the Vatican. When the UN started in 1946, Switzerland decided not to join 'for the time being', in contrast to the other European neutral countries, especially Sweden, which had gone through the Second World War in a situation quite comparable to that of Switzerland. The decision taken in Bern at the time, incomprehensible to those born after the Second World War, was primarily justified on the grounds of Swiss neutrality. It was probably more of a fig leaf for a foreign policy that wanted to avoid complications at all costs and continue to trade with everyone.

Pour la petite histoire:: the then head of the economic department at the Soviet UN mission, later to become a long serving Russian Foreign Minister, Sergei Lavrov, was constantly undecided about which side he should play for in an informal football match South vs North organised by the Tunisian and Swiss representative - as a non-member, you do what you can to stay popular with your diplomatic colleagues. As a tactically skilled and talented midfielder, Lavrov ultimately joined his colleagues from the Global South on the other side of the pitch. Had I known then what became obvious after 2022 at the latest, I might have once missed the ball and kicked his shin instead.

5. Swedish neutrality sui generis

The shots fired by Olof Palme's murderer had barely faded away when I joined the embassy in Stockholm in 1986 as its number 2 diplomat. To this day, it is not known with certainty who the assassin was and why the prime minister was shot. However, this charismatic politician's support for what

he saw as oppressed peoples may have played a role. Sweden, personified by Palme, was particularly well known worldwide as a pioneer in Western protests against the Vietnam War. This was the opposite of neutrality, but what Palme saw as morally justified partisanship for North Vietnam, *the underdog* battered by imperial America.

Palme's close companion, the long-standing State Secretary Pierre Schori – son of Swiss immigrants to Sweden – once hosted the short-lived annual meeting of the four neutral state secretaries in the foreign ministries of Finland, Austria, Sweden and Switzerland in the wake of their cooperation within the CSCE. Those meetings highlighted how 'neutrality' was interpreted differently in the four countries. Schori was very clear on this point. There was no binding law of neutrality; for him, neutrality policy meant a foreign policy committed to Swedish interests and values. I remember him saying that it was more accurate to describe Sweden as 'non-aligned' rather than neutral.

Encore pour la petite histoire: On the occasion of the aforementioned meeting in Stockholm, which included a joint visit to the sauna after the diplomatic work was done, I saw two European presidents *au naturel*: Martti Ahtisaari of Finland and Thomas Klestil of Austria, both of whom were then state secretaries in the foreign ministry and were later elected as the highest representatives of their countries.

6. European turning point 1989/90

"The Wall has come down". Once again, I was fortunate in my career, as the events after the fall of the Berlin Wall on 9 November 1989, symbolising the implosion of the Soviet empire, was the focus of my daily work as deputy head of the then First Department (Europe and North America) at the Foreign Ministry in Bern from 1989-93.

In contrast to the geopolitical situation as I write these lines – symbolized by Trump's betrayal of Ukraine and thus the international rehabilitation of Putin – a hopeful era began at that time, in which states based on Western fundamental values and international law seemed to be emerging victorious. It was of course noted with horror that in the year of Eastern Europe's liberation, 1989, the state massacre in Tiananmen Square marked China's fateful and – as is now obvious – permanent departure from the idea of a ruler-based state of free citizens. But the slaughter of its own people by the still Maoist-influenced Communist Party was seen more as the aftermath of

Far Eastern despotism than as a *blueprint* for the suppression of opposition by future autocrats.

All foreign policy options, even for Switzerland, which remained officially neutral, were supposedly open, including accession to the then European Community (EC). After the disappearance of the Warsaw Pact, NATO seemed to have lost its enemy. Klaus Jacobi, then State Secretary in the Swiss Foreign Ministry, created an internal working group with the telling title *Eurovision*, which was to map out Switzerland's path to Europe, including possible positions as a member of the EC.

After thorough internal debate, the other three neutral countries took the turning point of 1989/90 as an opportunity to join the European unification project, first the EC and then the EU. Switzerland did not, but we were closer to the goal of full participation in the future of our home continent than is often portrayed now. Of course, the double majority in citizens referenda required for such a fundamental decision – the approval of both an absolute majority of voters and a majority of the cantons – was a high hurdle. However, that alone was not decisive; rather, it was the large amount of campaign money spent on counter-propaganda by national conservatives that led to a narrowly negative result in the main test for membership, the vote on the EEA (European Economic Area) in 1992.

Although people in Switzerland, often complacently referred to internally as the oldest republic, do not like to hear it, money thus plays an important role in referenda such as the one on the EEA. While the proponents in government, business, academia and culture remained discreet for a long time, the opponents deployed their concentrated financial power early and intensively. They did so with two central propaganda lies that are still used today by those who, in truth, worship conservative nationalism and/or fear the regulatory power of European authorities: First that Swiss neutrality would have to be abandoned in the event of accession to the EU and second that Brussels represented the 'modern Habsburgs' against which the old Swiss Confederation fought medieval battles. That the first argument did not correspond to the facts and the second seemed slightly ridiculous – the Habsburgs were originally Swiss and Austria was not even a EU member at time of the referendum – was lost in the barrage of counter-propaganda. My personal lesson from this probably worst foreign policy mistake during my time as a Swiss diplomat has been burned into my memory as an example of how shamelessly the argument of neutrality can be abused.

7. Economically important to our neighbour, but not politically

'Would you like to be my first employee?' was the question I was asked at the beginning of 1993 by the newly appointed Swiss ambassador to France. From my time at the CSCE, I got on well with Edouard Brunner, who was widely recognised as a top Swiss diplomat. So I immediately accepted.

This was made even easier for me as the last period of my stay in Bern was overshadowed by the crisis surrounding the disintegration of Yugoslavia and the civil wars there, caused initially by Serbian, and later also by Croatian nationalism. At that time, Switzerland was practically a frontline state in this first major armed conflict in Europe since the Second World War, as a result of an extraordinarily high number of guest workers from many parts of Yugoslavia. Neutrality in this conflict was not an option in the face of flagrant aggression and violations of international law. As a non-member of the EU and NATO, it was necessary to do at least what was possible for us to prevent an endless conflict from being carried into Switzerland by members of hostile factions from the former Yugoslavia. Then, as now, I am convinced that the swiftest possible international recognition of the states emerging from the break-up of Yugoslavia was necessary in order to establish a clear basis for international law to permit intervention. This was the only way to refute the accusation of 'interference in internal affairs' levelled by the Serbian aggressors and helped to uphold the principle of the right to self-determination of all people, so solemnly anchored in the context of 'Helsinki'. However, this corresponded by no means to the views of those colleagues in the Foreign Ministry who believed that Switzerland should, as usual, exercise restraint at all costs. They saw the recognition policy I was formulating at a technical level by virtue of my position in the Ministry as a betrayal of the traditional neutral cause. The resulting internal animosity was one of my most disappointing professional experiences and left deep scars that continued to affect my career.

This made my appointment, first as economic counsellor and soon afterwards as minister and Deputy Head at the embassy in Paris, all the more welcome. Alongside cultural, neighbourly and historical ties, economic and financial affairs form the great link between official Switzerland and the 'Grande Nation'. Traditionally, the Number 2 at this Embassy is also tasked with looking after the large Swiss expatriate community in France. This sometimes required 'neutrality' in order to defuse conflicts therein.

As far as big politics were concerned neutral Switzerland simply played no role in this classic Western capital. Again, as a non-member of the

EU and NATO, Swiss diplomats are a *quantité négligeable* for the *Quai d'Orsay*, the French Foreign Ministry. Without the obligation to consult and of information dissemination provided to the embassies of all members of these two organisations, we were received, if at all, only out of courtesy. However, not so Ambassador Edouard Brunner, thanks his additional role as Special Representative of the UN Secretary-General for the Middle East from 1991 to 1993, as the direct successor to the legendary Swede Gunnar Jarring, and for Georgia and thus also Ossetia from 1993 to 1995. He was a sought-after discussion partner at the *Quai*. That makes me think of an informal remark by a successor to Brunner as Swiss ambassador in Paris. He once confided to me that he sometimes was a bit bored in this bilateral posting, as he had previously served as the central point of contact during Switzerland's first presidency of the OSCE (Organisation for Security and Cooperation in Europe) when it was still a hotspot for European security.

What remained here was the realisation that the neutral observer is kept away from the important work within organisations such as the EU and NATO. Organisations that determine the fate of all European states, including the neutral ones.

8. 'Geneva' as a substitute for neutral non-participation, 1996-98

For a good 100 years, international Geneva has served Switzerland as proof that neutrality does not exclusively mean standing on the sidelines and lacking commitment to the good international cause. When it became apparent in the 1990s that NATO would not disappear, but would transform itself into a transatlantic body for continent-wide security, with Yeltsin's Russia also interested, Switzerland seized the opportunity to join NATO's *Partnership for Peace*. This took the form, among other things, of the three Geneva Centres, where I took up an exciting but difficult task as the founding director of the Geneva Centre for Security Policy (GCSP) with my first ambassadorial title. Difficult because local representatives of international Geneva saw GCSP not so much as an expression of Switzerland's increasingly active policy of neutrality, but as a natural manifestation of Geneva as the diplomatic Rome, and did not consider it appropriate to have a representative of the distant federal capital as an expression of Swiss neutrality.

Exciting because in the capitals of the most important countries represented on the GCSP's board of trustees, such as Washington and Bonn – at that time, this ministry was not yet divided into two departments in Bonn

and Berlin – I was given recognition for this first step towards NATO and away from the traditional neutrality of Switzerland.

At this point, praise is due to the then Swiss Defence Minister 'Dörf' Ogi. With his visionary commitment to a more active role for Switzerland in European security. He was then already an erratic block in his party, which today, with its exclusively nationalist interpretation of neutrality, opposes any Swiss involvement on the European stage.

For the countries participating in the GCSP, it was Geneva's location and not Swiss neutrality that was of decisive importance. Here, they maintained large representations with accommodation facilities for representatives from countries without hard Western currencies. Here, they could count on their civil servants, who had been sent to the Centre for further training, to take courses with direct practical relevance to international diplomacy. I will never forget an informal meeting with lively discussions between course participants at the GCSP, who at that time came mainly from Western defence ministries, and a group of North Koreans invited to Geneva by a third party to learn about multilateral diplomacy. A meeting that could hardly have taken place anywhere else but Geneva. Not even in New York, where events within the framework of the UN are more political and therefore more in the spotlight than in Calvin's city.

Swiss neutrality may have played a certain role in the choice of Geneva as the seat of the League of Nations in the aftermath of the 'Great War' of 1914-18. The Hague Conventions of 1907, based on a 19th-century understanding of neutrality, were still fresh, even if they had by no means been negotiated with particularly Switzerland in mind. It is often forgotten that in the interwar period, Belgium declared itself to be just as neutral as Switzerland. In Brussels, as in Bern, neutrality was seen primarily as a means of avoiding being caught up in a Franco-German conflict. Since the end of the Second World War, hostility between these two European big powers has, as is well known, been transformed into the opposite, with Berlin and Paris becoming the central driving force in Europe. A byproduct to this fundamental shift is that Switzerland had lost its former main reason for neutrality, namely to maintain close contacts and sympathies based on language and mentality across national borders.

My professional work in Geneva, also in view of the countless organisations and structures for international mediation located there, was a direct lesson in what makes the city so attractive as a place for international cooperation. It is its tradition, its infrastructure and the presence of practically all the countries in the world, not Switzerland's neutral status.

9. Beautiful, rich and discreet Switzerland, not neutral Switzerland, as a role model

My next posting in Kuwait and, at the same time in Bahrain and Qatar from 1989 to 2002, a first as a bilateral ambassador, was marked by the ongoing threat to the Arabian Peninsula from Saddam Hussein's Iraq. What later became obvious was by no means clear at the time. Even after his devastating defeat and withdrawal from illegally occupied Kuwait some 10 years earlier, Saddam continued to be seen as a latent threat, possibly still armed with weapons of mass destruction. In bilateral relations with Kuwait, neutrality was not an issue, Switzerland was and still is seen as a summer retreat and banking centre for wealthy princely families and their supporters in the Gulf countries.

Over the next four years as ambassador to Singapore, sometimes referred to at the time as the 'Switzerland of Asia', this changed, at least officially. After gaining independence in 1963 and its involuntary separation from Malaysia in 1965, the small city-state felt particularly threatened by its large neighbour Indonesia, whose leader Sukarno had repeatedly made disparaging remarks about this '*small red dot*' on the map in the middle of the Malay Archipelago. Rapid rearmament in line with the principle of armed neutrality thus became a priority for the young state. Switzerland was often cited as an official role model at the time. This was justified in terms of the development of an efficient banking system, but not in the area of security policy. From the outset, Israel was Singapore's key partner in equipping and developing its impressive military power. Out of consideration for its immediate international environment, characterised by its Islamic neighbours Indonesia and Malaysia, which still have no official relations with the Jewish state, the security advisers from Israel were referred to as 'Mexicans' in Singapore.

Even in Singapore's wider environment, there was no question of security policy neutrality, e.g. between the US and China. Thanks to its highly developed infrastructure, including a blue-water port built early on that can accommodate aircraft carriers, Singapore serves as a *de facto* American base in the middle of Southeast Asia, with important centres of the US navy located throughout the larger region. It remains to be seen how this will change in light of the current upheavals in international alliances due to a possible *super deal* between Trump and Xi Jinping.

10. Australia

Representatives of traditional Swiss neutrality sometimes say that it may be called into question in Europe, but not in the wider international arena, where Switzerland's respective reputation supposedly remains intact. The opposite is true. The further away from Europe, the more indifferent political actors become towards Swiss neutrality.

As a representative of Switzerland in Australia from 2008 to 2012, I experienced this first-hand. Our country was and is well known there as an economic player and research centre with global appeal, and also as the former home of many immigrants who brought their expertise and work ethic to their new home on the fifth continent, but not as a political discussion partner. When Australian politicians want to find out about Europe, consider possible cooperation of a political or, if necessary, military nature, but also the role that Australia could play within the European single market, Canberra turns to NATO and EU member states, including the European diplomats sent out by Brussels.

In Switzerland some politicians argue that the country's official representatives abroad should consequently work twice as hard to obtain the necessary information and establish important contacts. No need to worry, Swiss diplomats usually do. In my case, this meant establishing an informal club of 'other Europeans' to secure access to important information and key figures. Initially together with my Norwegian colleague - the UK still being in the EU - and later with the involvement of the Turkish ambassador, we achieved our goal of being heard and gaining access. But this happened later and at a lower level than the group of EU diplomats, who met regularly with the Foreign Minister. This may not have any serious consequences in the short term, but it certainly does in the longer term. Switzerland was and is simply regarded as a political *quantité négligable* in Australia. At best, its neutrality was of interest to a lone history professor at one of Australia's major universities. And even then, it was research centred on the field of *non-alignment* in the Indo-Pacific region, of some interest there as a position between China and the US. This ofcourse is in line with the different historical, geopolitical and ideological background in this area of the world, very different from classic Swiss-style neutrality.

11. Neutrality as dogma

In 2025, neutrality is once again at the centre of security policy discussions in Switzerland. It took Russia's aggression against Ukraine and now its betrayal by a new American administration, for the *raison d'être* of neutrality to finally be raised again. It had long been fossilised into a rigid untouchable dogma that shall not be touched.

This corresponded to my experience when, shortly after leaving the Foreign Ministry in 2012, I was asked by the Center for Security Studies, CSS at ETH Zurich to write an article on neutrality for its annual report. No longer bound by an official interpretation, I made a few suggestions for an adaptation of Swiss foreign policy. Away from the unshakeable dogma that routinely accompanies official Swiss statements on international crises and conflicts, such as 'Switzerland as a neutral country [...]', or defensively '[...] as a neutral country, Switzerland cannot [...]' or tentatively '[...] which has to be compatible with Swiss neutrality'. My draft text to the CSS came back promptly with so many corrections that it appeared to express pretty much the opposite of what was actually meant originally. When I responded that I could not take responsibility for this heavily revised text, I got an oral response, thoroughly polite, even apologetic, that it was impossible for the Center to print the original text. What remained unsaid was that the institution is funded directly by the Swiss Ministry of Defence – not a usual practice at Swiss universities.

Until the turning point following Putin's aggression against Ukraine and its de facto approval by President Trump, Switzerland was spared a real test of its neutrality, which is still officially based on 19th-century international norms, the Hague Conventions of 1907. This changed when Russia initiated the annexation of Ukraine in flagrant violation of international law.

12. Ukraine and Trump – the definitive end of neutrality

The waves of outrage in the public and political spheres over Russia's actions against Ukraine, exacerbated by obvious war crimes committed by both the highest leadership and the foot soldiers of the invading army, ran high after the beginning of the Russian aggression and it still do. Just as high in Switzerland as in other Western countries. Future historians will have to find out why Bern waited a few days following the Russian assault against Kiev before official Switzerland joined the European Union's sanctions.

Since then, official Switzerland has backpedaled, taking small steps away from what turned out to be no really sincere departure from traditional neutrality. Respective examples span a wide range of areas where Switzerland, as a country committed to highest democratic and human rights standards, has shirked its responsibilities by invoking 'neutrality'. These range from not allowing other states to decide freely on the use of war material long since sold from Swiss production to the refusal of swift and thorough freezing of Russian state assets and those of sanctioned Russian citizens. These shortcomings are discussed in detail elsewhere in this book. With the American embrace of Putin's autocratic oligarchy by Trump and his government, the need for a far-reaching departure from Switzerland's traditional neutrality has once again accelerated decisively.

Not because Russian troops could suddenly appear on the Rhine river, thereby rendering our neutrality obsolete anyway, but because Switzerland must stand up for European, and thus also for Ukrainian defense lest we put our values into question and betray our closest partner countries in Europe. Compared to this, the Hague Conventions of 1907, based on wars in the 19th century, are now an irrelevant historical relic. They have also long been superseded by subsequent international law, such as the UN Charter. The often-invoked 'neutrality' that is said to be anchored in the DNA of the Swiss people is a purely domestic political issue with no bearing on the conduct of Swiss foreign policy.

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Three layers of international law and the law of neutrality

Urs Saxer¹

Summary

In international law, three layers can be analytically distinguished, which also reflect historical developments: international law as the law of coexistence, cooperation, and integration. Neutrality is a product of the classical law of coexistence, when war was permissible. With the codification of the principles of coexistence in the UN Charter, in particular the prohibition to use force in the relation between states, and the obligations to cooperate within the framework of the collective security system as stipulated in the Charter, the basic prerequisites for the law of neutrality ceased to apply. It only applied in a modified form if the collective security system did not function. In addition, there is no longer any place for the law of neutrality in international law as a law of integration, insofar as integration encompasses the communitarization of security and defense. The prerequisites for a universally applicable law of neutrality have long since ceased to exist.

1. Levels of applicability of international law

Historically, the law of coexistence represents the traditional, long-standing exclusive level of application of international law governing relations between sovereign states.^{2 3} More than a hundred years ago, with the institutionalization of the system of states in the first world organization, the League of Nations, this level was supplemented by *international law as the law of cooperation* between states. Although the states are still sovereign,

1 The author would like to thank Olga Lieder, Dipl.-Jur., for her valuable research work.

2 See also *Jamal El-Zein*, Das Ende des Neutralitätsrechts, Kölner Schriften zum Friedenssicherungsrecht Volume 26, Diss. Cologne 2024, pp. 43 with further references on the origins of neutrality.

3 *Fritz Münch*, Die Koexistenz im Völkerrecht, in: Vereinte Nationen, issue 6/1964, p. 207 ff.

they have since then moved away from the idea of more or less absolute autonomy protected by sovereignty in favor of international cooperation through a variety of international ties among themselves in treaties and within the framework of international organizations.⁴ This second level has, in a sense, superimposed a new dimension on the level of coexistence. Apart from an interruption during the Second World War, it has remained dominant to this day. This is not changed by relapses into disruptive unilateralism, such as Russia's war in Ukraine, the escapades of an unpredictable US President Donald Trump, who ignores manifold existing obligations under international law, and the military actions of Israel as a regional power in Gaza and Syria, Lebanon and Iran. This is because the network of global interdependencies is so strong and diverse and permeates all areas of life and politics that states cannot cope with it on their own, given the increasingly limited scope and thus effectiveness of sovereign decisions due to interdependence. They have no choice but to jointly manage and regulate these interdependencies at the international level, preferably within an institutionalized framework.⁵ One consequence of this is that in some states, such as Switzerland, the official publication of international legal obligations is equivalent in scope to domestic law.

The cooperation-related dimension of international law is undoubtedly the most important in terms of international law and realpolitik. It goes hand in hand with the dominance of international treaties as the main source of law in the international system,⁶ supplemented by the decision-making practices of countless intergovernmental organizations and bodies as the institutionalized embodiment of global and regional cooperation in a wide variety of policy and subject areas. This is joined by another, more recent level of application of international law, namely its function as *inte-*

4 Conceptualized, partly under the term transnational law, Wolfgang Friedmann, *The Changing Structure of International Law*, Calcutta 1960, p. 60 ff.; Andreas v. Arnould, *Völkerrecht*, 5th edition 2023, §1 Rn. 3; Anne Peters/Anna Petrig, *Völkerrecht*, 6th edition, Geneva 2023, Chapter 1, margin note 30; on the duty of cooperation between states, see also Evelyn Schmid, *Stillsitzen und Wegschauen ist nicht mehr zeitgemäß*, in: NZZ No. 143 of June 24, 2025, p. 18; on supplementing the right of neutrality with the principle of solidarity, see Robert Nef, *Die bewaffnete Neutralität ist ein Friedensangebot*, in: Schweizer Monat: die Autorenzeitschrift für Politik, Wirtschaft und Kultur Volume 102, 2022, p. 60.

5 Andreas v. Arnould, note 4), § 1 Rn 3.

6 Anne Peters/Anna Petrig, (note 4), Chapter 6, margin note 1.

gration law.⁷ This manifests itself both within and outside an institutionalized framework, with the institutionalized framework being the rule. This integrative function is particularly evident in supranational organizations, above all the EU, which have their basis in international treaties but create an integrative order of their own right, in which sovereignty is strongly curtailed in favor of joint regulation and administration of many policy areas.⁸ This idea of communitarization, i.e. ultimately the supranational collective assumption of direct responsibility by states within an institutionalized framework, is also evident in some of the Security Council's resolutions, particularly where it directly intervenes without the usual implementation by states to regulate specific areas and sanction private individuals and/or impose obligations on them.⁹ WTO law also has an inherent tendency toward increasing integration. This is reflected in the efforts to establish further trade policy regulations,¹⁰ comparable to the process of European integration in its early stages. After all, anyone who wants to regulate the economy will be compelled to view a wide range of issues and policy areas as interconnected and therefore in need of regulation. The function of international law as integration law is also evident in concepts such as the

7 *Stephan Breitenmoser*, Föderalismus und Internationalisierung, in: *Verfassungsrecht der Schweiz*, Volume I: Grundlagen, Demokratie, Föderalismus, in: Oliver Diggelmann/Maya Hertig Randall/Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz*, Zurich 2020, p. 639 ff.

8 *Rudolf Streinz*, *Europarecht*, 12th edition, Heidelberg 2023. On the restriction of sovereignty as a result of international interdependence *Tobias Jaag/Julia Hänni*, „Europarecht, Die europäischen Institutionen aus schweizerischer Sicht, Geneva: Schulthess, 5th edition 2022, margin note 4320; on Switzerland's understanding of sovereignty vis-à-vis the EU, *Thomas Cottier*, Kosten des konservativen schweizerischen Souveränitätsverständnisses, in: Thomas Cottier/André Holenstein (eds.), *Die Souveränität der Schweiz in Europa. Mythen, Realitäten und Wandel*, Bern 2021, p. 211 ff.

9 On economic sanctions against private individuals, see *Samuele Scarpelli*, Wirtschaftssanktionen gegen private Personen. Verfahren und Rechtsschutz in der Europäischen Union und in der Schweiz unter besonderer Berücksichtigung der Rolle und Befugnisse des UN-Sicherheitsrates im Rahmen der Terrorismusbekämpfung, Zurich/St. Gallen 2015, esp. pp. 9-43.

10 *Gilbert Gornig*, *Völkerrecht*[], Munich 2023, § 130 Rn. 6; *Paul Weismann*, Jüngere Entwicklungen im WTO-Recht, *RIW* 2021, p. 549 ff; *Richard Senti*, Zukunft der WTO, *EuZ* 2020, p. 56 ff.; *Nicolas F. Diebold/Anne-Cathrine Tanner*, WTO-Recht und regionale Integration, in: *SRIEL* 2019, pp. 173-201; *Peter Hilpold*, *The EU in the GATT/WTO System*, Facultas: Vienna 2019.

Common Heritage of Mankind,¹¹ the regulation of deep-sea mining¹², and the status regulations for the Moon,¹³ outer space¹⁴, and the polar regions.¹⁵ What they have in common is that national sovereignty plays a subordinate role and that international regulation is as direct as possible, not unlike a state, but – apart from supranational organizations – without the corresponding structural and institutional prerequisites. Thus, the integration layer at least partially overlaps with the coexistence and cooperation layer and selectively complements it.

The distinction described between different layers of international law is based on an understanding of historical developments as an increase in interstate interdependence, primarily for economic and technical reasons, and reflects varying degrees of breadth and depth in the regulation of intergovernmental and genuine international relations. The different layers correspond to different functions of international law, which in turn reflect developments in its socio-political foundation. Against this background, these developments appear to be a logical, even necessary process with its own inherent rationality: beginning as a law of coexistence, international law has increasingly developed into a law of cooperation and is now also becoming, in part, a law of integration. These layers coexist alongside and with each other, with shifts in meaning occurring between them and newer layers, partially transforming the older ones. This is embedded in the much-discussed *process of constitutionalization in international law and of international law itself*,¹⁶ i.e., the emerging constitutional structures

11 *Andreas v. Arnauld*, Völkerrecht, 5th edition, Heidelberg 2023, margin note 807; *Edwin Egede*, Common Heritage of Mankind, Oxford Bibliographies in International Law 2014.

12 *Dirk Petersen*, Der Tiefseebau: Eine umweltvölkerrechtliche Baustelle. Eine Einführung in ein junges Rechtsgebiet, in: ZJS 4/2019, pp. 257. This is regulated in Part XI, i.e. Arts 133 et seq. and in particular 150 et seq. of the UN Convention on the Law of the Sea 1994 and in the Agreement for Implementation of Part XI of the Convention on the Law of the Sea.

13 *Alexander Proelß* in Alexander Proelß (ed.), Völkerrecht, 9th edition, Berlin/Boston 2024, p. 565.

14 *Knut Ipsen*, Völkerrecht, 8th edition, Munich, 2024, § 47 margin note 1; *Alexander Proelß*, in Alexander Proelß (note 13), p. 565; on space as a "res communis," *Marcel Kau*, in: Wolfgang Graf Vitzthum/Alexander Proelß (eds.), Völkerrecht, 8th edition, Berlin/Boston 2019, p. 241.

15 *Jörn A. Kämmerer*, in Alexander Proelß (ed.), (note 13), p. 14.

16 Instead of many *Thomas Kleinlein*, Konstitutionalisierung im Völkerrecht - Konstruktion und Elemente einer idealistischen Völkerrechtslehre, Beiträge zum ausländisches öffentlichen Recht und Völkerrecht, Volume 231, Heidelberg 2012; *Anne Peters*, Kon-

of the international system in terms of actors, structures, institutions, processes, values, and policies, caused by rapidly intensifying and, in some cases, structure-forming interdependencies. In view of recent geopolitical developments, there are fears of a setback for constitutionalization and, associated with this, a relapse into a mere coexistence order.¹⁷ Such fears overlook the norm- and structure-forming character of millions of daily transnational interactions between actors at all levels, which certainly cannot be addressed at the coexistence level alone, but must lead to strong cooperation and increasing constitutionalization.

The layers described are ideal types, and accordingly there are mixed forms. However, they form an analytical tool that can also be used to grasp the essence and concrete influence of neutrality as a complex of norms under international law more adequately, both in its historical and temporal dimensions, than an analysis based solely on positive neutrality law and state practice. This gain in depth is linked to the hope that the transformations of the concept and the orientation of the relevant actors towards action can be revealed in a concept of neutrality characterized by a specific layer. A further hope is that this approach will allow extrapolations as to the future of neutrality in view of the trends determining the development of the layers of the international legal order.

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- 17 See Anne Peters, *International Law and its Scholarship in the Time of Monsters*, Max Planck Research Paper Series 2025-05, May 6, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5242721.

2. Neutrality and the coexistence layer of international law

a) Beginnings: Grotius and neutrality¹⁸

The title of the 17th chapter of the third book of Hugo Grotius's epoch-making work *De Jure Belli ac Pacis* (1625) is translated into English as "On Neutrals in War".¹⁹ The section begins with the important statement that there is no right to wage war against those who are not involved in the war.²⁰ Non-participation in a war must be accepted. When troops march through the territory of a neutral country, they must behave in a disciplined manner. They must pay for food and accommodation, and looting and raids are strictly prohibited. However, those not involved in the war also have duties, namely "not to do anything that could strengthen the representative of the bad cause or hinder the enterprise of those who are fighting the just cause."²¹ In cases of doubt, neutrality requires equal treatment, e.g., in granting the passage of troops or the maintenance of troops. Using historical examples from antiquity, Grotius shows that allowing the recruitment of mercenaries or providing support with money and manpower is not compatible with the status of a non-belligerent. The latter best secures its status by concluding treaties with the belligerents in which its status as a non-participant in the war is recognized.

Neutrality is therefore a concept that dates back to antiquity. It reflects an evident option as to the course of action in disputes between third parties, namely that of non-participation. This option is a very general one in social situations, e.g., in interpersonal conflicts, and in political situations

18 For a detailed discussion of the origins of the doctrine of neutrality, see also the contribution by *Ralph Janik*, *The Return of Neutrality*, pp. 277 in this volume. For more on Grotius' doctrine of "bellum iustum," see *Michael Bothe*, *Friedenssicherung und Kriegsrecht*, in: Wolfgang Graf Vitzthum/Alexander Proelß (eds.), *Völkerrecht*, 8th edition, Berlin/Boston 2019, pp. 755-874.

19 *Hugo Grotius*, *De Jure Belli ac Pacis Libris Tres*, Paris 1625, translated by Walter Schätzel, Tübingen 1950, pp. 542 ff.; on neutrality in Grotius, see also *Jamal El-Zein*, (note 2), pp. 45

20 *Hugo Grotius*, (note 19), p. 542.

21 *Hugo Grotius*, (note 19), p. 544 [translated from the German version]; see also *Patricia Egli/Milena Holzgang*, *Neutralitätsrecht und Neutralitätspolitik: Ein Überblick*, in: *AJP* 2022, p. 608. On the participation of neutrals in acts of war, see also *Gerhard Jandl*, „Die Neutralität (erneut) als Identitätsmerkmal, in: *Wiener Blätter zur Friedensforschung*, Vierteljahresschrift des Universitätszentrums für Friedensforschung (UZF), in: *Wiener Blätter zur Friedensforschung*, quarterly journal of the University Center for Peace Research (UZF)], No. 170, March 1/2017, pp. 17-22.

such as in inter-state disputes. It gives rise to obvious rules of conduct: no involvement in the conflict, no close ties with any of the parties to the conflict regarding the conflict, and equal treatment or non-discrimination of parties. The status of non-participation is, however, unstable because it is dependent on the recognition of the parties to the dispute and, according to the prevailing, albeit partially disputed, view, neutrality did not restrict the right to wage war at that time: in other words, states remained entitled to wage war also against neutral parties unless they had committed themselves to respecting neutrality.²² Without this recognition, non-participation may not work depending on the circumstances, or the neutral party may not be able to rely on its status.²³ Non-participation can, however, be in the interests of the parties to the conflict because it conveys stability and conserves their resources.²⁴ At the same time, it is in the interests of the party that does not want to be drawn into the conflict.²⁵ Ideally, declared non-participation results in greater stability for all, which is why the parties to the conflict also have an incentive to recognize this status. Neutrality is therefore also a concept of conflict limitation. At the same time, it opens the possibility of positive involvement by neutral parties in conflicts to mediate and help resolve them.²⁶ In this respect, neutrality is intended to stabilize the system and has also had this effect.²⁷

However, as Grotius's remarks show, neutrality as a concept stands and falls with war under international law: *without war, there is no neutrality*; war is the lifeblood of neutrality, i.e., the prerequisite for its existence and the basis for its *raison d'être*.²⁸ War is a state subject to rules, as is neutrality,

22 See also *Jamal El-Zein*, (note 2), pp. 127 with further references.

23 On the trust-based nature of neutrality, particularly with regard to its protective function, see also *René Rhinow*, Permanence as a unique feature – Switzerland and its policy of neutral pp. 70 in this volume.

24 So-called conflict limitation function; see *Jamal El-Zein*, (note 2), pp. 53; on securing the economic position of non-participating states, see *Mark E. Villiger*, 2. Teil – Zur Neutralität im Allgemeinen, in: *Mark E. Villiger*, Handbuch der Schweizerischen Neutralität Teil 2 – Über die Neutralität im Allgemeinen, in: *Mark E. Villiger*, Handbuch der Schweizerischen Neutralität, Zurich 2023, pp. 34.

25 This is the so-called protective function; cf. *Jamal El-Zein*, (note 2) pp. 54.

26 So-called mediation function; cf. *Jamal El-Zein*, (note 2), p. 54.

27 For more details on this, see the relevant comments by *René Rhinow* (note 23) in this volume on common security interests, which formed the background to Swiss neutrality, particularly in 19th-century Europe.

28 For a general discussion of this topic, see *Michael Bothe*, Neutrality, Concept and General Rules, in: MPEPIL 2015, margin note 19 et seq. Modern terminology refers to armed conflict.

and takes place between sovereigns. Through neutrality, a sovereign therefore withdraws from a conflict between other sovereigns. It does so in its own interest, but possibly also in a higher interest.

b) Neutrality and the doctrine of just war

If war determines the status of neutrality, does the question of the legitimacy of war have an influence on the status and options for action of the neutral party, or is the status determined solely by the fact of war? Grotius's remarks on neutrality are influenced by the doctrine of just war, whose leading proponents were Augustine and Thomas Aquinas. He acknowledges that there are legitimate and less legitimate motives for waging war. However, Grotius's era did not recognize any actual prohibitions on war: *waging war is and remains a sovereign decision*;²⁹ the structural and institutional prerequisites for prohibitions on war and their enforcement were lacking in the world of principalities and kingdoms of that time, especially in Europe.³⁰

c) Status issues

Neutrality is a status that is primarily linked to the fact of war, which is not unusual for the decentralized structure of international law, which repeatedly links international status consequences to facts.³¹ Nevertheless, the question of the legitimacy of war has a twofold influence on neutrality. On the one hand, war against a neutral party is not legitimate, or – as Grotius puts it – there is no right to wage war. On the other hand, the legitimacy of war can be inferred from the options available to the neutral party, particularly in terms of obligations of omission, namely not to do anything that harms the representative of the good cause and benefits the

29 See also *Jamal El-Zein*, (note 2), pp. 43. See also the references in this volume by *Ralph Janik* (note 18) pp. 279-285 to de Martens and Wheaton.

30 *Dietrich M. Schindler*, *Völkerrecht, Neutralität und Menschenrechte/Dauernde Neutralität* (1975), in: Benjamin Schindler/Daniel Thürer (eds.), *Gemeinwesen zwischen Tradition und Weltoffenheit, Ausgewählte Schriften von Dietrich Schindler* (1924-2018), Zurich/Geneva 2024, p. 369.

31 This applies, for example, in classical international law doctrine to the recognition of new states or relations with governments.

representative of the bad cause.³² What is good or bad is determined by the prevailing views on the criteria for the legitimacy of war – insofar as such criteria exist.

In terms of the history of international law, it is unclear whether neutrality as a status automatically followed from non-participation in a war or had to be declared and possibly also recognized by the warring parties.³³ There was no obligation to remain neutral,³⁴ and states that did not wish to participate were not obliged to make a formal declaration of neutrality in military conflicts between third states. Were they thus neutral or not? Even if, according to Verdross, there was no obligation to remain neutral, he believed that third countries were obliged under general international law to follow certain rules towards the belligerents and to tolerate interventions. "The epitome of these norms is the law of neutrality."³⁵ Were these obligations always binding on all states that did not participate in the hostilities, or not? Were there only belligerents or neutrals? States not involved in the conflict were not necessarily neutral, apart from those that were permanently neutral. They simply did not participate in the conflict, were non-belligerents,³⁶ and the parties to the conflict had to comply with the usual rules and customs of inter-state relations in their dealings with them.³⁷ Those states that not only did not participate in the hostilities but also wanted to be neutral in a conflict had to declare this – also for reasons of legal certainty and in their own interest – and in order to be sure of their status, but this status had to be recognized by the parties to the conflict.³⁸

32 See also *Jamal El-Zein*, (note 2), pp. 36, 44. This view is, in a sense, the precursor to what is known as benevolent neutrality; on the obligations of neutral states under international law, see *Gotthard Frick*, *Das Ende der Schweizerischen Neutralität?*, in: *ASMZ*, vol. 179, 07/2013, p. 10.

33 See also *Jamal El-Zein*, (note 2), pp. 52. See also *René Rhinow*, (note 23) pp. 67.

34 *Alfred von Verdross*, *Völkerrecht*, Berlin 1937, p. 311. However, this does not always seem to be entirely clear in international law doctrine insofar as those who wanted to benefit from the (protective) rights of neutrality had to behave neutrally.

35 *Alfred von Verdross*, (note 34), p. 311; on the rights and obligations of neutral states, see also *Marco Sassòli*, *Neutralität gibt's nicht à la carte*, in: *Schweizer Monat: die Autorenzeitschrift für Politik, Wirtschaft und Kultur*, vol. 102, 2022, pp. 65-66.

36 See also *Michael Bothe*, *Neutrality, Concept and General Rules*, in: *MPEPIL* 2015, para. 4.

37 *Michael Bothe*, *Neutrality, Concept and General Rules*, in: *MPEPIL* 2015, para. 4 ff.

38 *Mark E. Villiger*, *Handbuch der Schweizerischen Neutralität*, Zurich 2023, para. 364. This applies at least in recent times; see also *René Rhinow* (note 23) pp. 72. Permanent neutral countries are, of course, excluded from this.

d) The law of neutrality as a set of norms modifying the law of coexistence

There was thus a coexistence of the normal rules of inter-state relations and rules of neutrality, which consisted largely of obligations of omission and *partially modified the norms of coexistence*. The law of neutrality imposed obligations on the neutral party, which were usually obligations of omission, but also gave it rights that corresponded to the obligations of omission of the belligerents. A central right was that the neutral party could not be drawn into the military conflict and that its territory was inviolable; a central obligation was the equal treatment of the parties to the conflict and the refraining from acts of support for any of the parties to the conflict.³⁹

All this is particularly clear in the Hague Conventions on Neutrality, which codified part of the law of neutrality shortly before the First World War.⁴⁰ The Convention respecting the Rights and Duties of Neutral Powers and Persons in the Event of War on Land stipulates in Article 1 that the territory of neutral parties is inviolable, and Article 2 prohibits belligerents from moving troops through the territory of neutral parties. In return, the neutral party must, among other things, prevent the recruitment of combatants on its territory for the belligerents (Article 4) and may not allow the belligerents to station troops or technical equipment on its territory.

At the heart of The Hague's neutrality law was a *partial ban on war in favor of neutral parties* – a remarkable development at a time when the right to wage war was a natural expression of national sovereignty. In return, the

39 On this subject, also with reference to land warfare, see *Peter Hostettler/Olivia Danai*, Neutrality in Land Warfare, in: MPEPIL 2015, para. 7 ff.; *Nikolas Stürchler*, Der Begriff des Krieges im Völkerrecht: Spezifisch unter dem Gesichtspunkt des Neutralitätsrechts, in: SZIER 2011, p. 637; *Cécile Kienzi*, Schweizer Neutralitätspolitik, eine Quadratur des Kreises?, in: Schweizer Soldat, vol. 98, 12/2023, p. 34.

40 For detailed information on Hague law, see *Mark E. Villiger*, (note 38), p. 37 ff., in particular on its current significance; on the significance of the Hague Convention, see *Marco Jorio*, Die Schweiz und ihre Neutralität. Eine 400-jährige Geschichte, Zurich 2023, p. 175 ff.; on the Hague Neutrality Agreement and Switzerland's position, see *Dietrich M. Schindler*, Völkerrecht, Neutralität und Menschenrechte/Fragen des Neutralitätsrechts im Zweiten Weltkrieg (2001), in: Benjamin Schindler/Daniel Thürer (eds.), Gemeinwesen zwischen Tradition und Weltoffenheit, Ausgewählte Schriften von Dietrich Schindler (1924-2018), Zurich/Geneva 2024, p. 421 ff.; on the relevance of the Hague Conventions today, see also *Astrid Epiney/David Kläui/Sophie Dukarm*, Die Neutralität der Schweiz - status quo und Perspektiven, Schweizerischer Juristentag 2025 – Rechtliche Herausforderungen für die Schweiz im Spannungsfeld bewaffneter Konflikte, in: ZSR, Volume 144, 2025, II, p. 12.; on the obligations of a neutral state under the Hague Convention, see *Philippe Descamps*, Neutralität, eine Waffe für den Frieden, in: Le Monde diplomatique, 7 April 2022.

neutral state had to accept a loss of sovereignty in the form of obligations to act and refrain from acting, which also served to limit war and ensure the non-participation of the neutral state, while non-participating third states that were not neutral did not have to comply with these obligations, but also had a less secure status. War and its permissibility were *therefore the linchpin of The Hague's law of neutrality*. Without war, neutrality as a concept of international law made no sense, even if in political practice there was conduct in non-military conflicts that could also be described as neutral.

In this way, the relevant parts of The Hague Law of Neutrality overlapped with and modified the classic law of coexistence prior to the First World War. *The law of neutrality itself was a law to secure coexistence* as it ensured the peaceful coexistence of third countries with the warring parties. In contrast, it did not belong to the layer of cooperation, let alone integration, in international law. These levels were only rudimentary in the very sovereignty-oriented 19th century. Cooperation was dominated by trade, consular, settlement, and technology-related treaties (e.g., postal and railway services) and sometimes alliance treaties.⁴¹ International organizations as a form of permanent, institutionalized cooperation between states existed at that time only in the form of administrative unions based on the principle of consensus.⁴² Neutral states did not have to cooperate with other states or become institutionally integrated internationally—on the contrary, they were supposed to remain independent, and obligations of omission were intended to support this status.

41 See, for example, the articles in: Das schweizerische Konsularwesen im 19. Jahrhundert, Politorbis, Zeitschrift für Aussenpolitik No. 36, 2/2004, in particular Schnyder, Matthias, pp. 5-68. Alliances include in particular the Holy Alliance (1815) and the Three Emperors' League (1873) between the German Empire, Austria-Hungary, and Russia; on alliance treaties, see Nadir Weber, Lokale Interessen und große Strategien. Das Fürstentum Neuchâtel und die politischen Beziehungen der Könige von Preußen (1707-1806), Cologne/Weimar/Vienna 2015, p. 47.

42 Bardo Fassbender, Heinrich Triepel und die Anfänge der dualistischen Sicht von „Völkerrecht und Landesrecht“ im späten 19. Jahrhundert, in: Lukas Gschwend/Peter Hettich/Markus Müller-Chen/Benjamin Schindler/Isabelle Wildhaber (eds.), Recht im digitalen Zeitalter, Festgabe Schweizerischer Juristentag 2015 in St. Gallen, pp. 464.

3. Neutrality and the layer of cooperation in international law; the organized community of states

a) On the compatibility of neutrality and international cooperation

A myriad of bilateral and, above all, multilateral treaties, as well as international organizations as a permanent, institutionalized form of cooperation between states, usually based on international treaties as founding documents, embody the layer of cooperation in international law.⁴³ Neutrality as a special set of norms of coexistence law did not and does not fundamentally conflict with the layer of cooperation: the obligations of neutral states relate to a narrow area, namely armed interstate conflicts, limited to and only setting limits on action in times of peace on states that are permanently neutral.⁴⁴ Other policy areas are not affected by neutrality. In Switzerland, however, this was long viewed differently, with the result that after the Second World War, accession to international and European organizations in particular proceeded very slowly, based on a doctrinaire policy of neutrality that went far beyond the law of neutrality and had as effect, among other things, that Switzerland did not join the UN until 2002, i.e., almost 60 years after the founding of the world organization!⁴⁵

43 On the distinction between bilateral and multilateral treaties in international law: *Fabiane Thomann-Reber*, Die Kündigung völkerrechtlicher Verträge unter besonderer Berücksichtigung der schweizerischen Rechtslage und Praxis, in: ASR, Volume 841, 2024, para. 214 ff.

44 On permanent neutrality, see also *Michael Bothe*, Neutrality, Concept and General Rules, in: MPEPIL 2015, para. 16 ff.; on the debate surrounding permanent neutrality, see also *Rebecca Ingber*, The abuse of neutrality, in: *Virginia Journal of International Law*, vol. 65, 2025, p. 455 et seq.; on permanent neutrality as an extension of the Hague Conventions, see *Pearce Clancy*, Permanent Neutrality and the UN Security Council, in: *Irish Studies in International Affairs*, Volume 32, 2021, p. 241–259, esp. p. 244; cf. on the question of when support ends neutrality *Terry D. Gill/Kinga Tibori-Szabó*, *The Use of Force and the International Legal System*, Cambridge University Press, Cambridge 2024, p. 342 ff.

45 For details, see *Marco Jorio*, (note 40), pp. 357 ff.; cf. Federal Council decision on the result of the referendum of March 3, 2002, BBl 2002 3690. On the compatibility of neutrality with UN membership, see Message on Switzerland's accession to the United Nations (UN) of December 21, 1981, BBl 1982 I 497 ff.; on Switzerland's initial involvement in the UN, see *Martin Dahinden*, Schweizerische Sicherheitspolitik im internationalen Kontext von 1815 bis heute: Eine Skizze, Zurich 2025, p. 52; on Switzerland's accession to the UN, see *Mathias-Charles Krafft/Daniel Thürer/Julie-Antoinette Stadelhofer*, Switzerland, in: Vera Gowlland-Debbas (ed.), *National Imple-*

There were essentially two factors that motivated this reluctance towards the UN: firstly, doubts were expressed about the compatibility of neutrality with Security Council sanctions that neutrals as UN members are obliged to adhere to and to implement. Well-known representatives of international law doctrine expressed general concerns about the compatibility of neutrality with UN membership. The Federal Council's initial objections to Switzerland joining the UN disappeared after various other neutral countries had no problems with neutrality law as UN members. An initially envisaged neutrality reservation, which would hardly have been accepted by the UN, thus became unnecessary.⁴⁶ On the other hand, because of its overbroad understanding of neutrality, Switzerland wanted to avoid taking positions and making decisions in connection with inter-state disputes and tensions as far as possible. Remnants of this view have survived in Switzerland to this day. However, no other state that describes itself as neutral has gone as far as Switzerland in its understanding of neutrality. This applied not only to its policy of neutrality, but also to its understanding of the scope of neutrality law.

b) Prohibition of the use of force and neutrality

Like the League of Nations was, the UN is an institutionalized instrument of cooperation for securing and maintaining peace. Its purpose is to curb the use of force between states and to settle disputes peacefully. While the Covenant of the League of Nations did not actually prohibit the use

mentation of United Nations Sanctions, A Co-operative Study, Leiden/Boston 2004, p. 523 ff.

