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On my honour as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it.
Felix Müller

ABSTRACT

Die vorliegende Arbeit befasst sich mit der Vereinbarkeit der österreichischen Neutralität und den daraus hervorgehenden völkerrechtlichen und verfassungsrechtlichen Verpflichtungen im Hinblick auf Unterstützungs- und Sanktionsmaßnahmen im Zuge des Russland-Ukraine-Krieges. Das Ziel der Arbeit ist es, potenzielle Neutralitätsverletzungen Österreichs herauszuarbeiten, um zu beurteilen, ob diese Verletzungen eine neue Qualität erreichen.

Zur Beantwortung der Forschungsfrage wird eine Literaturrecherche zur (österreichischen) Neutralität durchgeführt, dessen wesentliche Ergebnisse anschließend auf die österreichische Fallstudie im Russland-Ukraine-Krieg angewendet werden.

Aufgrund der Derogation des Neutralitäts-BVG im Bereich der GASP durch Art. 23j der österreichischen Bundesverfassung können aus verfassungsrechtlicher Sicht keine Verletzungen der Neutralität festgestellt werden.

Basierend auf der Feststellung, dass Österreich bis dato völkerrechtlich an die immerwährende Neutralität gebunden bleibt, können eine Unterstützungsmaßnahme für die Ukraine und zwei restriktive Maßnahmen gegen die Russische Föderation als völkerrechtliche Neutralitätsverletzungen identifiziert werden. Dies betrifft 1) den Transport von Kriegsmaterial aus EU-Mitgliedstaaten in die Ukraine über österreichisches Hoheitsgebiet, 2) das Blockieren von ausländischen Vermögenswerten der Russischen Zentralbank und 3) das Waffenembargo gegen die Russische Föderation. All diese Maßnahmen beruhen auf GASP-Beschlüssen.

Da sich Österreich in diesen neutralitätskritischen Fällen im Bereich der GASP nicht konstruktiv enthielt, wird geschlossen, dass Drittstaaten keine berechtigte Erwartung auf solch eine konstruktive Enthaltung haben. Womit Österreich die letzte neutralitätsrechtliche Einschränkung im Bereich der GASP glaubwürdig unterminiert. Diese Entwicklung in Kombination mit den bereits erwähnten völkerrechtlichen Neutralitätsverletzungen lassen den Schluss zu, dass die Verletzung der österreichischen Neutralität eine neue Qualität erreicht.

This paper deals with the conformity of Austrian neutrality and its obligations under international and constitutional law with regard to support and restrictive measures in the course of the Russia-Ukraine War. The aim of this paper is to determine potential violations of neutrality law by Austria in order to assess whether these violations reach a new quality.

To answer this research question, a literature review on (Austrian) neutrality is conducted and subsequently applied to the Austrian case study in the Russia-Ukraine War.

Due to the derogation of the Federal Constitutional Law on Neutrality of Austria in the area of the Union's CFSP by Art. 23j of the Austrian Constitution, no violations of neutrality are found from the constitutional perspective.

After determining that Austrian neutrality remains in effect under international law, one supportive measure for Ukraine and two restrictive measures against the Russian Federation are identified to violate neutrality obligations under international law. This concerns 1) the transport of war material from EU Member States to Ukraine via Austrian territory, 2) the blocking of foreign assets of the Russian Central Bank and 3) the arms embargo against the Russian Federation. All these measures are based on CFSP decisions.

With its reluctance to revert to the tool of constructive abstention in these instances, Austria has shown third states that they cannot legitimately expect Austria to make use of constructive abstention. It is here claimed that with such practice, Austria credibly stripped off the last legal limitation of its neutrality within EU CFSP action. This paper argues that this development, in combination with the aforementioned international neutrality violations, warrants the conclusion that the violation of Austria's neutrality reached a new quality.

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Introduction

Neutrality quite fundamentally aims for peace. In not contributing to armament races or the triggering of military alliances, neutral states de-escalate potential conflicts, grant non-involvement in armed conflicts and can contribute as mediators in international (peace-) negotiations and good offices. But neutrality equally tolerates to a certain extent cruelties, crimes and conflicts in not intervening for their prevention.

The concept of neutrality in foreign policy has a long history and peaked in 1907, when the law of neutrality was codified in The Hague Convention. The fundamental component of the non-involvement in armed conflicts encompasses the aspects of supplying war material to only one side of the belligerents, the deployment of troops or mercenary forces as well as the provision of sovereign neutral territory for belligerent states.¹

In Austria, neutrality seems to be inextricably linked to the foundation of the Second Republic. Ever since its adoption in 1955, it manifestly contributes to the Austrian self-identity and its role in foreign policy. After a comparably rigorous pursuit of neutral foreign policy during the Cold War, especially from the 1960s to the 1980s, the EU accession in 1995 as well as the EU's development through the Treaty of Amsterdam (1999) and the Treaty of Lisbon (2009) raised fierce debates of the compatibility of Austria's neutral status and its EU Membership. Recently again, the ongoing Russian aggression in the Ukraine, that massively shook the European Security Architecture, not only sparked more in-depth debate on the further framing of the EU's common defence and security policy towards a common EU Defence Union but also questioned Austria's current security position and stance on neutrality. The clear EU solidarization, support and supply with money for armoury, war and survival equipment as well as the delivery of weaponry to the Ukraine, subjected Austria's neutrality to a harsh reality and practice test. Whose effect and significance provides enough reason to devote further attention to this topic. In this context, not only a noteworthy public and political discourse, but also extensive

¹ See: Federal Department of Foreign Affairs (FDFA): Swiss Neutrality. Bern, 2022. https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/20221026-neutralitaetsbericht_EN.pdf.

academic debate reinvigorated the widely discussed and controversial topic of the status of neutrality in Austria.

While most literature frames Austria's neutrality as hollowed out, some scholars even stress the dangerous implications that derive from Austria's positioning as a security free rider on the international scene and its disregard of ensuring sufficient security capabilities to conventional and non-conventional warfare.²

In this context, the following paper aims to contribute to the current discourse on Austrian and European Defence in comprehensively revising the aspects of Austrian neutrality. Especially the last part of the paper, the outlook on security options for Austria, could thereto constitute a helpful discursive contribution for the elaboration of a new security doctrine in Austria.

The paper further aims to provide another scholarly source to disseminate the Austrian position of neutrality in Europe and the world. To this day, Austrian neutrality is still little known or understood at the international or even the european stage. This master's thesis in English, that comprehensively tackles the issue of Austrian neutrality and its implications under international and constitutional law can therefore well contribute to the state of research, discourse and accessible information as well as for a better understanding of the situation including the implications and effects of the most recent developments, especially in regard to the Russia-Ukraine War and the respective EU response.

Integrated in the general framework of Austrian neutrality, the research question of this paper specifically addresses the conformity of Austrian neutrality and its obligations under international and constitutional law with the current EU sanction regime vis-à-vis Russia and the respective, potentially war decisive, support of the Ukraine. It builds up on the current stage of research of Austrian neutrality and investigates whether the recent developments constitute a new landmark in the deterioration process of Austrian neutrality. After assessing if Austria's current interpretation and pursuit of neutrality is in conformity with therefrom arising obligations under international and constitutional neutrality law, the main research question tackles the aspect, if such potential neutrality violations in the course of the Russia-Ukraine War constitute a violation of a new quality.

Already in 2004 Theo Öhlinger concluded that due to the rather obvious contradiction of a common european defence policy and neutrality, the end of Austrian neutrality is inevitable

² See i.a.: Gerhard Jandl: Neutralität - wozu? AIES-Kommentar 3, Vienna, 2022. <https://www.aies.at/publikationen/2022/aies-kommentar-03.php>; Franz Cede: Sicherheitspolitische Standortbestimmung Österreichs 2022. AIES Kommentar 2, Vienna, 2022. <https://www.aies.at/publikationen/2022/aies-kommentar-02.php>.

and only a matter of time.³ Advancing from the conclusion of the current state of Austrian neutrality, an outlook on future security models or modifications of neutrality including their relevance and legal implications will be given too. This is based on the possibility that the generally assumed ‘Zeitenwende’ in the context of the Russian-Ukraine War may also fundamentally change or abolish the long-standing Austrian neutrality doctrine.

