

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as Austria is concerned, any international legal obligations in this area, assuming they continue to exist, are largely superseded by provisions of EU law.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.