46 See, for example, *Alfred von Verdross*, (note 34) and cf. below in *Paul Guggenheim* (note 52); on the corresponding practice of the Swiss political authorities following the founding of the UN, see *Marco Jorio*, (note 40), pp. 359. A different view, in line with long-established doctrine, is taken by *Mark E. Villiger*, (note 40), pp. 61-88; a nuanced view on neutrality and UN membership is taken by *Anna Petrig*, *Die Schweiz im UNO-Sicherheitsrat*, in: *BJM* 2023, p. 39-69; *Constantine Antonopoulos*, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality*, Cambridge 2022, pp. 58-73; on the desire for explicit recognition of integral neutrality by Switzerland, see *Thomas Fischer* (note 97), pp. 108. See also *Markus Mohler* *The Swiss combination of neutrality policy and neutrality law – An analysis based on the example of Russia's war of aggression against Ukraine and the relationship between neutrality and international humanitarian law*, pp. 101. in this volume.

of force, but merely provided institutionalized mechanisms for preventing war, without prohibiting the latter,⁴⁷ the UN Charter, in Article 2 (4), establishes a general prohibition on the use of force in inter-state relations, with the only exceptions of the right of self-defense and of authorizations to use military force by the Security Council or, subsidiarily, by the UN General Assembly.⁴⁸

This has a decisive influence on the concept of neutrality, because the prohibition of war *removes the basis from the concept*: the fundamental nexus between the protection of the neutral party from the use of force in return for the obligation to avoid any escalation between the warring parties no longer applies. It is true that the rules on neutrality in land warfare under the 1907 Convention can in principle still be applied: With the general prohibition of war, the territory of the neutral party is even more inviolable, but not as a result of a recognized status as neutral, but rather as a result of a universally applicable norm of coexistence, i. e. the general prohibition of the use of force, compliance with which is guaranteed in the sense of the cooperation dimension of international law by an institutional superstructure, namely the system of collective security. The instrument of enforcement here is collective sanctions by the members in the sense of an institutionally anchored alliance against states that violate the prohibition of the use of force. This raises the question of whether compliance with the obligations of omission and imperatives of action directed at neutral states still makes sense for them, insofar as these obligations go beyond the norms of universally applicable international law. We will return to this point shortly.

47 A general prohibition of war was only introduced in the Briand-Kellogg Pact of 1928, i.e. outside the League of Nations Covenant; see also the contribution by *Ralph Janik*, (note 18) pp. 271.

48 In this respect, the UN Charter goes further than the Briand-Kellogg Pact; on the comprehensive prohibition of the use of force and the UN Charter, see *Manuel Rodriguez*, *Das Neutralitätsrecht und das umfassende Gewaltverbot* gemäss Art. 2 Abs. 4 UNO-Charta - Ansätze einer Lösung des Spannungsverhältnisses zwischen dem Neutralitätsrecht und dem System der kollektiven Sicherheit unter besonderer Berücksichtigung der Schweizer Neutralität und vor dem Hintergrund des russischen Angriffskriegs gegen die Ukraine, Basel 2024, p. 27; On the attempt to enforce the prohibition of the use of force, see also *Peter Lieb*, *Völkerrecht und Verbrechen in europäischen Kriegen des 20. Jahrhunderts*, in: Jörg Echternkamp/Hans-Hubertus Mack (eds.), *Geschichte ohne Grenzen? Europäische Dimensionen der Militärgeschichte vom 19. Jahrhundert bis heute*, 2nd edition, Berlin 2025, p. 88.

c) The system of collective security and neutrality

The fact is, however, that at least early international law doctrine struggled with the relationship between neutrality and the system of collective security as a particularly intensive level of international cooperation.⁴⁹ Guggenheim sums this up in the following words: "There is a contradiction between the principle of collective security and that of neutrality."⁵⁰ The London Declaration of the Council of the League of Nations of February 13, 1920, states the following with regard to Switzerland's position in the League of Nations and its neutrality: "La Société des Nations, tout en affirmant le principe que la notion de la neutralité des Membres de la Société des Nations n'est pas compatible avec cet autre principe que tous les Membres de la Société auront à agir en commun pour faire respecter ses engagements, reconnaît que la Suisse est dans une situation unique motivée par un tradition de plusieurs siècles, qui a été explicitement incorporée dans le Droit des Gens."⁵¹ This allowed Switzerland to become a member of the League of Nations.⁵² In the first edition of his textbook on international

49 See also the references in *Jamal El-Zein* (note 2), p. 55

50 Translation for the German original wording; *Paul Guggenheim*, *Völkerbund, Dumbarton Oaks und die schweizerische Neutralität*, New York 1945, p. 64; on "ius ad bellum" and "ius ad neutralitatem," see *Jakob Tanner*, *Die schweizerische Neutralität – ein Anachronismus*, Berlin 2023.

51 28/3076/44, Resolution adopted by the Council of the League of Nations, meeting in London at St. James's Palace on February 13, 1920, reprinted in the original at <https://dodis.ch/1721>; on the historical background, see *Marco Jorio*, (note 40), p. 214 ff.

52 "The League of Nations, while affirming the principle that the concept of neutrality among League members is incompatible with the principle that all League members must act in concert to ensure compliance with their obligations, recognizes that Switzerland is in a unique situation stemming from a centuries-old tradition, which has been explicitly incorporated into international law". See the corresponding federal resolution on Switzerland's accession to the League of Nations, dated March 5, 1920, BBl 1920, Volume I, p. 483: „Die Bundesversammlung der schweizerischen Eidgenossenschaft, nach Einsicht einer Botschaft des Bundesrates vom 4. August 1919 sowie einer Zusatzbotschaft vom 17. Februar 1920 und unter ausdrücklicher Feststellung, dass die immerwährende Neutralität der Schweiz, die insbesondere in der Akte vom 20. November 1815 anerkannt worden ist, in Art. 435 des zwischen den alliierten und assoziierten Mächten und Deutschland am 28. Juni 1919 abgeschlossenen Friedensvertrages als ein Abkommen zur Aufrechterhaltung des Friedens anerkannt und dass sie nach Art. 21 des Völkerbundsvertrages als mit keiner Bestimmung dieses Vertrages unvereinbar anzusehen ist, wie dies der Rat des Völkerbundes in seiner am 13. Februar 1920 in London abgegebenen Erklärung feierlich anerkannt hat, [...]“ ["The Federal Assembly of the Swiss Confederation, having considered a message from the Federal Council dated August 4, 1919, and a supplementary message dated

law, Alfred von Verdross argued that the participation of a neutral state in collective economic sanctions under Articles 10 and 16 of the Covenant against a state that had unlawfully attacked another state constituted unilateral behavior that violated the principle of impartiality as part of the law of neutrality.⁵³

Verdross saw particular problems in collective sanctions against states that were not members of the League of Nations. Since such a state was not required to comply with the obligations under the League's statutes, it could take reprisals.⁵⁴ It should be noted, however, that this has nothing to do with neutrality: Insofar as economic sanctions affect economic relations governed by international law, there is generally a right of retaliation regardless of neutrality. In the case of neutral states, however, there is also the violation of the principle of impartiality. This principle seems to require that sanctions be imposed not only on the aggressor, but also on the state that has been attacked. So, if, within the framework of the collective security system, the aggressor is to be sanctioned to stop his illegal actions, this view holds that the principle of equal treatment under the law of neutrality requires the imposition of the same sanctions on the attacked state. This was one of the reasons for Switzerland's hesitant adoption of EU sanctions against Russia.⁵⁵ However, this understanding of neutrality obligations un-

February 17, 1920, and expressly noting that the perpetual neutrality of Switzerland, which was recognized in particular in the Act of November 20, 1815, is recognized in Article 435 of the peace treaty concluded between the Allied and Associated Powers and Germany on June 28, June 1919 as an agreement for the maintenance of peace and that, according to Article 21 of the Covenant of the League of Nations, it is to be regarded as incompatible with no provision of that Covenant, as the Council of the League of Nations solemnly recognized in its declaration made in London on February 13, 1920, [...]. On Switzerland's special position as a member of the League of Nations *Jann von Sprecher*, Als die Schweiz zur integralen Neutralität zurückkehrte, in: *Schweizer Monat: Die Autorenzeitschrift für Politik, Wirtschaft und Kultur*, 2022, p. 63 f.

53 *Alfred von Verdross*, (note 34), pp. 326

54 *Alfred von Verdross*, (note 34), p. 327; *Andreas v. Arnault*, (note 4), margin note 1042.

55 On Switzerland's adoption of EU sanctions against Russia: *Thomas Cottier*, Der Ukraine-Krieg: Wendepunkt in den Beziehungen der Schweiz zur Europäischen Union und zur NATO?, in: *SRIEL* 2022, p. 547 ff.; *Peter Burckhardt/Paka Nina Lumengo*, Die Russland-Sanktionen der Schweiz, in: *RIW* 2022, p. 266 ff.; *Thomas Cottier*, Die Kernfrage der Neutralitätsdebatte, in: *NZZ* No. 160 of July 12, 2024, p. 18; on Switzerland and the EU sanctions *Pascal Lottaz*, Im neuen Kalten Krieg ist die Schweiz Konfliktpartei, in: *Schweizer Monat*, Volume 102, 2022, pp. 67-69; Federal Council, press release dated February 28, 2023, Switzerland adopts EU sanctions against Russia, www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.m

dermines the purpose of sanctions against the aggressor, because it requires the weakening of the attacked state, which is also sanctioned even though it has not committed any violation of the law. This also removes the legal disapproval of the aggressor's unlawful behavior: neutrality thus mutates into legal and moral indifference.⁵⁶

This no longer has anything to do with the original system-stabilizing function of neutrality: prima facie impartiality becomes covert partiality, because the neutral party effectively places itself outside the collective security system and does not really support its decisions. Nevertheless, Verdross approved Switzerland's decision in the Abyssinia War 1935/36 to impose a bilateral ban on the export of war material, rather than a unilateral ban as decided by the League of Nations, because in his opinion there is an incompatibility between neutrality and the sanctions regime under the League of Nations Covenant, in accordance with Article 16 CLN.⁵⁷ However, it remains unclear what this would concretely entail, as it could ultimately have meant an incompatibility between neutrality and League of Nations membership, at least for permanently neutral countries, which could only have been countered by a genuine neutrality reservation. This is contradicted by the fact that Switzerland, Belgium, Sweden, and the Netherlands became members of the League of Nations without a neutrality reservation.

The relationship between neutrality and the system of collective security can therefore be described as ambivalent and somewhat unclear at best, and incompatible at worst.⁵⁸ This also applies to the relationship between

sg-id-87386.html ; Anna Petrig, Die Vereinbarkeit von Sanktionen mit der Schweizer Neutralität, in: ZSR/RDS Volume 143 I, 4/2024, p. 413.

56 For details on the problem of indifference in connection with neutrality, see Paul Guggenheim, (note 50), pp. 64.

57 Alfred von Verdross, (note 34), p. 327; on the various views on the relationship between neutrality and Art. 16 CLN, see Jamal El-Zein, (note 2), pp. 58 f.; on Switzerland's distancing itself from the League of Nations, see Theodora Peter/Marco Jorio, In Europa herrscht Krieg – und die Schweiz ringt um ihre Neutralität, in: Schweizer Review, die Zeitschrift für Auslandschweizer, vol. 49, 6/2022, p. 7.

58 For a detailed discussion, see Adrian R. Schaub, Neutralität und Kollektive Sicherheit. Gegenüberstellung zweier unvereinbarer Verhaltenskonzepte in bewaffneten Konflikten und These zu einem zeit- und völkerrechtsgemässen modus vivendi, Diss. Univ. Basel, Basel/Frankfurt a.M. 1995; see also the comments by Peter Hilpold, *The right to neutrality at a crossroads: The situation in Austria and Switzerland from the perspective of international law, European law and constitutional law* pp. 22 in this volume.

neutrality and the prohibition of the use of force.⁵⁹ The Briand-Kellogg Pact largely, though not completely, prohibited war. This meant that, regardless of a neutrality status, all states were prohibited from providing military support to an aggressor state.

d) Neutrality and support for the (unlawfully) attacked state

The question arises, however, as to what influence neutrality has on the permissibility of supporting the attacked state, or to what extent neutrality can still have any effect in this regard. Since neutrality is a concept based on the permissibility of war, it can be argued that its basis ceases to exist when wars are prohibited. It is not neutrality, but the *dichotomy of permissible and impermissible use of force* that would then be decisive, leaving no room for neutrality, but requiring sanctions in the form of individual or collective, including military reprisals to enforce norms and stabilize the system, e.g., within the framework of a collective security system. Because neutrality does not apply, even those who are permanently neutral may support the attacked state, even with military means. In this respect, they have the same freedom of choice as all other states, although they are of course free to refrain from providing support on the basis of an autonomous (neutrality) policy decision. What is missing is legal obligation.

This view is rejected by Verdross. He believes that neutrality continues to apply, as there is no obligation under international law to assist the attacked state.⁶⁰ This is correct insofar as such an obligation would leave no room for neutrality. The opposite assumption, namely that neutrality applies as a result of the absence of an obligation to provide assistance, is not compelling. The very inadmissibility of wars, given the legal and moral indifference associated with neutrality, argues against an obligation to remain neutral. In the interwar period, a concept of neutrality was developed that, in deviation from the strict principle of equal treatment, allowed discrimination against the aggressor.⁶¹ In the second edition of

59 For details on the relationship between neutrality and the Briand-Kellogg Pact, see *Jamal El-Zein*, (note 2), pp. 60 with further references.

60 *Alfred von Verdross*, (note 34), p. 327; see also *Michael Bothe*, Neutrality, Concept and General Rules, in: MPEPIL 2015, paras. 10 and 28et seq.

61 Cf. *Jamal El-Zein*, (note 2), pp. 62 with further references. The USA followed this view at the outbreak of World War II until it entered the war.

his work on international law, published in 1950, Verdross retrospectively notes, in contrast to the first edition, that during the First World War there had been a revaluation of neutrality, with the view gaining ground that every state was obliged to take a stand against an aggressor acting in violation of international law.⁶² Verdross noted a very widespread view that a war of aggression constituted a crime against the international community, against which all states must intervene in solidarity.⁶³ Verdross constructed this *ex post* in 1950, even though in the interwar period there was no concept of international law norms applicable *erga omnes*. Verdross then rightly notes that the *Brian-Kellogg Pact* does not recognize any obligation to remain neutral.⁶⁴ The pact does not in fact comment in any way on neutrality, nor does it generally comment on the consequences of violating the prohibition of war. This was the purpose of the collective security system of the time, embodied in the League of Nations. A key question for Verdross is to what extent support for the attacked state is permissible. He argues that such assistance is permissible in the absence of an obligation of neutrality, but that this means that such a state can no longer invoke neutrality.⁶⁵ Anyone who does not want to be drawn into war must be neutral. Clearly, Verdross rejects the view that under the law at the time there was an obligation to support a state under attack. This, he argues, is a legal policy requirement that would abolish neutrality in the case of unlawful wars. In the case of non-prohibited wars, on the other hand, the right to be neutral would continue to exist.⁶⁶

Verdross's remarks point to a fundamental problem of neutrality in cases of wars that violate international law: *those who wish to benefit from neutrality status must not support the attacked state*. They must adhere to the principle of equal treatment and treat the aggressor who violates international law in the same way as the victim of aggression – even in the case of unjust, illegal wars. In view of this, it is not surprising that after the end of both the First and Second World Wars, neutrality fell into disrepute in some quarters: the neutral party was seen as an unsupportive profiteer. However, this meant that the conflict-limiting aspects of neutrality were lost sight of.

62 *Alfred von Verdross*, *Völkerrecht*, Vienna 1950, p. 397 et seq.

63 *Alfred von Verdross*, (note 62), p. 398.

64 *Alfred von Verdross*, (note 34), p. 327.

65 *Michael Bothe*, *Neutrality, Concept and General Rules*, in: *MPEPIL* 2015, para. 16 et seq.

66 *Alfred von Verdross*, (note 34), p. 328.

4. The influence of UN coexistence law and the collective security system on neutrality

a) The partial dissolution of the right to neutrality in UN coexistence law

The UN Charter sets out key principles of coexistence in Articles 1 and 2. Article 1 describes the objectives of the UN, while Article 2 sets out the principles to be observed in pursuing these objectives. The purposes include the maintenance of peace, including the use of the collective security system, the development and promotion of friendly relations among nations to ensure international peace, and global cooperation to address common problems, while respecting and promoting human rights. These purposes are fundamentally irrelevant to neutrality. Coercive measures within the framework of the collective security system may constitute a certain exception. We will return to this point later. The principles relevant to the implementation of the UN's objectives are the sovereign equality of states, the obligation to fulfill the obligations of the Charter in good faith, the duty to settle disputes peacefully, the prohibition of the use of force, the obligation to implement UN measures, in particular sanctions, the renunciation of support for a sanctioned state, and the principle of non-interference. All these principles are set out in the famous Resolution 2625 (XXV) of the UN General Assembly of 1970, the so-called Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. This resolution, which was adopted by consensus, forms the core of the international law of coexistence, alongside the provisions of the Charter.⁶⁷ The Declaration does not mention neutrality. Neither it nor other UN resolutions provide any direct indication of a possible special status for neutral states. Rather, the obligations under the principles of coexistence apply to all states without exception. However, the principles have an indirect impact on neutrality.

The definition of the prohibition of the use of force is of particular importance. The obligation derived from this to prevent the deployment of troops and armed groups for incursions into a third country is particularly striking. This obligation, which was previously postulated for neutral

67 UN-GA, Resolution A/RES/2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

states, thus becomes a general one. At the same time, as already noted, the general prohibition of the use of force undermines neutrality. The obligation to settle disputes peacefully and the prohibition of intervention, i.e., the requirement not to interfere in the internal affairs of other states, are self-evident for neutral states, especially for permanently neutral states, but apply to all states. This means that no unique selling point can be established for neutrality. This also applies to respect for the principle of sovereign equality of states. From this it can be deduced, among other things, that the territorial integrity and political independence of a state are inviolable.⁶⁸ What used to be a privilege of neutral states is now valid to all states.

The UN law of coexistence has thus led above all to *the special legal status of neutral states becoming generalized in essential areas* and becoming part of the general principles of coexistence. Neutral states such as Switzerland can still invoke the special norms of neutrality law. In substance, however, the *law of neutrality is largely superseded by the UN law of coexistence*. Although there is no direct conflict between the norms,⁶⁹ the newer norm replaces the older one. In other words, the modernization of the law of coexistence has led to the partial disappearance of the law of neutrality.⁷⁰

b) The impact of the UN system of collective security

The collective security system is embedded in UN coexistence law and serves to enforce its security-related aspects. This is already expressed in the first sentence of the operative part of the UN Charter, in Article 1, paragraph 1, sentence 1, according to which the United Nations sets itself the goal, among other things, of "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and for the peaceful settlement

68 See paragraph 2(d) of the description of the sovereign equality of states in the 1970 Declaration; on the right to self-defense and state sovereignty, see *Dirk Hasler*, *Das Recht der staatlichen Selbstverteidigung: von der zulässigen Ausnahme zur rechtswidrigen Regel?*, in: *Sicherheit und Frieden*, 1/2006, pp. 33-37.

69 See in this context Article 103 of the UN Charter, according to which, in the event of a conflict between obligations under the Charter and obligations under other international agreements, the obligations under the Charter shall prevail.

70 In his contribution to this volume, *Ralph Janik* speaks of a definitive end to the law of neutrality as a consequence of the UN Charter; Janik (note 18) pp. 308

of international disputes or situations which might lead to a breach of the peace, by rapid and effective collective action according to the principles of justice and international law."

By its nature, the system of collective security is *cooperative law and, in exceptional cases, also integration law*. The Charter relies on international cooperation to secure, maintain, and restore peace under the leadership of the Security Council as the body primarily responsible for peace. In this context, Article 2(5) of the Charter requires Member States to cooperate with each other and with the UN in enforcing decisions and prohibits support for states against which sanctions have been imposed. Furthermore, Article 25 of the UN Charter stipulates that the members of the United Nations agree "to accept and carry out the decisions of the Security Council in accordance with this Charter." Resolutions of the Security Council based on Chapter VII of the Charter may have the legal nature of recommendations or may be legally binding on the parties to the conflict, but possibly also on all member states. This depends on the will of the Council as reflected in the wording of the resolutions. In contrast, resolutions of the Security Council under Chapter VI are generally mere recommendations to the parties to the conflict. The decisions of the General Assembly in conflicts are also generally mere recommendations. Article 25 does not differentiate between the legal nature of the decisions. The fact that such decisions may be politically binding rather than legally binding does not preclude an obligation to observe and implement them. However, failure to comply with this obligation cannot be qualified as a violation of membership obligations.

What is the relationship between the collective security system and the law of neutrality? In principle, collective security takes precedence. This follows from Articles 2 (5), 25, and 103 of the Charter. This means that binding decisions take precedence over the law of neutrality in any case, insofar as the latter can still play a role. This may be the case with equal treatment under the law of neutrality. A binding arms or economic embargo, for example, leaves no room for a policy of *courant normal*. If an embargo is directed only against one party to the conflict, e.g., because it is the aggressor or the violator of the law, a neutral party could unilaterally extend the embargo to the other party or parties to the conflict on the basis of the principle of equal treatment under the law of neutrality. However, the Security Council will have had its reasons for imposing a unilateral embargo. By taking such a measure, a neutral party would therefore be opposing the considerations and values behind the embargo decision. In

other words, it would be acting contrary to the spirit and intent of the decisions. This would probably be understood by very few of the member states.

This reveals a fundamental problem: what remains of neutrality in view of the development of UN coexistence law and the UN system of collective security *no longer allows for a coherent concept of neutrality*. Neutrality can no longer be understood in this context, and referring to neutrality does not result in a gain in legitimacy – quite the contrary. The corresponding options for action then exist independently of neutrality as an expression of national sovereignty.

The same considerations also apply to the non-binding resolutions of the Security Council and the General Assembly. It is true that objections based on the law of neutrality against such resolutions may be valid in view of their non-binding nature. However, even if there is no legal obligation to comply with these resolutions, they are shaped by considerations, values, and community interests that led to their adoption. Invoking the law of neutrality against resolutions that are intended to contribute to the resolution of a conflict is a difficult undertaking that will certainly not lead to a gain in legitimacy for neutrality.

The conclusion therefore remains that the right to neutrality *has practically no place* in an international system determined by the principles of coexistence and the UN's collective security system, *insofar as this system functions*. This is demonstrated – to take one example – by Switzerland's activities as a member of the UN. The right to neutrality played practically no role here, and neutrality policy played a highly subordinate role. Even when it was a member of the Security Council in 2023/24, Switzerland concentrated on traditional policy areas such as human rights, international humanitarian law, and conflict mediation.

c) Neutrality in the event of the failure of the UN system of collective security; Switzerland's conduct

After a brief period of rejection of neutrality by the victorious powers of the Second World War,⁷¹ it experienced a renaissance. The reason for this was

71 See Marco Jorio, (note 40), pp. 359; on the military violation of neutrality in the two world wars, see Jürg Martin Gabriel, Die Gegenläufigkeit von Neutralität und humanitären Interventionen, in: SZIER 2000, p. 222.

the formation of international blocs as part of the Cold War⁷² and the failure of the collective security system because of frequent vetoes by the most important veto powers, the US and the Soviet Union. This made it largely impossible for the Security Council to engage in genuine crisis and conflict management. Armed national and international conflicts smoldered largely unchecked—in some cases as proxy wars between the superpowers. In general, this situation of inadequacy on the part of the world organization and the weakness of the enforcement of central Charter norms revealed the tendency of many states to fall back on legal concepts and institutions of classical international law.⁷³ This also included neutrality.

In addition to the classic law of neutrality based on the Hague Conventions of 1907, new variants such as neutralism and non-alignment developed, which were far more political than legal concepts, but which found their place in international politics during the East-West conflict. Neutrality was also understood in many different ways. For example, there have been and continue to be forms of neutrality in which one of the parties to a conflict is supported by various non-military means.⁷⁴ It is unclear whether these are variations of neutrality or a violation of the law of neutrality.⁷⁵ Very few states that described themselves as neutral were guided by the Hague Conventions on Neutrality of 1907. After the Second World War, these conventions were ratified by only a very few states, and a total of only around 40 states have acceded to them, most of them from Europe and America. None of the well over 100 states that emerged after the Second World War in the context of decolonization have ratified these treaties. The conventions are therefore far from being globally applicable, and their norms can no longer be considered part of customary international law,⁷⁶ especially since their content is also very outdated, as they are based on

72 See Marco Jorio, (note 40), p. 373 ff.

73 See Wilhelm G. Grewe, *Epochen des Völkerrechtsgeschichte*, Berlin 1988, p. 794 f.

74 This is known as benevolent neutrality; instead of many *Heintschel von Heinegg*, *Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality*, in: *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, in: Brill/Nijhoff 2007, p. 545. This applied, for example, to the neutrality of the United States before its entry into World War II; cf. *Peter Hostettler/Olivia Danai*, *Neutrality in Land Warfare*, in: MPEPIL 2015, para. 3.

75 *Peter Hostettler/Olivia Danai*, *Neutrality in Land Warfare*, in: MPEPIL 2015, para. 4, according to which these are violations of neutrality.

76 A. M. Michael Bothe, *Neutrality, Concept and General Rules*, in: MPEPIL 2015, para. 7.

the premise that wars are a means of enforcing national interests that is permitted to states.

However, after the end of the Second World War and during the Cold War, neutrality appeared to many states to be an attractive way of avoiding being drawn into military conflicts, especially conflicts between the super-powers and their allies. These states could rightly claim that by turning to neutrality, they were attempting to fill a legal vacuum because the collective security system was not working. The regression to the right of coexistence and its resurgence in its seemingly classic form therefore appeared to be a sensible fallback position in view of the failure of the international system to secure peace. However, this renaissance had little to do with classic neutrality as part of the right of coexistence. Normally, states, after the Second World War, did not participate in armed conflicts between third states, but did not see themselves as neutral, but simply as not involved in the conflict and not interested in it. This had nothing to do with the classical idea of neutrality as a status resulting, as it were, *ex lege*, with binding rights and obligations for states not involved in a war. Ultimately, this neutrality was a shadow of its former self: it could only be applied in the event of a failure of the collective security system and, given the low level of ratification of the Hague Conventions on Neutrality, its significance was somewhat unclear. In addition, it faced competition from concepts such as neutralism and non-alignment,⁷⁷ and was ultimately overshadowed by the prevailing view that strict neutrality was incompatible or at best only partially compatible with the obligations of the Charter.

Only a few states adhered to the traditional concept of neutrality, foremost among them Switzerland, which for a long time placed neutrality at the center of its foreign relations, which prevented it from becoming a member of the UN until the end of the Cold War. This very doctrinaire understanding of neutrality, which went far beyond what was legally required,⁷⁸ and the resulting political consequences were unique. Other European neutral countries such as Austria, whose neutrality was established

⁷⁷ *Michael Bothe*, Neutrality, Concept and General Rules, in: MPEPIL 2015, para. 16 ss.

⁷⁸ For details, see *Marco Jorio*, (note 40), pp. 358, esp. pp. 379; on Switzerland's understanding of neutrality, see *Christophe Farquet*, Neutral Paradoxes. Switzerland and the Allies at the Beginning of the Second World War, in: *Diplomacy & Statecraft*, Vol. 35 4/2024, pp. 605–630, esp. p. 614.

on the model of Switzerland,⁷⁹ Sweden, Ireland, and Malta⁸⁰ handled their neutrality much more flexibly and integrated themselves without any problems into all important international organizations, including the EU. In Switzerland, on the other hand, the very sovereignty-oriented level of coexistence was so dominant that any steps toward international cooperation and integration immediately raised domestically the question of neutrality.

With the end of the Cold War and the resurgence of a functioning system of collective security, Switzerland also revised its concept of neutrality, which was outdated in every respect.⁸¹ It joined the UN after having already largely adopted UN sanctions as a non-member state in order to avoid being suspected of indirectly helping sanctioned states, and reduced its neutrality to its so-called legal core, i.e., essentially to the Hague Conventions on Neutrality of 1907. As a result, neutrality played no role for Switzerland within the framework of the UN.⁸²

What is the so-called legal core of neutrality in the state system ruled by the UN Charter? The inviolability of territory and the fundamental non-participation in armed conflicts are rights and obligations that already arise from the principles of coexistence, namely the prohibition of the use

79 See *Peter Hilpold* (note 58); on Austria's neutrality in comparison to Switzerland's neutrality, see *Gerhard Jandl*, 20 Years of Austrian Partnership with NATO – Record and Outlook, in: *Politorbis*, Nr. 61: Schweizer Partnerschaft mit der Nato 1/2016, p. 75; on the comparison of the law of neutrality between Austria and Switzerland, see *Peter Hilpold*, Das Neutralitätsrecht Österreichs und der Schweiz im "weiten Feld" des internationalen Rechts, Aktuelle Entwicklungen im Vergleich, in: *AVR* 60/2022, pp. 268–287; on Austria's neutrality following the example of Switzerland, see *Ralph Janik*, Neutralität 2023: 2023: Verfassungs- vs. Völkerrecht? Von Einheit zum Widerspruch, in: *ZöR* 2024, p. 358; on the debate on Austria's neutrality in comparison to Switzerland, see *Martin Senn*, Eine Debatte über Österreichs Neutralität: Warum sie notwendig ist und wie sie geführt werden sollte, in: *ÖZP*, Volume 53, 2024, p. 2.

80 For a detailed discussion of the neutrality of Ireland and Malta, see *Ulrike Haider-Quercia*, Neutrality in the European context: Constitutional perspectives of Ireland and Malta pp. 337 in this volume; for a comparison of the understanding of neutrality between Switzerland and Finland, Austria, and Sweden, see *Matthieu Gillabert/Pauline Milani*, Communicating neutrality: public diplomacy by neutral states at the beginning of the Cold War in: *European Review of History: Revue Européenne d'histoire*, vol. 27, 5/2020, pp. 628–650.

81 For a detailed discussion of this development, see *Marco Jorio*, (note 40), pp. 419. For *Ralph Janik*, this is the time of the "swan song of neutrality," cf. *Ralph Janik*, (note 18) pp. 296.

82 For further information on Switzerland's neutrality in the UN Security Council from today's perspective, see *Anna Petrig*, Die Schweiz im UNO-Sicherheitsrat, in: *BJM* 2023, pp. 39–69.

of force and the principle of sovereign equality of states. A direct influence of the law of neutrality is particularly evident in the prohibition of participation in collective military self-defense to protect a state under attack, as long as and to the extent that the Security Council has not taken the necessary measures.⁸³ However, the decision not to provide military assistance to a victim of aggression can just as easily be a sovereign decision by a state. Neutrality is not necessary for this. As a rule, formal decisions by states and groups of states were only made in the event of military support for a state under attack. Insofar as the question of assistance is discussed at all in other states, the discussion is only determined by considerations of neutrality in very few states. General political considerations are at the forefront. In the vast majority of states, there are normally no such discussions.

Another, possibly relevant, principle of neutrality law is the requirement of equal treatment of the parties to the conflict. However, this obligation also only plays a role if the Security Council has not issued any binding resolutions based on Chapter VII of the Charter, i.e., if the UN system of collective security is not functioning in an armed interstate conflict. Otherwise, Security Council resolutions, such as a general arms embargo, apply to the parties to the conflict at large. The principle of equal treatment can have an impact in the area of war material deliveries, for example by obliging neutral states to stop supplying military goods to a state that has recently become involved in an armed conflict.⁸⁴ In Switzerland, neutrality played a role as to the refusal to grant NATO states permission to fly over its territory in military interventions in Serbia and Kosovo that were not authorized by the Security Council. However, these are all side effects. Neutrality is not required as a justification for these measures.

83 *Michael Bothe*, Neutrality, Concept and General Rules, in: MPEPIL 2015, para. 10.

84 For an assessment of the supply of war material according to contemporary and modern international law, see *David Furger*, Due Diligence bei der Waffenausfuhr genehmigung - Zu den völkerrechtlichen Anforderungen an die nationale Kriegsmaterialkontrolle, in: *Sicherheit & Recht*, 3/2018, p. 176. For a detailed discussion of this issue, see the contribution by *Thomas Cottier*, Neutrality, Trade in Implements of War and the Prohibition of Force – From equal treatment of belligerents to the protection of human rights, democracy and the rule of law, pp. 233 in this volume; on Switzerland's position on the supply of war material, see *Priska Seiler Graf/Jo Lang/Anna Leissing*, Wie geht Friedenspolitik in der Schweiz?, in: *Neue Wege, Beiträge zu Religion und Sozialismus*, vol. 115, 2021, pp. 11-18.

5. Neutrality and the layer of integration under international law

The layer of integration under international law is usually captured by the concept of *supranationalism*, i.e., the phenomenon whereby states create joint institutions to which they transfer powers in policy areas over which the institutional bodies can exercise political and regulatory authority on behalf of and above the political bodies of the participating states. This results in a genuine transfer of originally national powers to a joint international institution, which can exercise these powers with its own organs and independent powers. This, too, is an ideal type, embodied above all in the EU, and there are fluid transitions. For example, the practice of the UN Security Council sometimes has supranational features, e.g. when the Council imposes legally binding, directly applicable sanctions against non-state actors and individuals, or – as in the case of counterterrorism – when the Council imposes in resolutions general rights and, above all, obligations derived from existing international conventions on combating terrorism.⁸⁵

What is the relationship between neutrality and the layer of integration under international law? From a purely abstract point of view, the incompatibility between neutrality and this layer is even more obvious than with the layer of cooperation. The inherent aloofness of neutrality, the autonomy and sovereignty orientation it embodies, is incompatible with the communitarization of national competences within the framework of common institutions: what is communitarized is removed from the disposal of the nation state. In this respect, neutrality can no longer exist at the national level.⁸⁶

In reality, the contrast is less obvious because neutrality only affects a few policy areas, namely national and international security and the possibilities and limitations of corresponding intergovernmental cooperation.

85 Instead of many *others*, see Mehrdad Payandeh, Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte, in: ZaöRV 66/2006, pp. 41 ff.; on the general measures of the UN Security Council: Peter Wallensteen/Patrik Johansson, The UN Security Council: Decisions and Actions, in: von Einsiedel/Malone/Ugarte (eds.), The UN Security Council in the Twenty-First Century, London 2016, pp. 27-54; on sanctions against individuals, see Peter Wallensteen/Helena Grusell, "Targeting the Right Targets? The UN Use of Individual Sanctions," Global Governance 18/2012, pp. 207-230.

86 See also Adrian R. Schaub, (note 58), pp. 108.

Therefore, the institutionalized communitarization of many policy areas may be irrelevant to neutrality: economy, social affairs, human rights, culture, health, environmental protection—neutrality does not fundamentally limit cooperation in these areas. The EU therefore has neutral member states, namely Austria, Ireland, and Malta, and formerly also Sweden and Finland.⁸⁷ All these states participate in the EU's Common Foreign and Security Policy and Common Security and Defense Policy. However, the compatibility with neutrality is more than questionable. The relevant Article 42(7) of the EU Treaty contains a mutual assistance clause referring to the right to individual and collective self-defense guaranteed in Article 51 of the UN Charter. The provision reads as follows: "(7) 1 In the event of an armed attack on the territory of a Member State, the other Member States shall owe it all the aid and assistance in their power, in accordance with Article 51 of the Charter of the United Nations. 2 This shall not affect the specific character of the security and defense policy of certain Member States."

Paragraph 2 refers primarily to those EU Member States that are also members of NATO, in the sense that they fulfill their obligation to provide assistance within the framework of NATO. This is also indicated by paragraph 3, which reads as follows: "3. Obligations and cooperation in this area shall remain consistent with the obligations undertaken in the North Atlantic Treaty Organization, which remains the foundation of collective defense for its member states and the means of achieving it." This makes it clear that, given that 22 of the 27 EU member states belong to NATO, the EU's mutual assistance obligation is partly complementary to and partly subsidiary to the mutual assistance obligation in Article 5 of the North Atlantic Treaty.

87 On the relationship between EU membership and neutrality in the case of Austria, see *Peter Hilpold*, (note 58) pp. 35 in this volume; with reference to Ireland and Malta, see *Ulrike Haider-Quercia*, *Neutrality in the European context: Constitutional perspectives of Ireland and Malta* pp. 337; *Ralph Janik* comments on Austria's neutrality in "Neutralität schadet Österreich zunehmend" *Neutrality is increasingly damaging Austria!*, in: *Salzburger Nachrichten*, July 31, 2025, p. 2; on Austria, Finland, and Sweden's commitment to the common foreign and security policy, see *Hubert Isak*, *GSVP und Irische Klausel: Neutrale Mitgliedstaaten – Lösung oder Problem?*, in: *Sicherheit & Frieden*, vol. 36, 4/2018, pp. 186-190, esp. p. 186.

However, the paragraph is also to be understood in the sense of consideration for the neutral EU members.⁸⁸ However, this can hardly be understood as a general exemption from the obligation to provide assistance, because this would partly contradict its description in paragraph 1.⁸⁹ The reference to Article 51 of the UN Charter then makes it clear that the duty to provide assistance fundamentally includes the military component. However, an obligation on neutral states to provide military assistance would result in the elimination of the core elements of neutrality law that are claimed to be currently still in force. A military duty to provide assistance could at best be justified by the special legal nature and structure of the Union, with its almost federal-like relations between EU member states, also in contrast to the question of joining NATO as a purely defensive alliance. However, the viability of such an argument is doubtful: if a non-neutral confederation of states provides for an obligation of military assistance on the part of its members, the prevailing opinion is likely to be that the members are not neutral. At present, however, the understanding is that this provision takes neutral states into account, which means that they cannot be obliged to provide military assistance.⁹⁰

88 On the so-called Irish clause, see *Ulrike Haider-Quercia*, (note 87) pp. 337; also *Peter Hilpold* (note 58); on the Irish clause as a lifeline for neutrality, see *Waldemar Hummer*, Die neue EU als „Militärpakt“ Solidarität-Neutralität-„irische Klausel“, in: *EuZ* 2005, pp. 2-6; on the interpretation of the Irish clause, see also *Gerhard Jandl*, Die gemeinsame europäische Verteidigung – was ist sie, und wenn ja, wie viele?, in: *Sicherheit und Frieden* 4/2018, p. 174; on the Irish clause and the invocation of neutral status with reference to Austrian law, see *Peter Bußjäger*, Die Neutralität, die NATO und der Demos – Reflexionen über den Rang der Neutralität und eines allfälligen NATO-Beitritts in der Normenhierarchie der Bundesverfassung, in: *ÖZP* Volume 53, 2024, p. 4; on the UN Charter's consideration of the right to neutrality, see *Evelyne Schmid*, Optional but not qualified: Neutrality, the UN Charter and humanitarian objectives, in: *International Review of the Red Cross*, 2024, pp. 1044-1064, esp. pp. 1052

89 See also *Peter Hilpold* (note 58) pp. 35.

90 See also *Peter Hilpold*, (note 58) pp. 50 with a detailed explanation of Austria's concrete participation in military structures; on Switzerland's participation in the Sky Shield air defense system, see *Christof Forster*, Die Schweiz geht einen Schritt auf die Nato zu, in: *Schweizer Revue: Das Magazin für Auslandschweizer*, Volume 50, 5/2023, p. 23; on Switzerland's neutrality in the event of NATO membership, see *Ulrich F. Zwygart*, Natoisierung Europas – und die Schweiz?, in: *Schweizer Monat: The authors' magazine for politics, economics, and culture*, Volume 102, 2022, pp. 85-87; on Switzerland's armed neutrality, see also *Fritz Kälin*, Ein neuer Krieg stellt alte Fragen an die bewaffnete Neutralität, in: *ASMZ* Volume 189, 2/2023, pp. 4-7.

The neutrality of a state, especially permanent neutrality, is based very strongly on its autonomy and sovereignty. It avoids legal commitments that contradict neutrality or terminates such commitments in the event neutrality is to be applied. This works without any problems at the coexistence level and largely at the cooperation level. The situation is different with regard to the level of integration, which is usually institutionally anchored and aimed precisely at curtailing national sovereignty in favor of joint bodies with independent powers. This does not mean a complete surrender of sovereignty, but rather its significant downgrading to a guarantee of autonomy determined by integration law with residual sovereignty, insofar as this is not covered by integration efforts. However, as soon as integration relates to external security, there is little room for the application of neutrality law. This requires a genuine reservation in favor of neutral states, insofar as this is compatible with the goals of institutionalized integration. However, this results in asymmetries regarding the obligations associated with integration rights, in such a way that the neutral state appears to be a non-solidary maverick that benefits from joint security arrangements while selfishly pursuing its own interests. Nothing remains of the original idea of neutrality, namely the limitation of war and the protection of islands of peace in the interests of regional stability. It therefore has been rightly stated that neutrality has dysfunctional effects in an integrated community of states.⁹¹

6. Conclusion: What remains of neutrality

Neutrality has repeatedly been the subject of fierce criticism: after the First World War as a result of the League of Nations' new system of collective security;⁹² after the Second World War; and more recently in connection with Russia's war against Ukraine, although opinions are divided on this issue, including in this volume: For some, this conflict shows that neutrality has

⁹¹ *Adrian R. Schaub*, (note 58), pp. 108

⁹² *Jamal El-Zein*, (note 2), pp. 55. with references to contemporary authors who argue that neutrality is incompatible with the system of collective security.

become irrelevant,⁹³ while others see it as gaining political significance.⁹⁴ The fact is, however, that there are regular publications predicting the end of neutrality. A recent dissertation on international law simply states the death of the law of neutrality.⁹⁵ However, it must be noted that those declared dead sometimes live longer than expected. This also applies to neutrality. The war in Ukraine has at least led to a resurgence of the neutrality debate, to attempts at self-assurance based on a traditional understanding of neutrality, but also to criticism of neutrality.⁹⁶

A sober analysis of the development of the international legal order against the backdrop of the three layers of international law described above reveals an obvious, but in view of the development of the international system, logical, inevitable, and unsurprising decline of neutrality. Neutrality is a product of classical international law, i.e., the law of coexistence in its traditional form, not yet modified by the law of cooperation. As a result, the law of neutrality experienced its heyday until the First World War, culminating in the Hague Codifications of Neutrality of 1907. Neutrality meant limiting war, which was permissible, protecting neutral states, providing certainty for the belligerent states, and ensuring regional stability despite war. In this respect, neutrality was in the interest of all.

Under the law of cooperation, the concept of a collective security system in particular poses a challenge to neutrality and the law of neutrality – both under the Covenant of the League of Nations and under the UN Charter. Collective security means, to a certain extent, the *communitarization of national competences in defense and security policy in international institu-*

93 See the critical discussion in various articles in this volume. *Ralph Janik* states: "Legally, neutrality has been dead for a good 80 years, and strictly speaking, it will soon be 100 years.; Janik (note 18) p. 308. On Switzerland's departure from classical neutrality, see *Daniel Woker*, Russia's War of Aggression in Ukraine as the Final End of Swiss Neutrality in Europe, in this volume; differentiating between permanent and situational war neutrality, see *René Rhinow*, (note 23) *passim* on the criticism of Switzerland's practice of neutrality, *Markus Mohler* (note 46) *passim*.

94 See the notes by *Ralph Janik*, (note 18) p. 310 and *Ulrike Haider-Quercia*, (note 87) pp. 337.

95 See *Jamal El-Zein*, (note 2), *passim*.

96 See also *Ralph Janik*, (note 18) pp. 302 ("Neutrality after February 24, 2022: legal end and (political) comeback?"); for a critical examination of Swiss neutrality in the Ukraine war, see also *Markus Mohler*, Neutralität mit Verfallsdatum bei Kriegsmaterial? Statt dessen: UNO-Charta konformer Vorschlag, in: *Jusletter* of March 3, 2025, p. 6; on arms deliveries to Ukraine and their compatibility with the law of neutrality, see *Stefanie Schmahl*, Völker- und europarechtliche Implikationen des Angriffskriegs auf die Ukraine, in: *NJW* 2022, p. 973.

tions. At the same time, states are deprived of the right to wage war. This is replaced by international mechanisms for inter-state dispute resolution and, in general, the desire to curb the use of military force, not only in inter-state conflicts but also in internal conflicts.⁹⁷ This reveals the main problem of neutrality as a set of norms under international law: the prohibition of force undermines the central basis and premise of neutrality. The right to collective security in the service of the prohibition to use force takes precedence over the right to neutrality and renders it largely irrelevant, even if collective security does not function properly. In general, the system of collective security and the numerous regional and global crisis and conflict management activities of the UN and regional organizations make neutrality a marginal phenomenon: with functioning global and regional security institutions, there is no need for neutrality. Nor is the label of "neutrality" necessary for indifference to third-party conflicts, provided that no generally applicable sanctions are imposed, or for mediation activities. Neutrality can only (re)emerge if the system does not function or does not function fully. In this respect, it can have a niche existence in exceptional situations but remains in a precarious position because it is questionable whether it will produce meaningful results for the international community. Especially in the form of permanent neutrality, it becomes an *exceptionalist position that demands recognition, consideration, and understanding from the international community* without any visible advantages for the latter, especially since incompatibilities with cooperation and integration law repeatedly arise, which are challenging for the very few remaining neutral states: this applies, for example, to the application of the principle of equal treatment or the prohibition of discrimination in armed international conflicts that violate international law and have a clearly identifiable aggressor. When is the aggressor clearly identified? What are the requirements for multilateral support for such a determination? Does the prohibition of discrimination then mutate into an obligation to discriminate? Is the indirect

97 Thomas Fischer, Die Grenzen der Neutralität. Schweizerisches KSZE-Engagement und gescheiterte UNO-Beitrittspolitik im Kalten Krieg, 1969–1986, in: Schweizer Beiträge zur internationalen Geschichte – Contributions suisses à l'histoire internationale, Volume 7, Zurich 2004, p. 129; Alois Riklin, Checkliste zur Neutralität der Schweiz, in: ASMZ, Volume 188, 9/2022, p. 16 ff.; Andreas Barz, Das Ende der Neutralität, Die neutralen Staaten im Wandel der Weltpolitik, in: APuZ 1992, Volume 47-48, p. 3-11; Barbara Haering/Peter Hug, Zur Neutralität der Schweiz im 21. Jahrhundert, in: ASMZ 2007, Volume 173, 2/2007; Hugo Bütler: Neutralität am Ende?, in: Zur Diskussion gestellt: Bewaffnete Neutralität heute, Frauenfeld 1992, pp. 57-64.

or direct supply of war material or the transfer of war-related information permissible? Does the right to collective self-defense under Article 51 of the UN Charter imply that a neutral party may also provide military support to the victim of aggression? One of these questions can be answered relatively clearly: a neutral party may not provide direct military support to the victims of aggression, i.e., participate in combat operations. The rest is unclear: questions, nothing but questions.

Almost all international conduct that claim neutrality as their basis can be supported by traditional principles of international law, namely sovereignty, the prohibition of intervention, and the prohibition of the use of force. *In contrast, references to neutrality end up in a semantic cage* from which there is hardly any escape, obscuring the actual problems and leading to irrational discourse. Instead of reflexively invoking neutrality, whose apparent, normatively bound lack of alternatives often fails to produce clear, comprehensible answers to problems, the freedom of action gained without neutrality should be used in the sense of interest- and value-guided individual but also internationally coordinated policies within the framework of the relevant institutions, to ensure peace, contain and resolve armed conflicts, and enforce central norms of the international system. This is clearly more effective than shadow boxing with meaningless terms.

The conclusion is therefore clear: very little to almost nothing remains of the right to neutrality. It does contain, particularly in the form of the 1907 Neutrality Conventions, a stock of standardized options for action that individual states or groups of states can follow in specific cases. However, these courses of action are not mandatory and do not stem from any overarching concept, but they do have the advantage of being historically proven. They can be considered by states within the framework of sovereign decisions in specific conflict situations. However, this does not require the term neutrality. Under these circumstances, neutrality can at best exist as a legal niche.

This is a particular problem for states that see themselves as permanently neutral. They are in the process of losing part of their identity and their foreign policy orientation. The law of neutrality may then play a role, albeit a very minor one, if in a specific case the Security Council is unable to take the necessary measures, usually because of a veto. The specific effects are limited to the fact that the neutral state is prohibited from supporting the attacking and attacked states militarily or with war material. In addition, there are more symbolic actions such as the refusal of overflight or transit

rights. This does not win any friends: depending on the circumstances, it is seen as a lack of solidarity with a victim of aggression and the states supporting it, or even as taking sides with the aggressor. For permanently neutral states, this residual right to neutrality acts as a *normative straitjacket that* does not allow for *any consideration of the circumstances and thus* does not permit *any policy tailored to the specific situation*. At the same time, the stability- and peace-securing aspect of neutrality is not apparent. States that are not legally neutral do not have these problems. They can take ad hoc measures that they deem appropriate or take no action at all, depending on the circumstances and in accordance with their sovereign rights. This includes stopping or, on the contrary, expanding the supply of war material, granting or denying overflight and transit rights. Neutrality is not needed as a justification.