While most literature on Austrian neutrality focuses on the domestic legal obligations in the context of sanction and support measures in the Russian-Ukraine War, this paper specifically aims to combine both, the international law and the constitutional scope on this matter.

In order to comprehensively analyse these aspects, the main part of the paper will be divided into the following chapters.

The main part of the paper commences with a brief general overview on the concept of neutrality to provide quick access to the topic. Subsequently, the first chapter of Austrian Neutrality is approached. This begins with highlighting its development, relevance and significance, to the end of clearly defining the scope and meaning of ‘Austrian neutrality’, that has undergone substantial changes and adaptations over time. The general confusion and lack of clarity that surrounds the term, recently led to the publication of public letters of notable and prominent persons of the Austrian cultural, legal and political sphere as well as foreign policy experts, demanding an “open discussion of Austrian security policy” most importantly in regard to its neutrality.⁴

In the second subsection, the constitutional neutrality law of Austria will be discussed. After an in-depth analysis of the legal implications and their current interpretation, specifically in regard to the used terms such as: permanent neutrality, her own free will, maintain and defend with all the means at her disposal, as to never in the future accede to any military alliances, nor to permit the establishment of military bases of foreign States on her territory.

In the following section the connection to the EU-level will be cast. Of utmost interest in this section is the question, if or to which extent Austrian participation violates fundamental neutrality provisions. The discussion whether the EU constitutes a military alliance will be expanded on instruments and frameworks of EU external action of potential relevance to neutrality.

The third chapter constitutes the key part of the paper. After a brief introduction to the Russia-Ukraine War, relevant international law aspects will be discussed. This particularly aims at the

³ See: Theo Öhlinger: Stellungnahme. Neutralität als Staatsziel in einer künftigen Bundesverfassung. In: Österreich-Konvent. Bericht des Ausschusses 1. Z6 Immerwährende Neutralität (BVG, BGBl 1955/211). Vienna, 2004. http://www.konvent.gv.at/K/DE/AUB-K/AUB-K_00004/fnameorig_016622.html.

⁴ See: Offener Brief an den Bundespräsidenten, die Bundesregierung, den Nationalrat und die Bevölkerung Österreichs. <https://unseresicherheit.org>.

conformity of neutrality with involvement of neutral states in international armed conflicts via support and restrictive measures. After wrapping up the main aspects of the EU's and Austria's supportive measures for Ukraine and restrictive measures against Russia, their conformity with Austrian neutrality under constitutional and international law will be analysed.

Subsequently, a resumé on the current security situation of Austria will be drawn. Advancing from the question as to whether keeping or terminating neutrality would be recommendable, a general outlook on security options including their plausibility, advantages and disadvantages as well as their legal implications will be given. When remaining neutral, Austria could formally 1) keep the status quo 2) change its neutrality status from permanently neutral to non-aligned and 3) refocus to full adherence to neutrality (Öxit, leave EU). Within those options, Austria could a) push for a more convincing armed neutrality, b) opt for unarmed neutrality or c) keep the status quo. When ending neutrality, legally valid options for entering or establishing military alliances arise, amongst which joining NATO or a fully fledged EU army/defence union would be most likely.

Given the extensive general literature on (Austrian) neutrality and plenty recent publications in light of the Russian-Ukraine War, a Case-Study based on a literature review seemed the most promising methodology to fulfil the general aim of this paper and to be able to include the most recent developments and perspectives. This includes the extensive examination of domestic, EU and international law provisions on neutrality.

Finally, a concise conclusion will summarize the paper and answer the research question if Austria's current interpretation and pursuit of neutrality in the Russia-Ukraine War constitutes a violation of neutrality law of a new quality.

Neutrality Definition

The noun 'neutrality'⁵ or the verb 'neutral' derives from the Latin 'neuter', that translates to 'neither of the two'. In international law, neutrality is a long-standing legal concept that regulates the relationship between states during an international armed conflict. In this context, a neutral state is obliged to adopt an impartial stance between the belligerent parties. The main

⁵ Unless indicated otherwise, the following section is based on: Paul Seger: The Law of Neutrality. In: Andrew Clapham/ Paola Gaeta (Eds.): The Oxford Handbook of International Law in Armed Conflict. Online edition, 2014, p.259. <https://doi-org.uaccess.univie.ac.at/10.1093/law/9780199559695.003.0010>; Martin Senn: Österreichs Neutralität. In: Martin Senn/ Franz Eder/ Markus Kornprobst (Eds.): Handbuch Außenpolitik Österreichs. Ebook, 2022, p. 24-28. <https://doi.org/10.1007/978-3-658-37274-3>; James Upcher: Neutrality in Contemporary International Law. Oxford Monographs in International Law. Oxford, 2020, p. 70-73. <https://opil-oup.com.uaccess.univie.ac.at/display/10.1093/law/9780198739760.001.0001/law-9780198739760>; Fachdossier Parlament Österreich: Was macht die österreichische Neutralität aus? April, 2023. <https://www.parlament.gv.at/fachinfos/rlw/Was-macht-die-oesterreichische-Neutralitaet-aus>.

obligations of a neutral state during such a conflict are its non-participation, e.g. direct involvement in the war, and the prohibition of indirect military support of one belligerent party to the detriment of the other.

In the Hague Conventions V and XIII in 1907 the main aspects of the international customary law of neutrality were codified. Historically, they only applied when both belligerent states were parties to the Convention. As there was little development in customary law in this area, the rights and obligations deriving from the Hague Conventions remain valid as international customary law until today and comprise the following elements: for the right of the inviolability of a neutral's territory as well as the maintenance of political, economic or other cooperation with belligerent parties during an international armed conflict, a neutral state is obliged not to participate in the conflict nor to militarily support one of the belligerent parties. This provision mainly addresses the avoidance of causing a military advantage or disadvantage to one of the belligerent parties and includes, in particular, the prohibition of supplying arms and war material, troop deployment or the provision of neutral territory to a belligerent. A neutral state is further called upon to actively ensure the inviolability of its territory. This necessitates the possession of sufficient defence capabilities to credibly demonstrate to other states, that the neutral territory will most likely not be used by any of the belligerents during a conflict.

Neutrality needs to be distinguished from similar concepts like non-military alliance, neutral foreign policy or non-belligerency that all describe mitigated forms of a neutral stance in international affairs. Neutralization differently circumscribes octroyed neutrality by other states in order to establish a certain balance of power within a region, for example.

Neutrality, however, is characterised by a 'free will' and can be either declared on an ad-hoc basis, e.g. on a case-to-case basis in regard to outbreaking or raging international armed conflicts, or on a permanent basis. Although there is no definition of permanent neutrality in the Hague Convention nor a "universally agreed definition"⁶, it is generally understood as to assure neutrality in all foreseeable future wars and therefore grants more credibility to the international community. At the same time, permanent neutrality does not only apply in the course of a specific international armed conflict but is extended to peace times as well. Permanent neutrality subsequently encompasses certain obligations in times of peace that shall ensure its neutrality during a future armed conflict, such as the accession to military alliances.

Neutrality can be legally binding either solely under international law, without specific domestic obligations, or solely domestically, which is, for example, the case for all alliance-free,

⁶ See: Seger, Law of Neutrality, 2014.

neutral states. The case of Austria represents a dynamic case for both areas, that have undergone substantial changes over times.⁷

1. Austrian Neutrality. The state of play.

This section aims to provide an overview of Austrian neutrality. Beginning with its origin and conceptual development throughout the 20th and 21st Century, this section analyses the specifics of Austrian neutrality from a constitutional point of view in order to then proceed to the EU and international law dimension.

1.1 Historical Overview

The origin⁸ of Austrian neutrality dates back to the thaw period after Stalin's death and the Moscow Memorandum in April 1955. As a precondition for preventing a permanent division of its territory and regaining full sovereignty after post World-War II occupation, the Austrian delegation promised the Soviet Union to pursue and implement permanent neutrality by law. On 26 October 1955, this promise was fulfilled with the enactment of the constitutional law of neutrality. The inherent mix of legal and political dimensions of the concept of neutrality can be traced by means of the various interpretations of Austrian neutrality since 1955, that mainly stemmed from i.a. the respective global (security) context, popularity within the population and political opportunism. Neutrality presented itself as an elastic legal concept, that bent and adapted to the prevailing policies and currents without awaiting international approval.

Broadly speaking, four to five such general phases of reorientation or reinterpretation can be identified. During the first phase from 1955 until the 1960s, neutrality in Austria consolidated throughout a period of vast 'ignorance' or indifference towards the topic. The main focus of foreign policy was laid on the constant integration into the international arena, e.g. via accession to International organisations and development of a distinct Austrian state profile. At the time,

⁷ See: Michael Schilchegger: Die österreichische Neutralität nach Lissabon. ZÖR, 66, 2011, p.7. <https://link-springer-com.uaccess.univie.ac.at/article/10.1007/s00708-011-0082-6>.

⁸ Unless indicated otherwise, the following section is based on: Senn, Österreichs Neutralität, 2022; Peter Hilpold: How to Construe a Myth: Neutrality Within the United Nations System Under Special Consideration of the Austrian Case. Chinese Journal of International Law, 18, 2019, p. 260-265. <https://doi-org.uaccess.univie.ac.at/10.1093/chinesejil/jmz013>; Id.: Das Neutralitätsrecht Österreichs und der Schweiz im „weiten Feld“ des internationalen Rechts. Aktuelle Entwicklungen im Vergleich. Archiv des Völkerrechts, 6, 2022, p. 272-274. <https://doi-org.uaccess.univie.ac.at/10.1628/avr-2022-0016>; Kirsten Schmalenbach: Unionsrecht und Neutralität. In: Stefan Griller et al. (Ed.): 20 Jahre EU-Mitgliedschaft Österreichs. Auswirkungen des Unionsrechts auf die nationale Rechtsordnung aus rechtswissenschaftlicher, politikwissenschaftlicher und wirtschaftswissenschaftlicher Sicht. Vienna, 2015. <https://elibrary-verlagoesterreich-at.uaccess.univie.ac.at/book/99.105005/9783704674043>.

even European Economic Community (EEC) membership was discussed. Its eventual failure was not due to neutrality concerns.

From the late 1960s until the mid 1980s, Austrian neutrality policy expanded to a phase of ‘exaggeration’, alongside an increasingly tense Cold War. This period can be defined by a rigorous interpretation of neutrality and active neutral foreign policy, in which Austria aimed to position herself between the two power blocks as a bridge builder and main location of international diplomacy. Throughout this period, Austrian identification with neutrality as a Post-World War II mediator on the international scene grew in importance.

The collapse of the Soviet Union around 1990, enabled a period of ‘reorientation’, that eventually materialised in the reduction of neutrality to its military core. Furthermore, Austria acceded to the European Union and even contemplated NATO membership. Amongst others, NATO’s intervention in Kosovo as well as the US-led War on Terror, increased political dynamic for sticking to neutrality and to apparel it with a new set of meaning. While this period from the early 2000s until today can be best described by stagnating or decreasing political debate of neutrality, e.g. its de-politicisation, neutrality simultaneously re-consolidated as a symbol of national identity within the population and the political leadership.

Alongside each of these developments, certain interpretations of neutrality prevailed. Some of which are still very popular to this day. Franz Cede⁹ summarized various strands and interpretations and found fitting metaphors for each prevailing interpretation of neutrality. A brief overview thereto will be given, in order to provide a better understanding of the elasticity of neutrality in Austria and better orientation in further discussions on this matter in the following chapters:

The ‘Corset-Doctrine’ reflects a restrictive interpretation of neutrality, most importantly in regard to its international foundation, which is understood to be of quasi-contractual nature. Furthermore, the duty of impartiality in international affairs is rather pronounced.

In reference to Frank Sinatra’s hit ‘I do it my way’, the ‘Sinatra-Doctrine’ allows Austria to freely shape and design its neutrality as it sees fits. This includes i.a. the potential accession to a military alliance without demands directed at the international community, let alone their approval. While this of course seems practical for Austrian leaders, such an interpretation disregards not only the political credibility of Austrian foreign policy, but also violates the good faith and the principle of legal certainty of other states. Thus, next to the international political

⁹ See: Franz Cede: Österreichs Neutralität und Sicherheitspolitik nach dem Beitritt zur Europäischen Union. ZfRV, Vienna, 1995. <https://rdb.manz.at/document/rdb.tso.LI0953900086?execution=e3s1>.

problematic of non-credibility in realm of neutrality, the pursuit of the Sinatra doctrine creates a legal problem, and therefore does not convince.¹⁰

The ‘Identity-doctrine’ exaggerates the connection of neutrality and pronounced identity-forming aspects of Austria’s past such as the role of a bridge builder and mediator for Peace between the two power blocks in the Cold War and blurs the inherent purposes of the law of neutrality for Austria. These purposes are independence and the territorial inviolability.

The ‘Osmosis-doctrine’ reflects an osmotic exaggeration of neutrality which fully pervaded all foreign policy. This doctrine was most prevailing in the 1970s during a more and more fierce Cold War. With increasingly active neutrality policy at the time, the defence spending heavily dropped too. Furthermore, in the pursuit of this interpretation, foreign policy aspects were constantly justified by not necessarily applicable legal aspects, like the doctrinal adherence to the wording of the Hague Convention of 1907, that lives on rather detached from reality. This led to well-founded confusion about the legal aspects of neutrality. Eventually, since the fall of the Soviet Union and EU-accession, a reorientation to the core military aspects of neutrality was undergone, an approach that Cede called ‘Avocado-Doctrine’.

1.2 Constitutional Law on the Neutrality of Austria

After having shown the elasticity and historical development of Austrian neutrality throughout the 20th Century, this subsection aims at comprehensively analysing the wording of the neutrality law of Austria. The Federal Constitutional Law on Neutrality of Austria¹¹ from 26 October 1955 is one of the shortest laws in Austrian legislation and reads as follows:

The National Council has enacted:

Article I

(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.

Article II

The Federal Government is authorized to enact appropriate legislation.

In order to comprehensively analyse this article and elaborate on its compliance in practice later-on, this section is dedicated to study the following parts: the decision to declare

¹⁰ See: Schilchegger, Neutralität nach Lissabon, 2011, p. 8.

¹¹ [BGBl. Nr. 211/1955](#)

‘permanent neutrality’ based on ‘her own free will’, which Austria is to ‘maintain and defend with all the means at her disposal’ and ensures insofar as to ‘never in the future accede to any military alliances’ nor to ‘permit the establishment of military bases of foreign States on her territory’.

1.2.1 Her own free will

Already the wording of “her own free will” is, historically speaking, problematic. It is generally recognised¹² that Austrian neutrality was not freely chosen but resulted from Post-World-War II negotiations. To the end of regaining full sovereignty and to avoid permanent division of its territory, neutrality was promised to the Soviet Union during the negotiations for the Moscow Memorandum. As a result of the intervention of Western Allies, who wanted to avoid the creation of a precedence for West-Germany, the Soviet proposal of a neutralisation of Austria (imposed neutrality, enshrined in the Austrian State Treaty¹³) that could only be revoked by consent of all states who initially accepted it¹⁴) was prevented. This made the assumption of neutrality via ‘free will’ possible and, legally speaking, factual, despite strong political pressure and coercion at the time.¹⁵

1.2.2 Permanent Neutrality

Permanent neutrality is a long-standing concept of international (customary and treaty) law. While the concept of (ad-hoc) neutrality entails the obligation to remain neutral for a specific war or specific wars, which is decided on a case-to-case basis, permanent neutrality assures to remain neutral for all upcoming conflicts in the foreseeable future. This encompasses the obligation to avoid actions in times of peace that would interfere with the duties of neutrality in times of war, such as the accession to a military alliance which could trigger alliance and military support in the event of international armed conflicts. Furthermore, permanent neutrality generally includes the commitment to pursue a neutral foreign policy in times of peace to ensure a credible neutral stance in the event of an international armed conflict. In order to fend off unwanted foreign control, permanent neutrality needs to be of an armed nature. In Austria, this obligation is ensured by the constitutional obligation to defend neutrality with ‘all the means at her disposal’ (see below). This is further enshrined in constitutional law Art. 9a¹⁶, ensuring

¹² See i.a.: Jandl, Neutralität – wozu, 2022; Hilpold, Neutrality within the UN, 2019, p. 254-256.