We must see things as they are: neutral states are a very small minority. There are very few classic cases of neutrality left, the scope of application of neutrality law has become very small, and more and more textbooks on international law do not (or no longer) deal with neutrality, or only very briefly at the end – as a kind of reminiscence of a formerly relevant set of international law norms.⁹⁸ It has become a *niche concept of declining importance*. As far as can be seen, there are no discussions of neutrality in Africa, Asia, or Oceania, and only very marginally in North and South America. Forty-five years ago, Dietrich Schindler argued that the law of neutrality was now practically only a right of permanently neutral states⁹⁹ –

98 The third edition of the work by Verdross, *Alfred Verdross/Bruno Simma*, *Universelles Völkerrecht. Theorie und Praxis*, 1984, deals only very briefly with permanently neutral states, §§ 400–403 in the section on subjects of international law, without going into further detail on the law of neutrality; The fifth edition of *Andreas von Arnault's* textbook, *Völkerrecht*, fifth edition 2023, deals with the topic of neutrality sporadically in the context of the law of armed conflict, paras. 1209–1215. The 8th edition, Munich 2024, of *Völkerrecht* by *Knut Ipsen* contains comments on neutral states in the section on subjects of international law, § 7, margin numbers 145–148, and on the law of neutrality, § 66. In the 8th edition of 2019, *Völkerrecht* by Wolfgang Graf Vitzthum/Alexander Proelß (eds.), *Michael Bothe* discusses neutrality in the section on peacekeeping and martial law, p. 854 ff.; Akehurst's *Modern Introduction to International Law?*, by *Alexander Orakhelashvili*, 9th edition, London 2022, contains a short section on "Law of neutrality," pp. 534–537.

99 *Dietrich Schindler*, *Die Lehre von den Vorwirkungen der Neutralität*, in: *Festschrift für Rudolf Bindschedler zum 65. Geburtstag* 1980, p. 573; on permanently neutral states, based on Verdross *Julia Schreiner*, *Neutralität nach „Schweizer Muster?“*, *Österreichische Völkerrechtslehre zur immerwährenden Neutralität, 1955–1989*, Baden-Baden 2018, p. 44.

of which there are fewer and fewer. The days of a universally applicable law of neutrality are therefore probably numbered.

*As a concept and a vague description of possible courses of action, neutrality will continue to exist, stripped of its basis in international law.*¹⁰⁰ In this context, it is also conceivable to take the traditional Hague Conventions as a guide, if this makes sense and is appropriate. However, this is not done out of an awareness of a legal obligation, but pragmatically to decide practical questions.

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100 Similar conclusions are drawn by Ralph Janik, (note 18) p. 310.

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

*Thomas Cottier**

Abstract

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

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I. Introduction

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

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

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- 1 Alois Riklin, Neutralität am Ende – 500 Jahre Neutralität der Schweiz, (The end of neutrality -500 years of Swiss neutrality), *Zeitschrift für schweizerisches Recht* 5 (2006) I. S 563, 592; Peter Hilpold, Das Neutralitätsrecht Österreichs und der Schweiz im «weiten Feld» des internationalen Rechts, (The law of neutrality of Austria and Switzerland in the "wide field" of international law) *Archiv des Völkerrechts* 60 (2022) pp. 268, 284/285.
 - 2 For a detailed discussion of the uncertainty in Austria and Switzerland and the current debate on neutrality, see in particular Peter Hilpold, The right to neutrality at a cross-roads: The situation of Austria and Switzerland from the perspective of international law, European law and constitutional law, in this volume pp. 17-66.

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

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

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

II. The Law on War Materials

A. Foundations

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

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

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

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

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

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

B. The War Materials Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. International Economic and European Law

A. WTO Law and National Security

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

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

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

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

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

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

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

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

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

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

B. The UN Arms Trade Treaty

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

- The inherent right of all States to individual or collective self-defence as recognised in Article 51 of the Charter of the United Nations;
- The settlement of international disputes by peaceful means in such a manner that international peace and security and justice are not endangered in accordance with Article 2(3) of the Charter of the United Nations;
- Refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations in accordance with Article 2(4) of the Charter of the United Nations;

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

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

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

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

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

C. European Law

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

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

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

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

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

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

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

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

IV. Effects of Neutrality

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

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

A. Neutrality in the Constitution

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

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

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

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

B. Neutrality and the War Materials Act

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

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

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

C. The Hague Conventions of 1907

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

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

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

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

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

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

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

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

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

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

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

V. The Impact of the Prohibition of Force

A. The Paradigm Shift

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

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

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

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

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

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

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

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

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

B. Primacy of the Prohibition of Force

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Qualified Neutrality

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Direct Effect of International Law

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

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

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

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

E. Consistent Interpretation

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

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

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

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

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

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

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

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

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

F. Allocation of Powers

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

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

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

VI. Efforts at Revision

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

A. Re-exportation of War Materials

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

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

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

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

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

B. The Exportation of War Materials

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

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

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

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

VII. Prospects

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

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

⁷⁹ Loc. cit. (note 63).

⁸⁰ SRF Tagesschau, 2 December 2025.

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

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

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

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

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

82 Loc. cit. (note 29).

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

VIII. Uniform Legislation

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

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

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

IX. Defence Cooperation of Neutrals within Europe

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

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

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

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

84 Loc. cit. (note 31).

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

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

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

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

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

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

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

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

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

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

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

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

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The Return of Neutrality¹

Ralph Janik

Abstract

Neutrality is caught in an inherent contradiction: On the one hand, it has been largely irrelevant as a matter of law for almost a century. The general prohibition of war and force protects all peaceful (!) states alike, neutral or not. On the other hand, neutrality has never disappeared as a *political* concept. There have always been good reasons for states to refrain from taking sides in international crises: avoiding the wrath of an aggressor, maintaining access to foreign markets and cheap raw materials, or extracting political benefits of various kinds. In light of the growing global instability of our times, neutrality appears to be making a comeback.

To describe this legal decline and political revival, the present chapter first describes the parallel development of the broad right to wage war and the laws of neutrality from the eighteenth to the early twentieth century. It then explains how the latter became obsolete after the two World Wars, were revived during the Cold War, fell into abeyance again in the early 1990s, and are reemerging in the post-liberal world order. The conclusion is therefore straightforward: the more interstate war returns, the more neutrality gains in political, rather than legal, significance.

I. Introduction

Neutrality is a big and small word. Big because it can be used to convey the impression of a sober, objective and rational foreign policy, of being above the muddy ground of world politics. Small because neutrality usually means doing little or *nothing* at all, *i.e.* not taking a stand or sides, or, at the very least, not supporting any belligerent militarily.

¹ Thanks go to Andrew Scott Mansfield for helping me with the translation of this article. Any remaining errors or confusing formulations are my responsibility.

This passivity can therefore be both amoral and moral.² Once international law outlawed war, especially when it is clear which state is the aggressor, there is little to no justification to treat both sides as equals. At that point, neutrality is no longer, as it could be for most of its existence, a value-free security strategy.³ Staying neutral is now only justified when both sides may be partly, or perhaps equally, wrong or right, or where the situation of who is “in the right” is not (yet) sufficiently clear. Better to help no one than – intentionally or not – helping the wrong one.

From a legal perspective, neutrality and its underlying justifications have become irrelevant. While it has never been formally abolished, choosing this status does not offer any additional protection. The prohibition of force knows no difference between neutral and non-neutral states; it distinguishes between aggressors and their victims. When states act neutrally, they thus do so for political reasons. Legally speaking, a neutral state is no better off than a state that assists another in exercising its right to (collective) self-defence. While it is better protected, and perhaps “more moral,” than the aggressor state and those supporting it, that distinction does not amount to much.

This chapter explains why and how neutrality has nevertheless survived to the present day and is even enjoying a kind of a renaissance. This is particularly, though not exclusively, true in permanently neutral states such as Austria and Switzerland, where neutrality is often regarded as a hallmark of national identity, a precondition for peace, and, indeed, a source of moral superiority.⁴ Given the current global political turmoil,⁵ this is somewhat understandable. For that reason, it seems entirely possible that the *political* significance of neutrality will continue to grow.

Before we reach that point, however, there is still some ground to cover. We first need to trace the history of the law of neutrality from its heyday

2 On the ethical and moral aspects of neutrality, see Franz Cede and Ralph Janik, ‘Die ethische Dimension der österreichischen Neutralität. Spannungspunkte und Widersprüche’, in: Martin Senn and Jodok Troy, *Österreichs Neutralität: Recht, Politik und Gesellschaft – Eine Debatte* (transcript 2025), 153–168.

3 For a critical discussion of the self-proclaimed morality of permanently neutral states, first and foremost Austria, see Karl Zemanek, ‘Immerwährende Neutralität in der österreichischen Staatenpraxis’, in: Waldemar Hummer, *Staatsvertrag und immerwährende Neutralität Österreichs* (Verlag Österreich 2007), 197–212.

4 Zemanek (n 3), 197–198.

5 See, among countless others, Richard N. Haass, *A World in Disarray. American Foreign Policy and the Crisis of the Old Order* (Penguin Press 2017); Carlo Masala, *Weltunordnung: Die globalen Krisen und die Illusionen des Westens* (C.H. Beck 2025).

during Eric Hobsbawm's "long nineteenth century" to its demise after the two World Wars. But do not worry, the following pages are not a staccato enumeration of historical events but rather describe how the significance of the law of neutrality stands or falls with the level of respect for the prohibition of force (the *ius contra bellum*). The more states claim a broad right to wage war, the more important neutrality might become.

II. The origins of (modern) neutrality

Neutrality is as old as war itself. Whenever two or more politically organised communities fight each other – to use the broadest and most historically constant definition of war⁶ – some will deliberately keep their distance: be it out of fear, due to strategic considerations, to receive political concessions or economic benefits such as cheap energy and raw materials from Russia, as one could observe after its full-scale invasion of Ukraine. We thus find early examples of neutrality as a political instrument in ancient Greece⁷ and in the Old Testament.⁸ Even the Roman Empire's "either with us, or against us" logic occasionally allowed others to refrain from joining wars of conquest.⁹ Only the Middle Ages, with their feudal system of loyalties and the idea of a unified Christian realm, left no room for neutrality.¹⁰

Obviously, such historical excursions often lack detail and may be superficial. For example, the question of whether and to what extent the Greek city-states and the rules governing relations between them can be compared with the modern concept of sovereignty and the corresponding understanding of international law. The lesson, however, is clear: wars do

6 Hedley Bull, 'Recapturing the Just War for Political Theory', *World Politics* 31/4 (1979), 588–599 (595–596).

7 Robert A. Bauslaugh, *The Concept of Neutrality in Classical Greece* (University of California Press 1991).

8 Alfred P. Rubin, 'The Concept of Neutrality in International Law', *Denver Journal of International Law & Policy* 16/2 (1988), 353–375.

9 Peter Lyon, 'Neutrality and the Emergence of the Concept of Neutralism', *The Review of Politics* 22/2 (1960), 255–268 (258–259).

10 Lyon (n 9). Simon Hornblower, who mentions the 'limited neutrality' allowed in *foedus Cassianum* in his entry on neutrality in *The Oxford Classical Dictionary*, available at <<https://doi.org/10.1093/acrefore/9780199381135.013.4395>>. Cf Josef Kunz, *Kriegsrecht und Neutralitätsrecht* (Springer-Verlag 1935), 204, who emphasizes that there was no neutrality between Greeks and non-Greeks in antiquity or between Christians and infidels during the Middle Ages.

not necessarily draw others in. There will always be some political actors who choose to remain neutral.

The beginnings: de Vattel

For present purposes, this brief history of neutrality can begin much later than antiquity, namely with Emer de Vattel, perhaps the most important founder of its modern understanding.¹¹ His moral relativism, formed and applied during the age of cabinet wars, can be transposed almost seamlessly into the present-day “dog-eat-dog” understanding of international relations.¹² Although de Vattel did not entirely abandon just war thinking, he accepted the view that both sides could have a *iusta causa* to wage war, not only subjectively, but even objectively.¹³ At the same time, he considered this distinction insignificant only as between the warring parties themselves, not in their relations with neutral parties.¹⁴ If a “prince makes an unjust war, every one [sic] has a right to succour the oppressed party. If he makes a just war, the neutral nations may interfere as mediators for an accommodation,—they may induce the weaker state to propose reasonable terms and offer a fair satisfaction,—and may save her from falling under the yoke of a conqueror”.¹⁵ As we shall see, this argument remains relevant to the law of neutrality today, albeit in different forms and against different backgrounds.

11 See Koen Stapelbroek, ‘Vattel and the Seven Years’ War’ in: Peter Schröder, *Concepts and Contexts of Vattel’s Political and Legal Thought* (Cambridge University Press 2021), 101–120.

12 Philip Allott, ‘The Emerging Universal Legal System’, *International Law FORUM du droit international* 3 (2001), 12–17.

13 Yet, de Vattel was not the first, Alberico Gentili did so already during the late 16th century, see Joachim von Elbe, ‘The Evolution of the Concept of the Just War in International Law’, *The American Journal of International Law* 33/4 (1939), 665–688 (675–677).

14 See Albert Geouffre de La Pradelle’s Introduction to Emer de Vattel, *Le droit des gens ou principes de la loi naturelle. Volume One* (Carnegie Institution of Washington, 1916), xxi.

15 Emer de Vattel, *The Law of Nations or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns* (6th American Edition by Joseph Chitty, T. & W. Johnson, Law Book Sellers 1844), § 49, available at <https://tile.loc.gov/storage-services/service/l1/llmlp/DeVattel_LawOfNations/DeVattel_LawOfNation.s.pdf> last accessed 31 December 2025.

Furthermore, de Vattel was probably the first to argue that neutrality should be achieved not only through equal treatment of the belligerents, but also through abstention: “Neutral nations are those who, in time of war, do not take any part in the contest, but remain common friends to both parties, without favoring the arms of the one to the prejudice of the other.”¹⁶ This is especially true where, as is so often the case, complete substantive equality of treatment is impossible.

In this respect, de Vattel’s answer to one of the fundamental questions of neutrality has survived until this very day: Neutral nations must stay out of wars, but they “are under no obligation to renounce their commerce for the sake of avoiding to supply [the respective belligerent’s] enemy with the means of carrying on the war”.¹⁷ In other words: Neutrality is preserved if trade continues as it did before the war began and if all belligerents are being treated equally.

De Vattel set the tone for debates on neutrality over the following century. More generally, his writings also foreshadowed both the triumph of legal positivism and the definitive end of the Christian natural law concept of just war. From the late eighteenth century onwards, the dichotomy between *iusta* and *iniusta causa* gave way to the dual function of sovereignty: a right to be left alone *by* other countries and a right to act *against* other countries. This meant, on the one hand, a robust prohibition of intervention and, on the other, understanding war as a means of enforcing state interests.

The classic law of neutrality: von Martens

By way of illustration, three standard works on international law from the period between the French Revolution and the last years before the outbreak of the First World War will be discussed below: Georg Friedrich von Martens’ *Introduction to Positive European International Law Based on Treaties and Customary Law* from 1796 (first published – interestingly – in 1789 as *Precis du droit des gens moderne de l’Europe*), the first edition of Henry Wheaton’s *Elements of International Law* (1836), and that of Lassa Oppenheim’s famous *International Law. A Treatise* from 1905.

16 De Vattel (n 15), § 103.

17 De Vattel (n 15), § III.

Von Martens' *magnum opus* is remarkable because it stood at the beginning of the positivist turn in international law.¹⁸ As a textbook for diplomats, it focuses on the actual practice of European states as expressed in treaties and other legally relevant acts. In short, von Martens tried to approach international law scientifically, by systematising, classifying and subdividing it and by defining its subjects and analysing its instruments. This left no room for teleologically-determined wishful thinking. Von Martens essentially viewed the law as what it is and how it is applied, not what one might wish it to be, whether for reasons of morality, religion, or politics. Secondly, von Martens built on Vattel's work, to which he repeatedly referred.¹⁹ He regarded war as justified, and objectively just for both sides, where it was undertaken as a measure of last resort in response to a past, ongoing, or reasonably foreseeable violation of a "perfect" (*vollkommen*) duty, and where no agreement existed to resolve the dispute by other means.²⁰ Examples include respect for treaties, access to impartial courts for foreign nationals, the right to one's own and legitimately acquired territory, protection for soldiers who are unable or unwilling to fight, and, most importantly for present purposes, respect for neutral states.

Von Martens' understanding of war results from his equation of people with their state. Sovereignty is a kind of collective property right over the respective state territory: "As soon as a people occupies a district (von Martens uses the German word "*District*" in the original version), it thereby acquires ownership of everything located within that borough (*Bezirk*), to the extent that it can make use of it to the exclusion of all other peoples and dispose of it in any way it sees fit, provided that this does not violate the full rights of a third party."²¹ The state has "supreme authority" (*Oberherrschaft*) and the "sole discretion" (*alleiniges Ermessen*) to determine its

18 See Martti Koskeniemi, 'Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law', *Constellations* 15/2 (2008), 189–207. On a side note, the arguably first positivist with a systematic approach to international law was Richard Zouch, see Anthony H. O'Brien-Thomond, 'Positivism and Monism in International Law', *Franciscan Studies* 8/4 (1948), 321–350 (321–325).

19 When outlining the rules of warfare or distinguishing between offensive and defensive wars for example.

20 Georg Friedrich von Martens, *Einleitung in das positive Europäische Völkerrecht auf Verträge und Herkommen gegründet* (published by Johann Christian Dieterich, 1796), 79 [original spelling retained], available at <https://www.deutschestextarchiv.de/boek/show/martens_voelkerrecht_1796> last accessed 31 December 2025, 325.

21 Von Martens (n 20), 79 (these and all subsequent translations are by the present author).

constitution, i.e. “excluding any foreign participation” (*mit Ausschluss aller fremden Theilnahme*).²² It follows that, as long as its fundamental rights are not infringed upon, “no nation has the right to demand “accountability from another state for its actions, other than to compel it to undertake or refrain from such actions”.²³ This also includes the right of a people to freely determine their religion and, complementarily, the prohibition of imposing one's own religion on others.²⁴

In the event of a violation of their rights and claims, states have the right to first announce and then resort to armed self-help: “Once the demand has been duly brought to light, the rule is that an amicable reminder, whether direct or indirect through a third party, must precede any actual violence; but in the case of a justified demand, a nation is as little obliged to accept an arbitrator as it is to accept a settlement at all. Therefore, if the path of kindness does not work, or if it is foreseeable that it will not succeed, there is no other way left for free peoples, since they recognise no higher judge above themselves, than that of self-help.”²⁵

Simply put, in von Martens own words, war is “one of the most essential sovereign rights”.²⁶ In line with the philosophical mainstream of his and the preceding era, he relies on a combination of contract theory and, relatedly, on the assumption that interstate relations exist in a state of nature: “Since every nation is entitled to follow its best insights in this matter, but none is the judge of the other, every people retains the right to repel force with force, but wars between free peoples must in every doubtful case be judged as externally just on both sides, insofar as the treatment of the enemy and the conclusion of war treaties and peace treaties are concerned.”²⁷

Thirdly, von Martens provided one of the first summations of the law of neutrality. Provided that third states do not belong to any alliance or coalition, he held that the right of one to wage war goes hand in hand with the other's right to neutrality.²⁸ Here, in keeping with his aforementioned penchant for structuring and categorisation, von Martens distinguishes between *complete*, *incomplete* and *contractual* neutrality. The first corresponds with the dichotomy between general abstention and equal treatment

22 Von Martens (n 20), 80.

23 Von Martens (n 20), 137.

24 Von Martens (n 20), 133.

25 Von Martens (n 20), 291–292.

26 Von Martens (n 20), 297.

27 Von Martens (n 20), 297.

28 Von Martens (n 20), 340.

that we find in de Vattel's writings and that is still common today. Complete neutrality is the only one guaranteeing the neutral party that it will be "treated amicably by the warring parties, spared all acts of violence and not deprived of its rights".²⁹ If these obligations are violated in isolated cases but not in their entirety, neutrality is considered imperfect: the relevant right is therefore "not yet extinguished in its entirety", but "restricted (*neutralité limitée*)".³⁰ Contractual neutrality, in turn, corresponds to today's understanding of perpetual neutrality: states *may* commit themselves, both in times of war and in times of peace, not to interfere during present and potential future wars.

On this basis, von Martens subdivides the rights and obligations of neutral actors into rules on support, neutral territory, neutral goods in war zones, and trade, although he refers to peoples rather than to states.

To begin with, von Martens indicates that neutral states are not permitted to send troops, ships or armaments, provide financial support or allow their nationals (referred to as "subjects") to participate in hostilities. This differs from the later-codified law of neutrality, which expressly does not impose any obligation on neutral parties to prevent their nationals or other people living on their territory from joining a belligerent.³¹

Von Martens set forth a second outdated rule: Neutral states could decide – as long as they treated all parties to a conflict equally – to allow belligerents to move troops through their territory. This contradicts the now long-standing obligation upon neutral states to refrain both from tolerating and also to actively prevent such actions on their territory. Belligerents, in turn, may not move their armed forces or war material through neutral territory.³²

If neutral states comply with these obligations, then, neither their land or sea territory nor their "subjects" and goods may be exposed to "violent acts".³³ The only exceptions are situations in which, although von Martens does not elaborate on them, a belligerent's "true right of necessity" at least "excuses" it from marching through or fleeing to the territory of the neutral state without its consent.³⁴

29 Von Martens (n 20), 342.

30 Von Martens (n 20), 342 (emphasis in the original).

31 Article 6 of Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

32 Articles 2 and 5 of Hague Convention V.

33 Von Martens (n 20), 345.

34 Von Martens (n 20), 346.

Last but not least, he does not presume that there are any restrictions on private trade, not even regarding “dual-use” (to use today’s terminology) or genuinely military goods. The sole condition is, again, equal treatment. Belligerents themselves may, of course, confiscate contraband, take it for themselves so long as they pay compensation, or at least prevent it from falling into enemy hands.

War as a sovereign prerogative: Wheaton

The next major figure in the history of international law whose views on neutrality merit discussion is Henry Wheaton. His *Elements of International Law*,³⁵ which remained a standard work for over half a century after his death, aimed to provide lawyers with a “simple, clear and convincing description”³⁶ of the topic. Some even regard him as the (William) “Blackstone” of international law.³⁷

In comparison to von Martens, Wheaton’s treatise is far less systematic and structured. Following the Anglo-American tradition, he refers much more to contemporary – primarily US and British – practice in a loose structure that does not claim to be exhaustive. States, not philosophers, make law. For Wheaton, custom now became the supreme source of law.³⁸ Sovereignty trumped justice and natural law. Natural law, as *divine law*, was separate from the actual *law of nations* and its focus is not on people but on the state itself. Wheaton takes both for granted, each needs no further legitimization. “The only foundation [...] of international law, so far as it differs from the law of nature, is the general consent of mankind to consider each separate civil society as a distinct moral being.”³⁹

The same applies to the rights of states discussed in the second part of his *Elements of International Law*, above all self-preservation and independence. Due to the state of nature prevailing between states, each state may defend itself and make appropriate preparations to protect its territory and

35 Henry Wheaton, *Elements of International Law* (Carey, Lea & Blanchard 1836), 36.

36 Mortimer N. S. Sellers, ‘The Elements of International Law’, *International Legal Theory* 6/1 (2000), 12–15 (12).

37 Sellers (n 36).

38 William S. Dodge, ‘Withdrawing from Customary International Law: Some Lessons from History’, *Yale Law Journal Online* (2010), <<http://yalelawjournal.org/forum/withdrawing-from-customary-international-law-some-lessons-from-history>> last accessed 3 January 2025.

39 Wheaton (n 35), 39.

population at any time. Interference in foreign affairs is only allowed if a state's independence, freedom and security are directly affected.⁴⁰ The maxim, as we all know, or should know from interpersonal relationships, that the freedom of one person ends where that of another begins was also applied in classical international law in the 19th and 20th centuries.

In this context, one state's right to be left alone may yield to another's interest in waging war to enforce rights. In Wheaton's work we again find the well-known fundamental problem of international law, the lack of a universally recognised judge above the states and an effective and centralised enforcement mechanism: "Every state has therefore a right to resort to force as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society [...] Every state is also entitled to judge for itself the nature and extent of the injuries which will justify such a means of redress."⁴¹

We are therefore once again at the intersection of older natural law and early modern sovereignty. Natural law still required a just cause for war that could be understood objectively, even if asserted subjectively. Sovereignty, by contrast, "recognises no superior" and allowed rulers to judge their own causes, including alleged violations of peace by others: "Sovereignty is only fulfilled" by exercising jurisdiction, both internally and externally, and the ability "to enforce respect for its own peace mandate and the implementation of the law with military force from its equals, who, like it, recognise no superior above themselves",⁴² as von der Heydte once put it. Wheaton is a perfect example of this then-prevailing thinking: "The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs in every civilized nation to the supreme power of state."⁴³ As a consequence, he was one of the first, if not the first, who expressly announced the death of just war theory: "The voluntary or positive law of nations makes no distinction [concerning the *ius in bello* or related rights and obligations] between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effect, as just

40 Wheaton (n 35), 131.

41 Wheaton (n 35), 209.

42 Friedrich August Freiherr von der Heydte, *Die Geburtsstunde des souveränen Staates. Ein Beitrag zur Geschichte des Völkerrechts, der allgemeinen Staatslehre und des politischen Denkens* (Verlag Josef Habel 1952), 294.

43 Wheaton (n 35), 212.

on both sides. Whatever is permitted, by the laws of war, to one of the belligerent parties, is equally permitted to the other.”⁴⁴

Let us now turn to Wheaton’s thoughts about neutrality, to which he devotes the entire third chapter of part four to deal with alliances and “qualified neutrality”, the protection of neutral property, or the right to pursue, detain and search neutral ships for contraband (*ie* war-related material).

Wheaton cites impartiality as the primary duty of a neutral state (using de Vattel’s terminology). It is “the common friend of both parties, and consequently is not at liberty to favour one party to the detriment of the other”.⁴⁵ The only exceptions are cases of individual contractual obligations, *i.e.* qualified neutrality. Fulfilling these obligations does not make a state a party to the war and therefore does not lead to the loss of all rights arising from neutrality.

Wheaton identifies three central elements of neutrality. The first is the protection of neutral territory, including against the passage of belligerent troops or fleets. Here, unsurprisingly, he treats equal treatment as a basic prerequisite. The second is abstention. Drawing on de Vattel, Wheaton treats abstention as a general duty, which means that even qualitatively and quantitatively equal support for both belligerents would be incompatible with neutrality, quite apart from its practical difficulty. The third concerns the limits of neutral trade and the law of prize, including the imposition and breach of blockades. Here, too, Wheaton engages with de Vattel and Cornelis van Bynkershoek, while also drawing extensively on British and American practice from the late eighteenth and nineteenth centuries, though without much systematisation.

Neutrality and legal positivism: Oppenheim

Later nineteenth- and early twentieth-century authors continued to regard international law as resting on the “common consent” of sovereign states to its fundamental rules. In its most extreme form, this view implied that states could withdraw at any time, turning international law into something closer to a set of moral principles than a body of legal rules.⁴⁶ This is particularly evident in the sovereign decision on war and peace. As the perhaps

44 Wheaton (n 35), 213.

45 Wheaton (n 35), 281.

46 Dodge (n 38). See also Gustav Adolf Walz, *Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (W. Kohlhammer 1930).

best-known representative of this school of thought,⁴⁷ Lassa Oppenheim poignantly assumed that war “cannot always be avoided” due to the structure of the international community.⁴⁸ It is therefore neither illegal nor “inconsistent with, but a condition regulated by international law”.⁴⁹ War usually ends diplomatic relations but not the application of international law as such. Rather, it entails a number of legal consequences, most importantly, for our purposes, the application of the *ius in bello* and the laws of neutrality. Hence, it does not contradict but, on the contrary, *confirms* the status of international law as law in the proper sense of the term. Interestingly enough, Oppenheim also stated that he would welcome a *ius contra bellum*, but ultimately considers it unrealistic, prompting him to make a less legal than political statement by describing Kant’s idea (without mentioning him by name) of an “eternal peace” as “an impossibility in the conditions and circumstances under which mankind live and perhaps will live for ever, although eternal peace is certainly an ideal of civilisation”.⁵⁰

Hence, we once again find the interplay between self-preservation and independence as self-evident “fundamental rights”⁵¹ of states in Oppenheim’s work: states justify their interventions with their sovereignty, and conversely, sovereignty means that not every intervention is permitted. States violate the sovereignty of others if needed to maintain their own sovereignty,⁵² as a “legal remedy” to respond to previous violations of their rights, or for mere “political reasons only”.⁵³ As there exists, as already mentioned, no judge with mandatory jurisdiction and no higher authority that can or even has to apply coercive measures, war inevitably remains available as a justified and legitimate measure of last resort. Assessing the cause of war is largely beyond the grasp of the law. Wars can be fought for all sorts of reasons, both legal and political.⁵⁴

47 Devika Hovell, ‘The Elements of International Legal Positivism’, *Current Legal Problems* 75/1 (2022), 71–109.

48 Lassa Oppenheim, *International Law. Vol. II. War and Neutrality* (Longman, Green & Co. 1905), 56.

49 Oppenheim (n 48), 56.

50 Oppenheim (n 48), 56.

51 Lassa Oppenheim, *International Law. Vol. I Peace* (Longmans, Green and Co. 1905), 158.

52 Oppenheim (n 51), 178.

53 Oppenheim (n 48), 56.

54 Oppenheim (n 48), 56–57.

Unsurprisingly, Oppenheim also devotes considerable space to the law of neutrality. The word itself appears in the title of the second book (Volume II), where an entire section (Chapter III) is devoted to it, and some 400 times in the text. He explains the development of the law of neutrality by the fact that all states may benefit from its observance:⁵⁵ the belligerents remain on good terms with the neutrals, and the neutrals avoid being drawn into a war.⁵⁶ The understanding of sovereignty at that time went hand in hand with the acceptance of wars and the corresponding right to remain neutral (while belligerents had no right to request other countries to remain neutral). Unless a state became directly or indirectly involved in a conflict or declared otherwise, it was presumed to be neutral and thus had a right to be left alone. A separate declaration might be helpful in removing any doubts, but is not mandated by international law.⁵⁷

At this point, a brief addendum on the historical context of Oppenheim's treatise is necessary. In the first edition from 1905, he was still hopeful that the law of neutrality would be codified at the Second Hague Conference in 1907.⁵⁸ Indeed, the two Hague Conventions turned out to be the culmination of a development that dates back to the late eighteenth century. When they were concluded, they did not introduce anything fundamentally new. This may explain why Oppenheim does not mention them in the second edition, published in 1912, despite his detailed account of the conference.

III. From the League of Nations to the Kellogg-Briand Pact

The long heyday of the law of neutrality came to an abrupt end with the horrors of the First World War. A few months after the beginning of the invasion, German Chancellor Theobald von Bethmann Hollweg described Belgium's neutrality as a "mask," and argued that Germany had been "coerced" to march through Belgium "for the sake of self-preservation" due to "military necessity" caused by France's war plans.⁵⁹ This official position was supported by authoritative voices from German academia, which con-

55 Oppenheim (n 48), 314.

56 Oppenheim (n 48), 314.

57 Oppenheim (n 48), 317.

58 Oppenheim (n 48), 314.

59 Quoted in Karl Strupp, *Die Neutralisation und die Neutralität Belgiens* (Verlag Friedrich Andreas Perthes A.-G. Gotha 1917), 180.

tinued to view Germany's actions as lawful even after the war had been lost.⁶⁰ Since that time Germany's invasion of Belgium and Luxembourg are routinely invoked to show that neutrality offers no protection if powerful states have overriding interests.

More generally, the attitudes towards war had been turned upside down since then. It was no longer seen as a natural and inevitable element of the anarchic character of the international system but rather as a fundamental evil that needed to be prevented. The “wherever there are states, there is war” cynicism had had its day and the pacifist movement experienced an “*I told you so*” moment that it would probably have preferred to avoid. For example, in July 1917, before the war's unexpected end, Walther Schücking wrote a powerful indictment of “the system in Europe” that had made “such a tragedy possible. [...] today we have learned where 'realpolitik' and the cult of power in Europe have led us. If we want to save our continent from renewed destruction by the return of such catastrophes, there is no other way than to seek refuge in the very idea of law”.⁶¹ Accordingly, it was necessary to “further develop the norms of peace law on the prevention of war in such a way that the recurrence of such a catastrophic war is prevented as far as possible”.⁶² This included, above all, overcoming the state of nature by creating a “union of states” in Kant's sense: “organized pacifism”, as Schücking called it.⁶³

He and other pacifists articulated these ideas even before Woodrow Wilson's famous Fourteen Points speech of January 1918. The idea of a permanent and ultimately political organisation became mainstream, with universal ambitions, insofar as universality was possible in a world still shaped by colonialism and by a civilisation paradigm that divided peoples and states into different classes. Even Oppenheim, horrified by the war, viewed “the right to peace” as “the centre of gravity of international law,” and “watched the growth of the League of Nations movement” with “cautious sympathy” late in his life.⁶⁴

60 For a general – and critical (!) – discussion of this argument, see Josef L. Kunz, *Das Problem von der Verletzung der belgischen Neutralität* (Manzsche Verlags- und Universitätsbuchhandlung 1920).

61 Walther Schücking, *Die völkerrechtliche Lehre des Weltkrieges* (Veit & Comp. 1918), v-vi (as noted at the end of this foreword, the printing of the book was delayed).

62 Schücking (n 61), 9.

63 Schücking (n 61), 11–12.

64 See Ronald F. Roxburgh's preface to his revised third edition of Oppenheim's *International Law* (Longmans, Green and Co. 1920), vii.

That also had consequences for neutrality. It is, after all, a product of anarchy, a state the League of Nations tried to overcome with a system of collective security aimed at eliminating or at least making war less frequent.⁶⁵ States that jointly take action against those who break the peace would move closer to an organized community.⁶⁶

Nevertheless, the League of Nations Covenant, although it contained an obligation to respect the independence and territorial integrity of all its parties, did not prohibit war altogether. Instead, it was made conditional on bringing the underlying dispute before an arbitration tribunal or the Council of the League of Nations.

The right to neutrality thus lost much of its significance without becoming completely obsolete. It continued to apply in wars fought between countries that remained outside of the League of Nations or in what has been described as “permitted individual wars”,⁶⁷ i.e. those in which the aforementioned procedural rules were observed, the two parties to the dispute did not recognise the Council's report as binding, one party did not fulfil its obligations under the report, or the report was not produced within the deadline (within six months) or was not unanimous.⁶⁸ In addition, there was the special case of Switzerland, which, under the banner of “differential neutrality”, was on the one hand exempt from military measures adopted by the league and on the other hand agreed to “cooperate” in economic sanctions against aggressors.⁶⁹ A few years later, however, it officially returned to a broad understanding of neutrality that included refraining from participating in economic sanctions on the eve of the Second World War after the sanctions regime and, more generally, the collective security system failed in the Abyssinia crisis.⁷⁰

The actual, albeit theoretical, end of the right to neutrality therefore arrived a few years after the conclusion of the League of Nations Covenant,

65 Lassa Oppenheim, *The League of Nations and its Problems* (Longmans, Green and Co. 1919), 11.

66 Nicolas Politis, *Neutrality and Peace* (Carnegie Endowment for International Peace 1935), 3.

67 Walther Schücking and Hans Wehberg, *Die Satzung des Völkerbundes* (second edition, Verlag von Franz Vahlen 2025), 635.

68 Schücking and Wehberg (n 67), 513.

69 Schücking and Wehberg (n 67), 634; see also Freiherr von Freytagh-Loringhoven, *Die Satzung des Völkerbundes* (Verlag von Georg Stilke 1926), 38.

70 See Francis Paul Walters, *A History of the League of Nations* (Oxford University Press 1960), 781.

with the Kellogg-Briand Pact of 1928. As it finally prohibited war altogether, neutrality offered no additional protection and thus was no longer a prerequisite for being left in peace. Outlawing war made neutrality redundant.⁷¹

Needless to say, matters were not quite so simple at the time. In academic writing and later also in practice, there was a lively debate about the actual scope of the Pact, *i.e.* whether it also prohibited low-threshold means of warfare such as armed reprisals or wars that were not subjectively recognised as such by neither of the belligerents.⁷² To name one prominent example, Philip C. Jessup, further developing the ideas of de Vattel, Wheaton and Oppenheim, still emphasized that the distinction between aggressor and defender was not always clear-cut and that neither the international community nor individual states would necessarily wish to take a clear position.⁷³ Furthermore, he argued that a number of countries, namely Germany, Austria, Czechoslovakia, Italy, Yugoslavia and Lithuania, had committed themselves to neutrality in certain circumstances.⁷⁴ Furthermore, the United States in particular was yet to abandon its neutral tradition.⁷⁵

Last but not least, one should keep in mind that the Pact was an unsatisfactory compromise and that the security guarantees France had originally hoped to receive from the United States never materialised. The first and final moment of glory of the declaration to “condemn recourse to war for the solution of international controversies” and to “renounce it, as an instrument of national policy in their relations with one another” came *after* the end of the Second World War, when it served as the basis for the notion of crimes against peace in the Nuremberg and Tokyo trials. The Pact could not alter the course of the 1920s and 1930s: the lasting influence of revanchist voices in Germany, the arguments of self-declared “realists” who saw peace as “war in disguise,”⁷⁶ the rise of fascism, or the challenges posed by the then-young Soviet Union. As the world had to learn once again in 1939, a piece of paper – and that is all international treaties are at the end of the day – cannot prevent wars.

71 Politis (n 66), 80.

72 See, for example, Axel Møller, ‘The Briand-Kellogg Pact’, *Nordisk Tidsskrift for International Ret* 3 (1932), 94–107.

73 Philip C. Jessup, ‘The Birth, Death and Reincarnation of Neutrality’, *The American Journal of International Law* 26/4 (1932), 789–793 (793).

74 Jessup (n 73), 792.

75 See, in addition to Jessup, also Lester H. Woolsey, ‘Problems of American Neutrality’, *American Society of International Law Proceedings* 43 (1940), 21–31.

76 Alexander Hold-Ferneck, *Lehrbuch des Völkerrechts. Erster Teil* (Felix Meiner Verlag in Leipzig 1930), 11.

IV. The definitive end of the right to neutrality: the Charter of the United Nations

Despite all the prophecies of doom, the interwar peace project, though sometimes disparaged as “utopian” and naïve,⁷⁷ was taken up again and further developed during and after 1945: the League of Nations gave way to the United Nations, its Council of the League to the Security Council, and the prohibition of war to a more far-reaching prohibition of force. The charge of naivety could no longer be made easily. After the failure to draw lessons from global politics after 1918, and in light of the invention and actual use of the atomic bomb, avoiding a Third World War had become a matter of global survival. The utopians had become realists.

As a consequence, neutrality was once again rendered obsolete.⁷⁸ Ironically, from an Austrian perspective, Hans Kelsen (the famous architect of its Constitution) was one of the earliest prominent scholars to point out that the prohibition of force precluded the equal treatment of belligerents. As he emphasized, international law now knew only three types of wars: they are either a serious violation of international law, legitimate self-defence or a permissible means of coercion within the framework of the collective security system.⁷⁹ There is nothing in-between. The age of anarchy was finally over, or so it seemed. Strict neutrality was incompatible with membership in the United Nations and its collective security system.⁸⁰

Matters developed differently in the real world. Although neutrality acquired a bad reputation or often proved ineffective during and immediately after the Second World War, non-aligned Sweden joined the United Nations as early as 1946, followed by neutral Austria, Ireland and Finland in December 1955.

The reason lay, among other things, in Soviet pragmatism after Stalin's death and the Korea War. At that point, neutrality, or more precisely *de facto* (i.e. not treaty-based) “neutralisation”, was “rediscovered”⁸¹ to create buffers to NATO and as a means of indirectly weakening the West. In

77 See E. H. Carr, *The Twenty Years' Crisis, 1919 – 1939* (Harper Perennial 1964).

78 For general information on this topic, see Jamal el-Zein, *Das Ende des Neutralitätsrechts* (Nomos 2024).

79 Hans Kelsen, *The Law of Nations. A Critical Analysis of Its Fundamental Problems* (Stevens & Sons Limited 1951); Hans Kelsen, *Principles of International Law* (Rinehart & Company Inc 1952), 89.

80 Kelsen (n 79, 1951), 108.

81 Heinz Fiedler, *Der sowjetische Neutralitätsbegriff in Theorie und Praxis. Ein Beitrag zum Problem des Disengagement* (Verlag für Politik und Wirtschaft 1959), 221 *et seq.*

the short term, securing existing spheres of influence was a more realistic alternative to hopeless expansionism. In the longer run, a *modus vivendi* for coexistence with non-communist states had to be found. If the Soviets could not tie them (too closely) to themselves, neutrality would at least keep or even pull them away from the United States.

Austria's neutral status is a case in point. Starting in 1952, the United States and, to a lesser degree, the United Kingdom and France had worked on the reconstruction of the Austrian Armed Forces in their zones of occupation.⁸² Occupied by the four Allied Powers since 1945, Austria's political elite and population felt closer to the West than the Soviet Union for various reasons. While United States' aid packages, products and pop culture proved remarkably popular, Red Army soldiers had committed countless war crimes and were particularly oppressive in their occupation zone, and countless Austrian prisoners of war remained in Soviet hands years after the end of the war. Unsurprisingly, the Communist Party enjoyed only limited support. However, due to Austria's geographic location, the (Austro-)German property located there, and the fact that Soviet troops had taken great pains to reach Vienna as early as possible during the final phase of the Second World War, NATO membership was never an option. The other alternatives were endless occupation, a division similar to that of Germany, or, as it was ultimately agreed, neutrality. Initially, there had even been talk of security guarantees for Austria, though these were never given.⁸³

At the UN level, Austria relied on the "Kunz-Verdroß doctrine", named after Josef L. Kunz, professor at the University of Toledo after his emigration in 1932, and Alfred Verdroß, professor at the University of Vienna and also a member of the International Law Commission from 1957 to 1966. It assumed that the veto powers would take due account of Austria's well-known perpetual neutrality. With the exception of China, they were also parties to the Austrian State treaty – and could therefore be expected to refrain from demanding any military or otherwise non-neutral action.⁸⁴ For some 35 years, however, this position was never really tested in practice

82 Johann Christoph Allmayer-Beck, 'Landesverteidigung und Bundesheer' [Parts I–III], 4–6 Österreichische Militärische Zeitschrift (1972); Manfred Rauchensteiner, 'Die B-Gendarmerie - mehr als eine Episode', 4 Truppendienst (2002), 4–9.

83 See Helfried Pfeifer, 'Der österreichische Staatsvertrag', Archiv des Völkerrechts 5/3 (1955), 296–307 (301–302).

84 See, among others, Alfred Verdross, 'Austria, Neutrality and the United Nations' India Quarterly 16/1 (1960), 24–30.

because the Security Council did not adopt any military coercive measures until the Iraq War of 1990-91. In the only two cases of Cold War sanctions, Austria's insistence that each case had to be examined individually and that the adoption of sanctions would have no general consequences for neutrality met with little or no interest.

Politically, Austria successfully managed to strike a balance between East and West. To take a particularly prominent example, it benefitted, similar to Sweden and Ireland, but in marked contrast to Finland,⁸⁵ from the Marshall Plan. In 1961, the United States then made some 1.2 billion Schillings (the then-currency of Austria;) available to Austria, subject to certain limits enshrined in a bilateral agreement. This sum of roughly 87,207,401.00€, albeit without taking inflation into account, exists to this day and is mostly used for development co-operation, research, and technological development, mostly benefitting small and medium-sized enterprises.⁸⁶

A few years later, in September 1968 and thus immediately after the brutal suppression of the Prague Spring by Warsaw Pact troops, Austria also became the first Western European country to receive Soviet natural gas. It thus served as a kind of laboratory to test the reliance of similar exports to Germany, which started two years later. The logic behind this offer was as simple as it was tempting: Austria had the best of both worlds, so why not other Western countries as well? Why not be good friends with both blocs instead of being best friends with only one?⁸⁷ All it took was to keep at least some distance from the United States!

At the end of the day, Austrian neutrality often boiled down to avoiding angering Moscow. The Soviet Union usually insisted or would have insisted on an expansive interpretation of permanent neutrality whenever Austria contemplated moving politically, economically or, God forbid, militarily closer to NATO countries. It meant "not only staying out of 'hot' wars, but also out of 'cold' wars",⁸⁸ as D. B. Lewin, an influential academic voice

85 Mikko Majander, 'The limits of sovereignty. Finland and the Question of the Marshall Plan in 2047', *Scandinavian Journal of History* 19/4 (1994), 309–326.

86 *Der Standard*, Nachkriegshilfe für Österreich: 600 Millionen aus ERP-Fonds im Jahr 2017, 15 June 2018, available at <<https://www.derstandard.at/story/2000081638840/nachkriegshilfe-fuer-oesterreich-600-millionen-aus-erp-fonds>>, last accessed 5 January 2026.

87 See Fiedler (n 81), 224.

88 D. B. Lewin, *Grundprobleme des modernen Völkerrechts* (Fundamental Problems of Modern International Law), in: Grigory Tunkin, D. B. Lewin, Eberhard Menzel, *Drei sowjetische Beiträge zur Völkerrechtslehre* (Three Soviet Contributions to International-

from the University of Moscow⁸⁹ put it in the late 1960s. Because of the dysfunction of the Security Council, permanent neutrality was “by no means outdated; rather, it has taken on new significance as a means of consolidating peace and security”.⁹⁰ During the Cold War, Austria’s foreign policy was therefore mostly determined by political considerations camouflaged in pseudo-legal debates on “pre-emptive obligations” (*Vorwirkungen*).⁹¹ When in doubt, restraint steadfastly remained the order of the day.

Meanwhile, the core of the *law* of neutrality with its focus on the military dimension remained unchanged and was applied repeatedly. Although the number of interstate wars had declined sharply since 1945, it had not fallen to zero. In addition, there were numerous conflicts with varying degrees of external involvement, some low-level, others quite intense. Thomas M. Franck famously wondered who had “killed” the prohibition of force as early as 1970.⁹² In the chaotic world of civil and decolonisation wars, the aftermath of the Prague Spring, nuclear threats and conflicts between Israel and its Arab neighbours, North and South Korea, and India and Pakistan, there were understandable reasons for the motivation to remain on the sidelines.

al Law) (Hansischer Gildenverlag, Joachim Heitmann & Co. 1969), 1–275 (226f.), cited in Ludmilla Lobova, ‘Die Außenpolitik und Neutralität Österreichs aus der Sicht der UdSSR’ in: Arnold Suppan, Gerald Stourzh and Wolfgang Mueller, *Der österreichische Staatsvertrag. Internationale Strategie, rechtliche Relevanz, nationale Identität* (Verlag der Österreichischen Akademie der Wissenschaften 2005), 891–922 (895) [own translation].

89 Kazimierz Grzybowski, review of ‘Three Soviet Contributions to International Law. Vol. 59. Foundations of Modern International Law; The Ideological Struggle and International Law; Fundamental Problems of Modern International Law. by G. I. Tunkin, D. B. Lewin, Eberhard Menzel’, *The American Journal of International Law* 65/2 (1971), 430–431.

90 Lewin (n 88), 227–228 [own translation].

91 For a critical view on this academic “dogmatism” concerning the interpretation of Austria’s neutrality, see Karl Zemanek, ‘Österreichs Neutralität und die GASP’, *Österreichisches Jahrbuch für Politik* 11 (1994), 1–17 (10).

92 Thomas M. Franck, ‘Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States’, *The American Journal of International Law* 64/5 (1970), 809–837.