¹³ Full title reads: Treaty for the re-establishment of an independent and democratic Austria, signed in Vienna on 15 May 1955.

¹⁴ See: Hilpold, Neutrality within the UN, 2019, p. 254.

¹⁵ See: Senn, Österreichs Neutralität, 2022, p. 28-32.

¹⁶ Bundes-Verfassungsgesetz
https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.html.

(B-VG)

https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.html

Austria's independence and her permanent neutrality by means of a 'comprehensive national defense.'¹⁷

The question on the conformity of EU Membership with permanent neutrality will be discussed extensively in the EU chapter. All that can be said here, is that if the EU actually represented a military alliance, Austria's EU-accession would have violated this constitutional aspect as well as Austria's permanent neutrality obligations under international law.

1.2.3 Maintain and defend with all means at her disposal

In order to enjoy credibility among the international state community, a permanently neutral state under international law is called upon to being capable of actively preventing the involvement in an international armed conflict, which necessitates solid defence capabilities and in essence, armed neutrality. This international obligation is derived from Art. 5, Hague Convention V that provides for an active obligation to fend off foreign control over neutral territory. While the section of 'maintaining and defending neutrality' is deduced from this international law obligation, the wording 'with all means at her disposal' refers to Austria's sovereign decision regarding her defence budget.¹⁸

Despite Austria's de jure commitment to such an armed neutrality, in practice, Austria never met a sufficient threshold for credible autonomous defence. While this can be criticized, it needs to be noted that in the 21st Century a fully autonomous self-defence is hardly manageable. Which is amongst the reasons why the current Austrian security strategy first¹⁹ and foremost refers to security guarantees provided by the UN, the EU, the OSCE as well as to the close cooperation with NATO and the Council of Europe.²⁰

This active obligation to maintain and defend Austria's neutrality together with the two passive obligations of abstaining from military alliances and the prohibition to allow military bases of foreign military on Austrian territory, form the above-mentioned 'military core' of Austrian neutrality.²¹

¹⁷ See: Senn, Österreichs Neutralität, 2022, p. 24-32; Hilpold, Neutrality within the UN, 2019, p. 249-256; Schilchegger, Neutralität nach Lissabon, 2011, p. 7-12; Jandl, Neutralität – wozu, 2022; Schmalenbach, Unionsrecht und Neutralität, 2015, p. 293-298.

¹⁸ See: Senn, Österreichs Neutralität, 2022, p. 31.

¹⁹ See: Bundeskanzleramt Österreich: Österreichische Sicherheitsstrategie. Sicherheit in einer neuen Dekade – Sicherheit gestalten. Vienna, 2013, p. 7-8. https://www.bundeskanzleramt.gv.at/dam/jcr:1e09ed01-5ea4-49e3-b505-4c5206c01c5c/sicherheitsstrategie_oesterreich.pdf.

²⁰ See: Hilpold, Neutrality within the UN, 2019, p. 256; Jandl, Neutralität – wozu, 2022.

²¹ See: Ralph Janik: Neutralität und der österreichische Beitrag zur EU-Sicherheitspolitik. ÖGfE Policy Brief, 14, Vienna, 2022, p. 2. <https://www.oegfe.at/wp-content/uploads/2022/10/PB-142022-1.pdf>.

1.2.4 Military bases

The prohibition on the establishment of foreign military bases on Austrian territory is mainly regulated in the Law on the Stationing of Troops (Truppenaufenthaltsgesetz, TrAufG)²². An absolute prohibition is not intended. As Cede stresses, the (TrAufG) grants extensive opportunities for foreign troop stationing upon decision in the realm of the United Nation's Security Council (UNSC), the EU's Common Foreign and Security Policy (CFSP), the Organization for Security in and Co-operation in Europe (OSCE) or for peace missions in the framework of other International Organisations (IOs). Furthermore, foreign troops may be temporarily stationed on Austrian territory during exercise and training sessions, the participation at scientific or sportive events or for rescue or disaster relief missions.²³

Similarly, the Act on War Material (Kriegsmaterialgesetz, KMG)²⁴, which regulates the import, export and transport of war material through Austria and lays a specific focus on safeguarding neutrality obligations, provides exceptions based on decisions taken by the UN Security Council, EUs CFSP, OSCE or to avert humanitarian catastrophes.

1.2.5 Military alliance

Since the establishment of the UN system in 1945 and the respective prohibition of the use of force (already ten years before the enactment of the Austrian law on permanent neutrality), all military alliances needed to be of a rather defensive than offensive nature. Nonetheless, Hilpold argues on the basis of a historical interpretation that this section of the federal constitutional law on neutrality of Austria rather referred to such an offensive military alliance which had prevailed before World War I. This argumentation is invoked for raising the question in how far the UN-system of collective self-defence, in which neutrals can participate, differs from other defence agreements like NATO where neutral states are generally excluded. Consequently, Hilpold suggests that nowadays accession to defence alliances should be compatible with neutrality "as long as this agreement operates in conformity with UN law or carries out peace operations for the UN."²⁵ The general legal assessment on this aspect turns out quite differently, as both from domestic and international law perspective, most legal scholars consider permanent neutrality to be incompatible with the accession to military alliances, regardless if they are of offensive or defensive nature.

For the case of Austria such an approach, next to the prohibition of entering military alliances, conflicts with the above-mentioned section of 'permanent neutrality', that both aim at avoiding

²² [BGBl. I Nr. 57/2001](#)

²³ See: Cede, Sicherheitspolitische Standortbestimmung, 2022, p. 6.

²⁴ [BGBl. Nr. 540/1977](#)

²⁵ Hilpold, Neutrality within the UN, 2019, p. 259.

(automatic) mutual assistance within military/defence alliances. Furthermore, in such a case the non-involvement in international armed conflicts, which is the main obligation for neutrals, cannot be guaranteed. Ever since Austria's EC application, questions of the conformity of EC/EU membership and neutrality have been raised. This discussion seems most intense in the context of the EU as a Defence Union. This and other neutrality related issues on EU-level will be examined in the following chapter.

1.3 Austrian Permanent Neutrality as an Obligation under International Law

When it comes to the specific particularities of the foundation of Austrian neutrality, it is best to start with its origin: the Moscow Memorandum of 15 April 1955. While it is highly doubtful whether this Memorandum had legal effect²⁶, it nevertheless indicates Austria's will to internationally declare permanent neutrality. After the enactment of the constitutional law of neutrality in October 1955, Austria notified this law to all states it had diplomatic relations with back then. While most notifications differ in form and wording, they essentially inform the respective state on the adoption of the neutrality law, the text of which was attached, and its entry into force. In the last sentence, Austria asks for recognition of that act. While most states formally recognised the law, only few states either confirmed the receipt or did not answer, thereby recognising it by acquiescence.²⁷

After this process, the law developed legal effect under international law via a web of unilateral declarations. The notification process was in the past oftentimes interpreted as a promise by Austria, whose acceptance (either formally or by acquiescence) led to a bilateral agreement. Cede argues that it is unclear whether Austria intended such a legally binding commitment, as the notification asks for recognition of the neutrality status the way it was enacted by domestic law, but not for its acceptance as such, which however would be necessary for a consensual basis. He therefore concludes that the foundation of Austria's permanent neutrality is limited to domestic law and not embedded in international (treaty) law. The constitutional law was presented to the state community only by means of notification, and thereby developed international legal effect.²⁸ This view is i.a. supported by Schilchegger²⁹ and seems to reflect the general view today.

Such a unilateral declaration becomes binding under international law when the subject (Austria) informs those concerned (other states) about the legal substance and intends to accept the

²⁶ See: Hilpold, *Neutralitätsrecht Österreichs*, 2022, p. 270-271.