V. The end of the Cold War: Swan songs for neutrality

The political downfall of neutrality came only later, with the end of the Cold War, when the soon-to-be formerly socialist states and the Western states undertook, as they stated in the 1990 Charter of Paris for a New Europe, “to build, consolidate and strengthen democracy as the only system of government of our nations”, followed by a declaration that sounds almost like science fiction today: “Now that a new era is dawning in Europe, we are determined to expand and strengthen friendly relations and co-operation among the States of Europe, the United States of America and Canada, and to promote friendship among our peoples.”⁹³

In this atmosphere, passive coexistence increasingly gave way to active cooperation, while strategic analyses and foreign policy increasingly focused on domestic, terrorist and non-military threats. The Security Council now intervened more frequently in civil wars – which had long been considered “internal affairs” –, from East Africa to the Yugoslav Wars, and even began to address the individual accountability of political leaders. Neutrality plays no role in intra-state warfare or when fighting terrorists.

In parallel, the negotiations and entry into force of disarmament treaties like the Ottawa Convention, the Chemical Weapons Convention, or the Firearms Protocol meant that arms exports were no longer predominantly, if at all, addressed through the law of neutrality. Interestingly, neutral states themselves had long moved beyond the narrow question of whether an interstate war existed. The 1972 version of the Swiss War Material Act, adopted in response to the Biafra War, during which weapons were supplied to Nigeria despite massive human rights violations, already went beyond the law of neutrality. It prohibited deliveries to areas where an “armed conflict”, whether between states or within a state, “prevails, threatens to break out or otherwise dangerous tensions exist”.⁹⁴ Austria followed suit in 1982 by amending the War Material Act of 1977. As the members of parliament behind this change openly stated, their intention was to prevent arms exports to military dictatorships such as that of Augusto Pinochet's

93 <<https://www.osce.org/sites/default/files/f/documents/0/6/39516.pdf>> last accessed 5 January 2025.

94 Quoted in Stefan Oeter, *Neutralität und Waffenhandel* (Springer 1992), 207.

in Chile or that of the Argentine junta under Jorge Rafael Videla.⁹⁵ To this day, arms deliveries in Austria are still viewed primarily through the lens of human rights, and only occasionally through the lens of neutrality law.⁹⁶

One final development from the 1990s that is significant for present purposes is the debate on the state responsibility articles: the International Law Commission once again clarified that states that knowingly aid or assist in a breach of international law can also be held responsible (Article 16). At least in some cases, the permitted passage of an aggressor's warships for example, there is a contradiction with the duty of equal treatment under neutrality law. Another, but ultimately (still?) hypothetical restriction on neutrality is the envisaged obligation to cooperate to end serious violations of peremptory international law (*ius cogens*), including the prohibition of force, and not to recognise the resulting situations (such as annexations).⁹⁷

In this atmosphere, Austria joined the European Union and later participated in the further development of its Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP) and, ultimately, the mutual defence clause in the Lisbon Treaty. Since then, its dual status as a permanently neutral EU Member State has meant that it may, but is not obliged to, participate in military measures within the framework of the European Union. Where the limits lie, or indeed whether there are any limits at all, would only be determined in case of an actual armed attack.

Switzerland, meanwhile, did not go this far. Even so, the Swiss Foreign Ministry openly acknowledged, as early as 1992 that neutrality “had lost importance as a result of the changed foreign policy environment [...] compared to other foreign policy instruments”, which also required a “re-orientation of foreign policy with regard to neutrality”.⁹⁸ A few months later, then-Minister of Defence Kaspar Villiger called for closer ties with NATO and the Western European Union, which still existed at the time:

95 See motion 177/A XV. GP submitted by Heinz Fischer, Karl Blecha and other SPÖ members of parliament on 12 May 1982, available at <https://www.parlament.gv.at/DOCUMENT/XV/A/177/IMFNAME_285039.PDF>, last accessed on 9 July 2025.

96 Heinz Gärtner and Ralph Janik, ‘Between Neutrality and Norm Compliance: Austria’s Arms Export Laws in a Multilateral Order’, working paper, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6059015> last accessed 11 January 2025.

97 Article 41 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. See also el-Zein (n 78), Chapter VI.

98 Aussprachepapier des EDA an den Bundesrat vom 1. April 1992, available at <<https://dodis.ch/59120>> last accessed on 9 July 2025.

“This is the only way we can avoid becoming isolated in terms of security policy.”⁹⁹

Ten years later, Switzerland joined the United Nations, a step that had failed in 1986 because of a negative referendum. In hindsight, as in Austria, the decades-long debate on this issue was thus ultimately primarily about *neutrality policy* rather than neutrality law. By the 1990s, it was generally accepted that sanctions, especially those imposed by the Security Council, did not trigger any obligations under the law of neutrality. There had also been no doubt that Switzerland could not be obliged to send peacekeeping troops.¹⁰⁰ What remained was the controversial question of overflights or the transit of armed forces acting on the basis of a Security Council mandate: It allowed only non-military transport for the “Coalition of the Willing” in the 1991 Iraq War and for NATO during its operations in the war in Bosnia and Herzegovina. Today, however, and similar to neutral Austria or Ireland, Switzerland takes the view that coercive military measures authorized by the Security Council do not constitute a war within the meaning of neutrality law and therefore allow them to render even military support.¹⁰¹ In any event, participation in peace-enforcement operations is not mandatory. While the Security Council could oblige members of the United Nations to contribute soldiers, especially since its powers, as the Charter of the United Nations in general, take precedence over other obligations under international law, including neutrality, the composition and the general lack of agreement among the P-5 renders such a scenario plainly unrealistic.

99 Sicherheitspolitische Annäherung der Schweiz an die NATO und die WEU, 18 December 1992, available at <<https://dodis.ch/61267>> last accessed on 9 July 2025.

100 On both issues, see Detlev Chr. Dicke, ‘Völkerrechtliche Probleme eines eventuellen Beitritts der Schweiz zu den Vereinten Nationen’, Archiv des Völkerrechts 22 (1984), 405–417.

101 See, for example, <https://www.eda.admin.ch/dam/eda/de/documents/aussenpolitik/internationale-organisationen/uno/2017-und-aelter/20140814-UNO-Politik-der-Schweiz_DE.pdf> last accessed on 9 July 2025. For Ireland’s position see <<https://www.gov.ie/en/departments-of-foreign-affairs/publications/international-security-policy-background-information/#irelands-policy-of-military-neutrality>> last accessed 9 July 2025: “Like other European neutral states, Ireland has not seen UN membership, EU membership or membership of NATO’s Partnership for Peace programme as prejudicing Ireland’s policy of military neutrality.”

VI. 9/11 and Iraq 2003: war, terror and neutrality

Despite the euphoria of the Post-Cold War period, neutrality was neither completely abandoned during the phase of the “liberal world order” nor rendered completely irrelevant. According to the Stockholm International Peace Research Institute (SIPRI), four *major* inter-state conflicts broke out in the hopeful period between 1990 and 2004:¹⁰² Iraq-Kuwait (including the US-led response) from 1990 to 1991, India-Pakistan from 1990 to 1992 and again 1996 to 2003, Ethiopia-Eritrea from 1998 to 2000, and the 2003 invasion of Iraq. In addition, and despite their characterization as a “humanitarian intervention” to stop and prevent human rights violations in Kosovo, the NATO air strikes against Serbia in 1999 also constituted a war in the sense of the laws of neutrality. Meanwhile, numerous internal conflicts were “internationalised” by external interventions, such as the conflicts over Transnistria in 1990-1992, South Ossetia from 1991 to 1992, Abkhazia from 1992 to 1993, Nagorno-Karabakh in 1992, as well as the civil wars in Sierra Leone from 1991 to 2001, Burundi from 1993 to 2005, the Democratic Republic of Congo from 1996 to 1997, and the Yugoslav Wars from 1991/92 and 1995.¹⁰³

This relatively (!) peaceful phase came to an end with the 9/11 attacks and the massive US response, above all the 2003 Iraq War. While the former were followed by a wave of solidarity, the situation was quite different when the possibility of an attack on Iraq was intensively discussed from 2002 onwards. Although George W. Bush stated that other countries could only side with the United States or with the terrorists when announcing the *War on Terror*,¹⁰⁴ he could no longer count on unconditional support, even within NATO. France and Germany, in particular, opposed the war, called for more time for the UN weapons inspectors and refused to participate (directly) in the attack. France also announced that it would use its veto

102 It should be noted that this is not a classification under international law; rather, SIPRI refers to whether the armed forces and territories of several states are involved, see <<https://www.sipri.org/sites/default/files/YB05%20121%2002a.pdf>> last accessed on 9 July 2025.

103 Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', *The American Journal of International Law* 92/2 (1998), 236–242.

104 Speech from 30 April 2002, available at <<https://www.ssa.gov/history/gwbushstmts2.html>> last accessed on 9 July 2025.

in the Security Council if necessary.¹⁰⁵ Subsequent US attempts to invoke “pre-emptive” self-defence or a “resurgence” of the older authorisation of armed force against Iraq dating from the 1990/91 Gulf War were generally rejected.

These different starting points also had an impact on how neutrality was handled. In the case of “Operation Enduring Freedom” against Al-Qaeda and the Taliban as the de facto rulers in Afghanistan, Austria, in contrast to Switzerland, approved military overflights – despite the lack of authorisation by the UN Security Council, which merely reaffirmed the United States’ right to self-defence. A few weeks after 9/11, then-Federal Chancellor Wolfgang Schüssel once again said that he would not rule out NATO membership.¹⁰⁶ In December, the Parliament’s Defence Committee even passed a resolution with the votes of the ÖVP and the FPÖ (the two governing parties at that time) that mentioned the “security and defence policy benefits of Austria’s NATO membership [...] in light of security policy developments” and that it would “keep the option of [NATO] accession in mind”.¹⁰⁷

As a typical – formally speaking – inter-state war, the 2003 US attack on Iraq was different. Despite its sympathies for the Bush administration’s position, the Austrian government basically had no choice but to close its borders and hope for the best. Ultimately, it performed a veritable balancing act by sharply criticising Saddam Hussein while still explicitly openly declaring *ad hoc*-neutrality. This was a political decision that would not have been necessary since a permanently neutral state can be expected to act in conformity with this status in every war anyhow. Switzerland also emphasised its intention to apply the laws of neutrality on the first day of the attack. Furthermore, both states had already prohibited military overflights and troop movements through their territory because they were part of the preparations for the war.

In this regard, one must keep in mind that any military support for the United States and its co-belligerents would have been contrary to international law, regardless of neutrality. The Iraq War was a clear case

105 <<https://www.nytimes.com/2003/03/06/international/europe/france-and-russia-re-ady-to-use-veto-against-iraq-war.html>> last accessed 9 July 2025.

106 <https://www.ots.at/presseaussendung/OTS_20011103_OTS0009/profil-schuessel-n-ato-beitritt-nicht-ausschliessen> last accessed 9 July 2025.

107 <https://www.parlament.gv.at/aktuelles/pk/jahr_2001/pk0871> last accessed 9 July 2025.

of aggression. As briefly explained above, international law prohibits both direct attacks and support for violations of the prohibition of the use of force. No state, whether neutral or not, may make its territory available to an aggressor (not even for mere troop movements), supply weapons, provide strategically relevant information, or provide substantial financial support. Mere “*non-belligerence*” is not sufficient; the passive support for the Iraq War by countries such as Germany, Italy or Canada – be it by permitting overflights, participating in the surveillance of Iraqi airspace, or transporting troops¹⁰⁸ – was therefore illegal.¹⁰⁹

VII. Neutrality after 24 February 2022: legal end and (political) comeback?

Around 19 years after the Iraq War, neutrality returned to the spotlight once again when Russia launched its full-scale invasion of Ukraine. This time, the European neutrals went further than ever, although they still adhered to their core obligations under the law of neutrality. In addition, then still non-aligned Sweden and Finland even sent weapons and ultimately joined NATO. Intense debates about “whose” war the war in Ukraine was and at what point a state would become a “warring party” and, related to this, where support should end also took place in the United States or Germany. Neutrality law also played a significant role here. The decision to remain outside of conflict or set certain limits to military support is often independent of membership in military alliances.

In the end, Ireland, Austria, Malta and Switzerland (only) provided various forms of “*non-lethal aid*”. Ireland went remarkably far in its support, sending “Meal, Ready-to-Eat” and protective clothing from its armed forces’ stocks right at the start of the war to support Ukraine’s troops.¹¹⁰ Later, it went as far delivering radar systems¹¹¹ and training Ukrainian soldiers

108 <<https://www.dw.com/de/irak-krieg-nach-der-1%C3%BCge-folgte-der-v%C3%B6llk-errechtsbruch/a-64942299>> last accessed 9 July 2025.

109 See Georg Nolte and Helmut Philipp Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’, *International and Comparative Law Quarterly* 58/1 (2009), 1–30.

110 <<https://www.breakingnews.ie/ireland/body-armour-and-10-tonnes-of-food-sent-by-ireland-to-ukrainian-army-1273802.html#:~:text=Ireland%20has%20sent%200%20ready,forces%20battling%20the%20Russian%20invasion>> last accessed 9 July 2025.

111 <<https://www.irishtimes.com/ireland/2025/02/24/ireland-to-donate-air-defence-systems-to-ukraine-as-war-enters-fourth-year/>> last accessed 9 July 2025.

in clearing mines and unexploded ordnance as part of the *EU Military Assistance Mission in support of Ukraine* (EUMAM Ukraine).¹¹²

Austria was somewhat more cautious and ruled out any support for Ukraine's armed forces. Instead, it merely sought to "help the Ukrainian civilian population to better protect itself" by supplying helmets and protective vests,¹¹³ as Defence Minister Klaudia Tanner (ÖVP) announced on 28 February 2022. Following a debate initiated by Federal President Alexander van der Bellen in May 2023, she stated that "[w]e will not risk the involvement of Austrian soldiers, even indirectly, in acts of war".¹¹⁴ In a response to a parliamentary question in November of the same year, she also argued that "the [legal] conditions for deployment [...] in the context of humanitarian aid during an ongoing conflict were not met."¹¹⁵ This finding was correct. The relevant law, the Federal Constitutional Law on Cooperation and Solidarity in the Deployment of Units and Individuals Abroad (KSE-BVG), does not permit deployments of the Austrian Armed Forces to war zones, whether outside or inside the EU. It would have only been possible to train Ukrainian soldiers inside Austria. As one may expect, this idea remained an academic pipe dream. Any direct contact between Austrian and Ukrainian soldiers was the government's red line. In the end, it merely financed, via the International Trust Fund and similar to Switzerland, demining equipment and support for an aid programme run by the Organisation for Security and Cooperation in Europe (OSCE).¹¹⁶

Nevertheless, a small but remarkable revolution, especially in light of Austria's long-standing practice of "exaggerating"¹¹⁷ its neutrality obligations beyond what was actually required by law, did take place: While the government never actually thought about sending or allowing the export of weapons, it did allow their transit. To this end, the Foreign Ministry specif-

112 <<https://www.military.ie/en/news-and-events/news/rish-defence-forces-training-as-sistance-to-eu-military-assistance-mission-in-support-of-ukraine-eumam-ua-cyprus.html>> last accessed 9 July 2025.

113 <<https://www.derstandard.at/story/2000133716003/oesterreich-schickt-helme-schutzwesten-und-treibstoff>> last accessed 9 July 2025.

114 <<https://orf.at/stories/3316150/>> last accessed 9 July 2025.

115 <https://www.parlament.gv.at/dokument/XXVII/AB/15658/imfname_1594196.pdf> last accessed 9 July 2025.

116 <<https://www.bmeia.gv.at/ministerium/presse/aktuelles/alle/2023/05/oesterreich-finanziert-entminungsgeraet-fuer-die-ukraine-im-wert-von-2-millionen-euro>> last accessed 9 July 2025.

117 Peter Hilpold, *Solidarität und Neutralität im Vertrag von Lissabon* (Facultas 2010), 28 *et seq.*

ically requested a provision in the relevant Council Decision (338/2022), according to which “[m]ember States shall permit the transit of military equipment, including accompanying personnel, through their territories, including their airspace”.¹¹⁸ In contrast to the parallel Council Decision on providing lethal aid (339/2022), the government did not abstain “constructively” (meaning it does not prevent the adoption of a decision) but voted in favour. Such a Council Decision supersedes the Neutrality Act: In conjunction with Article 23j of the Federal Constitutional Law, which allows participation in measures within the framework of the CFSP whenever there is a legal basis under EU law, there was a clear constitutional basis. Ultimately, Austria’s neutrality proved quite flexible: Traditional neutrality as codified in the two Hague Conventions ultimately focuses on direct military support from or to a belligerent. It says nothing about equipment transported by a non-belligerent, meaning a state that is neither neutral nor a direct participant in a war, to a belligerent.¹¹⁹

Malta, the third permanently neutral EU Member State, took a middle path. Its small size probably played a role here. Although Prime Minister Robert Abela repeatedly stated that Ukraine could not “win this war”, Malta nevertheless participated in the aforementioned training mission by sending a liaison officer between the United Kingdom and the EU.¹²⁰ In this context, the Maltese armed forces emphasised that none of their soldiers were involved in training their Ukrainian colleagues and that ensuring communication did not constitute a violation of neutrality.¹²¹

Unsurprisingly, Switzerland was much more cautious than the neutral EU Member States. Even two and a half years after the start of the war, the Federal Council (*Bundesrat*) still continued to refuse the export of protective vests to Ukraine because they can be used for both military and civilian purposes and because it found that equal treatment of the warring parties takes precedence over the protection of the Ukrainian

118 Helmut Tichy, Konrad Bühler and Pia Niederdorfer, ‘Recent Austrian Practice in the Field of International Law. Report for 2022’, *Zeitschrift für öffentliches Recht* 78 (2023), 113–163 (162).

119 See Ralph Janik, ‘Austrian Neutrality amid Russia’s War on Ukraine’, *Austrian Review of International and European Law* 26 (2023), 147–155.

120 <https://www.maltatoday.com.mt/news/national/134217/malta_is_part_of_eu_mission_to_train_and_supply_ukraine_against_russia> last accessed 9 July 2025.

121 <https://www.maltatoday.com.mt/news/national/134217/malta_is_part_of_eu_mission_to_train_and_supply_ukraine_against_russia> last accessed 9 July 2025.

civilian population.¹²² At the same time, Switzerland has taken the initiative in humanitarian mine clearance in civilian areas since the first year of the war by providing substantial funding and entering into partnerships with non-governmental organisations active in demining and the Swiss company Global Clearance Solutions.¹²³

Looking back, it is striking that, in addition to the permanently neutral states, debates in Germany and even the United States also drew on the vocabulary of neutrality. For example, the German federal government under Chancellor Olaf Scholz has supplied Ukraine with weapons while stopping short of directly supporting military operations since the beginning of the war. In his first statement after taking office, his successor Friedrich Merz also emphasised that Germany would continue to support Ukraine but would not become a party to the war.¹²⁴

In general, Germany repeatedly acted with hesitation and only gave way under sustained pressure from external or domestic sources and after the Biden-led United States took the lead, most prominently when it came to the delivery of Leopard 2 battle tanks. While criticism of such excessive restraint repeatedly came from within the ranks of the conservative CDU/CSU, the pro-Russia (populist) opposition, namely the Bündnis Sahra Wagenknecht and the far-right Alternative für Deutschland (AfD), exploited both the memory of the Second World War and all too understandable concerns that becoming a “warring party” would make Germany a legitimate target.

From a purely legal point of view, it was and remains clear that arms deliveries as such constitute a violation of neutrality without reaching the threshold of belligerency. The German government made a clear statement on this in response to a question from the CDU/CSU in April 2023: “Supporting Ukraine with equipment and arms deliveries in exercising its right to self-defence, as enshrined in the United Nations Charter, does not make Germany a party to the conflict.”¹²⁵

122 <<https://www.swissinfo.ch/ger/st%C3%A4nderat-will-schutzwesten-export-in-ukraine-nicht-erm%C3%B6glichen/87602731>> last accessed 9 July 2025.

123 <<https://www.eda.admin.ch/eda/de/home/das-eda/aktuell/dossiers/krieg-gegen-ukraine.html>> last accessed 9 July 2025.

124 <<https://www.tagesschau.de/inland/bundestag-merz-erste-regierungserklaerung-100.html>> last accessed 9 July 2025.

125 <<https://www.bundestag.de/presse/hib/kurzmeldungen-943542>> last accessed 9 July 2025.

While this simple finding was and remains correct, determining whether and when Germany becomes a party to Russia's war against Ukraine is *legally* irrelevant. It only arises in relation to the legality of attacks inside Ukraine, not attacks on or in Germany. While German soldiers may be attacked or weapons be destroyed there under the *ius in bello*, Germany remains protected under the *ius ad bellum* / *ius contra bellum*. The prohibition of force applies to all states, be it the victim of an attack or those who come to its aid, whether directly or indirectly, whether through arms deliveries or the deployment of their own armed forces, whether as non-neutral states or as belligerents.

On a side note, the German debate regarding support for Ukraine was not only conducted in the language of international law but also German constitutional law. As the Research Services of the German Bundestag ("wissenschaftliche Dienste") emphasised in connection with the highly controversial but, as yet, unrealized delivery of TAURUS cruise missiles, "even a – theoretically assumed – decision by the German government to use the TAURUS cruise missile to combat war-related military targets and infrastructure in Russia (for example the Crimean Bridge) would be covered by the collective right of self-defence and thus permissible under international law [...] Conversely, this means that even active military support by Germany in favour of Ukraine, which would make Germany a party to the conflict (deployment of ground combat troops, participation in air defence in Ukraine, etc.), would not constitute an act of aggression within the meaning of Article 26(1) [of Germany's constitution, the "Basic Law" (*Grundgesetz*)]."¹²⁶

Similarly, no other state that supplies Ukraine with weapons took the view that this, or, more generally, violating neutrality would turn it into a belligerent. Very few governments even found it necessary to justify their support in more detail under international law at all.¹²⁷ The reason might be the simple fact that there is no doubt as to the legitimacy of coming to the aid of the victim whenever the aggressor is clearly identifiable. While there was, for obvious reasons, no UN Security Council resolution condemning Russia's aggression, the UN General Assembly passed several

126 <<https://www.bundestag.de/resource/blob/1002070/WD-2-025-24-pdf.pdf>> last accessed 9 July 2025.

127 See Niccolò Zugliani, 'The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of the Conflict in Ukraine', *European Journal of International Law* 36/2 (2024), 389–410.

resolutions with solid majorities of 140 or more states and only five to six negative votes, among them Russia itself.¹²⁸ Furthermore, the International Court of Justice ordered the withdrawal of Russian troops early on in the proceedings brought by Ukraine against Russia because of Putin's and his regime's absurd allegation of genocide,¹²⁹ which it would probably not have done had there been even the slightest legitimate legal basis for doing so.

That leaves the United States, which had long been Ukraine's largest and most important supporter. However, it is also significant because of its long tradition of neutrality, which, as the election of Donald Trump has shown, continues to have an impact. A position paper prepared by Stephen P. Mulligan for the United States Congress on 26 April 2022 stated that arms deliveries were covered by the old concept of "qualified neutrality". This concept was prominently articulated by former Attorney General and later Supreme Court Justice Robert Jackson during the Second World War, who argued that neutrality only prohibited support for an aggressor, not for states under attack. The paper also stated that even if such deliveries violated neutrality, Russia would not be entitled to attack the US because – and here it concurs with the above findings – a violation of neutrality does not *ipso facto* make a state a co-belligerent or a party to the war on the side of Ukraine.¹³⁰

Another internal US debate relating to neutrality concerned the question how to deal with citizens who fought or wished to fight on the side of Ukraine. According to the Neutrality Act, they should in principle be prevented from waging "private wars" against states with which the United States maintains peaceful relations. It therefore assumes that all US citizens should remain neutral in foreign wars.¹³¹

During Joe Biden's term in office, however, there appear to have been no serious criminal or other consequences, although some fighters were at least questioned when leaving the United States so that they could be kept

128 UN General Assembly Resolution ES-11/1, 2 March 2022, A/RES/ES-11/1 and the subsequent resolutions on Russia's war against Ukraine.

129 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, ICJ Reports 2022, 211 (231).

130 <<https://www.congress.gov/crs-product/LSB10735>> last accessed 9 July 2025.

131 <<https://www.justsecurity.org/80612/american-fighters-ukraine-and-the-neutrality-act-the-law-and-the-urgent-need-for-clarity/>> last accessed 9 July 2025.

under surveillance upon their return.¹³² At the time of writing, no specific information could be found on how the second Trump administration is dealing with these fighters. It should be noted, however, that Trump has said that it was a “shame” that “they died in a foreign country”.¹³³

Needless to say, Russia disagrees with the European and (former?) US views on neutrality. Russian officials have repeatedly stated that they regard states that supply military equipment, first battle tanks, later in the context of the TAURUS debate, and also NATO itself to be “warring parties”.¹³⁴ Even Austria and Switzerland, together with numerous other European states, are characterized as “unfriendly” countries.¹³⁵

VIII. Conclusion

Legally speaking, neutrality has been dead for some eighty, probably even one hundred years. 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. Put bluntly, Germany could supply the Ukrainian armed forces with TAURUS missiles tomorrow and send the Bundeswehr to attack Moscow the next day and still not become a legitimate target. Every state merely *may*, but is not required to stay neutral. 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. From a purely legal point of view, however, even they could justify a departure from their neutrality as a collective countermeasure in favour of the victim. Aggressors have no legal or other basis for complaints. They cannot massively violate one of the most fundamental rules of international law and then demand that neutral parties remain passive or impartial. The prohibition of the use of force clearly takes precedence over neutrality.

132 <<https://www.politico.com/news/2022/05/24/american-fighters-ukraine-white-supremacists-00034860>> last accessed 9 July 2025.

133 <<https://www.thedailybeast.com/donald-trump-79-sends-stunning-message-to-families-of-fallen-us-fighters/>> last accessed 11 January 2025.

134 <<https://www.tagesspiegel.de/internationales/kreml-erneuert-vorwurf-russland-sieht-nato-de-facto-als-kriegspartei-14330996.html>> last accessed 25 September 2025.

135 <https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Laenderinformationen/Laenderinfo_Russische_Foederation.pdf> last accessed on 25 September 2025; <<https://www.interfax.ru/russia/906573>> last accessed on 9 July 2025.

Nevertheless, no state has a right to demand support in repelling an attack that violates international law. The obligation to cooperate in bringing systematic violations of peremptory norms of international law like the prohibition of force to an end, as formulated by the International Law Commission in its articles on state responsibility, has proven toothless. With regard to Ukraine, a vast majority of states have repeatedly condemned Russia's war but have taken no further measures such as imposing sanctions or supplying arms. And none of them has deemed it necessary to justify its inaction by referring to legal arguments. Many countries simply do not consider themselves affected, cite their difficult social and economic situation, or simply want to take advantage of the opportunity to benefit from war. India's willingness to buy Russian raw materials or the role of Central Asian countries in the circumvention of sanctions are both a case in point.

Although there is no right to assistance in self-defence, there is at least a general obligation not to participate in attacks, either by providing one's own territory, sending armed forces, supplying weapons, sharing (intelligence and other) information or providing military training. Again, however, neutrality plays no role here; this obligation stems from the broad scope of the prohibition of the use of force under international law.

Politically, neutrality can be a double-edged sword. In the Iraq War, for example, Austria and Switzerland could rely on their status without being perceived as hostile to US' interest. Virtually no state, whether because of the extreme military asymmetry between Iraq and the US or the all too understandable lack of sympathy for Saddam Hussein's cruel dictatorship, considered to support his regime.

In Russia's large-scale attack on Ukraine, however, the pendulum swung in the opposite direction. Unless one is dumb enough to believe in Russian propaganda, Zelenskyy is no dictator but the democratically-elected president of a country that sought closer ties to the West rather than Russia which simply did not have much to offer. Here, neutrality meant and continues to mean abandoning a victim of aggression that had done nothing wrong.

Both politically and legally, clear-cut situations like this one explain neutrality's sometimes poor reputation, which goes back much further in history: while doubts about its protective function arose during the First World War with the German invasion of Belgium and Luxembourg, countries such as Sweden and Switzerland understandably stood accused of

having accommodated and even facilitated the actions of Nazi Germany to keep their countries safe.

As the discussions on Russia's attack on Ukraine show, the 19th-century logic of "when two quarrel, the third rejoices" (or at least stays out of the dispute) remains popular. Even though it has been clear who started the war in violation of international law and who defended themselves in most interstate conflicts since the founding of the United Nations, the old assumption that a war may involve two sides that are equally right or equally wrong seems to be alive and well.

What does this mean for the further development of neutrality? Prophetic statements run the risk of ageing badly, but it would be intellectually cowardly to end this article with a mere analysis of the past and current state of neutrality. I would therefore like to conclude with a short forward-looking statement: neutrality is here to stay and will even become more popular, be it due to opportunism, fear, or the simple inability to do more. But legally speaking, it is gone. In 1935, after the first major crisis of the League of Nations, Japan's invasion of Manchuria, and the National Socialist rise to power, Nicolas Politis wrote emphatically that neutrality had no place in an orderly system of states. A few years later, that very system collapsed, only to be rebuilt, albeit with a few improvements. Since then, Hans Kelsen's fundamental insight, born of the Second World War, has prevailed: collective security and the idea of *peace through law* are incompatible with neutral passivity. Anyone who takes *ius contra bellum* seriously can only stand on the side of the victim. Legally and morally, nothing has changed in this respect.

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Neutrality in Europe – Between Law and Politics: The Experiences of Austria, Finland and Sweden

Paul Luif

Abstract

This article looks beyond a single country and compares the recent policies of neutrality in Austria, Finland and Sweden. All three joined the European Union in 1995. Whereas Finland and Sweden then began to describe their foreign policy status as “non-alignment”, attempts of the center-right government in Austria failed in this regard, thus maintaining Austria’s “permanent neutrality”. In Finland and Sweden, center-right parties even started to advocate NATO membership. In contrast, from 2004 on, all Austrian political parties rejected membership. After the military invasion of Ukraine by Russia in February 2022, public opinion and most of the political parties in Finland and Sweden opted, without much delay, for NATO membership, but not Austria’s public and politicians. The article examines some of the reasons for the policy divergences of these three countries.

I. Introductory Remarks

Recently, a number of publications have dealt with Austria’s (permanent) neutrality. Most of the writings have concentrated on the legal aspects and its influence on Austria’s scope in handling its international affairs, including its policy in the European Union (EU). The domestic debates among the political parties on neutrality have been mostly neglected. The ramifications of the changes in the international system, the end of the Cold War and the developing crises have only been discussed, if at all, in connection with Austria’s EU membership. The reasons behind Sweden’s and Finland’s abandonment of neutrality/non-alignment, after 200 years in the case of Sweden or after some 70 years in the case of Finland, compared to the maintaining of neutrality by Austria have practically never been analyzed.

The 15 articles in Vol. 53 (2024) of the *Österreichische Zeitschrift für Politikwissenschaft* on the “State and the Future of Austrian Neutrality” are a case in point. Only one contribution, by Austria’s former foreign minister, Ursula Plassnik, notes the lack of debate in Austria on the two Nordic countries joining NATO in 2023 resp. 2024.¹ Among the 14 remaining researchers, one lonely voice calls for a further exploration of the domestic and international factors which led to the abandonment by Finland and Sweden of their non-aligned status.² In their 187 pages long book on the (possible) future of Austria’s neutrality, a retired Austrian diplomat (Franz Cede) and a specialist in international law (Ralph Janik) deal with the “tedious NATO question” only in one paragraph. According to the authors, Sweden and Finland undertook “a radical review of their non-alignment” – but they do not even mention the outcome of this assessment, namely NATO membership.³

II. Historical Background

The (permanently) neutral countries in Europe have had a long tradition of informal cooperation, during the Cold War, beginning already in the late 1950s. Important examples were, besides the coordinated approaches to European integration, the collaboration in supporting the Conference on Security and Co-operation in Europe (CSCE) and its successor, the Organization for Security and Co-operation in Europe (OSCE). Here the neutrals were organized in the N+N Group (together with non-aligned Yugoslavia).

When Austria applied for membership in the European Community (EC; later EU) in 1989, it took some time until Sweden (in 1991) and Finland (in 1992) followed suit. Switzerland did submit an application in

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- 1 Ursula Plassnik, Jenseits der Neutralität, in: Martin Senn/Elisabeth Röhrlich (eds.), Zustand und Zukunft der österreichischen Neutralität: Eine Auseinandersetzung, *Österreichische Zeitschrift für Politikwissenschaft/Austrian Journal of Political Science*, Vol. 53, Special issue 2024 (<http://oezp.at/>).
 - 2 Marion Foster, Die österreichische Neutralität zwischen Strategie und Identität, in: Martin Senn/Elisabeth Röhrlich (eds.), Zustand und Zukunft der österreichischen Neutralität: Eine Auseinandersetzung, *Österreichische Zeitschrift für Politikwissenschaft/Austrian Journal of Political Science*, Vol. 53, Special issue 2024 (<http://oezp.at/>), 7.
 - 3 Franz Cede/Ralph Janik, *Auslaufmodell Neutralität? Geschichte und Gegenwart eines österreichischen Mythos*, Innsbruck: Michael Wagner Verlag, 2025, 164, 182.

May 1992, but it suspended it after a negative referendum on the participation in the European Economic Area, which was intended to be the first step towards membership. There was already a slight difference in the application letters of the three neutrals. Whereas Austria included, at the request of the Social Democrats, a reference to its (permanent) neutrality, Sweden's and Finland's applications lacked this reference. In 1995, Austria, Finland and Sweden became members of the EU. During the negotiations on EU accession, Austria, Finland and Sweden promised in a Joint Declaration that they will "be ready and able to participate fully and actively in the [EU's] Common Foreign and Security Policy [CFSP]" and "their legal framework [...] will be compatible with the 'acquis'" in this area. In implementing this pledge, Austria introduced Article 23f (now 23j) in its Federal Constitution. It supersedes the constitutional Neutrality Law from 1955 in the EU context. Since Finnish and Swedish neutrality was not based on laws, legal adjustments were not required. Instead, Finland and Sweden started to eliminate references to neutrality and replaced it with "non-alignment" (*alliansfrihet* in the Swedish case).

In 1994, Finland and Sweden joined NATO's Partnership for Peace program, Austria followed, after some reluctance by the Social Democrats, in 1995. It allowed non-NATO members to participate in military cooperation, in particular in crisis management; the partners set their own cooperation priorities.

Austria's newly independent neighbors to the East started to discuss EU and NATO membership in the mid-1990s. Hungary, the Czech Republic and Poland were invited to join NATO at its Madrid summit (8/9 July 1997). On 12 March 1999, the three countries became members of NATO. The new coalition government of the Social Democrats (SPÖ) and the conservative People's Party (ÖVP) announced in their March 1996 Coalition Agreement that the parties will aim at a "comprehensive participation in Europe's security structures". In this context, the "government will comprehensively examine all evolving security *options*, including full membership in WEU".⁴ Membership in WEU (a military alliance) would have ended neutrality. The lengthy debates among the parties about the *Optionenbericht* finally turned around membership in NATO (WEU was a never

4 This part is based on Heinrich Schneider, Der sicherheitspolitische „Optionenbericht“ der österreichischen Bundesregierung: ein Dokument, das es nicht gibt – und ein Lehrstück politischen Scheiterns, in: Informationen zur Sicherheitspolitik Nr. 16 (März 1999) [https://www.bmlv.gv.at/pdf_pool/publikationen/01_seo_02_soo.pdf]. Emphasis here and all translations from German and Swedish are by Paul Luif.

a fully established alliance of only European states). In view of the NATO activities of Austria's neighbors, the leader of the ÖVP parliamentary group, Andreas Khol, declared in early 1998 that Austria's "NATO membership will come as sure as night follows day [literally: will come like the amen in a prayer]". From the SPÖ side, the Speaker of the National Council Heinz Fischer and leader of the SPÖ parliamentary group hotly opposed any "NATO option" in the proposed text.

Researchers from the left warned that Austria would have to radically increase its defense budget as a NATO member.⁵ Austria was spending, compared to other states, very little on military defense (see Figure 1 in the Annex). Warnings about Austria being viewed by other countries as a "free rider" were not heeded.⁶

The governing parties could not find an agreement on the *Optionenbericht*. The FPÖ, the largest opposition party under Jörg Haider, strongly supported NATO membership, the Greens were against it. A public opinion poll from February 1998 showed that 65 percent of Austrians were opposing NATO, however 57 percent believed that in the final instance Austria would become NATO member and only 21 percent thought Austria will never join the alliance (Der Standard, 16 March 1998). The rejection of the NATO option by the Social Democrats in 1998, even though the ÖVP and FPÖ would have accepted it, turned out to be an important "critical juncture" of Austria's foreign policy.

After EU accession, Finnish politicians started to discuss NATO membership. Two parties in the Finnish parliament officially supported membership: the center right National Coalition Party (*Kokoomus*) and the Swedish People's Party (the party of the Swedish-speaking minority, *Svenska folkpartiet*). The official line of the government was a "NATO option": No immediate need for NATO membership but Finnish foreign policy kept open the option of joining if the security situation changed.⁷

5 Heinz Gärtner/Johann Pucher, *Kostenschätzung einer österreichischen NATO-Mitgliedschaft*, Österreichisches Institut für Internationale Politik, Laxenburg 1997 (= Arbeitspapier AP 17), 8.

6 See e.g. Paul Luij *Der Wandel der österreichischen Neutralität. Ist Österreich ein sicherheitspolitischer „Trittbrettfahrer“?* 2., ergänzte Version. Österreichisches Institut für Internationale Politik Laxenburg, April 1998 (= Arbeitspapier, AP 18).

7 Minna Ålander, *Finland wants to use the "NATO option"*, Stiftung Wissenschaft und Politik Berlin, Point of View, 27.04.2022 [<https://www.swp-berlin.org/publikation/finland-wants-to-use-the-nato-option>].

After the Social Democrats returned to power in Sweden, September 1994, the now biggest opposition party, the conservative Moderate Party (*Moderaterna*) agreed to a Commission which should “list and value the different security policies which are available” for Sweden; NATO was not mentioned. Members of the (classical) Liberals (until 2015 *Folkpartiet liberalerna*) wanted NATO membership put on the table, likewise an editorial of the liberal newspaper *Expressen*. The Moderate Party stressed more the importance of EU membership, while the Social Democrats strongly opposed Sweden joining NATO. Thus, there was no Commission report. Yet when NATO invited the Czech Republic, Hungary and Poland to join NATO in 1997, the Social Democrat government published a report with rather positive references to NATO. In 1998, the conservative leader Carl Bildt was open to debate NATO membership after 2000. But when Tarja Halonen, Social Democrat and a strong opponent NATO membership, became Finnish president in 2000, winds changed also in Sweden and the push for NATO membership abated. Furthermore, the Military Intelligence and Security Service (*Must*) of the Swedish Armed Forces stated in its 2003 Report that the “danger of an armed conflict can be excluded in the foreseeable future”.⁸ Sweden reduced its military expenditures, whereas Finland maintained more or less its high level of spending on defense. Austria’s military budget (as percentage of gross domestic product) was always lower than Sweden’s or Finland’s and had declined even more after the end of the Cold War, as Figure 1 (Annex) shows.

In Austria, the ÖVP-FPÖ government (2000-2007) again tried to abolish “neutrality” or at least reduce its impact on foreign policy.⁹ Chancellor Wolfgang Schüssel attempted to frame the issue historically in a speech at the Austrian national day (26 October 2001):

The old templates – be it Mozart balls, Lipizzaners or neutrality – cannot grasp the complex reality of the early 21st century.

8 See Maggie Strömberg/Torbjörn Nilsson, *Högt över havet. Så övergav Sverige alliansfriheten*, Stockholm: Albert Bonniers Förlag, 2024, 264-266.

9 The following two paragraphs are taken from Paul Luif, „Die alten Schablonen [...] ob das Mozartkugeln, Lipizzaner oder die Neutralität sind — greifen in der komplexen Wirklichkeit des beginnenden 21. Jahrhunderts nicht mehr.“ Die Diskussion über die Neutralität, in: Robert Kriechbaumer/Franz Schausberger (eds.), *Die umstrittene Wende. Österreich 2000-2006*, Wien-Köln-Weimar: Böhlau Verlag, 2013, 551-584, here 567-569.

Again the Speaker of the National Council, Heinz Fischer (later President of the Republic 2004-2016) immediately requested “deference” for neutrality which was part of the Federal Constitution. The speaker of the Greens, Alexander Van der Bellen (Austria’s President after Fischer) spoke about “an obligation for active neutrality”. Austria’s by far biggest newspaper (read at that time by about 40 percent of Austrians every day), *Kronen Zeitung*, wrote the next day on page one about a “major scandal” concerning Schüssel’s speech.

During the Iraq crisis in spring 2003, the Austrian government “discovered” neutrality again. It blocked the transit of US troops through Austria because the UN Security Council had not authorized US military intervention in Iraq. Benita Ferrero-Waldner, foreign minister from February 2000 till October 2004 under Schüssel, had supported Austria’s NATO membership. But during her presidency election campaign in early 2004 she started to oppose Austria joining NATO. The reason being that public opinion polls had shown that her opponent, Heinz Fischer, clearly had a huge advantage by supporting neutrality; Fischer got elected. In October 2004, the Conservatives abandoned their quest for NATO membership. The “new” FPÖ without Haider began to favor neutrality. Since then, no Austrian party has officially supported NATO membership.¹⁰

In 2009, Finland and Sweden began to participate in the „NATO Strategic Airlift Capability“ at the Pápa Air Base in Hungary. Although the site of this Base in Western Hungary is quite close to the Austrian border, Austria has not joined in this activity (on the participation/cooperation of the three countries with NATO see Table 1 in the Annex).

With the Lisbon Treaty (in force since December 2009), a mutual military assistance clause (similar to, but actually with stronger wording than Article 5 of the Washington Treaty) became part of the Treaty on European Union (Article 42(7)). The “Irish clause” in this Article allows Member States to maintain their “specific character of the security and defence policy”. Finland was initially hesitant about the introduction of this assistance clause, but later adopted a positive view.¹¹

Article 42(7) never played an important role in the discussion on security and defense in Finland and Sweden. The EU was not seen as a primary

10 A minor exception is the small NEOS party, where some members want Austria to join NATO.

11 Matti Pesu/Tuomas Iso Markku, Finland as a Nato ally. First insights into Finnish alliance policy (Finnish Foreign Policy Paper 9), Helsinki: Finnish Institute of International Affairs, December 2022, 10.

security provider. In contrast, Austrian critics of neutrality argued that Austria's foreign policy status had lost its credibility with EU membership. Thus NATO membership, which was opposed by a large majority of the population, was not essential to end neutrality, it was full participation in the EU's Common Security and Defense Policy.

Tensions in the North increased. On 29 March 2013, Russian long-range bombers and fighter jets in the Baltic unexpectedly began simulated attacks on Stockholm and military targets in southern Sweden. The Swedish air force was unable to react to the Russian provocation.¹²

So it was probably no surprise that a separation in NATO policies of Austria on the one hand and Finland and Sweden before long emerged. After Russia's annexation of Crimea and the occupation of Eastern Ukraine in early 2014, NATO answered this challenge at the Wales Summit in September 2014. One element of the response was the Partnership Interoperability Initiative. In its context, five countries were selected as "Enhanced Opportunities Partners", among them Finland and Sweden (together with Australia, Georgia, Jordan and later Ukraine). The partners were not only cooperating with NATO in Afghanistan, the Balkans and Libya (as in the framework of Partnership for Peace), the Initiative also included coordination of defense with NATO on its European territory, it was thus linked to territorial defense.¹³

Austria belatedly joined the Individually Tailored Partnership Programmes (ITPP) of NATO in 2021. According to the Austrian Security Strategy, ITPP gives the appropriate basis to expand political dialogue and deepen military cooperation. Austria wants to exhaust the possibilities of cooperating with NATO in the fields of conflict prevention, crisis management, and cooperative security in the interest of strengthening the interoperability of the military capacities. But there is no reference to cooperation in territorial defense.¹⁴

Austrian foreign policy actually moved in another direction. It was very much involved in initiating and generating the "Treaty on the Prohibition of Nuclear Weapons" (TPNW). In contrast to the Non-Proliferation Treaty

12 Christian Nuenlist, *The Struggle for Sweden's Defence Policy*, CSS [ETH Zurich] Analysis in Security Policy No. 138, July 2013, 1.

13 Axel Wernhoff, *Från partnerskap till medlem – perspektiv från Natodelegationen*, in: Ingvar Mattson (red.) *Sverige in NATO*, Stockholm: Dialogos, 2025, 69-89, here 71.

14 Austrian Security Strategy 2024, Austrian Federal Chancellery, Vienna, September 2024, 9.

(NPT, in force since 1970) which aims at preventing the spread of nuclear weapons, the TPNW seeks to abolish all nuclear weapons. A number of Austrian diplomats were involved in this endeavor which followed the established tradition of Austria's "active neutrality".¹⁵ Finally, a Conference, organized by the UN, adopted the Treaty by a vote of 122 States in favor, with one vote against and one abstention on 7 July 2017. It entered into force on 22 January 2021; until February 2024, 93 countries had signed the TPNW, but mostly from the Global South.¹⁶ Besides Austria, only four other European countries have ratified the TPNW: the Holy See, Ireland, Malta and San Marino; no NATO country.

The debate on the TPNW had also repercussions in Sweden. Margot Wallström, then foreign minister from the Social Democrats (2014-2019), wanted her country to sign and ratify the Treaty. She was strongly opposed by the defense minister, Peter Hultqvist, also a Social Democrat. Wallström's effort failed and she stepped down in September 2019.¹⁷ It seems that many Austrian diplomats (a number of them close to the SPÖ), even under a conservative foreign minister, still adhered to the active neutrality policy approach of Chancellor Bruno Kreisky (1970-1983). Whereas in Sweden, a new generation of politicians had already gone beyond the foreign policy conceptions of Prime Minister Olof Palme (1969-1976 and 1982-1986).

III. Response to the Russian Invasion of Ukraine, February 2022

A. Austria

Shortly after the Russian invasion of Ukraine, Austrian Chancellor Karl Nehammer (ÖVP) in early March 2022 asserted that "Austria was neutral, is neutral and will also remain neutral". Neutrality "has served Austria well". He thus quickly ended a debate on neutrality which was started by some

15 Alexander Kmentt, Abrüstungs-, Rüstungskontroll- und Nichtverbreitungspolitik, in: Martin Senn, Franz Eder, Markus Kornprobst (eds.) *Handbuch Außenpolitik Österreichs*, Wiesbaden: Springer VS, 2022, 323-344, here 336.

16 See <https://disarmament.unoda.org/wmd/nuclear/tpnw/> and <https://treaties.unoda.org/t/tpnw/participants>, accessed Feb. 15, 2024.

17 Strömberg/Nilsson (2024), 150, argue that Wallström had to resign when she lost this controversy with Hultqvist.

members of his party.¹⁸ The support for neutrality noticeably increased in Austria after Russia's invasion. Whereas in February 2019 56 percent of Austrians regarded neutrality as "personally very important", the importance of neutrality for Austrians rose to 70 percent in March 2022.¹⁹ It has remained on this level in the following years. No party touched this subject any longer. When Veit Dengler, a founding member of the NEOS party and the party's foreign policy spokesperson, supported NATO membership in a newspaper interview in November 2025, he immediately lost his position and was appointed as spokesperson for research.²⁰

B. Finland

After 2014, Finland, besides being a NATO Opportunities Partner, also developed a diverse set of bilateral, trilateral and minilateral partnerships with Sweden and important NATO allies, like the United States, Norway and the United Kingdom. All these partnerships were linked to territorial defense. Finland started to see itself as a part of NATO's defense system in Europe. The "policy of non-alignment gave way to a new policy of alignment".²¹ However, public opinion polls showed Finns still opposing NATO membership. In December 2021, 51 per cent of Finns were against NATO membership, merely 24 per cent were in favor. But with the invasion of Russia in Ukraine on 24 February 2022, public opinion started to change dramatically. In a new poll from 28 February a majority of Finns already supported joining NATO. In mid-April, 68 percent of Finns viewed military alignment positively and by early May, support for NATO membership exceeded 75 per cent and stayed roughly at that level.²² This change in public attitudes were influenced by an intensive debate in Finnish media

18 Nehammer: Österreich bleibt neutral, Diskussion beendet, in: Die Presse, 8.3.2022 [<https://www.diepresse.com/6108512/nehammer-oesterreich-bleibt-neutral-diskussion-beendet>].