²⁷ See also: Senn et al., *Handbuch Außenpolitik Österreichs*, 2022, p. 31.

²⁸ See: Franz Cede: *Österreichs Neutralität und Sicherheitspolitik nach dem Beitritt zur Europäischen Union*. ZfRV, Vienna, 1995. <https://rdb.manz.at/document/rdb.tso.LI0953900086?execution=e3s1>.

²⁹ See: Schilchegger, *Neutralität nach Lissabon*, 2011, p. 13-14.

legal obligations related thereto.³⁰ The will to declare permanent neutrality and the respective notification to the state community fulfil these criteria. Thus, Austria was legally bound to adhere to the rights and obligations arising from the concept of permanent neutrality under international law. Proceeding from there, Austria, in essence, had the options to 1) actively repeal its neutrality, 2) revert to the legal doctrine of a) desuetudo or b) obsolescence, or 3) remain bound by the respective unilateral declaration binding under international law.

Ad 1) Despite legitimate reasons to repeal neutrality with reference to the legal doctrine of a fundamental change of circumstances (*clausula rebus sic stantibus*) for example, Austria never formally revoked its neutrality by any means of notification to the state community.³¹

Ad 2a) Desuetudo describes a legal doctrine that terminates rights and obligations under international law arising from treaties or unilateral acts, based on evolved and superseding customary law. In this case, the passing of a longer period of time of “practice contrary to what is foreseen by the treaty”³², or unilateral act respectively, including an *opinio iuris*, e.g. the general conviction that such practice is the law. While the ongoing violation of international neutrality law by Austria constitutes some state practice in this regard, *opinio iuris*, e.g. a general legal conviction of the lawfulness of this practice is lacking and far from evident.³³ Thus, such a derogation of permanent neutrality by means of desuetudo cannot be followed.

Ad 2b) Obsolescence describes the non-applicability of treaty obligations due to the loss of the respective context of application, usually resulting from a change of circumstances. Despite noteworthy legal opinion that puts obsolescence on a par with desuetudo (both are seldomly used), obsolescence does not necessitate the emergence of opposing customary law.³⁴

Its most prominent invocation was in fact the declaration of obsolescence of certain military and aviation provisions of the Austrian State Treaty in 1990. After having been formally adopted by the government, the declaration of obsolescence was notified to the parties of the State Treaty (GB, USA, Soviet Union and France) and as such accepted by all of them. This case “is a textbook example of the previously rudimentarily sketched material applicational prerequisites of the legal principle” of obsolescence, that are fundamentally related to historical

³⁰ See: Claude Schenker (Eidgenössisches Departement für auswärtige Angelegenheiten): Praxisleitfaden Völkerrechtliche Verträge. 3. Aufl., Bern, 2015. https://www.eda.admin.ch/dam/eda/de/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_de.pdf.

³¹ See: Öhlinger, Österreichs Neutralität in der EU, 2018, p. 632-633.

³² Marcelo G. Kohen: Desuetude and Obsolescence of Treaties. In: Enzo Cannizzaro (Ed.): The Law of Treaties Beyond the Vienna Convention. Oxford/New York 2011, p. 352. <https://academic.oup.com/book/7419/chapter-abstract/152308748?redirectedFrom=fulltext>.

³³ See: Schilchegger, Neutralität nach Lissabon, 2011, p. 12-13; Schmalenbach, Unionsrecht und Neutralität, 2015, p. 310-311.

³⁴ See: Christina Binder: Die Grenzen der Vertragstreue im Völkerrecht. Am Beispiel der nachträglichen Änderung der Umstände. In: Max-Planck-Institut für ausländisches Öffentliches Recht und Völkerrecht. Beiträge zum ausländischen Öffentliches Recht und Völkerrecht, 245. Heidelberg, 2013, p. 267-268.

circumstances which cease to exist, regardless of relevant state practice. However, the historic circumstances in which the treaty obligations arose “must have completely disappeared.”³⁵ Then, “the declaration of obsolescence ascertains the mootness”³⁶ of the provision(s). While specific procedural requirements are not necessary, a publication or deposition of the declaration of obsolescence must be granted for legal certainty. On that basis, consensus on the obsolescence between the parties of the contract will be ensured in most cases.³⁷

Just as there is no formal repeal of neutrality, there is no formal declaration of its obsolescence. This fact alone makes a case for non-obsolescence. Furthermore, it is highly unlikely that a complete disappearance of the historical circumstances, that led to the foundation of Austria’s permanent neutrality is given. The end of the Cold War around 1990 enabled some provisions of the State Treaty to be declared obsolescent. This however, is not applicable for (Austria’s) permanent neutrality. Next to the civil war and subsequent international armed conflict in former Yugoslavia in the 1990ies³⁸, this is currently underscored by the Russian aggression in Ukraine which constitutes a prime example that conventional warfare between states did not vanish from the world, let alone from Europe. Rather, it seems that the architects of Austria’s permanent neutrality precisely aimed to prevent the involvement into such conflicts. In that context, Austrian neutrality, including its foundation in international law through a unilateral act, arguably becomes more relevant than ever before and is, therefore, far from obsolete.

Ad 3) Hence, the main and general legal conviction that Austria remains bound by international neutrality law,³⁹ will here be followed.

2. Austria and the EU

The compatibility of Austria’s permanent neutrality with her EU-accession, in particular in regard to the Union’s common foreign and security policy, was severely disputed. Nonetheless, in 1995 Austria acceded without any neutrality reservations and committed to a full and active participation in the Union’s CFSP. Gradually, through the development of the European Union itself and updated domestic laws like KSE-BVG and TrAUfG (BGBl 1997/38; BGBl I 2001/57), EU solidarity in foreign policy further curtailed Austrian neutrality to its military core, i.e. the prohibition to participate in armed conflicts, the prohibition to join military alliances and the prohibition to establish foreign military bases on Austrian territory. This

³⁵ Binder, *Grenzen Vertragstreue*, 2013, p. 311 (transl. by the author: „müssen völlig weggefallen sein”).

³⁶ *Ibid.* (transl. by the author: "stellt die Obsoleterklärung die Gegenstandslosigkeit [...] fest")

³⁷ See: *Ibid.*, p. 311.

³⁸ See: August Reinisch (Ed.): *Österreichisches Handbuch des Völkerrechts*, 1. Vienna, 2013, p. 712.

³⁹ See: Öhlinger, *Österreichs Neutralität in der EU*, 2018, p. 632-633.

development was reflected by an increasing political will⁴⁰ to shift Austrian neutrality towards the status of non-alliance, which better reflected the Austrian neutrality stance at the time.⁴¹

On the whole, the European Union's external action is divided into two parts. The intergovernmental approach of the CFSP, which is enshrined in the TEU⁴² (Art. 23 – Art. 46) and comprises the Common Security and Defence Policy (CSDP); and the (supranational) integrated approach of other external action, which are mainly laid down in the TFEU. According to Art. 24 TEU, the scope of the Union's CFSP comprises all foreign and security policy areas. Of particular pertinence in regard to Austrian neutrality are the outlook on the EU's CSDP which stresses "the progressive framing of a common Union defence policy [which] will lead to a common defence" (Art. 42 (2) TEU); the Petersberg tasks that are laid down in Art. 43 (1) TEU and i.a. include military operations and Art. 42 (7) TEU, the 'mutual defence clause'. The Union's restrictive measures, e.g. sanctions (Art. 215 TFEU) are technically laid down outside the CFSP, but need to be based on a CFSP decision (Art. 31 TEU).

In order to resolve the incompatibility of domestic neutrality law with such CFSP action, the constitutional article 23j (formerly Art. 23f) of the Constitution was enacted, derogating Austrian neutrality law in the realm of CFSP.

2.1 The EU as a military alliance

As discussed, Austria may not enter military alliances. It is disputed whether the EU constitutes a military alliance. After providing a well-elaborated and concise definition by Stefan Bergsman on what constitutes 'military alliances', the views of numerous legal scholars on whether the EU makes up a military alliance or not will be analysed.