19 See Exxpress, 18.5.2022 [[exxpress.at/klarere-auftrag-fuer-nehammer-und-vdb-oesterreicher-fuer-erhalt-der-neutralitaet](https://www.exxpress.at/klarere-auftrag-fuer-nehammer-und-vdb-oesterreicher-fuer-erhalt-der-neutralitaet)].

20 Christian Ultsch, Veit Denglers kurze Karriere als außenpolitischer Neos-Sprecher, Die Presse, 25.11.2025 [<https://www.diepresse.com/20345748/nato-beitritt-gefordert-warum-veit-dengler-nicht-mehr-aussenpolitischer>]. NEOS are the smallest member in the government coalition with ÖVP and SPÖ, in office since February 2025.

21 Matti Pesu/Tuomas Iso-Markku, Insufficiency of informal alignment: why did Finland choose formal NATO membership?, in: *International Affairs*, Vol. 100: 2 (March 2024) 569-588, here 576, quote from 577.

22 The results of the polls are taken from Pesu/Iso-Markku (2024), 578.

on NATO accession and among the political parties which had begun already in December 2021. Russia's aggressive actions in Georgia, Syria and in Ukraine 2014 had been a factor in the turnaround. In addition, the tradition of neutrality and non-alignment during the Cold War came under increased scrutiny. "Finlandization" was not only regarded accommodation of Finnish foreign policy to Soviet interests, but also seen as domestic self-censorship in the media, parties and in education.²³

As already mentioned, at the beginning of the NATO debate in Finland only two of the eight parties in Parliament were for NATO membership. During a meeting of Finnish and Swedish government leaders in Helsinki, 3 March 2022, Finnish Prime Minister Sanna Marin notified her Swedish counterpart, Magdalena Anderson, that opinion in Finland was quickly changing, also among the Finnish Social Democrats (both prime ministers being Social Democrats). For Marin, Article 42(7) of the EU Treaty would not be sufficient as a security guarantee.²⁴

Prime Minister Sanna Marin in fact belonged to the left wing of the Finnish Social Democrats.²⁵ But she was also young, age 34 when she took office in December 2019. She was much more internationally oriented than her counterparts in Sweden. Participating in the European Council meetings of the EU in Brussels, she realized that in security and defense questions she, as a ("neutral") Finn, was an outsider, had "no place on the table". Nevertheless, in January 2022, Marin asserted that Finland would not become member of NATO "under her watch". This would actually have been an abandonment of the Finnish "NATO option", her many critics argued. 24 February 2022, the massive attack by Russia on Ukraine, did change everything. The following weekend Sanna Marin and the Social Democratic leadership aimed at applying for NATO membership by 1 April. Finland's "NATO option" did not leave a chance; when not now, then on what occasion?²⁶

The problem was how to convince Marin's party and the other parties in the coalition government. In the Green League, a lively debate on NA-

23 Pesu/Iso-Markku (2024), 579.

24 Strömberg/Nilsson (2024), 59.

25 This and the subsequent paragraphs follow the analysis of Strömberg/Nilsson (2024), 63-65.

26 Tomas Ries wrote already in 1999 about Finnish NATO ambitions: "the danger is that it may always be too early until it is too late"; see his paper on Finland and NATO, Department for Strategic and Defence Studies. National Defence College, Helsinki, Finland, November 1999, last sentence.

TO had already developed; but the Left Alliance was definitely against membership. This left the Center Party, formerly the staunchest defender of neutrality/non-alignment. Annika Saarikko, the leader of the Party and Deputy Prime Minister finally decided to support Marin's position. Both ladies agreed to convince their parties' rank and file in a coordinated manner.²⁷ Marin also talked with the opposition leader of the NATO friendly National Coalition Party. Even the populist Finns Party now supported NATO membership.

In Finland, foreign policy is decided by the government and the president together. So on 2 March 2022, President Sauli Niinistö (formerly member of the National Coalition Party) summoned a meeting of all party leaders, parliamentary group leaders and speakers of Parliament. It was decided that Parliament should request a report from the government about the changes of the security environment of Finland. The process towards Finnish NATO membership had started.²⁸ The Report of 13 April did not explicitly recommend Finnish NATO membership, it implicitly deemed all other options insufficient.²⁹ There was a widely shared perception of a "deterrence deficit". Finland's existing security arrangements in relation to Russia were simply insufficient. Thus NATO membership was seen as the only viable way of enhancing Finland's security.³⁰ The Social Democrats, who previously had opposed NATO membership, held an extraordinary council meeting on 14 May 2022 and approved now, at the instigation of Sanna Marin, NATO membership. So the Finnish Prime Minister could on 16 May 2022 present the Report on Finland's Accession to NATO to Parliament.³¹ The next day, the Parliament approved the Report with a 188 yes and 8 no votes (3 member absent).³² On 17 May 2022, President Sauli Niinistö, who previously had been, at least in public, more cautious about NATO membership, communicated Finland's intention to apply for NATO membership, Finnish Minister for Foreign Affairs Pekka Haavisto (Green

27 Strömberg/Nilsson (2024), 66.

28 Strömberg/Nilsson (2024), 68.

29 See Government of Finland, Government report on changes in the security environment, Helsinki: Prime Minister's Office, 13 April 2022.

30 Pesu/Iso-Markku (2024), 583.

31 Report on Finland's Accession to the North Atlantic Treaty Organization, Helsinki: Finnish Government, 15 May 2022.

32 A good compilation of the Finnish NATO process can be found in the article of the Library of Congress, Finland: Parliament Votes to Join NATO, 17.5.2022 [<https://www.loc.gov/item/global-legal-monitor/2022-05-17/finland-parliament-votes-to-join-nato/>]; on the vote see. <https://perma.cc/623V-9JQ7>.

League) signing a letter to that effect. The Finnish letter was delivered to NATO Secretary General Jens Stoltenberg, together with Sweden's letter of application, on 18 May 2022. There were problems with Turkey, but Finland succeeded to become full NATO member on 4 April 2023, leaving Sweden behind.

After becoming the new Finnish president on 1 March 2024, Alexander Stubb (National Coalition Party's candidate) shortly afterwards explained the security status of Finland in an interview:

I have never felt safer as a Finn. We have three locks that our defense is based on. The first lock is our national defense. The second lock is NATO and the EU, and of course, Sweden as well. The third lock is our DCA treaty, which is a defense treaty with the USA.³³

According to the Values and Attitudes Survey from October 2025, two-thirds of Finns viewed the alliance positively, while only 10 percent expressed negative views. Support for NATO was highest among the conservative National Coalition Party (90 percent) and Green League (79 percent) voters and slightly less among Social Democratic Party (73 percent), Center Party (71 percent) and Finns Party (69 percent) supporters. The lowest support was among Left Alliance voters (44 percent).³⁴

C. Sweden

Sweden already had a rather close, but covert relationship with NATO during the Cold War, cooperating in particular with and through Norway.³⁵ Swedish researchers had a long tradition of discussing NATO. A recent example, before February 2022, was the article by Katherine Kjellström Elgin and Anna Wieslander, where the authors examined NATO's partnerships with Sweden and Finland as key examples of the possibilities of building

33 Interview in SVT Aktuellt, 16 April 2024, quoted from Lars-Erik Lundin, Building solidarity peer pressure within NATO and the EU, in: The Royal Swedish Academy of War Sciences. Proceedings and Journal, No. 2/2024, 47.

34 Data according to an EVA survey, quoted from the article Half of Finns fear wider war but still trust NATO, Helsinki Times, 4 November 2025 [<https://www.helsinkitimes.fi/finland/finland-news/domestic/28173-half-of-finns-fear-wider-war-but-still-trust-na-to.html>].

35 See the extensive analysis by Mikael Holmström, Den dolda alliansen – Sveriges hemliga NATO-förbindelser. Stockholm: Bokförlaget Atlantis, 2011.

partnerships around converging interests.³⁶ For several years, Swedish officials in the foreign ministry had in vain pushed for a “NATO option”, similar to Finland.³⁷

The first reaction of the Swedish government (a minority government by the Social Democrats) to the Russian invasion in Ukraine came from Foreign Minister Peter Hultqvist. He wanted a deepened military cooperation of Sweden with Finland, perhaps even forming a military alliance.³⁸ But this kind of “minor” mutual military assistance would have ended Swedish neutrality/nonalignment after 200 years. Magdalena Andersson, prime minister since November 2021, presented a plan on 8 March 2022, a day after the Hultqvist proposal: Sweden should rearm (aiming at a defense budget of 2 percent of GDP, cf. Figure 1 of the Annex) as well as strengthen the trilateral cooperation with Finland and the United States. A “push to join NATO would destabilize northern Europe”.³⁹ The leader of the conservative Moderates pushed for NATO membership. It soon became clear that Finland would send an application.

Nonetheless, in the background, a push for NATO membership had quietly been building up. During the last 10 years (after Crimea 2014) joining NATO had become self-evident among important specialists of Swedish security policy. On the editorial pages of the newspapers one could find more positive than negative articles about NATO. Almost all experts commenting the Russian aggression in Ukraine supported NATO membership.⁴⁰

Among the political parties, the Liberals were early on pushing for joining NATO. In a survey from December 2020, the conservative *Moderaterna*, the Center Party and the Christian Democrats all supported NATO membership. The Social Democrats, the right-wing populist Sweden Democrats, the Left Party and the Green Party still opted for Swedish non-alignment.⁴¹ But the Sweden Democrats, the third largest party in

36 Katherine Kjellström Elgin/Anna Wieslander, Making NATO’s Partnerships More Strategic: Sweden and Finland as Partner Models for Development, in: Jason Blessing et al. (eds.) *NATO 2030 Towards a New Strategic Concept and Beyond*, Washington, DC: Brookings Institution Press, 2021, 109-130.

37 Strömberg/Nilsson (2024), 82.

38 Strömberg/Nilsson (2024), 80.

39 Strömberg/Nilsson (2024), 91/92. The authors took the quote from the Financial Times.

40 Strömberg/Nilsson (2024), 196.

41 SVT Nyheter, Lista: Så står partierna i Nato-frågan [<https://www.svt.se/nyheter/inrikes/lista-sa-har-star-partierna-i-nato-fragan>].

Parliament after the 2018 elections, soon changed their position. Already on 26 February 2022, a prominent member of the party wrote on Twitter:

It is now time to think about a NATO membership application – together with Finland. To stand firm against the 21st century Hitler is of overriding importance.⁴²

Like in the old days when they dominated Swedish politics, the decisive choice had to be made by the Social Democrats, still Sweden's largest party. Their room of maneuver had continuously decreased. It was clear, in contacts with Sanna Marin, that Finland would apply for NATO membership; thus a bilateral alliance Sweden-Finland was not feasible. The Moderate leader, Ulf Kristersson, indicated that his party would use the NATO question in the coming election campaign for the Swedish Parliament.⁴³ Maintaining military non-alignment would also be costly. Research showed that Sweden would have to increase its military spending from about 1 percent of GDP to 5 to 6 percent to successfully defend Sweden against a military attack.⁴⁴

Public opinion started to change dramatically. Whereas in January 2022 35 percent of Swedes and only 19 percent of Social Democratic sympathizers wanted Sweden to join NATO, in mid-April, the percentages were 46 and 34 respectively; at the end of April 2022, 51 percent both of the general public and of the Social Democratic sympathizers wanted Sweden to join NATO.⁴⁵

Finally, the National Board (*partistyrelsen*) of the Social Democrats met on Sunday, 15 May 2022, to officially decide on Sweden's NATO membership application. At six o'clock in the afternoon, Prime Minister Magdalena Andersson declared in front of the media:

We Social Democrats believe that it is the best for Sweden and for the security of the people of Sweden that we join NATO. This is not a decision that one takes lightly, but we must deal with the realities as they

42 Strömberg/Nilsson (2024), 294, a Twitter from Björn Söder.

43 Strömberg/Nilsson (2024), 158.

44 Oscar Stenström, *Sveriges medlemskapsförhandlingar*, in: Ingvar Mattson (red.), *Sverige in NATO*, Stockholm: Dialogos, 2025, 45-68, here 49. See also Figure 1 in the Annex.

45 Ulf Bjereld/Henrik Oscarsson, *Jordskred i Svensk Nato-opinion efter Rysslands invasion av Ukraina*, in: Ulrika Andersson et al. (red.), *Ovisshetens tid*. Göteborg: SOM-institutet, Göteborgs universitet, 2023, 141-154, here 145, opinion polls by Kantar Public (Sifo). See also Figure 2 in the Annex.

actually look like, and when reality changes we must take the appropriate decision.⁴⁶

On Monday, 16 May 2022, the Swedish Parliament voted for Sweden's NATO membership application. After the Finnish Parliament did the same on 17 May, Finland and Sweden submitted together their membership application in Brussels.⁴⁷ The Swedish Riksdag then voted on joining NATO on 22 March 2023, with 269 yes, 37 no votes. The no votes came from the Left Party and the Green Party, 43 members were absent.⁴⁸

After some troubles with Turkey, concerning Swedish support for “terrorists” and a spat with Hungary, Sweden finally became member of the NATO alliance on 7 March 2024. Thus ended 200 years of Swedish neutrality/*alliansfrihet*.

IV. Concluding Remarks

Why did Finland and Sweden become NATO members, but not Austria?

If geography would be the main reason for joining/not joining NATO, then in 1997/98, when Austria's neighbors in Central Europe became NATO members, Austria would have joined NATO as well.

One element already mentioned that distinguished Austria from the other two countries was the change of generations, in particular in the Social Democratic Party of Finland. For younger politicians, the experiences during the Cold War had not much significance any more. The Finnish drive for membership left the Swedish Social Democrats with little choice. With only a slight exaggeration one could say that Sanna Marin, the lady from *Vogue*, “pushed Sweden over the cliff”.⁴⁹

It seems that the media in Finland and Sweden were much more open to discuss NATO membership than Austrian media. In particular, there does not exist a newspaper like *Kronen Zeitung*, still read by a large number

46 Strömberg/Nilsson (2024), 212.

47 Strömberg/Nilsson (2024), 213.

48 Matti Wiberg, Keep calm and join NATO. Finland's and Sweden's road to the military-political alliance, Bonn: Center for European Integration Studies, 2023 (ZEI Discussion Paper 280), 35.

49 I take this from Strömberg/Nilsson (2024), 402.

of Austrians, which uncompromisingly supports neutrality.⁵⁰ Therefore, it should be no surprise that the support of “neutrality”, whatever it means,⁵¹ is so high. With a much larger range of views in the media, attitudes in Finland and Sweden could change more easily.

Neutrality is an important part of Austrian identity – this is what most politicians and researchers in Austria claim. How then can the idea of Sweden as a neutral country so quickly disappear after 200 years? A Swedish study explains that a state’s self can be conceptualized in terms of layered identity constructions. In Sweden military non-alignment was not presented as an end in itself, but “as essential for enabling Sweden to maintain other, arguably more deeply ingrained, identity constructs”. The authors list here e.g. Sweden as a contributor to peace and security as well as the special relationship with Finland.⁵² In the Austrian case, e.g. a “Central European identity” would be helpful, but this has been neglected, especially after the end of the Cold War. Thus a country in the center of Europe, which has, after Germany the highest number of neighboring states in Europe, does not have a close partnership with any of its neighbors. All of them, with the exception of Switzerland and Liechtenstein, are now members of NATO.

And this leads to one of the flaws in the research on Austrian neutrality. Practically none of the numerous scholars, be it political scientists or specialists in international law, discusses the opportunity costs of neutrality. It could be an interesting topic for research.

50 The *Kronen Zeitung* had a huge headline on 26 October 2025, Austria’s national day, warning all Austrians: Austria’s “neutrality is not to be shaken” [An der Neutralität ist nicht zu rütteln].

51 Rita Phillips, Fast alle halten Neutralität hoch, aber nur wenige wissen, was sie bedeutet, Forschungskommunikation, Universität Klagenfurt, 18. September 2024 [<https://www.aau.at/blog/fast-alle-halten-neutralitaet-hoch-aber-nur-wenige-wissen-was-sie-bedeutet/>].

52 Elvira Hjertström/Linus Hagström, Changing identity to remain oneself: ontological security and the Swedish decision on joining NATO, in: *Journal of International Relations and Development*, Vol. 28, 2025, 29–54, here 39.

Annex

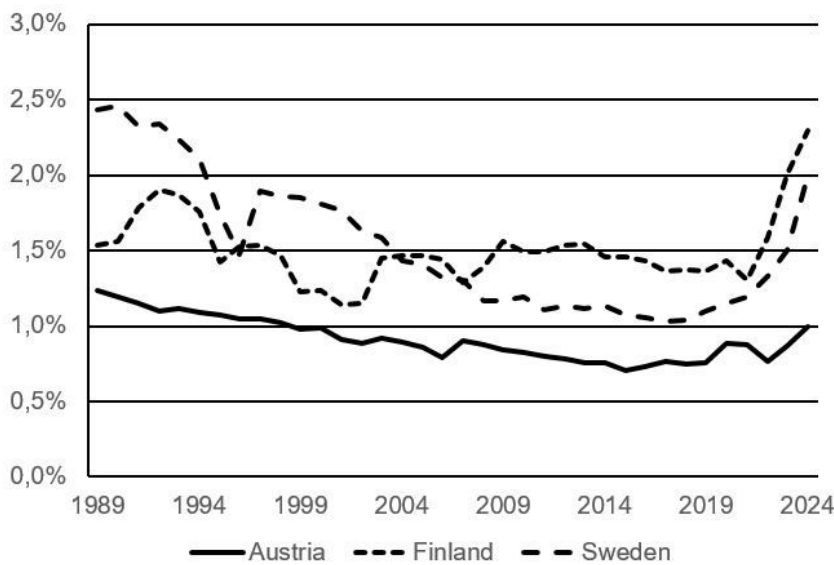
Table 1:

Participation/Cooperation with NATO: Austria, Finland, Sweden

	Austria	Finland	Sweden
Partnership for Peace	1995	1994	1994
“NATO Strategic Airlift Capability” at the Pápa Air Base in Hungary	–	2009	2009
International Security Assistance Force (ISAF), Afghanistan, UN-mandated, NATO-led, 2002-2014 (troops, data for 2011)	3	156	500
Enhanced Opportunities Partner (NATO Summit Wales 2014)	–	2014	2014
Host Nation Support Agreement with NATO	–	2014/2016	2014/2016
Individually Tailored Partnership Programme (ITPP)	2021	–	–
NATO Membership	–	2023	2024

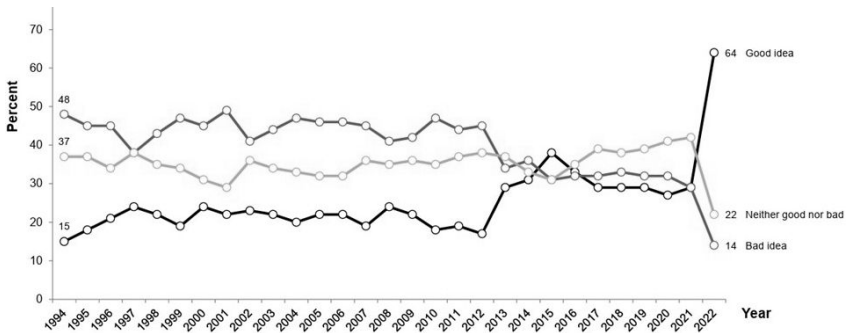
Source for ISAF: Andrew Cottey, *The European Neutrals and NATO: Ambiguous Partnership*, in: *Contemporary Security Policy*, Vol.34, No.3, 2013, 446–472, here 460.

Figure 1:
Military expenditure by country as percentage of gross domestic product, 1989-2024 (© SIPRI 2024)



Source: SIPRI Military Expenditure Database [<https://www.sipri.org/databases/milex>].
Graph by Paul Luif.

Figure 2

Public Opinion on Swedish Membership in NATO

Notes: Question: “What is your opinion on the following proposal?” 1994–2021: “Sweden should apply for membership in NATO”, 2022: “Sweden should become a member of NATO”. Five response alternatives to the question asked: “Very good proposal; Fairly good proposal; Neither good, nor bad proposal; Fairly bad proposal; Very bad proposal”. The results show percent answering “Very/fairly good” or “Very/fairly bad” among respondents who answered the question.

Source: SOM Institute, Swedish Trends 1986–2024, University of Gothenburg 2024, 68. Data from The National SOM Survey 1994–2022 [<https://www.gu.se/sites/default/files/2025-04/Swedish%20trends%201986-2024.pdf>].

Neutrality in the European context: Constitutional perspectives of Ireland and Malta

Ulrike Haider-Quercia

Abstract

After the Russian attack on Ukraine, neutrality has experienced a revival, despite being partially considered obsolete. Ireland and Malta both strictly maintain their neutrality despite changing security policy conditions, with Ireland practising it as a politically and socially significant principle without explicit constitutional enshrinement, while Malta explicitly anchors its neutrality in its constitution and further secures it through international treaties. Both countries, integrated into the EU and the international security system, follow different historical and legal paths in interpreting and developing neutrality. This contribution analyses these developments from constitutional, international, and European law perspectives, highlighting the national and international dimensions of neutrality in the context of the Ukraine crisis and global security upheavals.

1. Introduction

Following Russia's attack on Ukraine, neutrality has experienced something of a revival¹. For a long time, the end of neutrality had been predicted², as it was no longer considered compatible with international law — particularly the prohibition of war within the international security system (Article 2, paragraph 4 of the UN Charter). Nevertheless, the ongoing legal debate about the possible obsolescence of neutrality has not stopped individual states from maintaining or adapting their neutral status to current security

1 See N. Ronzitti, Neutrality, non-belligerency, and permanent neutrality according to recent practice and doctrinal views, in: *Journal of Conflict and Security Law*, 2024, p. 55 ff.

2 Cfr. N. Orvik, *The decline of neutrality*, London, 1971 and M. Gehler, *Finis Neutralität? Historical and political Aspects in European Comparison: Ireland, Finland, Sweden, Switzerland and Austria*, Discussion Paper C92, Centre for European Integration Studies, 2001.

policy circumstances, nor from further developing or constantly re-explaining it within the United Nations and European Union systems.

Ireland and Malta are among the states that have maintained their neutrality without restriction even after the attack on Ukraine. In addition to their geographical similarity as island states, these permanently neutral states are now strongly integrated into the international security system and are effectively affiliated EU member states. Moreover, the neutrality of both countries is predicated on a deliberate decision in the context of their independence from Great Britain, with their respective developmental trajectories diverging along historical, legal, economic and political pathways.

The latest developments in this complex area, which combines dimensions of international law, European law and constitutional law, require a differentiated and interdisciplinary analysis. It is imperative to acknowledge the pivotal role of studies³ that underscore the integration of components of international and European law into national legal frameworks; this is central to the analysis of neutrality in the context of the tension between national constitutions and the international security architecture. In the context of the methodological framework outlined above, this article undertakes a detailed examination of the legal foundations and developments of neutrality in Ireland and Malta. A particular emphasis is placed on the constitutional implications of neutrality-oriented political practice. In particular, the study considers their positioning in the context of the Ukraine crisis and how this is perceived by society against the backdrop of global political and international legal upheavals.

2. The constitutional significance of Ireland's neutrality in transition through EU referendums

The Republic of Ireland is currently the only neutral member of the European Union that has not explicitly enshrined neutrality in its constitution.

3 See in particular P. Hilpold, *The law of neutrality at a crossroads: The specific situation of Austria and Switzerland from the perspective of international law, European law and constitutional law*, in this volume, as well as the journal *Percorsi costituzionali* No. 3/2023, *Neutralità e Costituzione*, which considers and provides an in-depth analysis of the continued existence of the institution of neutrality in the light of constitutional, European and international law.

In contradistinction, the two other neutral states, Austria⁴ and Malta⁵, have also enshrined their commitment to neutrality in their constitutions. However, this has been achieved under different legal systems, at different times and for different geopolitical reasons⁶.

Irish neutrality is a concept of significant importance, extending beyond traditional historical and political aspects, despite the absence of explicit constitutional recognition. This principle is not merely a foreign policy tenet; rather, it is also, as a constitutional and social foundation, a crucial factor in the procedure for EU referendums. This is especially apparent in the context of constitutional referendums, in which significant extensions of the EU's powers must be legitimized by popular vote⁷. This is particularly important in the case of Ireland, given the implications for its participation in European foreign policy and security architecture, into which neutrality is now integrated⁸. It is widely acknowledged within the relevant literature that any alteration or abolition of neutrality would require the approval of a constitutional referendum⁹.

This constitutional relevance is also reflected in the fact that grounds for neutrality are sometimes asserted in lawsuits before the *High Court* and are the subject of case law. It is evident that Ireland's neutrality is also explicitly supported by the EU treaties. This construct, which gives expression to perpetual neutrality even without binding international law or domestic

4 See P. Hilpold, The Law of Neutrality in Austria and Switzerland in the "Wider Field" of International Law – A Comparison of Current Developments, in: Archiv des Völkerrechts, 3/2022, p. 268 ff. and ID., Neutrality as a priority characteristic, in: P. Hilpold, M. Matzka and W. Hämmerle, 100 Years of B-VG, Vienna 2020, p. 143 ff.

5 See S. Andò, Il declino della neutralità nell'attuale fase del costituzionalismo europeo : Malta come metafora, Padua, 2002.

6 For a comprehensive overview of the relationship between historical and international context and the constitution, see the interesting study on the provisions of contemporary constitutions relevant to foreign policy by Renato Ibrido, Geopolitica costituzionale. Una introduzione, Bologna, 2025.

7 See D. Fennelly, Crotty's Long Shadow: the European Union, the United Nations and the Changing Framework of Ireland's International Relations, in: E. Carolan (ed), The Constitution of Ireland: Perspectives and Prospects, Dublin, 2012.

8 To date, nine constitutional referendums have been held in relation to the EU. See G. Hogan, Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country, in: A. Albi and S. Bardutzky, National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law National Reports, The Hague, 2019, p. 1325 ff.

9 See E. Daly, Neutrality and the Irish Constitution, VerfBlog, 13 April 2022 (www.verfassungsblog.de).

constitutional norms, has enabled Ireland to pursue a particularly flexible policy of neutrality over the last eight decades¹⁰.

a. The constitutional relevance of Irish neutrality

Ireland has pursued a policy of military neutrality since the 1930s and is not a member of NATO, yet this neutrality has not been explicitly codified in the Irish constitution. The attainment of full independence by the Republic of Ireland from the United Kingdom occurred in 1937, coinciding with the entry into force of the new constitution. Following the Second World War, Ireland opted not to accede to NATO, as from an Irish perspective, membership would have been perceived as a legitimization of the partition of Ireland, particularly within the context of the ongoing Northern Ireland conflict. This standpoint is indicative of Ireland's profoundly entrenched political and historical identity as a postcolonial nation that has strategically opted to refrain from entering into a military alliance with the United Kingdom¹¹.

Ireland thus maintained a neutral stance throughout the Second World War, a decision that was widely regarded as a manifestation of its newly acquired independence from Great Britain¹².

Despite the absence of an explicit declaration of neutrality in the constitution, two pivotal moments in Ireland's constitutional development can be identified as instances where neutrality played a formal role in the constitution's formulation. The first constitutional change relating to neutrality status was initiated in 1939. On 2 September of that year, the then Prime Minister (*Taoiseach*) Éamon de Valera formally declared Ireland's position of neutrality in the face of the impending Second World War, initially in Parliament and subsequently in an address to the nation. Parliament, including the opposition party *Fine Gael*, supported this declaration of neutrality by a majority vote, with only one dissenting vote. Concurrently

10 See M. Gehler, *Finis Neutralität? Historische und politische Aspekte im europäischen Vergleich: Irland, Finnland, Schweden, Schweiz und Österreich* (The End of Neutrality? Historical and Political Aspects in European Comparison: Ireland, Finland, Sweden, Switzerland and Austria), Centre for European Integration Studies, Discussion Paper C 92, 2001, p. 39.

11 See B. Girvin, *National Interest, Irish Neutrality and the Limits of Ideology*, in: M. Gehler and R. Steininger (eds.), *The Neutrals and European Integration 1945-1995*, p. 88 ff.

12 *Ibid.*

with this political declaration, a constitutional amendment was passed that endowed both houses of the Irish Parliament with the authority to declare a national emergency even in the absence of direct involvement in a war. This amendment is now enshrined in Article 28, paragraph 3, number 3 of the Irish Constitution. In light of the provisions outlined, the Parliament proceeded to pass a resolution pertaining to Ireland's stance during the Second World War. This resolution stipulated that Ireland would adopt a neutral position, a decision that was enshrined through the enactment of the *Emergency Powers Act 1939*.

The aforementioned legislation bestowed upon the government a considerable degree of legislative authority, thereby enabling the government to implement measures deemed necessary in the prevailing circumstances¹³.

Following this primary constitutional reference point, Ireland's neutrality continued to have constitutional relevance in the context of its accession to the European Communities and, subsequently, to the European Union. Since the Single European Act of 1986 (SEA), any amendment to the EU Treaties has been subject to ratification through a national constitutional referendum in accordance with Article 46 of the Irish Constitution¹⁴. A total of nine constitutional amendments have been adopted to facilitate Ireland's adaption to EU law¹⁵, with neutrality concerns being taken into account at each stage of integration. The use of constitutional referendums to approve EU treaties is not expressly provided for in the Constitution, but derives from a landmark and widely debated ruling in 1987, when the *Supreme Court*, in its judgment in *Raymond Crotty v. An Taoiseach*¹⁶, held that treaty amendments affecting Ireland's foreign and security policy orientation – including its neutrality – may only be ratified with the consent of the population by referendum. The agreement on the Single European Act, which at that time referred exclusively to the common foreign policy and not yet to the common security and defense policy, was therefore deemed unconstitutional as a transfer of sovereignty, insofar as the common foreign policy envisaged therein would curtail the government's foreign policy

13 This law was repealed after the end of the war, but it was not until 1973 that Parliament decided that the underlying state of emergency had ended. See O. Doyle, *The Constitution of Ireland. A Contextual Analysis*, Oxford, 2022, p. 182.

14 See B. Gavin, *Einsatz und Durchführung von Referenden in Irland – Eine Analyse*, in: Braun Binder et al. (eds.), *Jahrbuch für direkte Demokratie 2018, 2019*, Baden-Baden, p. 174 ff.

15 *ivi*.

16 *Crotty v. AN Taoiseach* (1987) IR 713.

powers¹⁷. The so-called Crotty doctrine emerging from this ruling has since shaped Irish legal practice and has effectively institutionalized constitutional referendums as an element of democratic control over amendments to EU treaties¹⁸. This doctrine was subsequently applied to the ratification of the Maastricht Treaty and, in particular, the Nice and Lisbon Treaties, whose adoption initially failed and was only secured in a second referendum after issues of particular importance to Ireland had been addressed through protocols and declarations annexed to the respective EU treaties¹⁹.

In *Pringle v. Government of Ireland* (2012)²⁰, the Irish Supreme Court adopted a more flexible approach to the assessment of sovereignty transfer to the European Union for the first time, while nevertheless handling constitutional concerns with characteristic caution. The Court held that the establishment of the European Stability Mechanism (ESM) did not entail a significant transfer of sovereign powers warranting a referendum. This judgment signals a nuanced evolution in the Court's jurisprudence, accommodating pragmatic transfer of authority without neglecting the political and social sensitivities surrounding Ireland's military neutrality²¹.

There have been repeated attempts over time to enshrine neutrality explicitly in the Irish Constitution. The most recent of these was in March 2022, shortly before the outbreak of war in Ukraine, when *Dáil Éireann* (the lower house of the Irish parliament) rejected a bill to amend the constitution. The *Thirty-Ninth Amendment (Neutrality) Bill* would have introduced an explicit reference to permanent neutrality in the 1937 Constitution. Introduced by the Trotskyist opposition party *People Before Profit*, the proposal was rejected by the government majority²². However, immedi-

17 See O. Doyle, op. cit. pp. 35 and 200, and G. Hogan. Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country, in: A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, The Hague, p. 1325.

18 See E. Daly, cit., and H. Gerard: Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country, in: Albi, Bardutzky (eds.), *National Constitutions in European and Global Governance*, p. 1325.

19 See O. Doyle, cit., p. 201.

20 *Pringle v. Government of Ireland* [2012] IEHC 470.

21 See U. Haider-Quercia, I profili costituzionali ed europei della neutralità militare della Repubblica d'Irlanda, in: *Percorsi costituzionali* no. 3/2023, p. 185 ff.

22 <https://www.oireachtas.ie/en/bills/bill/2022/34/>.

ately after the Russian attack, the Irish government reaffirmed its policy of neutrality, confirming the decades-long political tradition²³.

The question of making an explicit reference to neutrality in the constitution is therefore not new, and is a regular topic of debate in the Dáil. A similar proposal based on broad public support for neutrality was put forward in 2003. At that time, the initiative was largely driven by the *Sinn Féin* party and supported by the *Labour Party*, but was ultimately blocked by the governing parties *Fine Gael* and *Fianna Fáil*²⁴. *Sinn Féin* raised the issue again in 2016²⁵ and 2019²⁶. The most recent push in this direction was the *Thirty-Ninth Amendment (Neutrality) Bill* of January 2022, would have provided for a referendum on enshrining military neutrality in the constitution²⁷.

The overall constitutional landscape therefore remains unchanged: while neutrality is not explicitly enshrined, it is indirectly reflected in the constitutional principles that govern international relations and form part of the state's regulatory framework. The relevant provisions (particularly Articles 1, 5, 28 and 29) affirm state sovereignty, the peaceful resolution of international conflicts and adherence to the principles of international law. Foreign policy is primarily the responsibility of the government, which can exercise it formally autonomously and with few restrictions, even without parliamentary approval. Parliamentary approval is required only in exceptional cases, such as a declaration of war (Art. 28(4)). Accordingly, these principles do not result in any direct restrictions on foreign policy, as might be derived from a constitutional declaration of neutrality. Therefore, they do not constitute an independent legal basis for evaluating the government's foreign policy measures²⁸.

The aforementioned autonomy of the government in international relations is a key argument against the draft constitutional amendment to

23 See E. Daly, Neutrality and the Irish Constitution, VerfBlog, 13 April 2022 (www.verfassungsblog.de).

24 See <https://www.oireachtas.ie/en/debates/debate/dail/2022-03-30/10/>.

25 See <https://labour.ie/news/2016/11/24/labour-supports-bill-on-neutrality-proposes-improvements/> dated 24 November 2016.

26 See K. Mullan, Martina Anderson calls for Irish neutrality referendum amid fears over European militarisation, in: Derry Journal, 9 April 2019, www.derryjournal.com and M. O'Halloran, Government rejects Bill enshrining Ireland's neutrality, in: The Irish Times, 10 April 2019, www.irishtimes.co.

27 See C. Finn, Government Parties vote against a Bill calling for a Referendum on Ireland's Neutrality, in: The Journal (www.thejournal.ie) of 30 March 2022.

28 See E. Daly, cit.

enshrine neutrality, which was rejected in 2022²⁹. The government has repeatedly emphasized that, in the Irish tradition, neutrality is a political decision and not a constitutional one³⁰. Explicitly enshrining neutrality in the constitution could restrict the executive's freedom of action when exercising its foreign policy powers under Article 29 of the constitution to peacefully resolve conflicts³¹. Constitutionally enshrined neutrality would significantly limit Ireland's ability to play an active role in international relations and security policy. In particular, concerns have been raised that a constitutional reference to neutrality could hinder Ireland's participation in UN peacekeeping missions³² – an issue that has long been debated in legal literature³³.

Despite legal system's reluctance to enshrine an explicit constitutional norm on neutrality, the concept has gained significant constitutional status over time. It has grown so relevant that abandoning the policy of neutrality in favor of joining a military alliance would almost certainly require a constitutional referendum. This is because any future decision to abandon neutrality in order to join a military alliance would constitute an amendment to the 1937 Constitution³⁴. In the event of such a drastic change in Ireland's international position, confirmation by a constitutional referendum would effectively protect political decision-makers from possible legal challenges³⁵ in the context of such a momentous decision³⁶.

29 See M. Killeen, Irish Government rejects Proposal to change Constitution on Military Neutrality, in: Euractiv, 1 April 2022 (www.euractiv.com).

30 <https://www.oireachtas.ie/en/debates/debate/dail/2022-03-30/10/>.

31 See Dáil Ériann, Parliamentary Debates, Official Report, No. 3, 30 March 2023, p. 233 f.

32 See *ibid.*, p. 234.

33 See M. Gehler, *cit.*, p. 22.

34 This contrasts with the case of the two EU states Sweden and Finland, which decided to abandon their neutrality status (defined as non-alignment in the absence of an international document or domestic law) and join NATO following Russia's attack on Ukraine. In both cases, the abandonment of neutrality and the parliamentary decision to join NATO did not pose any particular constitutional hurdles for these two countries.

35 See E. Daly, *cit.*

36 See M. Cahill, Crotty after Pringle, The Revival of the Doctrine of Implied Amendment, in: Irish Journal of European Law, 2014, p. 17 ff.

b. Anchoring in the European treaties

Ireland's participation in the European Communities further consolidated neutrality in formal legal terms³⁷. In 1973, Ireland became the first neutral country to join the European Communities. While neutrality did not pose any particular obstacle to accession initially, it subsequently led to specific adjustments in primary law, now known as the "Irish clause". Even after the Single European Act of 1986, which generally addresses European political cooperation, Ireland has continually expressed concerns about the expansion of the political dimension and security and defense policy areas within the Union.

This stance mainly reflected concerns about military and political alliances with the United Kingdom, which is also why Ireland was able to negotiate an exemption clause in primary law. Initially enshrined in Article J (4) of the Maastricht Treaty, this has since been incorporated into every subsequent treaty amendment. The "Irish clause" clarifies that the Common Security and Defense Policy (CSDP) does not affect "the specific character of the security and defense policy of certain Member States".

Based on this exemption, there are now five references to neutral states in EU law. In addition to the Irish clause, which is mentioned twice in Article 42 of the Treaty on European Union (TUE), references can be found in Protocol No. 10 on Permanent Structured Cooperation (PESCO) and in Declarations 13 and 14 on the Common Foreign and Security Policy (CFSP).

In 1995, the Irish clause was applied to the accession of the other neutral states - Austria, Sweden and Finland - which were unable to negotiate any further exemptions and therefore relied on the Irish clause in their accession treaties³⁸. The same applied to Malta in 2004. Thus, the European

37 It is widely known that the emergence of Irish neutrality is inextricably linked to the territorial issue with Great Britain. Its constitution is often dated to 6 December 1921, when the Irish Free State (Éire) was established by a treaty with Great Britain. However, this bilateral treaty makes no reference to neutrality, nor does the treaty of 1949, when Ireland legally and definitively withdrew from the Commonwealth. The external sovereignty of the Free State of Éire took effect with the ratification of the treaty by the Dáil Éireann on 7 January 1922 and was subsequently enshrined in the Constitution of 29 December 1937. See M. Gehler, *op. cit.*, p. 18. See K. Devine, A Comparative Critique of the Practice of Irish Neutrality in the "Unneutral" Discourse, in: Irish Studies in International Affairs, Volume 19, 2008, p. 74 f.

38 See H. Isak, *GSVP und Irische Klausel: Neutrale Mitgliedstaaten: Lösung oder Problem*, in: Sicherheit und Frieden, 2008, p. 186 ff.

context provided the framework for establishing the legal basis for Irish neutrality, which had been practiced at the political level for decades.

As European integration progressed, a strong relationship developed between neutrality and Irish national identity. Preserving neutrality has always been one of the central concerns in treaty reforms. For instance, referendums on the ratification of the Nice and Lisbon treaties had to be repeated after the Irish population initially rejected them³⁹. To finally enable the adoption of the Treaty of Nice, an amendment was added explicitly referencing the EU's defense policy. Since then, Article 29 (4) (9)⁴⁰ has contained an opt-out clause regarding a future EU defense union⁴¹ and expressly states that the decision on participation in a common defense under Article 42 TEU is solely Ireland's to make.

The open wording of this subsection highlights the flexible nature of Irish neutrality: there is no absolute refusal to participate in European security and defense policies; rather, the decision is removed from the remit of the European institutions and returned to the national level. Consequently, this provision did not prevent Ireland from participating in enhanced cooperation in foreign and security policy⁽⁴²⁾ and in the European Peace Facility, which it joined in 2001 and 2017 respectively.

Unlike the Treaty of Nice, the Treaty of Lisbon did not lead to as far-reaching a change to the Irish Constitution. However, it was accompanied by the European Council's decision on the "concerns of the Irish people re-

39 Cfr. M. Gastinger, J. Lieb, A. Maurer, M. McGinley, Ireland's No to the Lisbon Treaty. Campaigns, voting motives and perspectives on the Reform Treaty, Discussion Paper EU-consent, German Institute for International and Security Affairs, Berlin, October 2008, p. 7.

40 "The State shall not adopt a decision taken by the European Council to establish a common defense pursuant to Article 42 of the Treaty on European Union where that common defense would include the State."

41 See G. Barrett, *op. cit.*, p. 165.

42 See G. Barrett, *op. cit.*, p. 165.

garding the Treaty of Lisbon⁴³, which explicitly recognized Ireland's traditional military neutrality for the first time in an international document⁴⁴.

The flexible mechanism of Article 29 (4) (9) of the Irish Constitution also underpinned the government's October 2024 decision to take participation in the Europe-wide ESSI (*European Sky Shield Initiative*) air defense system into account when planning to procure modern radar and air defense systems for the Irish armed forces. In February 2024, the Irish government signed an Individual Tailored Partnership Program (ITPP) with NATO, enabling greater information exchange, including intelligence findings⁴⁵.

c. Contours of an Interpretation of Neutrality in Case Law: The Use of Shannon Airport by the USA

The consolidation of the Irish people's identity of neutrality is also evident in the controversial handling of Shannon Airport, which has become a symbol of the Irish concept of neutrality⁴⁶. Since the early 2000s, Shannon has developed into an important European transit point for US military aircraft and military cargo, particularly in the context of the missions to Afghanistan and Iraq in 2001 and 2003⁴⁷. The Irish government only approved the use of the airport on the condition that the aircraft were unarmed and did not carry ammunition or explosives, nor were they directly involved in military operations. However, these restrictions were rarely enforced and were often questioned, as numerous transits were linked to

43 In addition to referring to neutrality and security policy, this document also addresses other issues of importance to the Irish people, such as the right to life, education and family, and the scope of the Union's and Member States' powers in the field of taxation. With regard to neutrality, the declaration confirms in particular that the European Union's common security and defense policy does not in any way affect the national defense and security policy of Ireland or any other Member State. See Official Journal of the European Union L60/131 of 2 March 2013.

44 "The Treaty of Lisbon does not affect or prejudice Ireland's traditional policy of military neutrality."

45 See Attack on Neutrality, in German Foreign Policy, 17 June 2025, p. 4.

46 See C. Gallagher, Is Ireland neutral?, The many myths of Irish Neutrality, Dublin, 2023, p. 166.

47 See M. Havemann, Neutrality in Ireland: The War on Terror, the Use of Shannon Airport and the Irish Anti-War Movement, Independent Study Project (ISP) Collection. 359, https://digitalcollection.sit.edu/isp_collection/359.

active military operations. Shannon remains a regularly used military base in current conflicts, such as those in Ukraine and the Middle East. Since October 2023, at least eleven US military transports to Israel have been documented⁴⁸.

The use of foreign military aircraft at Shannon Airport has sparked intense social and political debate, symbolizing Ireland's tension between its claimed neutrality and its practical role as a logistical hub for US and NATO military operations. Against this backdrop, permission for US military aircraft to fly over Irish territory and land at Shannon has been the subject of several Supreme Court rulings, prompted by pressure from civil society. Although military neutrality is predominantly considered a political category under Irish law and is not directly enforceable, the Irish civilian population was able to bring the matter before the *High Court*, which delivered two rulings on it ⁴⁹.

In the first case, *Horgan v Ireland* (2003)⁵⁰, the *High Court* dismissed a lawsuit that challenged the use of Shannon Airport as a stopover point for US military aircraft travelling to the Persian Gulf. The plaintiff, a retired soldier, had challenged the legality of the government's authorization to allow the US armed forces to use Shannon as an air base during the Iraq War. This authorization has been approved by the Irish parliament, which supported the government's decision not to participate in the military action authorized by the UN Security Council. The plaintiff based his claim in particular on two articles of the Constitution: Article 28 (3), which states that Ireland may not participate in acts of war without the consent of the *Dáil Éireann*; and Article 29 (3), which refers to generally recognized principles and customs of international law, thus guaranteeing Irish neutrality under international law⁵¹. In his judgment, Judge Kearns acknowledged that the rules of customary international law governing the conduct of neutral states, particularly the Hague Conventions of 1907, could potentially form

48 www.shannonwatch.org/about-shannonwatch.

49 See G. Barrett, cit., p. 167.

50 *Horgan v Ireland and others, Application for declaratory relief*, 2003 No 3739P, [2003] IEHC 64, (2003) 2 IR 468, ILDC 486 (IE 2003), 28 April 2003, Ireland, High Court.

51 Specifically, allowing US military aircraft transporting troops and military equipment to transit through the country is contrary to the obligations of neutral states under the Fifth and Thirteenth Hague Conventions of 1907, which relate to neutrality in land warfare and naval warfare respectively. These conventions prohibit the transit of foreign troops into a belligerent country, as this contradicts the principle of impartiality and the desire to remain outside the conflict.

part of Irish law under Article 29 (3). However, he emphasized that the government has broad discretion in the area of foreign policy, which cannot be restricted by principles of international law⁵². Following case law from other jurisdictions⁵³, the High Court emphasized that no national authority is empowered to provide a legally binding interpretation of instruments of international law, nor to subject the government's foreign policy to judicial review. Furthermore, the High Court confirmed that Article 29 (2) of the Irish Constitution, which obliges Ireland to settle international disputes peacefully, does not establish subjective rights for individuals; rather, it merely standardizes the state's rights and obligations towards other states⁵⁴. Finally, Judge Kearns stated that, although neutrality is historically significant, it is not enshrined in the Constitution or in domestic law in such a way that legal obligations can be derived from it. Consequently, it must be regarded as a matter of government policy⁵⁵.

Similar issues concerning the relationship between domestic and international law, in particular the right to neutrality were addressed in another ruling from 2007⁵⁶. The plaintiff argued that the *Dáil Éireann* had not given its explicit approval for the ongoing use of Shannon Airport by US forces for transporting troops to Afghanistan. The court first noted that the plaintiff had not sufficiently demonstrated that neutrality had constitutional status. On all other points, however, the *High Court* upheld the earlier decision and emphasized the judiciary's non-interference of the government decisions. It also reiterated that no subjective rights for individuals could be derived from Article 29(3). New to the 2003 ruling was the expanded interpretation of Article 15(6) of the Constitution, which states that "no military or armed forces shall be maintained except those established by the *Oireachtas*". The court clarified that the Irish Army is the only official armed force; however, this does not preclude authorizing foreign troops and military installations to pass through the country.

52 See O. Doyle, cit., p. 36.

53 In particular, the judgment in *Kavanagh v Governor of Mountjoy Prison* (2002) 3 I.R. 97 case.

54 See L. Thornton, "Horgan v An Taoiseach", OUP International Law in Domestic Courts, ILDC 486 (IE 2003).

55 For more on this topic, see P. Daly, "Political questions" and judicial review in Ireland, in: Judicial Studies Institute Journal, 2008, p. 116 ff., in particular p. 129.

56 *Dubsky v Government of Ireland and Ors*, Judicial review, 2002 NO 571 JR, [2005] IEHC 442, ILDC 485 (IE 2005), 13 December 2005, Ireland; High Court.

This ruling affirms the stance adopted in the 2003 judgment, classifying Irish neutrality as primarily a political decision of the executive rather than a directly enforceable constitutional norm. Referring to the separation of powers, the ruling leaves the assessment of foreign policy measures to the government apparatus, which can interpret them flexibly.

d. The Role of Flexible Neutrality in the EU's Military Support for Ukraine

The Russian-Ukrainian crisis is, in a sense, the first serious test for neutral states within European defense policy. This policy is based on the principle of mutual political solidarity between member states (Art. 24(2) TEU), as well as the obligation to provide assistance in the event of an armed attack on the territory of a member state (Art. 42(7) TEU)⁵⁷. Russia's attack on Ukraine has prompted further developments in EU law concerning neutral states. The European Council's decision of 28 February 2022 to amend the purpose of the European Peace Facility (EPF) is of central importance. The EPF was established the previous year to coordinate Member State initiatives on conflict prevention, peacekeeping and strengthening international security. Since then, the EPF has financed joint European aid for Ukraine⁵⁸, which is exercising its right to legitimate self-defense as enshrined in Article 51 of the UN Charter. Ireland abstained from voting on this EPF support measure for the Ukrainian armed forces at the European Council on 28 February 2022 (2022/339).

In response to questions from the Irish parliament, the government clarified that certain restrictions apply to neutral countries with regard to this European aid. In particular, that the direct supply of weapons to a country at war is incompatible with neutrality⁵⁹. Consequently, Ireland –

57 Within the framework of the European Union's measures, no differentiation can be discerned with regard to the economic sanctions imposed on Russia by European states.

58 Cfr. M. Vellano, *L'evoluzione dell'aspirazione pacifista e della neutralità nell'azione dell'Unione europea e il suo futuro*, in: *Percorsi costituzionali*, No. 3/2023, p. 85 ff.

59 Cf. *Ukraine War, Dál Éireann Debate*, Thursday – 27 April 2023 (<https://www.oireachtas.ie>) *Austria sent military equipment to Ukraine. For reasons of neutrality, the equipment is limited to "non-lethal" protective helmets and vests*, in: *Wiener Zeitung*, 5 May 2022 (www.wienerzeitung.at).

like Austria⁶⁰ – distinguishes between lethal and non-lethal military equipment within the scope of European measures. The Irish government is therefore exercising its right to *opt out* of European security policy in order to provide non-military goods, such as medical supplies, food⁶¹, protective equipment and fuel, to countries affected by conflict.

Another issue that has resurfaced in the war in Ukraine, and which was also discussed during the military interventions in Iraq and Afghanistan, is the transit of military equipment through Irish territory and airspace. Although the Fifth Hague Convention of 1907 prohibits neutral states from allowing the transit of enemy troops or convoys carrying ammunition and supplies⁶², Ireland has authorized the transit of weapons and other military equipment from EU and NATO countries on route to Ukraine, despite the absence of a corresponding UN Security Council resolution⁶³. The Irish government has referred to Article 5 of the European Council Decision of February 2022⁶⁴. Based on this obligation under European law, the limits of neutrality were interpreted broadly to prevent a neutral country from actively blocking the transport of weapons to a country under attack through its territory⁶⁵.

A more restrictive interpretation of neutrality also appears to have been applied by the neutral states with regard to the European Council's decision

60 See A. Purger, *Old helmets, old vests and new millions from Austria for Ukraine*, in: *Salzburger Nachrichten*, 5 May 2022, (www.salzburgernachrichten.at).

61 For example, relatively soon after the outbreak of the war, Ireland sent packaged, long-life and ready-to-eat soldier food ("Meal, Ready-to-Eat") and protective clothing from its armed forces' stocks to Ukraine. <<https://www.breakingnews.ie/ireland/body-armour-and-10-tonnes-of-food-sent-by-ireland-to-ukrainian-army-1273802.html#:~:text=Ireland%20has%20sent%205,000%20ready,forces%20battling%20the%20Russian%20invasion.>

62 Articles 2 and 5.

63 If the direct shipment of weapons were to be considered a violation of neutrality, the authorization of the transit of third-party arms deliveries would nevertheless be compatible with neutrality status, as this does not fall within the scope of the Hague Convention, which provides for an explicit prohibition exclusively against belligerent states. In this context, the Hague Convention is used as an argumentative instrument to expand the scope of action of neutral states within the law of neutrality. See R. Janik, *Current Developments: Austrian Neutrality amid Russia's War on Ukraine* (26 August 2022), in: *Austrian Review of International and European Law*, vol. 26, 2023.

64 See M. Zimmermann, *Weapons for Ukraine through the neutral country. How Austria is navigating the situation*, in: *Salzburger Nachrichten*, 8 May 2023 (www.sn.at) and M. Smentana, *Weapons transports through Austria – despite neutrality?*, in: *Salzburger Nachrichten*, 17 August 2022 (www.sn.at).

65 Cfr. R. Janik, *cit.*

of 17 October 2022 decision to establish a training mission for Ukrainian soldiers on European soil⁶⁶. In this area too, Ireland adopted a flexible approach to its military neutrality, not only agreeing to the Council decision but also declaring its willingness to participate in the training of Ukrainian soldiers. However, Ireland limited its participation to the training of Ukrainian soldiers in mine and unexploded ordnance clearance as part of the *EU Military Assistance Mission in support of Ukraine* (EUMAM Ukraine), thereby participating in measures that primarily benefit the civilian population.⁶⁷

Foreign and Defense Minister Simon Coveney described this contribution as an opportunity for Ireland to participate in an EU structure to support and train Ukrainian soldiers in protection against Russian attacks, as mine clearance is a vital protective measure for both civilians and the military⁶⁸.

e. Reform of the Triple Lock and the current Controversies surrounding Irish Neutrality

Since June 2023, Irish neutrality, as a guiding principle of foreign and defense policy, has been the subject of intense public debate. The government has initiated a broad dialogue with citizens, experts and activists, and citizens' assemblies are also being considered as potential forums for discussing the enshrining of neutrality in the constitution.

Currently, the Defense (Amendment) Bill 2025 is under consideration, providing for a fundamental reform of the so-called Triple-Lock mechanism. Since 1960, this mechanism has governed the conditions for the deployment of Irish armed forces abroad. Deployments of more than twelve soldiers require a UN Security Council mandate and the approval of Parliament (*Dáil Éireann*) and the government, which is considered a

66 Unlike the decision on arms deliveries in February 2022, Ireland and Austria agreed to this training mandate. However, Austria exercised an opt-out and ruled out the participation of Austrian soldiers on grounds of neutrality. Cf. *EU military training mission approved*, in: *Tiroler Tageszeitung*, 10 October 2022.

67 <<https://www.military.ie/en/news-and-events/news/rish-defence-forces-training-assistance-to-eu-military-assistance-mission-in-support-of-ukraine-eumam-ua-cyprus.html>> last accessed on 9 July 2025.

68 See N. O'Leary and C. Gallagher, *Ireland set to provide training for Ukraine to clear Russian landmines*, in: *Irish Times*, 17 October 2022, (www.irishtimes.ir).

central constitutional barrier to preserving Irish neutrality. Although not a legal term, the term "triple lock" describes the practical legal framework introduced by the Defense Act 1960 and modified in 1993 and 2006⁶⁹. Although originally intended to enable Ireland's participation in UN missions, the mechanism is now often seen in political debate as the essential legal safeguard of neutrality⁷⁰.

The government's current reform proposal aims to increase the number of soldiers that can be deployed without parliamentary approval from twelve to fifty, and to remove the requirement for a UN mandate from the Security Council. Instead, missions in accordance with the principles of the UN Charter would also be permitted within the framework of other organizations (OSCE, EU and NATO)⁷¹. This reform has been met with considerable criticism from opposition parties and sections of the population, who view it as a departure from historical neutrality⁷². In June 2025, around a thousand people protested against the plan in Dublin. The government, on the other hand, emphasizes that military neutrality will be maintained, while Ireland's ability to act in foreign policy will improve in a changing security environment. Notably, the influence of the veto powers of individual permanent members of the UN Security Council, particularly Russia and China, on Irish troop deployments is set to be eliminated to ensure sovereign decision-making for international peace missions⁷³.

3. Sui Generis: Malta's Neutrality in the European Context

Unlike Ireland, Malta's neutrality is enshrined in its constitution. It has been a central pillar of Maltese foreign policy since the country gained independence in 1964, especially after the 1987 constitutional amendment. Article 1, paragraph 1, no. 3 of the Maltese Constitution defines Malta as

69 See K. McDonagh, What is Ireland's "Triple Lock" and why is it in the news again?, in: www.rte.ie, 23 May 2025.

70 See C. Murphy, Ireland, the Triple Lock and Military Neutrality, in: Institute of International and European Affairs, June 2025.

71 Press release, Tánaiste secures government approval to reform the Triple Lock, <https://www.gov.ie/en/department-of-defence/press-releases/t%C3%A1naiste-secures-government-approval-to-reform-the-triple-lock/>.

72 See Neutrality: Where Ireland's political parties stand, June 2025, www.eolas.ie and N. Ní Bhriain, Saving the Triple Lock, *The Neutrality Hawks v. The Government of Ireland*, Transnational Institute, August 2024, www.tni.org.

73 See B. Andrews, Irish Neutrality in a Changing Europe, April 2022, p. 7.

a neutral state that "actively pursues peace, security and social progress among all nations by adhering to a policy of non-alignment and refusing to participate in any military alliance"⁷⁴.

Another distinctive feature is that Malta secures its commitment to neutrality through international agreements with third countries. In 1980, Malta signed bilateral treaties with Italy and the former Soviet Union which enshrined the recognition and respect of Maltese neutrality. Italy also committed itself in a treaty, binding under international law, to defend Malta militarily in the event of an attack⁷⁵. This dual anchoring in international and constitutional law distinguishes Malta's model of neutrality from that of other European neutral states. In recent decades, this has enabled Malta to safeguard its political independence and interests at the international level flexibly and, above all, actively⁷⁶.

a. The Emergence of Maltese Neutrality: Geopolitical and Economic Foundations

Even though both states gained their independence from Great Britain, Maltese neutrality differs fundamentally from that of Ireland. While Irish neutrality is often seen as an extension of the struggle for independence, Maltese neutrality is primarily the result of efforts to achieve economic independence and a departure from Malta's previous role as a military base in the Mediterranean region⁷⁷. It was established over several decades through Malta's diplomatic efforts and negotiations with various states, including

74 Constitution of Malta, Art. 1(3), 1987. Official English version (last amended in 2019). See also: International Constitutional Law Project, *Malta Constitution*, https://www.servat.unibe.ch/icl/mt00000_.html.

75 See S. Andò, op. cit., p. 87 ff.

76 See A. Khakee and V. Cassar, Maltese neutrality in a brave new world, in: Times Malta, 16 March 2025, https://www.um.edu.mt/library/oar/bitstream/123456789/134732/1/Maltese_neutrality_in_a_brave_new_world.pdf.

77 Unlike Ireland, the question of Malta's neutrality was not an issue at the London Independence Conference in 1963, and the United Kingdom was neither opposed to nor demanding of a neutralist orientation for the island state. Since Malta gained sovereignty in 1964, the United Kingdom has refrained from interfering in Malta's internal and external affairs in the spirit of non-interference. See, among other sources, the Malta Independence Act, an Act of the Parliament of Westminster, 1964, for information on the United Kingdom's position on the question of Maltese neutrality.

Italy, France, Libya and Algeria, to secure international recognition of this status⁷⁸.

Malta's neutrality is also closely linked to Italy's post-war foreign policy. Italy regarded its support for Malta⁷⁹, including financial aid and the guarantee of neutrality, as a strategic opportunity to strengthen its own position in the Mediterranean region. The Treaty of Neutrality between Malta and Italy, which recognized Malta's neutrality and included financial support, was signed on 15 September 1980. This was intended to ease the economic burden on the island state following the challenging period after independence, particularly given that a significant proportion of the population had previously been employed by the British military⁸⁰. From this perspective, Maltese neutrality is not primarily viewed in the literature as a foreign policy restriction, but rather as an investment in political stability and economic development in Malta and the Mediterranean region⁸¹.

Malta officially joined the Non-Aligned Movement in 1973. Malta's example illustrates that neutrality does not have to be based on a long historical tradition; it can also serve as a strategic instrument for preserving national independence and positioning oneself in the international system. With the constitutional amendment of 1987, Malta's neutrality was enshrined in constitutional law. This development must be understood against the backdrop of decolonization and Malta's historical affiliation with the Non-Aligned Movement during the Cold War.

78 See S. Andò, *op. cit.*, p. 77.

79 From 1979 onwards, Prime Minister Aldo Moro in particular played a key role in lobbying the United Kingdom and NATO for the closure of British military bases in Malta. See G. Hauser, *Staats- und wehrpolitische Bildung im Bundesheer, Neutralität*, Vienna, 2019.

80 See S. Andò, *op. cit.*, p. 77.

81 For Italy and the Western states, Maltese neutrality did not merely represent a "negative strategic value" in the form of a renunciation of military presence, but rather a significant geopolitical gain for the stabilization and security of the Mediterranean region. Neutrality served as an instrument for de-escalating military tensions and as a guarantor of peaceful cooperation. Through this buffer function between East and West, Malta contributed to regional stability and limited the influence of external great powers, creating added value in the region's balance of power.

b. Architecture of International and Constitutional Law: From Bilateral Treaties to Detailed Constitutional Principles

Maltese neutrality is enshrined in a complex network of constitutional and international legal instruments developed over several years, covering various political, economic and legal aspects. Its central legal basis consists of two primary bilateral agreements. The first is the Treaty between Malta and Italy of 2 August 1980, supplemented by a financial protocol formalized through an exchange of notes on 15 September 1980, which was adopted alongside the Maltese government's declaration of neutrality on 15 May 1981. This treaty guarantees Malta's neutrality under international law and designates Italy (and therefore a NATO member) as Malta's protecting power⁸².

Secondly, there is a treaty with Libya dating from 1984 which initially provided for military cooperation as well as recognizing neutrality. However, it was amended in 1989 to align with Malta's neutrality status⁸³.

Additionally, the former Soviet Union recognized Malta's neutrality in a memorandum dated October 1981. This unilateral recognition was also confirmed by other Mediterranean states, including France (1981), Tunisia (1982) and Bulgaria (1982), and was also recognized jointly in the final document of the CSCE Conference in Madrid in 1982.

The final step towards formalizing neutrality was taken in 1987 with the inclusion of a relevant clause in Article 1, paragraph 1, No. 3 of the Maltese Constitution. This constitutional anchoring represents a domestic political agreement reached as part of a political compromise between Prime Minister Dom Mintoff's Labour Party, which promoted neutrality as a means of achieving economic independence and state autonomy, and the Nationalist Party. The constitutional amendment (Amendment Act IV of January 1987) formed part of a broader reform package that, among other things, reformed and stabilized the electoral system in exchange for the enshrinement of neutrality in the constitution⁸⁴. Since then, the neutrality

82 Treaty between Malta and Italy of 2 August 1980 and exchange of notes of 15 September 1980. Malta's declaration of neutrality of 15 May 1981.

83 Treaty between Malta and Libya 1984, amended 1989; cf. Andò, S., *op.cit.*, p. 77.

84 Maltese Constitution Amendment Act IV, January 1987. See Andò, S. *op.cit.*, pp. 75-80.

clause has remained formally unchanged, even after Malta's accession to the EU⁸⁵.

Malta's neutrality is constitutionally enshrined, representing a conscious, voluntary commitment that arose from an independent foreign policy initiative, not imposed by third countries. Malta does not rely on military defense⁸⁶, but instead relies on external guarantees under international law. This distinguishes Malta from other neutral states, as its security depends on Italy's protective role as a NATO member, making its neutrality a *sui generis* model.

Through the 1987 constitutional amendment, the Republic of Malta officially declared and enshrined its neutrality and enshrined its neutrality as a central principle of its foreign policy. These norms are based on formulations from the 1980 government declaration and from previously concluded bilateral treaties, particularly with Italy. The constitution obliges Malta not to enter into military alliances and not to allow foreign military bases on its territory (Art. 1 (1) and (3)). Malta thus combines military non-alignment with an active policy of promoting peace, which has since played a key role in shaping its foreign policy, including, as will be explained in more detail below, in relation to the European Union.

No other constitution contains such a detailed and comprehensive definition of neutrality as the Maltese one. Nevertheless, legal discussions highlight ambiguities in its content and questions of interpretation, given that it is the only declaration of neutrality in the world established in peacetime that is essentially based on the concept of non-alignment, which is not clearly defined in international law⁸⁷. In one respect, the Maltese constitution is similar to the constitutional neutrality obligations of other countries such as Switzerland and Austria, in that it expressly prohibits membership of military alliances⁸⁸. Unlike other neutral constitutions, however, the

85 On constitutional amendments following EU accession, see P. G. Xuereb, *The Constitution of Malta: Reflections on New Mechanisms for Synchrony of Values in Different Levels of Governance*, in: A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, The Hague, 2019, p. 141 ff.

86 Nevertheless, concerns are regularly expressed about Malta's low defense budget, which leads to Malta being viewed from outside as a "free rider" in terms of security. See D. Fiott, *Being small, acting tall? Malta and European Defence*, in: D. Fiott (ed.), *The Common Security and Defence Policy: National Perspectives* Egmont Paper 79, Ghent, 2015.

87 See S. Andò, *op. cit.*, p. 79.

88 See Art. 1, para. 1 no. 3 Constitution of Malta.

Maltese constitution does not stipulate a military obligation to defend neutrality. Although this is not explicitly stated as such, it follows from the interaction of the obligations that this is a perpetual neutrality.

The constitutionally standardized neutrality obligations can be divided into three main pillars. The first pillar consists of the prohibition of foreign military bases on Maltese territory (para. 3 lit. a and b). A further prohibition relates to the presence of foreign armed forces⁸⁹. The only exceptions are in the case of an express invitation from the Maltese government or in clearly defined situations, such as self-defense or on the basis of a UN Security Council resolution. The constitution generally prohibits the permanent presence of foreign military forces and their use of military facilities, except for a small number of civilian or technical personnel for the defense of Malta⁹⁰. Another element of constitutional neutrality concerns the purely civilian use of shipyards. Maltese shipyards are intended exclusively for civilian and commercial purposes and repairs to non-combatant military vessels are permitted only to a limited extent. Military vessels belonging to the former superpowers, the USA and the Soviet Union, are excluded from this, as explicitly stated in Malta's non-alignment policy⁹¹. Through these constitutional principles, Malta explicitly focuses on non-alignment, distancing itself from major powers, while striving to play an active role in promoting peace and in the economic and political development of the Mediterranean region⁹².

Legal literature points out that these explicitly stated obligations are not exhaustive, and that the constitutional wording leaves room for interpretation. This means that Malta could be subject to further foreign policy restrictions⁹³. Notably, Malta does not explicitly prohibit the use of force in international conflicts or the transit of military personnel, deviating from other neutral states such as Switzerland or Austria. However, some international law scholars argue that such obligations can be derived from customary international law. This is a legal peculiarity of Maltese neutrality⁹⁴. Ultimately, Maltese neutrality is understood as an active peace policy that has been practiced consistently as non-alignment since the parliamentary constitutional debate in 1987.

89 See Art. I, para. 1 no. 3, lit. b. Constitution of Malta.

90 Lit. c. of Art. I, para. 3 Constitution of Malta.

91 Constitution of Malta, Art. I(1)(3), lit. e.

92 See S. Andò, *op. cit.*, p. 84.

93 See S. Andò, *op. cit.*, p. 90.

94 See S. Andò, *op. cit.*, p. 91.

This hybrid constitutional architecture has enabled Malta to adopt an active position of neutrality over the past four decades, taking into account its international obligations and affiliations and guaranteeing the preservation of its constitutional neutrality.

c. Adapting Malta's Commitment to Neutrality within the EU Framework

Maltese neutrality is central to its constitutional and foreign policy identity. This commitment has not been abandoned or fundamentally questioned during Malta's EU membership. However, the changed international situation requires the commitment to neutrality to be adjusted and specified, particularly with regard to shaping the European Union's common foreign and security policy. Although Malta joined the EU as a neutral member state in 2004 following a referendum⁹⁵, joining countries such as Ireland, Austria, Sweden and Finland, this accession sparked complex debate about the compatibility of neutrality with EU membership obligations⁹⁶. In particular, the end of Malta's membership of the Non-Alignment Movement was discussed as part of the accession process. In return, Malta issued a declaration of neutrality, stating that its involvement in the CFSP would not affect its constitutional neutrality. Nevertheless, the Maltese government

95 Accession took place following a referendum in 2003, in which 54% of the population voted in favor of EU membership. In addition to this relatively weak consensus for EU accession (in the other nine accession countries in 2004, approval was much higher), it is interesting to note that there was a very high turnout (91% of eligible voters). See M. Cini, *Malta Votes Twice for Europe: The Accession Referendum and General Election, March/April 2003*, in: *South European Society and Politics*, No. 8/2003 and *id.* *Culture, Institutions and Campaign Effects: Explaining the Outcome of Malta's EU Accession Referendum*, in: *West European Politics*, vol. 27, 2007.

96 Malta's neutrality was already an important issue during the accession negotiations. Between 1993 and 1999, the European Commission expressed concerns about the compatibility of the Maltese constitution with the EU's security policy requirements, particularly with regard to joint CFSP actions and defense cooperation. The Commission considered constitutional changes to be necessary, even though the neutrality of other EU states (Austria, Ireland, Sweden, Finland) was already established practice. Despite these challenges, EU membership led to a broader national consensus on Malta's foreign policy. Commission Opinion Malta's Application for Membership (June 1993), point 17 "Common Foreign and Security Policy", and Report Updating the Commission opinion on Malta's application for membership (1999). See M. Cini, "Malta Votes Twice for Europe", *op. cit.*

made it clear that decisions on common defense measures must be made unanimously by the European Council, in accordance with the constitutional rules of each member state⁹⁷.

As early as 2006, the Maltese government, under the leadership of Prime Minister Lawrence Gonzi, initiated a formal attempt to align Malta's foreign policy guidelines with EU membership through the publication of the document "Strategic Objectives of Malta's Foreign Policy". Building on the traditional core values of Maltese foreign policy, which include peace, stability, and the promotion of dialogue in the Mediterranean region, this document reaffirms an active policy of neutrality without explicitly addressing the concept of neutrality⁹⁸.

This strategy was also reflected in Malta's response to the Ukraine crisis. Malta is not providing military support, but is focusing on diplomatic and humanitarian contributions, in line with its constitutional neutrality. Additionally, Malta has recently positioned itself as a brake on EU sanctions against Russia, as economic interests, particularly within the shipping industry, must be considered⁹⁹. Unlike Sweden and Finland, Malta has maintained its constitutional commitment to neutrality since the start of Russia's war of aggression in Ukraine. To date, Malta is the only EU member state that has not participated in Permanent Structured Cooperation (PESCO) in the defense sector, instead pursuing a wait-and-see approach¹⁰⁰.

The debate surrounding Malta's status as a non-aligned EU member state is viewed differently in domestic politics, particularly between the Nationalist and Labour parties, but it is generally considered to be advantageous for the country. Furthermore, Malta's 2024 chairmanship of the Organization

97 See V. Cassar, *Neutral Yet Aligned? Malta's Security and Defence*, Paper Series, L'Università ta Malta, 2004, p. 8 f.

98 See M. Cini, *Malta Votes Twice for Europe: The Accession Referendum and General Election*, op. cit.

99 See Russia sanctions: Malta now also opposes planned EU energy price cap, in: <https://weltwoche.de/daily/russland-sanktionen-nun-stellt-sich-auch-malta-gegen-geplanten-energiepreisdeckel-der-eu/>.

100 See M. Costa, "Malta to 'wait and see' before deciding on PESCO defense pact," *MaltaToday*, 2017 and Malta among three countries opting out of EU's new defence agreement", *Times of Malta*, 11 December 2017, www.timesofmalta.com. This stance can be traced back to the then Prime Minister Joseph Muscat, who stated that he wanted to observe how PESCO developed and functioned in practice and what – albeit unexpected – effects it might have on Malta's neutrality. See Costa, M., Malta to 'wait and see' before deciding on PESCO defence pact, Muscat says, in: *MaltaToday*, 15 December 2017, www.maltatoday.com.

for Security and Cooperation in Europe (OSCE) is based on this unique neutral position¹⁰¹.

d. Malta's active Neutrality in the Context of the Ukraine Crisis

The idea of abandoning Maltese neutrality has not gained relevance in the context of the Ukraine crisis. Instead, the active interpretation of neutrality that has been in place since Article 1(3) of the Maltese Constitution came into force in 1987 and that enables the small state to participate internationally in a manner that exceeds its size. This differs significantly from the more restrictive perspectives on neutrality held by Switzerland and Austria, which entail political isolation or restraint. Malta, on the other hand, views neutrality as an active instrument for fostering a peaceful Mediterranean region free of military presence. This would not oblige Malta to abstain from certain conflicts, but rather would legitimize its passive participation in them¹⁰².

Notably, Malta's positive domestic law provides for an exception to the prohibition on foreign armed forces using military facilities in Article 1(3) (b)(i) of the Constitution, specifically when this is done "in execution of measures decided by the Security Council of the United Nations". As a United Nations member since 1966, Malta thus expressly fulfils its obligations under the collective security system, particularly in accordance with Chapter VII of the UN Charter regarding the use of military force. Therefore, Malta's neutrality does not justify any differentiation in its membership of collective systems; rather, it expressly includes the implementation of measures decided by the UN.

101 See F. Caffio, *Il caso della neutralità maltese*, in: *Percorsi costituzionali*, No. 3/2023, p. 203 ff. The OSCE decided to hand over the chairmanship of the 57-member international organization to Malta after Russia vetoed the chairmanship of NATO member Estonia. Malta has also developed an active role in other organizations, above all the UN (particularly with regard to the UN Security Council).

102 See S. Andò, who quotes Prime Minister Dom Mintoff on this interpretation of neutrality.

Following its active policy of neutrality¹⁰³ during the 2011 Libya crisis¹⁰⁴, Malta condemned Russia's aggression against Ukraine from the outset, calling for an end to it and supporting European unity in this conflict¹⁰⁵. Although Malta's constitution commits the country to military neutrality, it does not exclude active value orientation or participation in peace policy principles. Consistent with this active neutrality, Malta has consistently refrained from providing military support to Ukraine, but has provided humanitarian aid and non-lethal military equipment¹⁰⁶ – similar to the other two neutral EU states¹⁰⁷.

Like Ireland, Austria and Switzerland, Malta participated in the EU sanctions packages against Russia and supports Ukraine with non-lethal means through the European Peace Facility¹⁰⁸. In March 2023, Malta also signed a European Defense Agency initiative for the joint procurement of ammunition. This enables the replenishment of national stocks as well as providing military support, thus facilitating the participation of neutral states in cooperative security measures¹⁰⁹. Despite the Russian invasion, Malta remains the only EU state to refuse to join the PESCO military

103 See A. Galea, How neutral is Malta? In: *The Independent*, 24 April, 2024, www.independent.com.

104 The Libya crisis was a particularly significant test for Malta's practice of neutrality. Due to its geographical proximity and close relations with Libya, Malta took an active role at the time. Then Prime Minister Lawrence Gonzi declared that the Gaddafi regime had lost its legitimacy, while Malta acted as a neutral state but took a leading role in humanitarian aid. While Malta's contribution to UN Resolution 1973 was debated internationally, Malta played a key role in the evacuations and as a transit hub for humanitarian aid. Particularly controversial was the admission of two defected Libyan fighter pilots at Malta Airport – an event that provoked political and public reactions without undermining Malta's policy of neutrality. See V. Cassar, cit., p. 9.

105 Ministry for Foreign and European Affairs and Trade, "Malta expresses grave concern with regard to the situation in Ukraine" Press Release Reference Number PR220251, 22 February, 2022, <https://foreign.gov.mt/en/government/press>.

106 See V. Cassar, cit., p. 12.

107 See U. Haider-Quercia, Permanent neutrality in times of war: Ireland and Austria and European military support for Ukraine, in: *DPCE online*, No. 63, 2024.

108 See M. Killeen, Irish PM: Non-lethal aid to Ukraine not against military neutrality, *Euractiv*, 1 March 2022, www.euractiv.com.

109 See J.P. Cordina, J.P., Malta joins EU ammunition procurement initiative that will help replenish Ukrainian stocks, *Newsbook*, 21 March 2023. <https://newsbook.com>.

initiative, continuing to adopt a wait-and-see approach. This is despite numerous observers arguing in favor of participation¹¹⁰.

In another significant area, Malta has taken a clear stance alongside other neutral EU members, such as Austria and Ireland, by signing the Treaty on the Prohibition of Nuclear Weapons (TPNW). While NATO countries either reject the agreement or offer limited support, Malta was among the first 50 countries to ratify the TPNW, thereby reaffirming its commitment to non-proliferation and the promotion of humanitarian security initiatives¹¹¹.

Malta is also actively involved in international organizations. For example, during its two-year term on the UN Security Council from January 2023, Malta also assumed the presidency. In February 2023, Foreign Minister Ian Borg unequivocally condemned Russia's actions in Ukraine, signaling a change in Malta's foreign policy tone¹¹². Despite this evolutionary development, the Maltese government assures that it will maintain neutrality as a proven foreign policy principle while adapting to changing security conditions¹¹³.

Furthermore, Malta advocates a proactive role for the European Union in security and defense matters, particularly with regard to the implementation of the Strategic Compass initiative adopted by the European Council in 2022. Malta emphasizes the importance of regional specificities, highlighting the Mediterranean region as a strategic priority. The country also acknowledges the United Nations' pivotal role in establishing a rules-based international order¹¹⁴.

110 See K. Sansone, Safeguarding neutrality and indifference: the decision to opt out of EU military cooperation, *Malta Today*, 3 March 2023, www.maltatoday.com.

111 See O. Meier and M. Vieluf, "From Division to Constructive Engagement: Europe and the TPNW" *Arms Control Today* Vol. 51, No.10. 2021, pp. 6-11 and C. Cutajar, "Neutrality as a key to promote peace, security and dialogue" *The Malta Independent*, 21 November 2021, <https://www.independent.com>.

112 The minister himself admitted: "Our foreign policy has changed significantly over the last year [...] Perhaps it has changed without us even noticing." Borg, B., Malta is speaking up about the Ukraine war. Is its foreign policy changing? in: *Times of Malta*, 28 February 2023, www.timesofmalta.com.

113 See B. Borg, Malta draws praise from Ukraine, condemnation from Russia at UN Security Council" *Times of Malta*, 28 February 2023. www.timesofmalta.com.

114 See V. Cassar, *op. cit.* p. 15.

e. Current Discussions on the Reorientation of Maltese Neutrality

Abandoning Maltese neutrality remains out of the question. Despite the occasional discussion on the issue, neutrality remains a fundamental and binding principle of Maltese identity and foreign policy, and the Ukraine crisis does not appear to have changed this. In fact, it has reinforced awareness that the formulation of neutrality in the 1987 Constitution, influenced by the situation of the two blocs during the Cold War, requires positive legal adjustment to the new global political situation and EU membership.

Similar to Ireland, where the government is seeking dialogue with civil society on the issue of neutrality, Malta is also experiencing an intense domestic political debate on the significance and future shape of neutrality against the backdrop of the war in Ukraine. There is a clear tension between public opinion and academic discourse¹¹⁵. While the majority of the Maltese population remains committed to neutrality¹¹⁶, a significant proportion supports the governments and EU's reactions to the Russian invasion of Ukraine¹¹⁷.

Malta's challenges in balancing strategic cooperation with international partners and upholding its constitutionally guaranteed policy of neutrality were particularly evident in 2020, during the controversial debate surrounding a planned Status of Forces Agreement (SOFA) with the United States. The agreement was intended to regulate the legal basis for the presence and actions of US military personnel on Maltese territory. The key issue was jurisdiction over criminal offences involving US military personnel: the SOFA stipulated that such cases should primarily be dealt with

115 See E. Zammit Lewis, Should we rewrite our constitutional neutrality?, in: Times of Malta, 6 April 2025, <https://timesofmalta.com>, I. Martin, "Time to consider rewriting Malta's neutrality – Evarist Bartolo" Times of Malta, 8 June 2022, www.timesofmalta.com; H. Briffa, Neutrality and Small States, in: P. Lottaz, H. Gartner, H.R. Reginbogin (eds.), *Neutral Beyond the Cold. Neutral States and Post-Cold War International System*, 2022, London, p. 46 ff. and Id. Maltese Neutrality: A Live Debate, 3 August 2023, in: <https://neutralitystudies.com/2023/08/maltese-neutrality-a-live-debate/>.

116 62.2% of the population states that neutrality is a very important part of Malta's politics, reputation and work in world politics. Cf. I. Martin, I. (2022) "Two in three Maltese strongly support neutrality – survey" Times of Malta, 9 February 2022, www.timesofmalta.com.

117 See Standard Eurobarometer 98, Malta National Report, March 2023. https://malta.representation.ec.europa.eu/news/standard-eurobarometer-98-national-report-2023-03-20_en.

by US courts. The proposal was met with widespread skepticism nationally as people feared that the agreement could undermine Malta's neutrality and sovereignty. The Maltese government proposed a watered-down version, but this was rejected by the US. The former president of Malta also publicly opposed the SOFA, arguing that it would pave the way for further military agreements. Due to this opposition, the agreement was ultimately suspended at the end of 2020. The Maltese government repeatedly emphasized the importance of Malta's constitutional neutrality and sovereignty as guiding principles for foreign and security policy decisions¹¹⁸.

At the same time, there is a growing recognition in academic and political circles that neutrality needs updating in light of the changed security situation. However, there is no questioning of its fundamental preservation, nor is NATO membership being considered¹¹⁹. In February 2022, as part of these debates, the Maltese Ministry of Foreign and European Affairs published a new foreign policy strategy. This strategy sets out guiding principles and strategic objectives for Malta's foreign policy, including protecting the values, well-being and prosperity of the Maltese people, and promoting peace, security and international influence. The strategy emphasizes neutrality as a central element, clarifying that it underlines Malta's active role in promoting peace in the region and beyond¹²⁰.

Another focus of domestic political debate is Malta's participation in NATO's Partnership for Peace program (PfP). Malta's PfP involvement began in the 1990s, was suspended in 1996 and resumed in 2008. This reflects differing views on neutrality within Maltese politics. While the Nationalist Party government viewed PfP participation as integration into the international security architecture and an opportunity for military modernization, the opposition Labour Party criticized close ties to military alliances as unconstitutional¹²¹. The government justified the resumption of PfP membership on the grounds that it would not undermine Malta's neutrality, but

118 See H. Briffa, *Maltese Neutrality: A Live Debate*, op. cit.

119 See H. Briffa, H., *Neutrality and Shelter Seeking: The Case of Malta*, in: Brady, A.M., Thorhallsson, B. (eds.), *Small States and the New Security Environment*, 2021, Switzerland, p. 135.

120 Malta's neutrality does not mean indifference to events in its surroundings. It ensures Malta's effectiveness and credibility and enables it to play a significant role in actively promoting peace and security. Ministry for Foreign and European Affairs and Trade, "Malta's Foreign Policy Strategy" February 2022.

121 See V. Cassar, cit., p. 18.

rather promote dialogue on foreign and defense policy within the EU¹²². However, there was no parliamentary debate at the time, which led to criticism¹²³. Since 2008, Malta has officially participated in NATO's PfP again, using this forum to promote capacity building and cooperation with NATO partners based on its constitutional neutrality and the protection guarantees of the EU Treaty¹²⁴. In May 2023, the government began negotiations on extending the partnership programme. Foreign Minister Ian Borg emphasized the prioritization of non-military areas of cooperation, such as cybersecurity and civil protection. The parliamentary debate on this issue was unanimous, reflecting a broad political consensus on the interpretation of Malta's neutrality and the use of the PfP¹²⁵.

4. Outlook: The Future of Europeanized Neutrality in Ireland and Malta

Ireland and Malta's neutrality is recognized within the EU as an integral part of the member states' diverse security policy traditions. It has undergone its first effective test within the EU treaty framework as a result of the war in Ukraine. The war in Ukraine has demonstrated that there can be different levels of European solidarity within the European legal framework. Neutral states can make use opt-out provisions under Articles 42 and 47 TEU in the context of the Common Foreign and Security Policy, while engaging at European level in a manner consistent with their foreign and security policy traditions.

The outbreak of the war in Ukraine has significantly influenced the debate on neutrality in small, neutral EU member states such as Ireland and Malta. At the same time, it has raised awareness of the importance of

122 See M. Xuereb, Membership 'will not impinge on neutrality', Times of Malta, 22 March 2008, www.timesofmalta.com.

123 See Times of Malta (2008b) "Partnership for peace: A bolt from the blue" Times of Malta 27 March 2008, www.timesofmalta.com.

124 See H. Briffa, Neutrality and Shelter Seeking: The Case of Malta, op. cit., p. 135 ff.

125 It can be observed that, after 30 years of EU membership as a neutral state, the decades-long debate between Malta's two dominant parties now seems to have been overcome. The Nationalist Party has promoted this as part of its program and election campaigns since the 1990s, whereas the Labour Party has considered it absolutely out of the question, partly because of the constitutional obligation of neutrality, which would be violated by EU accession. Neutrality was an important argument for opponents of the EU as well as for EU institutions, which believed that Malta still had improvements to make before it could become a member of the EU. See Andò, cit., p. 59.

neutrality and highlighted the need to redefine the principle in line with contemporary circumstances. Both countries are integrated into the European security structure. However, unlike other former neutral states, they show no willingness to participate more intensively in the EU's or NATO's defense integration or to abandon their neutral positions enshrined in EU law. A change in their neutral position would only be possible through a constitutional referendum in both states. However, it should be noted that a broad social debate on the significance of neutrality is taking place in both countries. In Ireland, in particular, social attitudes diverge from the government's foreign policy. Overall, neutrality is widely accepted by society, but this acceptance is conditional upon a constitutional redefinition in the context of EU membership and changing international law.

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The international legal framework for a peace agreement in Ukraine and the reactions of third parties: What does the principle of non-recognition of violent territorial acquisition mean for neutrality?

Prof. Dr. Stefan Oeter

Abstract

The stance on the key points of a conceivable peace agreement for Ukraine reveals a fundamental disagreement among Western states on how to deal with Russia's war of aggression against Ukraine. President Trump appears to be unwaveringly following the guidelines of classic realpolitik and consistently ignoring the normative dimension of international politics. The European states, which have declared themselves defenders of the 'multilateral world order' and international law, insist on the fundamental normative codes of the international legal order as established by the UN Charter in 1945 and further developed over the last decades in an increasingly dense web of practice. The prohibition of the use of force in Article 2 (4) of the UN Charter is one of the fundamental pillars of this modern international legal order, declared by the overwhelming majority of international legal scholars to be one of the central rules of *jus cogens*, and prohibits any form of violent acquisition of territory. This article first reviews the fundamental role of the prohibition of force in the modern peace order enshrined in international law. These fundamental considerations make it clear why the prohibition of the acquisition of territory by force, which was established before the Second World War under the heading of the 'Stimson Doctrine', is of such fundamental importance for the architecture of the international legal order. Given the precarious nature of the fundamental norm of the prohibition of the use of force, the reaction of the international community to fundamental breaches of law – committed more or less openly – is of particular importance. Articles 52 and 53 of the Vienna Convention on the Law of Treaties are considered to be the central guiding norms of international law in this response, and their implications for the assessment of a possible peace treaty involving the cession of territory are analysed in detail.

This reveals a direct link to questions of neutrality. A classic position of neutrality, maintaining equal distance from both parties and refraining from taking a normative stance, threatens to undermine the necessary solidarity of third countries with regard to violations of *jus cogens* – and therefore requires certain revisions in the understanding of neutrality. The normative 'crucial question' in the background is: Is a 'rule-based' order, as enshrined in Articles 52 and 53 of the Vienna Convention on the Law of Treaties, illusory in view of the current realities of international politics? The renaissance of 'neo-realism' in political debate points precisely in this direction. This makes it all the more urgent for international law doctrine – if it is willing to persist on its normative claims – to address the question of how the legal situation can be adapted to the facts created on the battlefield if a simple transfer of territory through peace treaty cessions is no longer possible under the pressure of arms. This question vividly illustrates the challenges facing the defenders of the 'rules-based order'.

I. Introduction

In the run-up to the meeting between US President Donald Trump and Russian President Vladimir Putin announced for Friday, 15 August 2025, at which possible peace options for Ukraine were to be discussed, the issue of possible territorial concessions by Ukraine had once again become the focus of media attention. The joint statement by EU heads of state and government on 12 August 2025 emphasised "that international borders must not be changed by force" and that a just and lasting peace that brings stability and security must respect international law.¹ US President Trump, on the other hand, insists that there will be "a land swap". These statements reveal a fundamental disagreement among Western states on how to deal with Russia's war of aggression against Ukraine. President Trump appears to be unwaveringly following the principles of classic *realpolitik* and, as is almost always the case, ignoring the normative dimension of international politics. Russia is clearly the stronger military power and, according to classic 'realist' logic, will demand a price for ending the war, even though it was Russia itself that started the war. The European states, which have declared

1 European Council, Statement by the leaders of the European Union on Ukraine, 12 August 2025, <https://www.consilium.europa.eu/de/press/press-releases/2025/08/12/statement-by-european-union-leaders-on-ukraine/>.

themselves defenders of the 'multilateral world order' and international law, insist on the fundamental normative codifications of the international legal order as established by the UN Charter in 1945 and further developed over the last decades in an increasingly dense web of practice. The prohibition of violence in Article 2 (4) of the UN Charter is one of the fundamental pillars of this modern international legal order, declared by the overwhelming majority of international legal scholars to be one of the central rules of *jus cogens*, and prohibits (as one of its basic corollaries) any form of violent acquisition of territory.²

How can a system characterised by a strict prohibition on the violent acquisition of foreign territory³ possibly adapt the legal situation to the facts created on the ground by military force? If a simple transfer of territory through peace treaty provisions – even if these are forced upon the weaker side by overwhelming force – is no longer possible *de jure*, the question may arise as to how the necessary political concessions can be made to persuade the stronger party to refrain from using force. Or has classical international law become a mere utopia, without any lasting steering power, since the unilateral use of force is once again becoming the norm of a 'law of the strongest' in international relations? This question vividly illustrates

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- 2 See the blog debate on these issues Kirsten Schmalenbach / Alexander Prantl, *How to End an Illegal War?*, *Völkerrechtsblog*, 21 April 2022, <https://voelkerrechtsblog.org/de/how-to-end-an-illegal-war/>; Michael N. Schmitt, *Ukraine Symposium – Territorial Acquisition and Armed Conflict*, *Articles of War*, 29 August 2023, <https://lieber.westpoint.edu/territorial-acquisition-armed-conflict/>; Maksym Vishchyk / Jeremy Pizzi, *Compromises on Territory, Legal Order, and World Peace: The Fate of International Law Lies on Ukraine's Borders*, *Just Security*, 6 October 2023, <https://www.justsecurity.org/89216/compromises-on-territory-legal-order-and-world-peace-the-fate-of-international-law-lies-on-ukraines-borders/>; Philipp Kehl, *Treaty or No Treaty? – International Law and the Purported Trump Peace Proposal for Ukraine*, *EJIL:Talk!*, 2 December 2024, <https://www.ejiltalk.org/treaty-or-no-treaty-international-law-and-the-purported-trump-peace-proposal-for-ukraine/>; Gregory Fox, *A Legal Framework for a Russia-Ukraine Peace Agreement*, *EJIL:Talk!*, 19 December 2024, <https://www.ejiltalk.org/a-legal-framework-for-a-russia-ukraine-peace-agreement/>; Felix Herbert, *Territorial Concessions to the Aggressor. (In-)Validity of a Prospective Peace Treaty Between Russia and Ukraine?*, *Verfassungsblog*, 6 January 2025, <https://verfassungsblog.de/territorial-concessions-to-the-aggressor/>; Florian Kriener / Anne Peters, *Legal Limits for UNSC Action on Peace in Ukraine*, *EJIL:Talk!*, 8 April 2025, <https://www.ejiltalk.org/legal-limits-for-unscc-action-on-peace-in-ukraine/>.
- 3 See Rainer Hofmann, *Annexation*, *MPEPIL*, Jan. 2020; Ingrid Brunk / Monica Hakimi, *The Prohibition of Annexations and the Foundations of Modern International Law*, *AJIL* 118 (2024), 418 et seq.

the predicament facing the defenders of the 'rules-based order'.⁴ If they fail to defend the central pillars of the UN Charter's peace order, codified in international law, against the challenge posed by military powers such as the USA, Russia, but also Israel, Iran and others, the international community is in danger of falling back into the (primordial) state of an 'anarchical society of states'.

The following considerations therefore initially focus on the fundamental role that the prohibition of the use of force plays in the modern peace order constituted in the forms of international law. These fundamental considerations make it clear why the prohibition of the violent acquisition of territory, which was established before the Second World War under the heading of the 'Stimson Doctrine', is of fundamental importance for the architecture of the international legal order. If one accepts an erosion of this fundamental principle, one accepts that a central pillar of this order will be permanently damaged – which in the medium term could jeopardise the stability of this order and even bring the entire normative edifice crashing down. This explains the increasingly desperate defence of the fundamental prohibition of any form of violent acquisition of territory, which, in view of the ongoing peace negotiations on the war in Ukraine, repeatedly leads to persistent normative interventions, especially by European states.

Accordingly, a 'peace treaty' involving changes to the territorial status quo imposed by armed force is not necessarily the primary means of achieving a peaceful resolution to the conflict, intended to end the conflict (even if only meant as a temporary solution).⁵ This purpose of a temporary solution is typically served by a ceasefire agreement, which initially accepts the facts created on the battlefield, in the form of a freezing of the front lines, within the framework of a 'de facto' arrangement, in order to create space for constructive negotiations on a balance of interests through the (provisional) construction of a silence of arms.⁶ The genuine legal problems then arise

4 See only Ingrid (Wuerth) Brunk / Monica Hakimi, Russia, Ukraine, and the Future World Order, *AJIL* 116 (2022), 687 et seq.; see also Monica Hakimi / Jacob Katz Cogan, The End of the U.S.- Backed International Order and the Future of International Law, *AJIL* 119 (2025), 279 et seq. and John Dugard, The Choice Before Us: International Law or a 'Rules-Based International Order'?, *Leiden J. Int'l. L.* 36 (2023), 223 et seq.

5 On the instrument of the peace treaty, see Jann H. Kleffner, *Peace Treaties*, MPEPIL, March 2011, and Nina Caspersen, *Peace Agreements: Finding Solutions to Intra-State Conflicts*, 2017.

6 On the instrument of ceasefire, see Christine Bell, *Ceasefire*, MPEPIL, Dec. 2009, and Yoram Dinstein, *Armistice*, MPEPIL, Sept. 2015.

in the following negotiations, which ideally should lead to a peace treaty that constitutively changes the legal situation in the sense of a settlement. In the context of such peace treaty negotiations, the question arises whether it is possible at all to agree on territorial changes – territorial changes that would constitute (as the 'fruit of the poisonous tree'⁷) evident effects of brute aggression and continuing military asymmetry? The question, if posed in this way, is not as easy to answer as it might seem at first glance.

With regard to possible 'victor's dictates', the question also arises as to the reaction of third countries confronted with the dictates of the aggressor. As a state committed to preserving the international legal order, can I remain indifferent at all to such (illegal) dictates, i.e. (in a broader sense) adopt a position of neutrality, if this indifference threatens to accept a fundamental breach of law and thus might become part of creating a new normality? The preservation of the fundamental principles of international law requires, it seems, dedicated normative reactions from the international community 'as a whole', if the normative indifference of the 'neutral' states (as laid down in the institution of neutrality) is not meant to lead to the erosion of the entire order in the sense of (widespread) free riding.⁸ In view of this finding, some specific adjustments to the obligations under the laws of neutrality appear necessary.

But how can one imagine a (re)arrangement of attribution of territory in the long term? In view of geostrategic imperatives and the will of the populations concerned, such a reorganisation may even appear sensible under certain circumstances. In one way or another, at least in the context of a longer period of time, there must be options for adapting the legal situation to the real circumstances on the ground if international law is not to mutate into a purely fictitious 'cloud cuckoo land' that no longer has any guiding force with regard to the real actions of states. Can the Security Council play a constructive role in promoting and securing such adjustments to the realities of international politics? And what is the role of ceasefire agreements? As these introductory considerations show, there are many questions – but the answers are uncertain and leave us feeling rather unsatisfied.