In his paper on "The concept of Military alliance", Stefan Bergsman defines a military alliance as: „an explicit agreement among states in the realm of national security in which the partners promise mutual assistance in the form of a substantial contribution of resources in the case of a certain contingency the arising of which is uncertain."⁴³

In Art. 42 (7) of the Treaty of Lisbon, the EU Member States promise a Member State in the event of an "armed aggression on its territory" an "obligation of aid and assistance by all the means in their power". As 1) the Treaty of Lisbon is an explicit agreement among the EU-

⁴⁰ See: BKA, Österreichische Sicherheitsstrategie, 2013.

⁴¹ See: Gerhard Hafner: Völker- und europarechtliche Fragen des Beitritts Österreichs zur und der Mitgliedschaft in der Europäischen Union. Austrian Law Journal, 1, 2015, p.130-137. <https://elibrary.verlagoesterreich.at/article/10.25364/1.2%3A2015.1.8>; Rudolf Streinz: Österreich und die Europäische Union. ZÖR, 68, 2013, p. 320-331. [EBSCOhost DACH Information](https://www.bmlv.gv.at/pdf_pool/publikationen/05_small_states_04.pdf).

⁴² The Treaty on European Union (TEU).

⁴³ Stefan Bergsman: The concept of Military Alliance. s.l., 2001, p. 29. https://www.bmlv.gv.at/pdf_pool/publikationen/05_small_states_04.pdf.

Member States, who 2) promise mutual assistance by more than substantial contribution, 3) in the case of an armed aggression, which clearly pertains to an emergency of national security, all definitional criteria of the above-mentioned definition are met by the European Union.

Furthermore, Art. 42 (2) TEU provides that “the common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.” This means that without any treaty amendments, upon one unanimous decision of the European Council, a common defence, e.g. a Defence Union will be implemented. Which shall though be “in accordance with” the Member States “constitutional requirements”. Which suggests the constitutional abolishment of Austrian neutrality before the adoption of such a decision.⁴⁴

The so-called ‘Irish clause’ in Art. 42 (7) TEU opens up a way out, as “this shall not prejudice the specific character of the security and defence policy of certain Member States”. Furthermore, it is also recognised that NATO “for those States which are members of it, remains the foundation of their collective defence”. In order to qualify these add-ons a brief literature review over the matter will be given.

Most authors regard the EU as a Defence Union, ad-hoc military alliance or military pact which is attenuated by the ‘Irish clause’, “lacking central and permanent operational headquarters”⁴⁵, “whose military institutionalisation is in *statu nascendi*”⁴⁶ and overshadowed by NATO, in which most EU-Member States find the ‘foundation of their collective defence’ (TEU Art. 42 (7)).

This is the crux Cede addresses when he argues that due to the fact that most EU-Member States regard their safety and defence to be ensured and protected by NATO and that an European army is hardly imaginable in the near future, the EU does not constitute a military alliance as such. Regardless of the even stronger terminology of the ‘mutual defence clause’ in comparison to NATO’s Art. 5. He stresses, though, that alongside the progressive framing of a common defence Union, the neutrality provision on non-military-alliance is threatened.⁴⁷

While it is true that NATO constitutes the main defence alliance for most EU Member States, according to the above mentioned definition, the EU as a military alliance does not necessarily need an ‘EU army’, whatever details this may comprise. Furthermore, the EU already possesses

⁴⁴ See also: Theo Öhlinger: Österreichs Neutralität in der Europäischen Union. ZÖR 73, 2018, p. 627. <https://elibrary.verlagoesterreich.at/article/99.105005/zoer201803062101>.

⁴⁵ Janik, EU-Sicherheitspolitik, 2022, p. 3 (“keine zentralen und dauerhaften Operational Headquarters hat”; transl. by the author).

⁴⁶ Schmalenbach, Unionsrecht und Neutralität, 2015. p. 310 (“dessen militärische Institutionalisierung sich in *statu nascendi* befindet”; transl. by the author).

⁴⁷ See: Cede, Sicherheitspolitische Standortbestimmung, 2022, p. 5.

significant military structures and capacities, like the EU Military Staff (EUMS, military and civilian experts) with i.a. the Military Planning and Conduct Capability (MPCC) or the Rapid Deployment Capacity that re-organises by 2025 the already existing EU battle groups with a minimum deployable force of 5000 troops.

Theo Öhlinger and Michael Schilchegger⁴⁸ both regard the EU since the Treaty of Lisbon as a genuine defence or military alliance. Next to a basis in primary law for the European Defence Agency (EDA), the call on Member States to develop their defence capabilities and to participate in permanent structured cooperation (PESCO), it is, above all, Art. 42 (7) the ‘mutual defence clause’, that constitutes the EU as a “military pact”⁴⁹. The ‘mutual defence clause’ regards an attack on one EU Member State as an attack on all and thereby obliges all Member States to grant “aid and assistance by all means in their power” in the event of an armed aggression on a Member State. While it is generally recognised that this wording is even more compelling and clearer than its NATO equivalent (Art. 5 of the North Atlantic Treaty), the following sentence, the so-called ‘Irish clause’, waters down the overall compulsory effect by respecting the neutrality, e.g. “the specific character of the security and defence policy of certain Member States”. This clause legally exempts Austria and other neutrals from providing military assistance and thereby creates an “asymmetric military alliance.”⁵⁰ In which neutral countries like Austria are theoretically exempted from providing military aid to other Member States, while at the same time expect military assistance if they themselves were under attack.⁵¹

In light of the principle of loyalty and EU solidarity, the predominant view is that neutrals like Austria could not completely forgo aid to the attacked Member State and would have to provide at least substantial non-military help. While support and aid is considered to be legally binding, it remains Austria’s sovereign political decision to decide on extent and type. Furthermore, it needs to be clarified that the ‘Irish clause’ does not legally limit Austrian support in such a case. As Austrian neutrality law is derogated in the realm of CFSP, Austria could, from a domestic legal point of view, fully support with any given (military) measures. The ‘Irish clause’ in this regard only offers some political leeway for neutrality policy. Under the premise of the solidarity clause, the situation would be different. As the solidarity clause (Art. 222 TFEU) does not come within CFSP, Austrian neutrality law remains applicable and could collide with certain

⁴⁸ See: Theo Öhlinger: Kommentar 23j. In: Karl Korinek et al. (Eds.): Österreichisches Bundesverfassungsrecht. Kommentar. s.l., 2022, p. 7. <https://elibrary-verlagoesterreich-at.uaccess.univie.ac.at/loseblatt/10.33196/9783704689610>; Schilchegger, Neutralität nach Lissabon, 2011, p. 20.

⁴⁹ Ibid. („Militärpakt“; transl. by the author).

⁵⁰ Schmalenbach, Unionsrecht und Neutralität, 2015, p. 310 („asymmetrischen Militärallianz“; transl. by the author).

⁵¹ See i.a.: Janik, EU-Sicherheitspolitik, 2022, p. 5-7; Schilchegger, Neutralität nach Lissabon, 2011, p. 17-20.

actions or decisions. In such a case, Austria would be legally bound to abstain.⁵² As the scope of the solidarity clause lays on terrorist attacks, man-made catastrophes or natural disasters, it is mostly unproblematic in regard to neutrality obligations.⁵³

While Kirsten Schmalenbach agrees that by reversion to the ‘Irish clause’, neutrality can be respected, the defence alliance, that was established by the ‘mutual defence clause’, remains a pounding issue for Austrian neutrality, as non-UN-authorized collective self-defence on a different state’s territory is not permissible under international neutrality law.⁵⁴

Michael Schilchegger comes to the different conclusion that due to the rightful exemption of military support by the ‘Irish clause’, such an Austrian membership in the EU-‘Defence Alliance’ does not constitute a violation of international neutrality law of an exceptional dimension. According to him such a dimension would only be reached if Austria were to participate in a “permanent military alliance.”⁵⁵ The slight difference in opinion seems to be about the weight put on the principle of legitimate expectation by third states. While rather neutrality-conform political decisions on a case-to-case basis per se may not violate neutrality obligations under international law, the lack of legal certainty that such a decision will be taken in favour of neutrality, is still grave. Nonetheless, one has to agree that an exceptional dimension, as Schilchegger put it, is not reached.

Despite the attenuating factor of the Irish clause that grants neutral states like Austria more leeway in their supportive action in the event of an armed aggression against another EU Member State, the EU fulfils all the criteria for a military alliance and is perceived by most legal experts as such an alliance. While the fact that NATO remains the main defence alliance for most EU Member States may play a crucial role in realpolitik, it should not be of greatest importance for defining, by way of approximation, the EU as a defence alliance.

Thus, Austria’s de facto participation in the military alliance of the EU seriously and permanently violates its neutrality obligations under international law. However, due to the above-mentioned attenuating factors, this does not constitute a violation of an exceptional dimension. Despite the collision of the Austrian neutrality law provision on permanent neutrality and the prohibition of entering military alliances with the participation in military alliances, the participation in the ‘EU military alliances’ does not constitute a violation of domestic neutrality law. Firstly, this provision of Austrian neutrality law is suspended through the supremacy of EU

⁵² See i.a.: *Ibd* p. 21-23; Jandl, *Neutralität – wozu*, 2022.

⁵³ See: Öhlinger, 23j, 2022, p. 8- 9; Id., *Österreichs Neutralität in der EU*, 2018, p. 629.

⁵⁴ See: Schmalenbach, *Unionsrecht und Neutralität*, 2015, p. 305-312.

⁵⁵ Schilchegger, *Neutralität nach Lissabon*, 2011, p. 21 („auf Dauer angelegten Militärbündnis“; transl. by the author).

law, which takes precedence of national law.⁵⁶ Secondly, by the enactment of constitutional law Art. 23j, Austrian neutrality is derogated in the realm of CFSP, where most neutrality-threatening decisions, like military measures, are taken.

2.2 Constitutional Article 23j

As mentioned above, even without the enactment of Art. 23j, the full participation in CFSP would derogate Austrian neutrality law on the basis of supremacy of EU law and as *lex posterior*. At the time of Austria's accession to the then European Community (EC), the CFSP pillar lay outside of the EC. In order to completely clarify full and active CFSP participation without limitations or constitutional boundaries, the constitutional Art. 23f of the Constitution was enacted, and later changed to Art. 23j. This provision effectively derogates neutrality law in the realm of the Union CFSP.⁵⁷

For Öhlinger a “remarkable novelty”⁵⁸ arose alongside the change from Art. 23f to Art. 23j, following the Treaty of Lisbon, that is, the new reference to the principles of the UN Charter and most specifically to the right of collective self-defence, which calls upon all CFSP action to be in line with UN law. In accordance with the parliamentary debate at the time, Öhlinger interprets this phrase as follows: Austria could only participate in military actions of the EU against third states, if there is an authorisation of the Security Council.⁵⁹ While other legal opinions attribute to this reference only a general commitment to the UN Charter, the new Art. 23j sets at least some limits to CFSP participation. Thus, provides a slight recourse to a stronger stance on neutrality.⁶⁰

Michael Schilchegger is of the other opinion and argues, that Art. 23j only refers to the Charter of the United Nations and not necessarily to a decision by the Security Council. This would render a potential involvement of Austria in an international armed conflict without a UN mandate constitutionally unproblematic.⁶¹

This view is supported by Bernhard Schulyok, who states that following Art. 23j military operations need not to be mandated by the UN as an EU mandate suffices. This issue becomes particularly relevant in the context of the EU battle groups (who have never been in action) or the newly established EU rapid deployment capacity, that is financed by all EU Member States, including Austria. As this is regulated under the CFSP, there are no constitutional limits to

⁵⁶ See: *Ibid.* p. 20; Öhlinger, 23j, 2022, p. 7-10.

⁵⁷ See: *Ibid.*

⁵⁸ *Ibid.*, p.11 (“bemerkenswerte Neuerung”; transl. by the author).

⁵⁹ See: *Ibid.*, p. 12; Id: Öhlinger, Österreichs Neutralität in der EU, 2018, p. 632.

⁶⁰ See: *Ibid.* p. 12-13; Schmalenbach, Unionsrecht und Neutralität, 2015, p. 301-302.

⁶¹ See: Schilchegger, Neutralität nach Lissabon, 2011, p. 11-12.

Austrian participation, while at the same time international law obligations are violated. In the case of a military operation of the EU battle groups in an armed conflict without UN authorisation, Austria could still withdraw its participation. Conversely, if there is a standing UN mandate, no neutrality obligations will be applicable.⁶²

From an international law perspective, this situation looks quite different. The (potential) constitutional legality to participate in an international armed conflict within the realm of the EU's CFSP without an UN-Mandate constitutes a grave and ongoing violation of Austria's neutrality obligations under international law. Moreover, it even constitutes a violation of international law by all other EU-Member States for not respecting the neutrality of Austria.⁶³

As a state may not unilaterally limit its obligations under international law, the international obligations of neutrality persist (as if there was no Art. 23j) and are thereby violated. This view is supported by Wieser.⁶⁴ Thus, from a constitutional point of view, Austria would no longer be bound to respect the respective neutrality obligations under national law, while under international law, the obligations persist.⁶⁵

In conclusion, from a constitutional point of view, Austria may in certain circumstances militarily intervene in an international armed conflict. While it is generally agreed upon that UN SC authorized military actions are in line with neutrality, it remains disputed if this is the only case. Due to the lack of clarity and grave violations of international law obligations in such a case, it seems advisable to wait for a Security Council decisions.

Art. 23j (2) in conjunction with Art. 23e (3) provides that the Austrian Parliament is to be included in "all decisions in the framework of CFSP". This ensures a broader political consensus and reduces the probability of violations of neutrality obligations under international law. Where a CFSP decision could potentially collide with Austrian constitutional law, e.g. in regard to Austrian neutrality law, the Parliament possesses an 'absolute veto' regarding the decision taken by the Austrian delegate in the Council of the EU.

Given a CFSP decision includes the deployment of military personnel, Art. 23j (4) in conjunction with KSE, provides that this may only be possible in regard to peacekeeping, humanitarian aid, rescue missions, exercises or in the event of catastrophes. Furthermore, it is referred to respecting Austria's obligations under international law and the strict accordance with the UN

⁶² See: Bernhard Schulyok: Österreichs Verständnis der Neutralität im Widerspruch zur GSVP der EU? Teil II. In: The Defence Horizon Journal, 2022, p. 4-6. <https://www.thedefencehorizon.org/post/%C3%B6sterreich-verst%C3%A4ndnis-neutralit%C3%A4t-widerspruch-gsvp-eu-2?lang=de>.

⁶³ See: Schilchegger, Neutralität nach Lissabon, 2011, p. 12.

⁶⁴ See: Maria Wieser: Diplomarbeit. Neutralität Österreichs im Rahmen der EU-Mitgliedschaft: Ist Österreich noch neutral? Graz, 2011, p. 134. <https://unipub.uni-graz.at/obvugrhs/content/titleinfo/222526/full.pdf>.

⁶⁵ See: Schilchegger, Neutralität nach Lissabon, 2011, p. 8-16.

Charter.⁶⁶ Another important aspect of implementing Art. 23j was to ensure the protection of government officials from penal code §320 (unlawful assistance of parties to an armed conflict) in the realm of UN, OSCE or CFSP decisions.⁶⁷

Still, it can be summarized that the lack of firm domestic legal boundaries allow Austria to participate in non-UN, but solely EU-mandated actions and missions in the context of international armed conflicts. Which constitutes a serious and ongoing violation of Austria's neutrality obligations under international law.

2.3 EU instruments and frameworks on security and defence

Apart from the above-mentioned theoretical reflections of the Union as a military alliance or Austria's potential participation in non-UN mandated missions and actions in international armed conflicts, it is important to take a look at actual security and defence instruments and frameworks of the Union. Such instruments and frameworks comprise in particular restrictive measures, the Petersberg tasks, the Permanent Structured Security Co-operation (PESCO) as well as the European Peace Facility (EPF), and are designed to contribute to peace, conflict resolution and more international security.