7 See also Fox, EJIL:Talk!, 19 December 2024 (note 2).

8 See Felix Herbert, (Ir-)Relevance of ius cogens? Legal Consequences of ius cogens in Russia's War of Aggression Against Ukraine, ZaöRV 83 (2023), 461, 472 et seq.

II. Use of Force and Law: The Prohibition of the Use of Force as a Central Norm of the Modern Order of Maintenance of Peace

If one wishes to understand what is at stake in the question of a possible 'land swap' under pressure from Russian aggression, one should first consider the fundamental importance of the prohibition of the use of force under Article 2 (4) of the UN Charter (and under parallel customary law) for the preservation of peaceful relations and the banning of force under modern international law. According to the literature of international law, the central function of any legal system is to enable the peaceful coexistence of all those entities subject to the law. Developed legal systems therefore provide for the state's monopoly on the use of force.⁹ "Modern international law also seeks to ensure peaceful coexistence between states and to restrict the use of force between states," as Michael Bothe puts it.¹⁰ However, given the decentralised nature of the international order, international law cannot in fact do this in the same way as the national legal systems. "There is no monopoly on the use of force in the international community comparable to that of the state. The decentralized use of force and its justification therefore play a completely different and incomparably greater role in international relations than the individual right of self-defence in domestic law."¹¹ After the collective security system established by the League of Nations and the Briand-Kellogg Pact had failed in the interwar period, the founding of the UN after the Second World War was an attempt to make a new start and avoid the mistakes of the old system. The UN Charter is clearly characterised by the desire to prevent wars in order to, as the preamble to the Charter states, "save succeeding generations from the scourge of war". To this end, the UN Charter establishes a system of collective security, the material core component of which is a general prohibition of the use of force.¹² This general prohibition of the use of force is not only considered

9 See, for example, Michael Bothe, *Friedenssicherung und Kriegsrecht* [Peacekeeping and Law of Wars], in Wolfgang Graf Vitzthum / Alexander Proelß (eds.), *Völkerrecht* [International Law], 8th ed. 2019, 755, 762.

10 Ibid.

11 Ibid.

12 Oliver Dörr, *Use of Force, Prohibition of*, MPEPIL, August 2019, para. 8; Bardo Fassbender, *Die Gegenwartskrise des völkerrechtlichen Gewaltverbots vor dem Hintergrund der geschichtlichen Entwicklung* [The current crisis of the prohibition of force under international law against the backdrop of historical developments], *EuGRZ* 31 (2004) 241, 246 et seq.

a norm of treaty law, but is also commonly regarded as part of customary international law.¹³ This is remarkable insofar as there is no consistent and general practice of refraining from military force – military force has been used repeatedly in international relations over the past decades as a means of enforcing political interests. At the same time, however, it can be said, looking at the practice of states, that there is undoubtedly a general legal conviction in the sense of a comprehensive acceptance that there exists in principle a prohibition of force under international law.¹⁴ No state that has used force in recent decades has questioned the validity of this prohibition *per se*. At most, attempts have regularly been made to justify the use of force by legal or factual arguments that presented the force actually used as a case of permissible exceptions to the unquestioned general rule of prohibition.¹⁵ The dispute over the permissibility of force in international relations is therefore essentially a dispute over the scope of the prohibition of force under international law and, in particular, over possible grounds for (exceptionally) justifying force. In practice, states that use military force do not consistently claim that the prohibition of force does not apply, but rather invoke exceptions to the general prohibition of the use of force¹⁶ – and this is completely logical bearing in mind the centrality of the exclusion of unilateral military force for the maintenance of the international legal order.

However, this central achievement of the modern law of peace and conflict remains precarious in practice. In a system of states in which the use of military force remains decentralised and a number of highly armed great powers (and also regional powers) repeatedly attempt to test the limits of the prohibition, if not to gradually extend it, in order to create scope for the use of military force against states in their neighbourhood, the unquestionable validity of the prohibition of force proves to be permanently contested beneath the surface. Russia's aggression against Ukraine¹⁷ is just one partic-

13 Stefan Kadelbach, *Zwingendes Völkerrecht (Mandatory International Law)*, 1992, 228-29; Dörr (note 4) para 9-10.; Bothe (note 9), para. 8.

14 See only Bothe (note 9), para. 8.

15 Bothe (note 9), para. 8.

16 David Wippman, *The Nine Lives of Article 2(4)*, Minnesota JIL 16 (2007), 387 et seq.

17 See Claus Krefß, *Russia's War of Aggression Against Ukraine and the Crime of Aggression*, in Masahiko Asada / Dai Tamada (eds.), *The War in Ukraine and International Law*, 2025, 55 ff.; Ruprecht Polenz, *Russlands Angriffskrieg gegen die Ukraine – was steht auf dem Spiel??*, in Uwe Marquardt et al. (eds.), *Krieg in der Ukraine: Perspektiven*, 2024, 131 et seq.; Anne Peters, *The Russian Invasion in Ukraine - An Anti-Con-*

ularly vivid example of such a (no longer really covert) 'contestation'¹⁸ of the prohibition of force, as Russia's justifications turned out to be extremely flimsy, bordering on the ridiculous – albeit parodying Western narratives that previously were used to justify problematic uses of force by the West, such as the 1999 intervention in Kosovo, the 2003 invasion of Iraq and the violent overthrow of the Gaddafi regime in Libya in 2011.¹⁹ The usual death declarations repeatedly postulated in academic literature regarding Article 2 (4) and the prohibition of the use of force in general, however, have consistently proven to be premature²⁰ – although the prohibition of the use of force is not truly uncontested, as can be seen from the cynical disregard for the norm by the Putin regime, but also by US President Trump's disregard for the normative requirements of Article 2 (4) and the regular overreach of possible justifications in recent Israeli practice under the Netanyahu government. These examples demonstrate sufficiently that we are currently dealing with a number of important political actors who no longer care about the normative foundations of our present international legal order, as they, being normative nihilists, believe only in the 'law of the strongest'.

stitutional Moment in International Law?, MPIL Research Paper Series 2024-11; Felix Lange, *Der russische Angriffskrieg gegen die Ukraine und das Völkerrecht*, Schriftenreihe der Juristischen Gesellschaft zu Berlin Vol. 200, 2023; Christina Binder, *Der russische Angriffskrieg gegen die Ukraine: Eine völker- und menschenrechtliche Einordnung*, in Stefan Hansen / Olha Husieva / Kira Frankenthal (eds.), *Russlands Angriffskrieg gegen die Ukraine: Zeitenwende für die deutsche Sicherheitspolitik*, 2023, 227 et seq.; James Green / Christian Henderson / Tom Ruys, *Russia's Attack on Ukraine and the Jus ad Bellum*, *Journal on the Use of Force and International Law* 9 (2022), 4 et seq.; Paulina Starski / Friedrich Arndt, *The Russian Aggression against Ukraine – Putin and his 'Legality Claims'*, *Max Planck Yearbook of United Nations Law* 25 (2021), 756 et seq.

- 18 For a fundamental discussion of the theory of contestation, see Antje Wiener, *Contestation and Constitution of Norms in Global International Relations*, 2018.
- 19 See Paulina Starski / Friedrich Arndt, *The Russian Aggression against Ukraine - Putin and his 'Legality Claims'*, *Max Planck Yearbook of United Nations Law* 25 (2021), 756 et seq.; René Värk, *Russia's Legal Arguments to Justify its Aggression against Ukraine*, ICDS Analysis, November 2022, <https://icds.ee/en/russias-legal-arguments-to-justify-its-aggression-and-conduct-in-ukraine/>; Anastasiya Kotova / Ntina Tzouvala, *In Defence of Comparisons: Russia and the Transmutations of Imperialism in International Law*, *AJIL* 116 (2022), 710 et seq.
- 20 Louis C. Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, *AJIL* 65 (1971), 544 et seq. Jost Delbrück, *Effektivität des Gewaltverbots*, *Friedens-Warte* 74 (1999), 139 et seq.; David Wippman, *The Nine Lives of Article 2(4)*, *Minnesota JIL* 16 (2007), 387 et seq.

III. Realpolitik vs. jus cogens: The Debate on the Limits of Territorial Changes Imposed by the Use of Force

If we focus on the undoubtedly precarious nature of the fundamental norm of the prohibition of use of force, the reaction of the international community to the - more or less openly committed - violations of fundamental rules are of particular importance. The impending erosion of the essential norms of maintaining international peace and security can only be halted if the states, as far as oriented towards the central norm of the prohibition of use of force, react to every violation of the core rules with a decided expression of their normative disapproval, condemning the violation as an (unacceptable) denial of the normative binding force of the basic rules of international law, and try to prevent the aggressor from enjoying the fruits of its aggression, by consistently refusing to recognise the legitimacy of the (new) situation thus created. In fact, the 90 per cent or so of small and medium-sized states that are structurally incapable of militarily overwhelming their neighbours and, as a result, have more to fear from violations of the prohibition of force than they have to gain from a stretching of the limits of permissible military force, should have a fundamental interest in maintaining the unreserved validity (and observance) of the basic rules of maintaining peace and security – and, at its core, in the continued respect for the prohibition of use of force.

1) Art. 53 VCLT: Prohibition of Use of Force as a Norm of 'jus cogens'

In international law, such a mechanism oriented towards preserving norms by not recognizing facts created as a result of fundamental breaches of law is nothing new. Famous in this context is the 'Stimson Doctrine', with which US Secretary of State Stimson responded in 1931 to Japan's invasion of China and the secession of Manchukuo as a Japanese puppet state, following on from the Briand-Kellogg Pact of 1928.²¹ The underlying idea is very modern – the non-recognition of any change in circumstances brought about by a breach of fundamental legal rules: "[The US] does not intend to recognise any situation, treaty, or agreement which may be brought about

21 See David Turns, *The Stimson Doctrine of Non-Recognition: its Historical Genesis and Influence on Contemporary International Law*, Chinese JIL 2 (2003), 105 et seq.; Thomas D. Grant, *Doctrines (Monroe, Hallstein, Brezhnev, Stimson)*, MPEPIL, March 2014, para. 8 et seq.

by means contrary to the covenants and obligations of the Pact of Paris of 27 August 1928, to which treaty both China and Japan, as well as the United States, are parties.”²² In a sense, this doctrine, which gained strength in the aftermath of the Second World War, and in connection with Art. 2(4) UN Charter, and became an ironclad part of state practice over the decades (and thus part of customary international law), anticipates the modern idea of the nullity of violations of *jus cogens*, as reflected in Art. 53 of the Vienna Convention on the Law of Treaties.

The prerequisite for this rule is, first of all, the existence of a mandatory norm of international law, a so-called *ius cogens* norm.²³ According to Art. 53 VCLT, a treaty is void “if [the subject matter of the treaty] is contrary to a peremptory norm of general international law”²⁴ The customary international law rules of state responsibility also give rise to an obligation on the part of the entire international community not to recognise or further promote a situation that is contrary to a peremptory norm of international law (as set out in Art. 41 ASR).²⁵ The fact that the prohibition of use of force in Article 2 (4) belongs to this group of peremptory norms of international law is largely undisputed²⁶ in international legal doctrine; the few voices that rebel against this (almost universal) consensus²⁷ have remained virtually without support. As a consequence, it is generally recognised that any form of violent annexation of foreign territory constitutes a direct violation of the mandatory norm prohibiting aggression and must therefore

22 Grant (fn. 21), para. 8.

23 On the category of ‘*jus cogens*’, see only Dire Tladi, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, 2021; Dinah Shelton, *Jus Cogens: Elements of International Law*, 2021; Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse*, 2020; Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law*, 2017; Robert Kolb, *Peremptory International Law - ‘jus cogens’: A General Inventory*, 2015; Thomas Weatherall, *Jus cogens: International Law and Social Contract*, 2015; Alexander Orakhelashvili, *Peremptory Norms in International Law*, 2006.

24 See on Art. 53 VCLT Kirsten Schmalenbach, Article 53, in Oliver Dörr / Kirsten Schmalenbach (eds.), *The Vienna Convention on the Law of Treaties. A Commentary*, 2nd ed. 2018, 965 et seq.

25 See also Kolb (note 23), 104 et seq., and Weatherall (note 23), 355 et seq.

26 See Yearbook of the International Law Commission, 1966, Vol. II, A/CN.4/SER.A/1966/Add.I, p. 247; see also Kolb (note 23), 73 f.; Weatherall (note 23), 223 et seq.; Schmalenbach (note 24), para. 82.

27 See, for example, James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, *Michigan Journal of International Law* 32 (2011), 215 et seq.

be treated as null and void as a result of its conflict with a norm of jus cogens, and consequently may not be recognised by third states.²⁸

However, the application of this rule to peace treaties is by no means trivial. In contrast to the unilateral annexation of foreign territory, where the breach of a norm of jus cogens is directly translated into a (normatively undesirable) change of status, this is different in the case of peace treaty arrangements, where an agreement of will between the warring parties is added between the breach of law and the effected change of status. In a very narrow interpretation, one could deny the conflict of norms from the outset – after all, the state concerned has agreed to the change in status. However, such a restrictive interpretation would not be entirely satisfactory, because in the event of continuing military asymmetry, the victim of aggression remains under duress and may have no alternative but to agree to the change of status demanded by the aggressor.²⁹

Ultimately, the question of whether the (continuing) coercive effect of the act of aggression will prevail over the content of the peace treaty depends largely on the scope for action remaining to the victim of the aggression. If the victim has succeeded in resisting the aggression and preventing the aggressor from achieving its goals, even the weaker negotiating partner may have good reasons, in the effort to achieve a viable balance of interests, to relinquish certain territorial claims and exchange (ultimately, in all probability, irretrievable) territory in exchange for concessions in other areas. The question of whether the overall power asymmetry between the negotiating partners in the struggle to reach a negotiated solution in the aftermath of a war of aggression will per se preclude territorial concessions by the victim of aggression cannot be answered unequivocally. Accordingly, this question is assessed quite differently in international legal literature.³⁰

28 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, 171, para. 87.

29 See, for example, Enzo Cannizzaro, A Higher Law for Treaties?, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, 2011, 425, 427 et seq. (esp. 434 et seq.), for such a rather broad interpretation of the conflict between treaty provisions and jus cogens.

30 See, for example, as statements on the case of Ukraine, Schmitt, Articles of War, 29 August 2023 (note 2); Vishchyk and Pizzi, Just Security, 6 October 2023 (note 2); Fox, EJIL:Talk!, 19 December 2024 (note 2); on the other hand, Herbert, Verfassungsblog, 5 January 2025 (note 2).

2) Art. 52 VCLT: Cession of Territory under the Pressure of Unlawful Force

A less expansive interpretation of the nullity rule in Article 53 of the Vienna Convention, which does not consider peace treaties involving territorial changes to be in conflict with the *jus cogens* rule prohibiting the use of force per se, has the advantage of establishing a meaningful concordance between the areas of application of Articles 53 and 52 of the Vienna Convention.³¹ If the mandatory rule of the prohibition of violence (including the normative follow-up provisions to be derived from it) is interpreted too broadly, there is a risk that Article 53 VCLT will completely consume the specific provision of Article 52 VCLT, leaving it with no scope of application of its own. This was probably not the intention of the ILC, nor of the majority of states that confirmed the Articles of State Responsibility as applicable law in a resolution of the UN General Assembly.

Article 52 of the Vienna Convention on the Law of Treaties, which deals with the problem of treaties concluded under duress, declares treaties to be null and void if their conclusion "was brought about by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".³² If one takes the underlying legal concept seriously, peace treaties are often in danger of being declared null and void under Art. 52 VCLT.³³ This applies in particular to peace agreements concluded in the context of an ongoing war of aggression by a highly armed major or regional power against a small or medium-sized state (with a significantly weaker military posture), especially if the peace negotiations take place under the pressure of continuing hostilities with their (characteristic) military asymmetry. Seen in the light of the facts

31 See also Herbert (note 8), 468 et seq.

32 On Article 52 of the Vienna Convention, see Olivier Corten, 1969 Vienna Convention Article 52, in: Olivier Corten / Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties*, Volume II, 2011, 1201 et seq. (paras 24- 28); Kirsten Schmalenbach, Article 52, in: Oliver Dörr / Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary*, 2nd ed. 2018, 937 et seq. (paras 20-24); H. G. de Jong, *Coercion in the Conclusion of Treaties: A Consideration of Articles 51 and 52 of the Convention on the Law of Treaties*, *Netherlands Yb. Int'l. L.* 15 (1984), 209 et seq.

33 See also Christian Tomuschat, *Peace Treaties and Jus Cogens*, in Christian Calliess (ed.), *Herausforderungen an Staat und Verfassung. Völkerrecht - Europarecht - Menschenrechte: Liber Amicorum für Torsten Stein zum 70. Geburtstag*, 2015, 339, 348-49, as well as Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, 2011, 320, 321 et seq.

of the case, nullity within the meaning of Article 52 VCLT depends on the criterion of "brought about by the use of force [...]". While the war of aggression continues, in which the victim state must negotiate under the coercive pressure of the aggressor's superior military power, this criterion of 'brought about' is almost always likely to be met.³⁴ This element can only be disregarded in a context of 'lateral causality' where, in the wake of the war of aggression, the attacked state catches up in military terms to such an extent that there is no longer any real asymmetry of power – consider the constellation of Saddam Hussein's war of aggression against Iran, when by the end of the 1980s the asymmetry of forces that existed at the outset had long given way to a military stalemate, despite all the support the West gave to Iraq under Saddam Hussein.³⁵ The other constellation in which the 'brought about' of Art. 52 VCLT might increasingly recede is the situation of an interim ceasefire, in which the originally asymmetrical predicament of ongoing aggression recedes into the background due to a consolidated truce – and the victim of the attack regains the political freedom to decide for itself on the sacrifices necessary for a lasting pacification of the conflict situation. The pressure of 'frozen' aggression may still be present here – through the occupation of not insignificant parts of the victim state's territory – but in this constellation of a consolidated ceasefire (without the looming threat of a resumption of hostilities), the victim state regains the political freedom to decide its own future.

In the case of Ukraine, at least under the prevailing circumstances – one must deny such a break in the causality of violent subjugation and (forced) territorial cession.³⁶ Ukraine remains under extreme pressure from the Russian military machine and, despite all its successes in repelling Russian aggression, is struggling to defend itself against the ongoing Russian offensive operations. Ultimately, there is an extreme imbalance in the economic and military resources of the two sides, despite the (albeit limited) support provided by Western states for Ukraine's self-defence; Russia's long-term

34 See also in this regard Schmalenbach and Prantl, *Völkerrechtsblog*, 21 April 2022 (note 2); Schmitt, *Articles of War*, 29 August 2023 (note 2); Herbert, *Verfassungsblog*, 5 January 2025 (note 2).

35 See Stefan Oeter, *Neutralität und Waffenhandel (Neutrality and Arms Trade)*, 1992, 112 et seq.

36 See also Schmalenbach and Prantl, *Völkerrechtsblog*, 21 April 2022 (note 2); Schmitt, *Articles of War*, 29 August 2023 (note 2); Vishchyk and Pizzi, *Just Security*, 6 October 2023 (note 2); Kehl, *EJIL:Talk!*, 2 December 2024 (note 2); Fox, *EJIL:Talk!*, 19 December 2024 (note 2); Herbert, *Verfassungsblog*, 5 January 2025 (note 2); Kriener and Peters, *EJIL:Talk!*, 8 April 2025 (note 2).

military and armaments policy sustainability is significantly greater than that of Ukraine, which keeps Ukraine in a state of duress and under threat of overwhelming defeat in Russia's ongoing war of aggression. It would be difficult to speak of a free and self-determined decision by Ukraine, at least as long as the military operations of the war of aggression continue. As a result, any form of territorial cession conceded by Ukraine under the pressure of the military challenge would be brought about by "the use of force in violation of the principles of international law laid down in the Charter of the United Nations" – and would therefore be null and void under Article 52 of the Vienna Convention on the Law of Treaties.

In other words, the classic mode of a peace dictated by the victor, as was still customary practice after the First World War, can no longer be reconciled with the provisions of Article 52 of the Vienna Convention on the Law of Treaties, at least insofar as the victor is the aggressor responsible for the use of force – and this would undoubtedly be the case in the situation in Ukraine.

3) Article 53 VCLT: The Right to Self-Determination as 'jus cogens'

Another aspect makes the idea of a peace treaty ceding territories of Ukraine to Russia under the dictate of an ongoing war appear highly problematic – and this is an aspect that is hardly ever addressed in the ongoing debates over the issue. Not only the prohibition of violence, but also the right of peoples to self-determination is generally considered to be one of the core components of the rules of jus cogens.³⁷ The right to self-determination primarily protects the right of every (state) people to determine independently the political order and economic constitution of their community.³⁸ In the context of the right to self-determination, 'people' essentially refers to the citizens of a given state established and recognised

37 See Yearbook of the International Law Commission, 1966, Vol. II, A/CN.4/SER.A/1966/Add.I, p. 247; see also Weatherall (fn. 23), 250 et seq.; Schmalenbach (fn. 24), para. 82, Dire Tladi, *Ius cogens*, MPEPIL, Feb. 2024, para. 63; the ICJ recently emphasised the jus cogens character of the right to self-determination in its OPT advisory opinion - ICJ, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, paras. 230 et seq.

38 For more details, see Stefan Oeter, *Self-Determination*, in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, Volume I, 4th edition, 2024, 457 ff., margin note 8 et seq., 33.

under international law – a condition that certainly applies to Ukraine and the Ukrainian people.³⁹ Putin's delusion of an imperial 'Russkiy Mir' based on the assumption that there is no Ukrainian people constituting an independent nation and that ultimately the population of Ukraine consists only of 'unredeemed' Russians with 'false consciousness'⁴⁰ can only be regarded as adventurous. As the people of a state recognized by the international community as a member state of the United Nations – including, *inter alia*, by Russia – it is solely up to the Ukrainian people to decide on their national affiliation and/or independence; insofar as Russia, in the wake of the historical narrative propagated by President Putin, presumes to decide from the outside on the 'right' national affiliation of the Ukrainian people, this is nothing more than an externally enforced 'foreign domination', essentially an act of colonial rape. From this perspective, the military takeover of the Ukrainian state and the installation of a Moscow-controlled puppet government (undoubtedly planned in 2022) would be nothing less than the suppression of the Ukrainian people's right to self-determination in the context of an act of imperial violence – in other words, a brute violation of the *jus cogens* rule of the right to self-determination.

There is little to suggest that this original blueprint of imperial fantasies of the Putin variety can still be implemented one-to-one in reality. The Ukrainian people's will to resist was too strong, and the military reorganisation of the Ukrainian state after the overhaul of military structures under the pressure from Russian aggression since 2014 (with some equipment aid from the West) was too thorough to allow the Russian army to march on Kyiv as it had dreamed of doing. From the perspective of Moscow's original war aims, the cession of large areas of Ukrainian territory in the east and south of the country would certainly be nothing more than a consolation prize – but it would still be highly problematic. In the case of forced cessions of large areas without the consent of the populations concerned, there would be a collision between the content of the treaty and the rules of the right of self-determination (which are to be regarded as *jus cogens*) under Art. 53 VCLT. According to a prominent doctrine,

39 Oeter (note 38), para. 24 et seq.

40 See Susanne Spahn, *Russia's Narratives and Disinformation in the War on Ukraine*, in Stefan Hansen / Olha Husieva / Kira Frankenthal (eds.), *Russia's War of Aggression against Ukraine*, 2023, 45 et seq.; Arnd Bauerkämper, *Putins Gedächtnispolitik als Waffe*, in Wolfgang Benz (ed.), *Die Ukraine: Kampf um Unabhängigkeit*, 2023, 377 et seq.; Lutz Unterseher, *Krieg in der Ukraine: Hintergründe und Abgründe* (War in Ukraine: Background and Abysses), 2023, 15.

not only does the free choice of political and economic system, which also includes integration into another state, require the self-determination of the people concerned exercised through an act of collective decision-making; the cession of large parts of territory from one state to another is also a fundamental act of political status determination, which requires consent exercised by referendum. of the inhabitants of the affected territory – "free and fair territorial referendums are the proper procedure for exercising the right to self-determination".⁴¹ The principle of 'territorial referendum' thus postulated has found increasing recognition in international legal doctrine and state practice and requires that, in the event of a transfer of territory from one state to another, the population concerned be consulted in a referendum – and should ultimately give its consent to the intended change of status.⁴² The classic mode of shifting territories back and forth at a 'green table' in some capitals of imperial actors is no longer compatible with post-colonial international law oriented towards self-determination and would – if it were nevertheless agreed by treaty – be considered null and void due to a conflict with the *jus cogens* rules of the right to self-determination. Given President Putin's thoroughly imperialist ideology, which is deeply alien to the concept of self-determination, it would be more than surprising if Russia were to envisage the takeover of territories it currently claims only after a referendum on the territory that could objectively be described as 'free and fair'. On the contrary, Moscow knows that the inhabitants of the affected areas strongly reject a transfer to Russian rule and would – as in Crimea and in the already occupied territories of eastern and southern Ukraine – forcibly transform the affected populations into 'good Russians' through targeted deportations and forms of brutal re-education. However, such a scandalous practice, currently exercised in the occupied Ukrainian

41 See Anne Peters, *The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, in Christian Calliess (ed.), *Herausforderungen an Staat und Verfassung. Völkerrecht – Europarecht – Menschenrechte: Liber Amicorum für Torsten Stein zum 70. Geburtstag*, 2015, 278, 286 et seq.; see also Urs Saxer, *Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung: Selbstbestimmung, Konfliktmanagement, Anerkennung und Staatennachfolge in der neueren Völkerrechtspraxis*, 2010, 777 et seq.

42 See Markku Suksi, *The Referendum as an Instrument for the Resolution of Territorial Disputes and for the Exercise of Self-Determination*, in Peter Hilpold (ed.), *Autonomy and Self-Determination in Europe and in International Comparison*, 2016, 84 et seq.

territories, violates not only the law of military occupation and human rights, but is also completely contrary to the right to self-determination.⁴³

IV. Neutrality vs. Solidarity: The Duties of Third States in Dealing with Violent Territorial Changes

The scope of the rules that govern the handling of cases of forcibly imposed territorial changes is not limited to the direct relationship between the perpetrator and victim states, but also covers third states which, in a closely interlinked world, have diplomatic and international legal relations with the parties to the conflict and, to a certain extent, are also involved in political and economic transactions with the parties to the conflict. It is difficult to avoid the question of how to deal with the (internationally problematic) results of violent land grabbing in legal transactions, whether this has taken the form of direct, unilateral annexation or has been ratified bilaterally (through the use of coercion) by contractual agreements.

The real question in that regard is how much room the value-laden modern international law still leaves for attitudes of classical neutrality.⁴⁴ Classical forms of neutrality are always fed by a certain indifference to the normative questions that arise in the relationship between the warring parties. The aim is to stay out of the conflict so as not to incur the wrath of one or even both parties to the conflict; in some circumstances, the aim may also be to continue doing good business with both sides, with which one may have had close economic ties prior to the conflict. In itself, this classic logic of neutrality is not reprehensible – but does current international law

43 On the flagrant violations of the law of military occupation, see David Wallace, *Ukraine Symposium – The Law of Belligerent Occupation, Articles of War*, 8 March 2023, <https://lieber.westpoint.edu/law-belligerent-occupation/>; see also Michael N. Schmitt, *Deportation of Ukrainian Civilians to Russia: The Legal Framework, Articles of War*, 24 March 2022, <https://lieber.westpoint.edu/deportation-ukrainian-civilians-russia-legal-framework/> and Katharine Fortin, *Abducting Dissent: Kidnapping Public Officials in Occupied Ukraine, Articles of War*, 22 March 2022, <https://lieber.westpoint.edu/kidnapping-public-officials-occupied-ukraine/>.

44 See, for example, Giulio Bartolini, *The Ukrainian-Russian Armed Conflict and the Law of Neutrality: Continuity, Discontinuity, or Irrelevance?*, *Netherlands Int'l. L. Rev.* 71 (2024), 281 et seq.; Natalino Ronzitti, *Neutrality, Non-Belligerency, and Permanent Neutrality According to Recent Practice and Doctrinal Views*, *Journal of Conflict & Security Law* 29 (2024), 55 et seq.; Dallas Bates, *Neutrality and Non-Belligerency: International Support of Ukraine against the Russian Invasion*, *Denv. J. Int'l L. & Pol'y* 51 (2022-2023), 109 et seq.

still leave enough manoeuvring space to seriously maintain such an attitude of normative indifference, including the resulting abstinence from any form of partisanship in favour of one of the parties?

A look at the empirical evidence of the positions actually taken and the practical handling of relations with the parties to the conflict in Russia's war of aggression against Ukraine is certainly instructive here. On closer inspection, the attitudes and practices of third countries prove to be deeply heterogeneous.⁴⁵ While NATO countries and EU member states have openly sided with Ukraine, avoiding direct participation in the fighting (and thus the status of a party to the conflict), there is a – albeit significantly smaller – group of client states closely allied with Russia that have openly sided with Russia by supplying it with weapons and military equipment (Iran), have made their own territory available to Russia for offensive operations (Belarus), and have even effectively entered the conflict as a party to the conflict by sending their own armed forces (North Korea).⁴⁶ The majority of the world's states fall somewhere between these two extremes, with quite different nuances. China, for example, does not openly side with Russia, but it does engage in intensive trade with the aggressor state by purchasing enormous quantities of oil and gas, which ultimately fills Russia's war chest, and it tolerates a considerable amount of commercial activity by its own companies that circumvents Western economic sanctions.⁴⁷ Other BRICS countries are striving for ostentatious equidistance from Russia and the West, while the majority of the smaller and medium-sized states of the 'Global South' are trying to muddle through somehow, while avoiding conflicts with the power blocs involved.⁴⁸ Although these states condemn

45 For an informative overview of the positions of the various groups of states on Russia's war of aggression, see Cătălin Balog, *Hitting Moscow – Between Strategic Desperation and Balance by Force*, IFIMES, 13 August 2025, <https://www.ifimes.org/en/researches/hitting-moscow-between-strategic-desperation-and-balance-by-force/5579?>.

46 See Herbert (note 8), 476.

47 Lili Bayer, 'Very big mistake': NATO chief cautions China over supplying weapons to Russia, *Politico*, 24 February 2023, <https://www.politico.eu/article/very-big-mistake-nato-chief-jens-stoltenberg-cautions-china-over-russia-weapons-supply-ukraine-war/>; see also Gyula Krajczár, *The Russia- Ukraine War and China: Neutrality with Imperial Characteristics*, in Bálint Madlovics / Bálint Magyar (eds.), *Russia's Imperial Endeavour and Its Geopolitical Consequences*, 2023, 311 et seq.

48 For an example of the case of African states, see Olayinka Ajala, *The Case for Neutrality: Understanding African Stances on the Russia-Ukraine Conflict*, *Journal of Military and Strategic Studies* 22 (2022), 129 et seq.

Russian aggression per se, as evidenced by the clear majorities in the relevant resolutions of the UN General Assembly that condemn Russia's war of aggression, most states in the 'Global South' also distrust the West, accusing it of double standards in its handling of the basic rules of international law and of a certain 'hypocrisy' in its attitude.⁴⁹ In the eyes of these states, the West is not really a credible defender of the 'rules-based world order', and this is reflected in their noticeable distance from the calls for solidarity from Western states. The attitude of this large majority of states in the 'Global South' can probably best be understood in terms of classic neutrality.

From the outset, the 'West', i.e. the NATO states and the member states of the EU, have departed from a position of traditional neutrality – in the sense of normative indifference and practical equidistance. Their open partisanship is characterised by a spirit of solidarity in a sense of collective self-defence. The massive military and arms industry support for Ukraine essentially functions as a kind of 'little sister' to collective self-defence.⁵⁰ Direct confrontation in the sense of entering the war as a party to the conflict is being avoided for geostrategic reasons, as most strategists believe that the dangers of uncontrollable escalation (up to and including the use of nuclear weapons) would be almost impossible to contain in a direct conflict between NATO and Russia. This stance can best be understood in terms of 'qualified neutrality' or 'non-belligerence', as practised by the Roosevelt administration in its policy of military support for Great Britain against Nazi Germany in 1939 – before the United States directly entered the war – as a stance of strategic ambiguity.⁵¹ Such an attitude decisively departs from the classic patterns of traditional neutrality, as it openly opts to take sides with one party to the conflict, namely the party normatively justified in its use of force under the rules of self-defence.⁵² Such an attitude could well be argued in view of the intense discussion after 1919 about the relationship between collective security and neutrality.⁵³ Is there still any room for attitudes of neutrality – the question underlying the

49 Balog (note 45), section VII.

50 See Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerence, and the Use of Force*, *Articles of War*, 7 March 2022, <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>.

51 See Oeter (note 35), 65 et seq.

52 See also Niccolò Zugliani, *The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of the Conflict in Ukraine*, *EJIL* 35 (2024), 389 et seq.; cf. also Bartolini (note 44), 287 et seq. and Ronzitti (note 44), 57 et seq.

53 On these debates, see Oeter (note 35), 50 ff., 57 et seq.

debate – if the normative distinction between aggressor state and victim of aggression, in the sense of a requirement of solidarity (supporting collective security) with the victim of the attack, actually compels support for the victim state? The question was not answered conclusively between 1919 and 1939, nor after 1945 – but there was a clear tendency to regard solidarity with the victims of aggression as the ethically and politically 'moral high ground', as the preferable stance in light of the spirit of modern rules of collective security.⁵⁴ This clearly left room for a stance such as (partial) 'non-belligerency'. In a historical 'longue durée', it is astonishing how these debates (and the attitudes shaped by them) have experienced an astonishing revival in the West's position on Russia's war of aggression against Ukraine. Under international law, in view of the *jus cogens* norm of Art. 2 (4) and the condemnation of aggression as a 'crime of crimes' under international criminal law, it is perfectly justifiable to take a conscious stance of partisanship in response to Russia's brazen aggression, departing from traditional patterns of neutrality.

With regard to the position of the states supporting Russia, the question of normative justifiability can be answered with exactly the opposite result. Precisely because of the manifest nature of Russia's war as an act of open aggression, in blatant violation of the UN Charter and other fundamental norms of *jus cogens*, direct support for the aggression (which has been perfunctorily renamed a 'special military operation' by the Kremlin) is not justifiable under international law.⁵⁵ The complicity of Belarus in allowing its own territory to be used as a staging area and operational ground for the Russian attacking force, the massive supply of combat drones and missiles to Russia by the Iranian regime, and certainly the deployment of North Korea's own armed forces to fight side by side with Russian troops on the front line in eastern Ukraine, clearly constitute acts of aiding and abetting aggression that are manifestly contrary to international law and must be assessed as independent offences under international law (in the case of North Korea, probably even as direct (co-)perpetration of a prohibited war of aggression).⁵⁶ There is basically no need to discuss the normative assessment of this support for Russia any further.

54 See Oeter (note 35), 57 et seq.

55 See also Herbert (note 8), 476 et seq.

56 See Marko Milanovic, *Ukraine Symposium – The Complicity of Iran in Russia's Aggression and War Crimes in Ukraine*, Articles of War, 19 October 2022, <https://lieber.westpoint.edu/complicity-iran-russia-aggression-war-crimes-ukraine/>,

Much more difficult to assess is the ostentatious equidistance maintained by most states in the 'Global South' towards the parties to the conflict, which ultimately amounts to a structural convergence towards a classic position of neutrality. As already mentioned, this position is not consistently characterised by a form of blind normative indifference – many of these states have joined in the condemnation of Russia's open aggression under international law (and thus taken a normative position in principle).⁵⁷ A clear lesson from the discussions of the interwar period and the years after 1945 on the relationship between neutrality and collective security is also that even with a clear normative assessment – an evident breach of international law on the one hand, the fundamental demand for solidarity with the victim of aggression on the other – there is no hard obligation to assist the victim state.⁵⁸ The often precarious military-strategic situation of smaller states may make it pragmatically advisable not to take sides openly and ultimately to adopt a neutral stance.

However, this does not apply without restrictions. First of all, following the basic concept of the 'Stimson Doctrine', which has long since become customary international law, there is an obligation not to recognise any form of violent acquisition of territory, such as also the practical consequences of such territorial acquisition.⁵⁹ All states are therefore obliged not only to treat the territorial acquisition as such as null and void, i.e. to refuse to accept the 'robber's' claim to the territory that has been forcibly incorporated, usually in the form of annexation;⁶⁰ but also, in principle, to refuse to recognise any form of exercise of sovereignty over the (illegally annexed) territory, with the exception of the so-called 'Namibia exception'⁶¹ with regard to personal status acts. Such non-recognition forces a certain degree of partisanship upon states – but a partisanship that is hardly avoidable under the concept of *jus cogens*.

and Steve Szymanski /Joshua C.T. Keruski, Ukraine Symposium - North Korea's Entry into International Armed Conflict, Articles of War, 10 December 2024, <https://lieber.westpoint.edu/north-koreas-entry-international-armed-conflict/>.

57 See Herbert (note 8), 480-81.

58 See Oeter (fn. 35), 71 et seq. and Michael Bothe, *Neutrality, Concept and General Rules*, MPEPIL, October 2015, para. 13.

59 See Grant (note 21), para. 13 et seq., also Hofmann (note 3), para. 26 et seq., 31 et seq. and Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law*, 2015, 63 et seq.

60 See Jochen A. Frowein, *Non-Recognition*, MPEPIL, December 2011, para. 3 et seq.

61 *Ibid.*, para. 5 et seq.

The obligations for third countries go far beyond this specific question of non-recognition of acquisition of territory by force. A number of authors dealing with the normative relevance of the category of *jus cogens*, have argued, informed by considerations of the law of state responsibility, that on the one hand, the general obligations not to promote forms of serious breach of *jus cogens* norms through acts of support result in far-reaching obligations of omission, i.e. obligations prohibiting any participation in the commission of serious violations.⁶² From this perspective, the cases described above of direct support for Russia's war of aggression must be classified as clear violations of the duty of 'non-assistance', maintaining the situation created by a 'serious *jus cogens* breach'.⁶³ Under certain circumstances, this requires neutral states to make adjustments to the classic regime of obligations of neutrality. The long-standing idea that a neutral state may continue to supply weapons and armaments to belligerents to the extent of its established pre-war deliveries, as long as it does not excessively favour one side,⁶⁴ must certainly be modified today in view of the obligation of 'non-assistance' in maintaining serious *jus cogens* violations. No substantial support should be given to the aggressor that might help him in continuing its violations of *jus cogens* – even if this means severing historically established trade or supply relationships on which the aggressor may be dependent to a certain extent in terms of military technology or even (in a more general sense) economic policy in order to keep its 'war economy' running.

Potentially even more far-reaching is the 'obligation to cooperate to end serious *jus cogens* breaches', which is also derived from general categories of state responsibility.⁶⁵ As a derivation from basic categories of state responsibility, this general obligation to cooperate has a certain logic. However, it remains questionable to what extent such an obligation has actually become an obligation that in terms of state practice can be claimed to have the status of customary international law.⁶⁶ The scope of relevant state

62 See, for example, Herbert (note 8), 476 et seq.

63 Ibid.

64 See Oeter (note 35), 217 et seq.

65 ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)', (2022) A/77/10, Annex, lit. a, conclusion 19.

66 See Herbert (note 8), 477 f., also Nina Jørgensen, The Obligation of Cooperation in: James Crawford / Alain Pellet / Simon Olleson (eds.), *The Law of International Responsibility*, 2010, 695, 699-700.

practice is rather limited; the classification given by the ILC in the 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)' of 2022, namely that this rule is 'now recognized under international law'⁶⁷, remains without sufficient evidence. However, the vast majority of states have explicitly or implicitly welcomed the postulation of such a norm in the ILC's 'draft conclusion 19'⁶⁸ – and in their practice in response to Russian aggression (and the subsequent serious violation of a number of other '*jus cogens*' norms), the majority of UN member states have effectively confirmed the existence of such a norm.⁶⁹ But even if one affirms such a general duty to cooperate, it remains largely unclear in detail what concrete conclusions will arise from it.⁷⁰ There is still much room for further legal developments here – but the direction in which these developments are heading is clear.

Further legal developments are increasingly undermining traditional notions of neutrality and calling for corresponding modifications to the regime of obligations of neutrality. From the standard position of the (uninvolved) third party, which was rigidly codified in the traditional law of neutrality of the 19th and early 20th centuries with a focus on equal treatment of the parties to the conflict, neutrality in modern *jus contra bellum* has changed to become an exception requiring justification. In many conflict scenarios, a position of neutrality can still be argued on normative grounds. In the case of open wars of aggression, however, the regime of neutrality tends to be superseded by the obligation of abstention and norm preservation that is imposed by a value-based international legal order, which only allows for indifferent standing aside to a limited extent and, in fact, increasingly makes it appear to be a (disreputable) case of 'free riding'.⁷¹

67 ILC, Draft conclusions *jus cogens*, with commentaries (fn. 64), conclusion 19, commentary para. 2.

68 Herbert (note 8), 481.

69 "Therefore, international practice in response to Russia's war, and *opinio iuris*, corroborate the customary status of the obligation to cooperate within international organisations through lawful means to end serious *jus cogens* breaches" – according to Herbert (fn. 8), 482.

70 See also Herbert (note 8), 482 et seq.

71 See also Bothe, Neutrality, MPEPIL (fn. 58), para. 10, and Rebecca Ingber, The Abuse of Neutrality, *Virginia J. Int'l L.* 65 (2025), 437, 450 et seq., 490 et seq.

V. Is there Still Room for Realpolitik? Options for Legally Effective Territorial Transfers through Peace Treaties

For apologists of traditional power politics, oriented towards a balancing of interests conceived in terms of realpolitik, the above overview of established categories and debates in international law may seem somewhat frustrating. Must the states concerned wage endless war, they might ask, since there is no longer any possibility of a realistic balance of interests that could offer the stronger side something that might induce it to end the use of force? If this were the case, the legal perseverance of the principled theorists of 'pure law' would be in danger of achieving a Pyrrhic victory in terms of peace policy. The noble principles of upholding the rules of *jus cogens* would be taken into account as a fundamental value, but realpolitik solutions to the impasse of open wars of aggression or conquest would be blocked.

Such a simple opposition between the (normative) world of law and the (empirical) world of realpolitik would be too simplistic, however. There are ways to achieve realpolitik goals while upholding the fundamental principles of international law. However, these must not result in a simple dominance of power relations in terms of realpolitik and thus in an unbridled 'law of the strongest' – a non-sensical formula because in a normative perspective the dictates of the powerful have nothing in common with law. Subsequently, it is necessary to explore the possible mechanisms that still open up space for realpolitik action.

1) Possible 'ex post' Validation of Invalid Peace Treaties by the UN Security Council

One idea considered in the literature in this context amounts to overriding the consequences of the invalidity of treaties concluded under duress by means of subsequent resolutions of the UN Security Council. Basis of this idea is the assumption that the Security Council, in the interest of its primary task of peacekeeping, should be able to set aside the interests of victim states of aggression, in order to be able to steer situations of escalating violence back into orderly channels. The basic idea underlying such an argumentation is that peacekeeping within the meaning of Chapters VI and VII cannot ignore the real balance of power and power imbalances, as the Security Council does not have at its disposal an arsenal of overwhelming means of power with which even important major and regional powers

could be disciplined. Ultimately, the system is designed to accommodate the fundamental interests of these powers – and this cannot always be achieved while scrupulously adhering to legal requirements.

Some of the authors in international legal literature object to this approach. They persistently stress that a Chapter VII resolution of the Security Council is clearly not capable of easily remedying the legal defects of a peace treaty that has been concluded in violation of *jus cogens* norms.⁷² The binding nature of *jus cogens* ultimately prevails, thus goes their argument, even over the powers of the Security Council. In principle, this idea of normative hierarchy is certainly correct. The ILC has discussed at length the issue of a possible conflict between Security Council resolutions and the requirements of *jus cogens* – and has ultimately included a rule in its 2022 draft conclusions that assumes the primacy of *jus cogens* even over Security Council resolutions in such cases.⁷³ However, this primacy rule is conditional on the content of the Security Council resolution actually conflicting with *jus cogens*. The counterargument insists that a resolution validating a transfer of territory under a peace treaty does not directly conflict with the provisions of *jus cogens*.⁷⁴ What is confirmed here is not a unilateral annexation in violation of *jus cogens*, but a contractual disposition that is legally dubious in the process of concluding the treaty (due to the continuing coercive effect of the aggression) – but its validation by the Security Council does not directly constitute a conflict with the provisions of *jus cogens*.⁷⁵ In a purely technical sense, this is probably correct, but the argument ultimately smacks of sophistry. As an organ of an international organisation, the Security Council is fundamentally bound by international law and therefore does not act in a legal vacuum in any of its options for action.⁷⁶ On the contrary, Art. 24 (2) of the UN Charter expressly binds the Security Council to the objectives and principles of the Charter.⁷⁷ This also includes the obligation to sanction violations of *jus cogens* and not to contribute in any way to the maintenance or even consolidation of such

72 See, for example, Fox (note 2); cf. also Forlati (note 33), Kriener / Peters (note 2) and Enrico Milano, *Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status*, EJIL 14 (2003), 999, 1015 et seq.

73 ILC, *Draft conclusions jus cogens, with commentaries* (note 65), conclusion 16.

74 According to Herbert (note 2).

75 Ibid.; see also Forlati (note 33), 329.

76 Kriener / Peters (note 2), section II.

77 See Anne Peters, Article 24, in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, Volume I, 4th ed. 2024, 1029 ff., para. 60.

serious violations. The ICJ recently emphasised this once again in its 2024 Advisory Opinion on the occupied Palestinian territories with regard to the right to self-determination as a peremptory norm of international law.⁷⁸ The obligations not to recognise serious violations and not to accept any consequences of a serious violation must be interpreted broadly and require that any form of de facto consolidation of the previous violation be refrained from. This obligation applies to all changes: "Member States are under an obligation not to recognise any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem".⁷⁹ This finding resulted in specific obligations to refrain from any contractual relations and to abstain from economic or commercial transactions or agreements "which validate or entrench its proposed occupation of the Palestinian Territory" as a result of Israel's violations of jus cogens.⁸⁰ In other words, it is more a matter of the spirit and purpose of preventing violations of jus cogens than of overly narrow, sophisticated constructions of the rules on the consequences of serious violations of jus cogens norms.

Similar features of a sophisticated relativisation of the obligations of 'non-assistance' are found in the argument that confirmation of the territorial disposition in the peace treaty does not violate the principle of non-recognition of the acquisition of territory by force.⁸¹ This principle, which has developed over decades starting from the fundamental basis of the Stimson Doctrine, may now be considered part of customary international law – but nothing more, it is claimed; it is undoubtedly not part of jus cogens, the argument goes.⁸² Thus, contractual recognition of a transfer of territory effected by force would not conflict with the provisions of jus cogens, but only with simple rules of customary international law – which the Security Council may disregard in an emergency, invoking the primacy rule of Article 103 of the UN Charter.⁸³

78 ICJ, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, available at: <https://icj-cij.org/sites/default/files/case-related/186/186-20240719-sum-01-00-en.pdf>.

79 ICJ, OPT Advisory Opinion (note 78), para. 278; see also paras. 280 et seq.

80 ICJ, OPT Advisory Opinion (note 78), paras. 278-79.

81 Herbert (note 2).

82 See Herbert (note 2); see also Forlati (note 33), 331-32.

83 On the primacy of Article 103 of the UN Charter over customary international law, see Andreas Paulus / Johann Ruben Leiss, Article 103, in Bruno Simma et al. (eds),

Prominent scholars, however, rightly point out that the Security Council, in exercising its primary responsibility for international security and peace, is entitled to take decisive measures which, in the coercive situation of immediate action required to avert threats or breaches of peace, also dispense with certain basic rules, such as the prohibition of force and intervention.⁸⁴ However, the forced implementation of a peace treaty which in itself has to be considered as null and void would not constitute an emergency measure under urgency, but would amount to legislative action by the Security Council.⁸⁵ Such legislative action is not prohibited per se to the Security Council – but in the case of (permanent) status-changing legislative acts to the detriment of the legal position of individual states, it is subject to very high requirements⁸⁶ What the Security Council is clearly not allowed to do in this context is to undermine the basic rules of international law to which it is bound in principle; it certainly must not deliberately undermine the fundamental rules of the international order, in particular not rules of *jus cogens*, which it is called upon to protect, by giving its seal of approval to flagrant violations of peremptory norms of international law.

Furthermore, it is highly doubtful whether the Security Council has any mandate at all to impose a permanent status settlement for disputed territories against the will of the states concerned. At the end, it has primarily the power to temporarily regulate situations involving the use of force in order to preserve peace or restore international order.⁸⁷ Changes to the fundamental status of territories that would deeply interfere with the territorial sovereignty of the states concerned (in the absence of their consent) are by no means covered by the powers of Chapter VII, if the Charter is read correctly.⁸⁸ They always require – and this is where contemporary international law reveals itself to be an order still deeply rooted in the categories of state sovereignty – the consensus of the states concerned, however difficult this may be to achieve in lengthy negotiations, in the absence of violent

The Charter of the United Nations: A Commentary, Volume II, 4th ed. 2024, 2743 et seq., para. 73 et seq.

84 See, for example, Kriener / Peters (note 2), Section II.

85 Ibid.

86 For details, see Peters, Article 24 (note 77), para. 70 et seq.

87 See also Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action*, *EJIL* 26 (2015), 671 et seq.

88 See also the sceptical views expressed by Milano (note 72), 1015 ff. and by Björn Elberling, *The "Ultra Vires" Character of Legislative Action by the Security Council*, *International Organizations Law Review* 2 (2005), 337, 348 ff.

coercion. A different interpretation of the Charter would turn it into a hegemonic order under the direction of a small group of major powers – an understanding that may not look far-fetched for some of the P5, but which would certainly not meet with the approval of the remaining 98% of the international community.

2) Ceasefire Agreement as a Necessary Prelude to any Territorial Disposition

According to established practice, the Security Council may (without any problems) impose a ceasefire, i.e. a provisional arrangement which for some time silences the weapons. There exist different modalities of such a provisional silencing of arms.⁸⁹ What all these arrangements, be it forms of a 'truce' or a 'ceasefire', have in common is their character of a provisional solution. They constitute essentially measures of a temporary nature that lead to a (provisional) cessation of hostilities, typically with the front line being frozen.⁹⁰ De jure, they have no effect on the status of the territories concerned under international law, which is why they fall unproblematically under the mandate of the Security Council – after all, no rights of the states concerned are curtailed.

They are not entirely without binding force – but the arrangements typically agreed in ceasefire agreements are limited, apart from the fundamental silence of the guns, to technical details such as the geographical and temporal scope of the ceasefire, possible measures for the separation of troops, minor corrections to the front lines where necessary, its monitoring (possibly also by international observers) and the parties' options for responding to alleged violations.⁹¹ The agreement of a ceasefire is also not entirely unproblematic in view of Article 52 VCLT – the frozen front line continues to manifest the injustice of the act of aggression, in the wake of which the aggressor has typically occupied parts of the territory of the victim state of the attack by means of military force – and the ceasefire (temporarily) confirms this occupation as a provisional solution. In a certain sense, therefore, a ceasefire agreement is thus a prolongation of the initial act of aggression, since it provisionally forces the victim state to

89 See Kriener / Peters (note 2), section IV.

90 See Valentina Azarova / Ido Blum, *Suspension of Hostilities*, MPEPIL, Sept. 2015, para. 2 et seq.

91 See Christine Bell, *Ceasefire*, MPEPIL, Dec. 2009, para. 16 et seq.

accept the 'fait accompli' arising out of the aggression as a serious violation of peremptory norms of international law. This 'fait accompli' is 'brought about' by the aggression, because without the use of force by the aggressor, the affected state would never have agreed to the (even if only temporary) loss of its territorial sovereignty. However, the ceasefire agreement is typically advantageous for the militarily inferior victim state, as it grants it a respite in the military conflict and thus relieves it of military pressure.⁹² It is precisely for this reason that in the war against Ukraine, Russia is rejecting any prospect of declaring a ceasefire, while Ukraine would be willing to accept a provisional silencing of arms without further ado.

At the same time, agreeing to a ceasefire is a fundamental prerequisite for establishing a process of sustainable peace negotiations. As long as hostilities continue, any form of substantial agreement between the aggressor and the victim state would fail to meet the requirements of Article 52 of the Vienna Convention on the Law of War, as the conclusion of such an agreement would always be contaminated by the ongoing aggression – brought about by coercion against the state attacked. Only the 'cooling-off' period of the ceasefire gives the weaker state, i.e. the victim of the attack, the political leeway necessary for a free political decision how to cope with the territorial 'fait accompli' brought about by the aggression. The aggression remains present as a latent form of coercion in the occupation of the territories behind the front line and clearly limits the victim state's options for action in terms of realpolitik. In the context of a ceasefire that has been consolidated over a longer period of time, with a correspondingly pacified situation on the ground, the question of the future territorial shape of the state has a real chance to become the subject of public discourse – an open debate can take place on whether it would be preferable to relinquish certain parts of the territory in order to achieve long-term peace.

Such a renunciation of territorial sovereignty claims, at the end codified as a transfer of territory in a peace treaty, may well make sense in terms of realpolitik. This is evident not least from the situation in Ukraine. Large parts of Donbass, especially the Donetsk and Luhansk oblasts, have not been under the control of the Ukrainian government for more than ten years now, but have been for a long time under Russian occupation, now having been effectively incorporated into Russia. It is not entirely clear whether the population of these two oblasts with a Russian-speaking

92 Ibid., para. 20 et seq.

population of ambivalent national allegiance would actually have opted for Russia in a free vote in 2014. The flight or expulsion of the decidedly Ukrainian sections of the population and the harsh policy of 'Russification' of the remaining population has now led to a national homogenisation that leaves little doubt about the loyalty of the local population to Russia. If the territories were to be returned, the Ukrainian administration would be faced with a population that is largely hostile towards it.⁹³ In addition, large parts of the territory are war-torn and economically bled dry.⁹⁴ Ukraine would have to expend considerable resources to keep these areas alive, not to mention the immense task of reconstruction. In a sober political calculation, it would therefore make perfect sense to relinquish these territories – and if Ukrainian politicians (and the Ukrainian public) were to come to this conclusion in a free and open internal debate, it would be absurd to speak of the 'bringing about' of the cession of territory through the use of force by Russia and to invoke the nullity clause of Article 52 of the Vienna Convention on the Law of Treaties. From a historical causality perspective, Russia naturally remains responsible for the loss of territory due to its violation of *jus cogens* through its aggression, but ultimately this is likely to be a matter of adequate causality rather than any historical contribution to causality.

With regard to Crimea, the question is likely to be quite different. Although the population of Crimea, which throughout the 20th century was dominated by ethnic Russians, may not necessarily be in favour of the region's reintegration into the Ukrainian state, Ukraine has a duty to protect with regard to the Crimean Tatars, the indigenous population of the Crimean peninsula. The Russian majority only has emerged as a result of immigration during the 20th century. After the deportation of the entire Crimean Tatar people to Central Asia on Stalin's orders in 1944⁹⁵, a large proportion of the Crimean Tatars managed to return to the peninsula in the late Soviet era and then during the 1990s, amid growing conflict

93 See also Nataliia Kasianenko, Internal Legitimacy and Governance in the Absence of Recognition: The Cases of the Donetsk and Luhansk "People's Republics", in Mikhail Minakov / Gwendolyn Sasse / Daria Isachenko (eds.), Special Issue 'Secessionisms in Europe: Societies, Political Systems and International Order under Stress', *Ideology and Politics* 12 (2019), 135, 144–45.

94 *Ibid.*, 142 et seq.

95 See Viktoria Savchuk, Die Deportation der Krimtataren, in Wolfgang Benz (ed.), *Die Ukraine: Kampf um Unabhängigkeit*, 2023, 167 et seq.

with the Russian majority in the region.⁹⁶ This conflict situation led the Crimean Tatars to lean heavily on the Ukrainian state as their 'protector', which, in the wake of the Russian occupation and annexation, led to the Crimean Tatars being accused of being pro-Ukrainian, ending up in a wave of systematic persecution and 'ethnic cleansing' by the Russian occupiers after the Russian occupation and annexation of the region in 2014.⁹⁷ The remaining groups of Crimean Tatars who stayed in the region are under massive pressure from the Russian administration and suffer from a high degree of repression against any insistence on their traditional cultural identity and cultural practices.⁹⁸ From this perspective, Ukraine could not accept a simple transfer of title concerning Crimea to Russia, as becoming a permanent part of the Russian Federation. Some form of credible protection mechanisms would be required to enable the Crimean Tatars to live a self-determined life (including forms of collective organization) while preserving their cultural traditions, religion and language – a prospect that will not exist under Russian administration in the existing regime structure. This would require a special arrangement, either in the form of condominium administration or through a mechanism of international monitoring and protection enforcing legal safeguards for the Crimean Tatars⁹⁹ – an arrangement that is unlikely to be acceptable to the Putin regime in the foreseeable future. As long as this unfortunate situation persists, it would not make sense to give up Ukraine's territorial claim – ultimately, it is the bargaining chip that will be needed in the medium term in the context of serious peace negotiations if Ukraine wants to eventually reach a meaningful arrangement in favour of the Crimean Tatars.

Concerning the oblasts of Zaporizhzhia and Kherson, an arrangement relinquishing territorial sovereignty over these areas is completely unthinkable from Ukraine's point of view. These are predominantly Ukrainian areas in terms of the cultural characteristics of the population, and more-

96 See Markéta Žídková / Hynek Melichar, *Crimean Tatars Before and After the Annexation of Crimea: Identity, Societal Security, and the Prospects of Violence*, ALPPI Annual of Language & Politics and Politics of Identity 9 (2015), 87, 97 et seq.

97 Žídková / Melichar (fn. 96), 99 et seq.

98 See Mariia Shynkarenko, *Compliant Subjects?: How the Crimean Tatars Resist Russian Occupation in Crimea*, Communist and Post-Communist Studies 55 (2022), 76 et seq.

99 See also my reflections in: Stefan Oeter, *Der Ukraine-Konflikt und das Völkerrecht: Wie gelingt die Rückkehr zu einem völkerrechtskonformen Zustand*, in Heinz-Gerhard Justenhoven (ed.) *Kampf um die Ukraine: Ringen um Selbstbestimmung und geopolitische Interessen*, 2018, 191, 216 et seq.

over, they are core areas of great significance for Ukrainian national history, one might remember the story of the Zaporizhzhia Cossacks. The duty to protect the human rights of its population would make it practically impossible for Ukrainian politicians to cede these territories to Russia – and to expose the local population to brutal Russian repression as usual in occupied 'enemy territories', not to speak of the patterns of forced policy of 'de-Ukrainisation', using extremely brutal methods to eradicate any form of Ukrainian identity among the inhabitants, with the aim of forcibly transforming them into Russians.

VI. Concluding Thoughts

The above considerations should have demonstrated with utmost clarity that a 'quick and dirty' peace agreement between Ukraine and Russia, as it was envisaged in Washington and Moscow, involving the cession of large areas of Ukrainian territory to Russia, would not constitute a sustainable solution under international law. Such a 'dictated peace' could be accused of being a glaring injustice, not only from the perspective of peace ethics, but also in political terms; such a 'peace' would also fail to provide a stable solution from a strictly legal perspective of international law, since a peace treaty that forces the attacked state to cede important parts of its territory under the pressure of ongoing (illegal) use of force would be null and void under the basic rules of treaty law set out in Articles 52 and 53 of the Vienna Convention on the Law of Treaties, and therefore cannot legally lead to a sustainable restructuring of inter-state relations. Article 52 of the Vienna Convention prohibits contractual dispositions that have been 'brought about' under duress – and this would undoubtedly be the case in Ukraine if Russia's war of aggression were to continue. Article 53 of the Vienna Convention declares treaties that conflict with mandatory rules of *jus cogens* to be null and void – and at least with regard to the right to self-determination as a mandatory rule of international law, this must also be assumed in the case of Ukraine, because the (forced) cession of territories against the will of the populations concerned is incompatible with the basic rules of the right to self-determination as understood today.

Without an interim ceasefire that leads to a medium-term consolidation of a 'normal situation' characterised by the absence of an ongoing use of force, enabling the victim of the attack to reach an internal political consensus on the price to be accepted for long-term pacification, the causal nexus

between any kind of contractual concession (e.g. in the form of territorial cessions) and the continuing violence cannot be broken; the 'peace treaty' surrender of territorial sovereignty would remain under the coercive effect of violence contrary to international law, and thus without legal validity. From this perspective, the 'conventional wisdom' that an armed conflict must first be temporarily pacified by a ceasefire before serious peace negotiations can be considered is fully plausible.

The fact that these fundamental structures of modern international law are currently being completely ignored in Moscow and Washington shows, first of all, only the decline in legal awareness among the traditional great powers, which obviously believe that their special status as 'permanent members' of the Security Council elevates them above the 'lowlands' of the classical disciplines of international law. Insisting on the basic principles of the Vienna Convention on the Law of Treaties, in combination with the derivations developed by the ILC from the modern concept of 'jus cogens', is not, however, a matter of nitpicking over principles, but is unavoidable if one wishes to defend the legal character of international law under the UN Charter system. Without the validity of the prohibition of the use of force according to Article 2 (4) of the UN Charter, and the demand for respect for this fundamental norm of the 'rules-based world order', even as far as the major powers are concerned, the international community would fall back into a violent anarchy characterised by the 'law of the strongest' – and the 'law of the strongest' is the opposite of law, essentially negating the idea of any legal commitment. If we were to abandon the norm of the prohibition of violence that characterises the modern international legal system and accept that highly armed military powers use ruthless force to take what they believe they are entitled to, the world would be plunged into chaos and would mutate into an assemblage of hegemonic spaces (the famous Schmittian 'Großraumordnungen') in which smaller states would only have room as vassals of the ruling powers. It is no secret that Moscow envisages a new type of such a 'multipolar world order'. But there are good reasons for the states of Europe, and ultimately also for most of the states of the Global South, not to embrace this vision of a 'new world order'. If we want to prevent the erosion of the existing international legal order, there is no alternative but to insist on the traditional fundamental principles of international law – and these undoubtedly include the basic rules of jus cogens and the rules codified for their protection in Articles 52 and 53 of the Vienna Convention on the Law of Treaties. If we are not willing to insist on these rules and would allow Russia to use (coerced) 'peace treaties' in

order to securing its spoils of aggression, Putin's Russia would be rewarded for its brazen disregard for the fundamental rules of international law, and incentives would be created for further acts of violence. This would not only be dangerous with regard to Moscow, but would also provide a blueprint for other states that have the military potential to seize foreign territory through the use of force. The future pattern of action for militarily well-equipped states would be set under the guiding star of Russia's approach: Conquer smaller states by force, secure the spoils by committing horrific crimes against international humanitarian law and human rights in order to deter the reluctant population of the affected areas from any form of resistance, and then wait until international support for the victim of the war of aggression wanes to the point where the adherents of 'realpolitik' develop the necessary willingness to accept the 'new realities' and come to terms with the results of the aggression. If we formulate the situation with which the international community in the case of Ukraine is faced in this way, there are good reasons to condemn the willingness to accept open aggression (and its consequences) as what it essentially is – a fatal sinfall that threatens to accept without any resistance the wanton destruction of the international legal order established after the Second World War. Every state (and every society) that has an interest in preserving a world as free as possible from the 'scourge of war' (preamble to the UN Charter) is therefore called upon to insist on the established rules of *jus cogens* – and to refuse to recognise the consequences of heinous acts of violence. This is the core of the rules of Articles 52 and 53 of the WVK discussed here, but also of the argument, with regard to the institution of neutrality, that the classic obligations of equal treatment are superseded by an obligation to take a firm stand against any form of open aggression. Even states of the 'Global South' – despite all their justified mistrust of the normative seriousness of the states of the 'West' – should consider whether it is not also in their own best interests to defend the existing international legal order against heinous acts of violence – they could easily be the next victims.

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Neutral in the face of coercion and force?

Challenges under international treaty law for a peaceful solution to the conflict in Ukraine

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Abstract

A negotiated solution to the Ukraine conflict suggests the conclusion of a treaty under international law (a “peace treaty”), which raises several questions from the perspective of the prohibition of the use of force and annexation under international law, as well as a possible violation of *ius cogens*. Various doctrinal solutions, as they have appeared in the literature, are discussed and evaluated as to their feasibility. Finally, this contribution offers an alternative approach through ‘law and economics’, whereby apparent contradictions between the law of treaties and the law of neutrality might be reconciled.

I. Introduction

Discussion of the Russia-Ukraine conflict is polarised, not only from the perspective of the politics or law of neutrality discussed in this volume: from the questionably motivated call for Ukraine to abandon its self-defence, coming from (often no longer quite) fringe parties on both sides of the spectrum, Donald Trump’s and J.D. Vance’s public dressing down of Ukrainian President Volodymyr Zelenskyy on live television, to the appeasement of Vladimir Putin, dangling the carrot of a peace process in front of the international community.

Any future peace treaty will be primarily shaped by the geopolitical interests of the various actors and thus be water on the mills of the school of classical realism in international relations.¹ Yet, its conclusion

1 See generally Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 7th ed. (2005).

– as Stefan Oeter equally demonstrates in his contribution in this volume – nonetheless calls into question a number of premises of international law proclaimed in the classroom, textbooks, and commentaries: the prohibition of the use of force, the prohibition of annexation, and *ius cogens* – all of which overlap with or even make obsolete the classical laws of neutrality.² One is still left wondering to what extent third states must remain neutral towards a treaty in light of coercion and force, accepting the weaker party's surrender and bowing to the interests of the strongman.

This contribution begins with a brief shift of scenery, transporting the reader to Northern Italy almost half a millennium prior to any discussion of a peace agreement between Russia and Ukraine, in order to illustrate that the scenario discussed here – of annulment of an international treaty due to coercion and force – is not necessarily purely hypothetical, at least historically (II.). This is followed by an overview of the provisions of the Vienna Convention on the Law of Treaties (VCLT)³ relevant to a peace treaty in the Russia-Ukraine conflict (III.), before a number of solutions to the resulting dilemma are presented – some of them realistic, others more far-fetched (IV.). Finally, a 'law and economics' approach⁴ is offered as an alternative solution (V.) before the contribution concludes (VI.).

II. The Peace of Madrid of 1526

On 24 February 1525, the King of France, Francis I of the House of Valois-Angoulême, was taken prisoner by his arch-rival, Charles V of the House of Habsburg, at the Battle of Pavia. In exchange for his release, Charles V demanded not only the renunciation of Flanders and Artois, but also the surrender of the Duchy of Burgundy, to which Francis I finally agreed in the Peace of Madrid on 14 January 1526. He was released, but had to leave two of his sons as hostages in Castile as a guarantee.

This did not prevent him from immediately declaring the Peace of Madrid null and void upon his release, citing coercion as the grounds. In addition, Francis I presented a notarised letter of protest, in which he had already declared all concessions made under duress to be invalid, as a precautionary measure prior to accepting the Peace of Madrid. Francis

2 See the contributions by Hilpold and Janik in this volume.

3 Vienna Convention on the Law of Treaties, 23.5.1969, 1155 UNTS 331.

4 See generally Richard A. Posner, *Economic Analysis of Law*, 9th ed. (2014).

I also found an ally for this legal opinion in Medici Pope Clement VII, with whose support he, together with Francesco Sforza – who had claims to Milan – as well as the cities of Venice and Florence, opposed Charles V's monopoly of power with the League of Cognac.

The Italian Wars thus continued until the so-called Ladies' Peace of Cambray of 1529, concluded between Margaret of Austria and Louise of Savoy, which largely confirmed the Treaty of Madrid, albeit with the significant change that the Duchy of Burgundy was now awarded to Francis I.

Could this episode in the relations between the Houses of Habsburg and Valois⁵ be repeated in the 21st century? What if a successor to Zelenskyy in the office of Ukrainian president decides to invoke Article 51 or 52 of the VCLT as a ground for invalidating a possible peace treaty? Could this ultimately avert an initial loss of territory?

III. The Vienna Convention on the Law of Treaties as a limit to peace treaties

Both Russia and Ukraine are parties to the VCLT, which regulates the application of international treaties, from their acceptance to their dissolution due to defects in their conclusion, or termination due to disturbances in their performance.

Articles 51 and 52 VCLT concern situations in which consent to an international treaty is obtained by coercion against a state representative – with the classic example of the euphemistic ‘offer he can’t refuse’ featuring in the movie *The Godfather* – or by the use or threat of force against a state. Such consent shall have no legal effect; the treaty is void *ab initio* and is dissolved *ex tunc*.⁶ These provisions are a logical consequence of the general legal principle of law *ex iniuria ius non oritur*: law cannot arise from injustice.⁷

5 For the events and their assessment in historiography, see Arno Strohmeyer, *Peace Treaties in Historical Perspective: The Perception of the Peace of Madrid (1526) in German Historiography*, in Heinz Duchhardt & Martin Peters (eds.), *Calculation – Transfer – Symbol: European Peace Treaties of the Pre-Modern Era*, Publications of the Institute of European History Mainz, Supplement Online 1 (2006), p.132.

6 Cf. Oliver Dörr, *Use of Force, Prohibition of*, in *Max Planck Encyclopedia of International Law* (June 2013), para. 32.

7 See Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*,

Regardless of this, another provision of the VCLT could still stand in the way of a peace treaty between Russia and Ukraine: the existence of a peremptory norm of international law, a so-called *ius cogens* norm. According to Article 53 of the VCLT, '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.

The customary international law of state responsibility also gives rise to an obligation on the part of the entire international community not to recognise, or further contribute to a situation that is contrary to a peremptory norm of international law.⁸ This precludes any neutral stance – legal or political – in the face of coercion and force.

Even aside from these rules of treaty law, the same result could in fact be derived from the primacy of Article 103 of the UN Charter,⁹ namely that a subsequent treaty between individual Member States of the United Nations must not lead to a departure from the prescriptive norm of Article 2(4) of the UN Charter.

A. Prohibition of force

Article 2(4) of the UN Charter codifies the prohibition of the use of force under international law, in the words of the International Court of Justice (ICJ) in the *Armed Activities* case, as a 'cornerstone'¹⁰ of international law: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'¹¹ Despite questioning voices in the literature,¹² the prohibition of force is generally accorded the status *ius cogens*.¹³

2011, p. 320; Gregory Fox, A Legal Framework for a Russia-Ukraine Peace Agreement, EJIL:Talk!, 19 December 2024, available at: <https://www.ejiltalk.org/a-legal-framework-for-a-russia-ukraine-peace-agreement/>.

⁸ See Art. 41 ASR.

⁹ Cf. n. 28.

¹⁰ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 168, p. 223, para. 148.

¹¹ German language version according to BGBl. Nr. 120/1956.

¹² See James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 *Michigan Journal of International Law* (2011), pp. 215–257.

¹³ See *Yearbook of the International Law Commission*, 1966, Vol. II, UN Doc. A/CN.4/SER.A/1966/Add.1, p. 247.

Attempts at interpreting the wording of Article 2(4) of the UN Charter restrictively, in order to exclude individual circumstances or generate exceptions outside the UN Charter, have proven unsuccessful¹⁴. To the contrary, NYU Professor Thomas M. Franck even described the prohibition as an ‘idiot rule’: ‘It says, in substance, that states may not initiate the use of armed force against another state.’¹⁵ States must therefore refrain from using military force against other states.¹⁶

There is therefore no further need for interpretation regarding the prohibition of force – unlike, for example, the question of an armed attack as a prerequisite for legitimate self-defence.¹⁷ Wherever military force or actions tantamount to it have been exercised against another state or on its territory, Article 2(4) of the United Nations has been violated.

The principle that forcible annexations of territory are withheld recognition was already formulated in 1932 by then US Secretary of State, Henry L. Stimson, in the doctrine that came to bear his name with regard to Japan’s annexation of Manchurian China.¹⁸ Following the Briand-Kellogg Pact of 1928,¹⁹ this paved the way for the development of law towards the prohibition of force, as found today in the UN Charter, and therefore makes the annexation of foreign territory a prime example – or, as the ICJ stated in its advisory opinion on the construction of the wall in the

14 See Simon Chesterman, *The Scourge of War: Humanitarian Intervention and the Prohibition of the Use of Force in the UN Charter*, in id. (ed.), *Just War or Just Peace? Humanitarian Intervention and International Law* (2002), p. 50 with further references.

15 Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990), p. 75.

16 Although the concept of the use of force in international law primarily refers to military action, it also encompasses other measures of comparable outcome, provided that they are equivalent in scale and effects to the use of military force, such as deliberately causing an environmental disaster in another State or a cyber operation with physical consequences.

17 See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits), I.C.J. Reports 1986, 14, pp. 103–104, para. 195.

18 See Quincy Wright, *The Stimson Note of January 7, 1932*, 26(2) *American Journal of International Law* (1932), 342.

19 Treaty between the United States and other Powers providing for the Renunciation of War as an Instrument of National Policy, 27.8.1928.

Palestinian territories, ‘a corollary’ – of the prohibition of the use of force.²⁰ Of course, this also has an impact on the exercise of neutrality.²¹

In addition to the use of force, Article 2(4) of the UN Charter also prohibits the threat of force. This threat may be either explicit or implicit, arising from circumstances such as the mobilisation of troops or military manoeuvres on the border of another state.²² Clearly, this also includes the prospect of sustained combat operations in the event of failure to meet certain demands.²³

B. Legal consequences for peace negotiations

At first glance, subsequently terminating a peace treaty that was concluded in full awareness of the limitations set by coercion and the use of force would appear to contradict the principle of *pacta sunt servanda*, which stands at the heart of the VCLT: agreements must be abided by. After all, according to the wording of Article 26 of the VCLT, this principle also includes the principle of good faith, meaning that concluding a treaty with the intention of later declaring it null and void would violate the general legal principle of law of *venire contra factum proprium*.

However, the possibility of raising the defence of forfeiture in Article 45 of the VCLT clearly excludes Articles 51 and 52 of the VCLT,²⁴ as the United Nations International Law Commission (ILC) has clearly stated in its explanations of the draft text: ‘[T]he Commission did not think that the principle [that a party is not permitted to benefit from its own inconsistencies] should be applicable at all in cases of coercion of a representative under Article [51] or coercion of the State itself under Article [52].’²⁵ Incon-

20 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, 171, para. 87.

21 See the contributions by Hilpold and Janik in this volume.

22 See Christian Tams, *Article 2(4)*, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, 4th ed. (2024), pp. 346–347, para. 110.

23 See *ibid.*, p. 345, para. 108.

24 See Marcelo Kohen & Sarah Heathcote, *Article 45*, in Olivier Corten & Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), 1074, para. 29.

25 Yearbook of the International Law Commission, 1966, Vol. II, p. 239. See With regard to state practice, apparently a different opinion: Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, 2011, p. 329. However, this overlooks

sistency or bad faith therefore, cannot be invoked in relation to the treaty in the case of coercion against state representatives or the use of force against the state itself.

Conversely, due to the logical reversal of this idea in Article 69(3) of the VCLT, as the aggressor, Russia could never invoke the invalidity of a treaty that it itself had procured through coercion.²⁶ Concerns regarding the stability of international relations or existing peace treaties were not taken into account when discussing the exceptions in Articles 51 and 52 of the VCLT, during the negotiation of the VCLT.²⁷

On the question of whether at least individual passages of the treaty could be exempted from invalidity and separated from the treaty – as Article 44 of the VCLT allows in principle – the ILC agreed that in the case of coercion against a representative of a state or use of force against the state itself, there are compelling reasons to consider the treaty null and void in its entirety:

“The Commission considered that where a treaty has been procured by the coercion either of the State or of its representative, there were imperative reasons for regarding it as absolutely void in all its parts. Only thus, in the opinion of the Commission, would it be possible to ensure that the coerced State, when deciding upon its future treaty relations with the State which had coerced it, would be able to do so in a position of full freedom from the coercion.”²⁸

In the opinion of the ILC, this was the only way to ensure that a State could freely shape its future treaty relations.

As regards the cessation of hostilities on the part of Russia which will be regulated in any peace treaty, this could only be considered declaratory un-

the ‘self-contained regime’ created by Article 42 of the VCLT concerning the invalidity and termination of treaties.

26 Cf. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 646, para. 14.

27 See Kohen & Heathcote (note 23), 1074, para. 30; Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), p. 321.

28 Yearbook of the International Law Commission, 1966, Vol. II, pp. 238-239. With regard to those standards that are already established under customary international law, there is apparently a difference of opinion: Kirsten Schmalenbach and Alexander Prantl, *How to End an Illegal War?*, *Völkerrechtsblog*, 21.4.2022, available at: <https://voelkerrechtsblog.org/how-to-end-an-illegal-war/>.

der the customary international law of state responsibility, which includes the obligation to cease acts in violation of international law.²⁹

Even after the violation has ceased, the ILC agreed in their explanations that a treaty once tainted by the use of force could not be remedied:

“Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio*.”³⁰

A legal malaise due to coercion or use of force remains attributed.

C. Assessment

Consequently, any peace agreement resulting from the use of force and coercion, or that entails the recognition of an annexation – i.e., without the full restoration of Ukraine's pre-2014 borders – is null and void.³¹ The fact that Russia, as the aggressor state, has indisputably violated Article 2(4) of the UN Charter was already established by an overwhelming majority of the UN General Assembly at its emergency meeting on 2 March 2022.³²

29 See Art. 30 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), *Yearbook of the International Law Commission* (2001-II), 20 (hereinafter: ASR). Cf. Schmalenbach & Prantl (n. 27).

30 *Yearbook of the International Law Commission*, 1966, Vol. II, p. 247.

31 Cf. United Nations General Assembly Resolution ES-11/4, *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*, 13 October 2022, UN Doc. A/RES/ES-11/4.

See also Florian Kriener & Anne Peters, *Legal Limits for UNSC Action on Peace in Ukraine*, EJIL:Talk!, 8 April 2025, available at: <https://www.ejiltalk.org/legal-limits-for-unscc-action-on-peace-in-ukraine/>; Vishchyk & Pizzi (note 30); Different view: Felix Herbert, *Territorial Concessions to the Aggressor: (In-)Validity of a Prospective Peace Treaty Between Russia and Ukraine?*, Verfassungsblog, 6 January 2025, available at: <https://verfassungsblog.de/territorial-concessions-to-the-aggressor/>. Herbert refers to the Lusaka Ceasefire Agreement (1999) and the Minsk II Agreement as counter-examples (similarly Schmalenbach & Prantl, n. 27). Ceasefire agreements are, strictly speaking, not treaties under international law (see Section IV.C.), and the Minsk II Agreement constitutes a political commitment. Moreover, the argument that nullity would allow the aggressor to remove territorial settlements from treaty regulation appears unconvincing.

32 See United Nations General Assembly Resolution ES-11/1, *Aggression against Ukraine*, 18 March 2022, UN Doc. A/RES/ES-11/1.

For third countries, the *ius cogens* status of the prohibition of force would also mean that even annexations incorporated in a possible peace treaty may not be recognised, nor may any form of support be provided to maintain the illegal situation.³³ In any case, no rights or obligations may be established in relation to this territory.³⁴ Thus, there is also no ‘neutrality under international treaty law’ regarding the subject matter of the treaty.

IV. Ways out of the dilemma

Why even hold peace talks if it is impossible to conclude a treaty during ongoing hostilities and occupation, or following the annexation of territory? A whole series of scenarios have been discussed in the literature, ranging from somewhat realistic to hypothetical and far-fetched.

A. Ending the use of force and returning annexed territories

Russia could, for a legal second, cease all hostilities and withdraw from all occupied and annexed territories (and subsequently have Ukraine ‘voluntarily’ cede territories³⁵). Given Russia’s territorial claims, however, this would hardly be conceivable as anything more than a circumvention of the rules. In practice, a withdrawal of Russian troops seems unlikely.

B. Application of the Vienna Convention on the Law of Treaties

Insofar as the scope of application of the VCLT only refers to written agreements concluded between States, an oral treaty or the transfer of the territories claimed by Russia to an international organisation for administration, subsequently ceded to Russia or Ukraine, could be considered. Similarly, both states could agree to terminate the VCLT before concluding

33 Cf. Maksym Vishchuk & Jeremy Pizzi, *Compromises on Territory, Legal Order, and World Peace: The Fate of International Law Lies on Ukraine’s Borders*, Just Security, 6 October 2023, available at: <https://www.justsecurity.org/89216/compromises-on-territory-legal-order-and-world-peace-the-fate-of-international-law-lies-on-ukraines-borders/>

34 Cf. Vishchuk & Pizzi (n. 30).

35 Cf. Herbert (n. 32).

a peace treaty. The treaty does not contain a ‘sunset clause’³⁶ providing for continued validity beyond termination.

Apart from the problem already discussed of recognising a situation contrary to *ius cogens*, these are merely further ways of circumventing Articles 51 and 52 of the VCLT, violating the object and purpose of the VCLT. The legal consequences of violating a *ius cogens* norm would equally apply outside of the law of treaties.³⁷ Certainly, it would not serve the interests of an international rule of law.³⁸

C. Ceasefires

The common view has it that Article 52 of the VCLT contains a ‘proviso’ whereby treaties relating to ceasefires, the provision of humanitarian services, or an exchange of prisoners are not covered and would therefore be permissible.³⁹ The reasoning behind this is that these situations necessitate an armed conflict and are therefore not brought about by the use of force itself.⁴⁰

Furthermore, some would find a ceasefire agreement to fall outside the law of treaties *stricto sensu*, rather categorising them as a *lex specialis* of international humanitarian law.⁴¹

The result would likely be a frozen conflict, as in the case of North and South Korea or Cyprus and Turkey; or as has been the case in Crimea since 2014. The weapons are silent, but the violation of law persists. In any case, should these views prove correct, the result would not be a peace treaty.

D. Security Council

Similarly, a Security Council resolution on a peace settlement could, as a non-contractual decision, make the terms of a peace treaty binding on

36 Such a clause provides for the continued application of a treaty or of specific provisions thereof beyond the moment of termination.

37 Cf. Arts. 40 et seq. ASR.

38 In addition, it would continue to apply in relation to third countries that are parties to the VCLT.

39 See Schmalenbach & Prantl (n. 27).

40 See *ibid.*

41 See *ibid.* By way of example, reference is made to the Lusaka Ceasefire Agreement of 1999; cf. also n. 32.

Russia and Ukraine (as well as all other members of the United Nations)⁴² or even replace it altogether.

Although the common view in the literature is that the United Nations Security Council is also bound by *ius cogens*⁴³, there is no authority to review the decision; in view of the *Lockerbie* ruling by the ICJ, the question remains purely academic.⁴⁴

Furthermore, it could be held that the primacy of such a decision pursuant to Article 103 of the UN Charter would take precedence over the provisions of the VCLT, in any case: '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, the former shall prevail.' After all, decisions by the Security Council are also derivative treaty law.⁴⁵

In any case, it seems problematic that Russia, as a permanent member of the Security Council, could block any further decision on the peace created by such means—such as a determination of its violation or an adjustment to changed circumstances.

E. Absence of a conflict of norms

One view put forward in the literature, is that there is no conflict of norms at all where the treaty does not refer to the use of force itself (i.e. directly refers to the legality of Russian aggression or annexation).⁴⁶ The same author concludes: 'International law's overarching object and purpose of

42 Cf. Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 327–328; Fox (n. 7); *ibid.*, *A Ukrainian Peace Agreement Without Ukraine?*, EJIL:Talk!, 8 April 2025, available at: <https://www.ejiltalk.org/a-ukrainian-peace-agreement-without-ukraine/>; Herbert (n. 32); Kriener & Peters (n. 31); Schmalenbach & Prantl (note 27).

43 See *ibid.*

44 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Request for the Indication of Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, 3, pp. 15–16, paras. 39–42; cf. Fox (n. 7).

45 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Request for the Indication of Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, 3, pp. 15–16, paras. 39–42.

46 See Herbert (n. 32).

maintaining international peace requires that a peace settlement will always be feasible.⁴⁷ International law seeks the peaceful resolution of disputes, so it must be possible to have a peace treaty, regardless of the provisions of the VCLT.

Whilst this is surely a noble idea and such a narrow, formalistic interpretation of conflicts of norms seems feasible in legal theory, it certainly misses the mark in terms of the object and purpose of the VCLT,⁴⁸ as evidenced by the above-cited *travaux préparatoires*, the explanations of the ILC. Furthermore, legal analysis cannot satisfy itself with objectives alone.

V. Termination of a treaty as ‘law and economics’

The ‘project of international law’ as an ever-advancing, rules-based order reflects Friedrich Schiller’s idea that all previous ages have striven towards a more human century, as laid out in his inaugural lecture at the University of Jena.⁴⁹ Correspondingly, a peace treaty contrary to normative progress already achieved in the 1960s, with the consent of the Soviet Union, can only be seen as an erosion of the international rule of law, despite all the objections of legal pedantry. The NATO mission in Kosovo in 1999 and the Iraq War in 2003, with Russia now appropriating the underlying justifications, have made very clear what such an approach has meant for the prohibition of the use of force.⁵⁰ Although classical realism carries within an appealing pragmatism, concerning itself with national interests, not legal norms, the defeatism currently dominating the scholarship of international

47 Felix Herbert, *(Ir-)Relevance of Ius Cogens? Legal Consequences of Ius Cogens in Russia’s War of Aggression Against Ukraine*, ZaöRV 83 (2023).

48 The formalistic counter-arguments advanced by Herbert (n. 32) fail to convince: first, conflicts between substantive norms differ fundamentally from the approach adopted by the ICJ in the *Jurisdictional Immunities* case, which concerned the distinction between procedural and substantive rules; second, the prohibition of the use of force constitutes an “idiot rule” (see Section III.A.), the object and purpose of which is beyond doubt; third, there is no reason why a treaty could not be invalid both because of the circumstances of its conclusion and because of its content (Art. 52 VCLT also applies to treaties the content of which does not necessarily violate *ius cogens*).

49 Friedrich Schiller, *What Is, and to What End Do We Study Universal History? An Inaugural Academic Lecture Delivered upon the Commencement of His Lectures*, 1789, p. 31.

50 See Markus Beham, *Russia’s War Against International Law, Climate Transition, and Europe*, *Nova et Varia* 3 (2022), p. 94.

law and the reduction of the subject to mere political rhetoric cannot satisfy anyone interested in normative doctrine or a positivist legal order. It is not enough to mourn the demise of the international legal order; viable solutions must be found to ensure its effectiveness.

As the above elaborations have shown, every peace treaty is subject to avoidance. Further consideration, however, suggests that Ukraine would first have to invoke the defence of nullity in accordance with Article 65 of the VCLT.⁵¹ This would be followed by a formalised process in which Ukraine would first have to notify Russia in writing of its claim for termination of the treaty. In doing so, Ukraine would also have to state its reasons, which should not pose too great a hurdle in view of the aforementioned General Assembly resolution of 18 March 2022:⁵² Russia has violated Article 2(4) of the UN Charter, thereby opening up the scope of application of Article 52 and, if necessary, Articles 51 and 53 of the VCLT.⁵³

Upon receiving such notification, Russia would, in turn, have three months to lodge an objection, failing which the treaty would be terminated by the transmission of an instrument signed by an authorised organ of Ukraine. In the event of an objection, the VCLT refers the parties to the peaceful means of dispute resolution set out in Article 33 of the UN Charter. These range from negotiation, possibly with the assistance of another state or an international organisation, to mediation and submission to an international court or arbitral tribunal. The parties would be back at the negotiating table for a more lasting peace.

Hence, there is no reason not to apply this provisionally invalid treaty on both sides, while at the same time placing the coerced party in the more favourable position of being able to invoke the invalidity of the treaty at any time. In the case of Articles 51 and 52 of the VCLT, only the party to the treaty that was subject to coercion may invoke the defence of invalidity. If a violation of *ius cogens* is assumed, it could now be argued that, according to the customary international law of state responsibility, the entire international community has a duty not to recognise the situation or to assist in maintaining it. Nevertheless, this coincides with the preservation of Ukraine's claims to the territories that were once annexed by force. It would be possible for third countries to take a neutral stance in this regard.

51 Cf. Fox (n. 7).

52 See n. 32 above.

53 See Section III.C.

Following the termination of the treaty, all actions taken by Ukraine on its basis remain legally valid. Russia, on the other hand, as the party exercising coercion or force, would have no claim to this under Article 69(3) of the VCLT. This would only be slightly modified if a violation of *ius cogens* were assumed, in which case, according to Article 71 of the VCLT, both parties would have to eliminate as far as possible, the consequences of actions taken based on a provision that is contrary to a peremptory norm of general international law. Here, too, the wording ‘as far as possible’ would leave sufficient room for interpretation in favour of Ukraine.

Therefore, when interpreted according to the general principle of law *ut res magis valeat quam pereat* – that a provision must be interpreted in a way that it has effect rather than not – a ‘law and economics’ consideration of Articles 51 and 52 of the VCLT, and, if necessary, Article 53 of the VCLT lets these appear as compensation for the originally limited negotiating position, a natural law element securing the contractual equilibrium and fairness between the parties.

There would also be nothing wrong with a dispute resolution mechanism that focuses exclusively on the interpretation of the treaty, excluding the question of whether the treaty is null and void, as would be the case in a submission to the ICJ. That the Secretary-General of the United Nations would have any right whatsoever to examine the content of a treaty upon the mandatory registration – analogous to the domestic debate on the right of executive organs to examine laws when countersigning them⁵⁴ – appears doubtful.⁵⁵

VI. Conclusion

From a ‘law and economics’ perspective, a peace treaty can be brought into line with the norms of the VCLT: although they cannot elevate an otherwise one-sided treaty to one that the weaker party would have concluded of its own free will, they do enable the latter to break away at any given moment. Raising the objection of the law of treaties comes not from the

54 See Markus Beham, *Must the Austrian Federal President Ratify CETA?*, Verfassungsblog, 16 July 2018, available at: <https://verfassungsblog.de/muss-der-oesterreichische-bundespraesident-ceta-ratifizieren/>

55 Cf. United Nations General Assembly Resolution 97(1), *Registration and Publication of Treaties and International Agreements*, 14 December 1946, UN Doc. A/RES/97(1).

ivory tower, but rather opens up a room for manoeuvre for Ukraine in the event of a regime change in Russia.⁵⁶ However, this does not imply 'neutrality under the law of treaties' with regard to coercion and force; rather, each state continues to have a duty not to take any further measures to preserve the elements of the treaty that violate international law or to recognise such a situation in the first place. Only with regard to the existence of the treaty and its contestation could third states remain agnostic.

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56 Cf. Fox (n. 7).

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Concluding Remarks

This volume is the result of a cross-border research collaboration among scholars who have been engaged for many years, in some cases for decades, with questions of peacekeeping, the prohibition of the use of force, and the law of neutrality, both in theory and in practice.

Already some time ago, leading experts on neutrality law in Austria and Switzerland, including *Dietrich Schindler*, *Karl Zemanek*, and *Hanspeter Neuhold*, pointed to the significantly diminished relevance of neutrality. The further consolidation of the international peace order, and its ongoing transformation into a value-based and solidarity-oriented system, can only reinforce this assessment.

Russia's invasion of Ukraine has brought these issues back to the forefront. In particular, it has raised the question of how European states, whose own security is also directly affected, should respond to such a grave violation of fundamental values and rules of international law. In such circumstances, can neutrality still be invoked as a legally permissible or politically sensible policy?

These questions prompted the contributors to undertake a fundamental analysis of the current status of neutrality under international law. Their findings confirm that the observations of the above-mentioned scholars reflected a broader trend that has continued in the meantime. The general conclusion is that neutrality has lost its relevance entirely, or at least to a very large extent, and is no longer compatible with the United Nations system of peace and security (*Markus Mohler*). There were, however, some differences of opinion as to whether neutrality law has completely exhausted its function or whether residual elements of it may still persist within United Nations law, at least insofar as the system of collective security fails to function effectively.

There was near-unanimous agreement that the principle of equal treatment of belligerents by neutral states, derived from Article 9 of the Hague Convention of 1907, no longer applies in cases of aggression which are prohibited by international law. While modern international law does not impose a direct and legally binding obligation of solidarity requiring states to support victims of aggression, provisions such as Article 41 of the ILC Draft Articles on State Responsibility clearly hint at far-reaching political

and moral obligations of solidarity in response to serious breaches of international law. Military aggression undoubtedly constitutes such a breach.

Against this background, maintaining a policy of neutrality to withhold sustained support—including military aid—from victims of aggression is no longer justifiable or excusable, assuming such a right to neutrality still exists at all. While neutrality policy remains a subject of intense debate, a clear distinction must be made between two conceptual levels. If such a policy seeks justification through international law, its validity hinges on a 'right to neutrality' that can no longer be taken for granted in its traditional sense. If, however, the policy abandons legal grounding in favor of pragmatic arguments—such as a state's role as a mediator or its historical traditions—these claims must remain subject to critical scrutiny, as they are far from universally accepted. Indeed, as this project demonstrates, Switzerland's avoidance of direct involvement in the Second World War was dictated less by its neutrality than by the strategic calculations of the belligerent powers (*Marco Jorio*).

This volume further demonstrates that Switzerland's strict export and re-export restrictions on war materiel lack a basis in international law and in fact conflict with modern international law, which requires a clear distinction between aggressor and victim states (*Thomas Cottier*).

The war in Ukraine has also highlighted the need for a stronger European defence effort. Military experts regard the European Sky Shield Initiative as a key response to the contemporary challenges of air warfare. Such measures can only be implemented in Europe through international cooperation, and this is particularly true for smaller states such as Austria. However, Austria would be unable to participate in the Sky Shield Initiative if it adhered strictly to the traditional interpretation of neutrality law (*Peter Hilpold*). Both the Austrian and Swiss governments have nonetheless decided to participate, acting consistently in pursuit of their respective national security interests, while relativising or disregarding neutrality-based objections. This again illustrates the obsolescence of neutrality law, which no longer serves, but rather undermines, the security interests of states that continue to describe themselves as neutral.

From a pragmatic perspective, this volume also shows that Austria and Switzerland, and likely other neutral states such as Malta and Ireland, will most probably not renounce their neutrality commitments in the near future (*Ralph Janik*, *Urs Saxer*; see also *Ulrike Haider-Quercia*). Decades of repetitive political messaging have profoundly shaped public perceptions, even though the legal implications of neutrality remain largely unclear,

not only to the general public but also within political circles and, occasionally, in academic discourse. Meanwhile, certain functions traditionally associated with neutrality, such as the provision of good offices and humanitarian engagement, may still remain meaningful. Yet the effectiveness of such policies depends on credibility. As René Rhinow has emphasised, that credibility is determined not by the neutral state itself, but by the international community as the addressee of the policy. Maintaining such credibility requires sustained effort and often entails significant limitations on sovereignty. Comparable outcomes could be achieved with less loss of sovereignty and less effort through a coherent and credible foreign policy.

A future peace settlement in the Russian-Ukrainian war will raise new and complex challenges for the international community, particularly with regard to preserving the United Nations system of peace and security (*Stefan Oeter, Markus Beham*). This is especially true if Ukraine were to be compelled to cede territory in exchange for a ceasefire. Fundamental principles of modern international law, including the Stimson Doctrine of 1932, the prohibition of the use of force under Article 2(4) of the UN Charter, and Article 41 of the ILC Draft Articles on State Responsibility, clearly oppose such outcomes. The international community must therefore consider whether it is prepared to accept a peace settlement that risks diluting these foundational norms.

For neutral states, this question arises with particular urgency if they have contributed to the erosion of these principles by remaining silent in the lead-up to the conflict and by treating aggressor and victim states as legally equivalent, contrary to international law. By failing to support the victim of aggression, such states have done nothing to prevent, and may even have facilitated, the weakening of the international legal order (*Markus Mohler, Thomas Cottier*).

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