2.3.1 Restrictive measures ('sanctions')

Under Art. 215 TFEU⁶⁸, the EU may impose restrictive measures, e.g. sanctions vis-à-vis third states, non-state entities or individuals (smart sanctions). This can be done autonomously, on various reasons like human rights violations or breach of international law, quasi-autonomously, or on the basis of UN sanctions. Quasi-autonomous sanctions go above and beyond the mere implementation of UN sanctions, e.g. exceed their scope. The procedure is the same for all three options: when a unanimous CFSP decision provides for restrictive measures, a joint proposal by the High Representative and the Commission shall be adopted by a qualified majority vote by the Council.

Similarly to the solidarity clause, restrictive measures (Art. 215 TFEU) lie outside the realm of CFSP. In general, Art. 23j of the Austrian Constitution would thereby not apply and not derogate Austrian neutrality law. According to Öhlinger, the wording of Art. 23j was specifically adjusted to match Art. 215 TFEU in regard to economic financial relations to third states, which implies that such restrictive measures were intended to dispense with eventual domestic neutrality obligations. This view is also in line with a systematic interpretation of the provisions.

⁶⁶ See: Öhlinger, 23j, 2022, p. 15-18.

⁶⁷ See: Schmalenbach, Unionsrecht und Neutralität, 2015, p. 301.

⁶⁸ The Treaty on the Functioning of the European Union ([TFEU](#)).

As restrictive measures need to be based on a unanimous CFSP decision, possible neutrality concerns would have already been eliminated in this process and cannot revive again at a later stage. In other words, restrictive measures could be problematic for Austrian neutrality law only when the respective implementation rather than the CFSP decision itself includes neutrality conflicting aspects.⁶⁹ While the implementation of UN sanctions is unproblematic from the perspective of neutrality, this is more disputed when it comes to autonomous EU sanctions.

2.3.2 Petersberg Tasks, EPF and PESCO

The area of CSDP can be divided into civilian missions and military operations. Which, pursuant to Art. 43 (1) include: “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.”

Currently, there are 21 CSDP missions and operations. Normally, such missions or operations are set up upon request of the respective partner countries or by a UN Security Council decision in any case, however, they need to fully respect international law.

The focus here shall be on military operations, of which there are currently nine. While military operations can be arranged in conjunction with NATO, in which case NATO’s command structures may be used, or by the set-up of operational headquarters by a EU Member State on behalf of the EU. Military operations cannot be funded via the EU budget (Art. 41 (2)) and therefore must rely on the contributions of the Member States in the EPF, the Unions off-budget military fund.⁷⁰

Next to the military operation in Bosnia and Herzegovina, where military personnel is deployed for regional stability, most operations focus either on the fight against terrorism or piracy in the respective countries (like EUMPM Niger and EUNAVFOR Somalia) or military training missions such as EUTM Mali, EUTM Central African Republic, EUTM Somalia and EUMAN Ukraine (see more below).⁷¹

Sven Biscop stresses that the wording “shall include” in Art. 43 (1) refers to a non- exhaustive list, which legally speaking renders “all types of operation”⁷² possible except collective territorial defence, which is regulated in Art. 42 (7). Therefore, the Petersberg tasks mainly aim at the external security of the Union by all types of missions and operations, including combat

⁶⁹ See: Öhlinger, 23j, 2022, p. 10-11.

⁷⁰ See: European External Action Service: Factsheet. EU Missions and Operations. 2023. https://www.eeas.europa.eu/sites/default/files/documents/2023/EU-mission-and-operation_2023_1.pdf.

⁷¹ See: Id.: Missions and Operations. 2023.

https://www.eeas.europa.eu/eeas/missions-and-operations_en#9620.

⁷² Sven Biscop/ Jo Coelmont: A Strategy for CSDP Europe’s Ambitions as a Global Security Provider. Egmont Paper, 37, Brussels, 2010, p.21. <https://www.jstor.org/stable/resrep06700>.

operations. This military dimension is, for example, visible in ‘crisis management’, which includes the “separation of parties by force” and “evacuation operations” that rely on force. In regard to other operations like humanitarian aid, conflict prevention, stabilisation etc., force may be applied too when deemed necessary. While this enables the EU to effectively manage such crisis situations on its own, a conflict with neutrality obligations under international law seems plausible.⁷³

While Schilchegger regards the conformity of Austrian neutrality obligations under international law and its participation in military operations in the context of the Petersberg tasks quite critical⁷⁴, Hafner highlights that possible collisions are not very likely to occur as the EU strongly observes UN law.⁷⁵ The legal basis for Austrian participation in such military operations is provided for in the Federal Constitutional Act on Cooperation and Solidarity in Deploying Units and Individuals Abroad (KSE-BVG, BGBl 1997/38).

If a CFSP decision were to collide with neutrality obligations under international law, Austria could resolve this conflict by constructive abstention, as, under neutrality law, Austria is not called upon to prevent such an EU action or decision.⁷⁶ This view is in line with Streinz, who refers to a general consensus in legal literature that a constructive abstention in CFSP upholds neutrality obligations despite the fact that the taken decision ‘commits all of the Union’. While domestically, Austria’s neutrality concerns are suspended anyhow under Art. 23j, the need of constructive abstention relates to the respect of still standing neutrality obligations under international law.⁷⁷ This aspect needs to be kept in mind for the final discussion on Austrian neutrality in Chapter 3.

Lastly, Art. 42 (6) TEU provides the framework of a Permanent Structured Co-operation (PESCO) for “the most demanding missions” for Member States with higher military capabilities. Since its formal establishment by a Council Decision in 2017, PESCO operates as a framework for deepening military co-operation amongst the participating 25 Member States (including Austria) and invited third states. Its modular approach grants a variety of different projects, in which EU Member States can voluntarily participate. While PESCO constitutes another step towards a Defence Union, especially this voluntary character seems unproblematic for neutrality. Currently, there are 68 ongoing projects under PESCO. A key feature of such a project is

⁷³ *Ibid.* p. 21-23.

⁷⁴ See: Schilchegger, *Neutralität nach Lissabon*, 2011, p. 10-11.

⁷⁵ See: Hafner, *Beitritt Österreichs zur EU*, 2015, p. 137.

⁷⁶ See: Schmalenbach, *Unionsrecht und Neutralität*, 2015, p. 303-304.

⁷⁷ See: Streinz, *Österreich und die EU*, 2013, p. 29.

that while the participating states operate to a varying degree with their own capacities, it is not individual states but the EU that is accountable for the actions taken.⁷⁸

2.3.3 Latest developments

A month after the Russian invasion in Ukraine, the EU agreed on its strategic compass: a framework initiative that aims to shape the Union's security and defence policy. Alongside the key words of acting, securing, investing and cooperating, measures are envisaged to address the current geopolitical challenges of the EU, safeguard its interest and values in foreign policy and to counter numerous threats ranging from hybrid threats, non-conventional and conventional warfare to increasing strategic competition in the wider world with the main aim of restoring peace in Europe. To this end, a Rapid Deployment Capacity (RDC) consisting of 5000 soldiers, that can swiftly adapt to different crisis situations, is envisaged to be "fully operational by 2025". The already existing EU battle groups, that were never actually deployed, form part of the RDC. Furthermore, the strategic compass envisages to unleash the potential of the European Peace Facility and grant a swifter decision-making process in CSDP. Moreover, crisis analysis procedures and responses to various threats will be improved. In order to achieve this goal, Member States are called upon to increase their military and technological development. What is more, increased cooperation with international partners like NATO, UN, and regional players like the OSCE, ASEAN, AU etc. as well as bilateral cooperation are envisaged to counter common threats.⁷⁹

3 Austrian Neutrality in the Russia-Ukraine War

The neutrality law enshrined in the Hague Convention of 1907 reflects the position of the time with the explicit right to go to war. In this context, neutrality was precise and allowed for and required a clear differentiation between belligerent parties. At the very latest, since the end of World War II and with the establishment of the Charter of the United Nations, the prohibition of the use of force fundamentally blurred this clarity. Neutrality as a concept of international law hardly survived this development with most states abandoning it during the 20th Century. The prohibition of the use of force as well as the UN's collective security system theoretically deprived neutrality of its existential basis. Amongst other things, this is the reason why neutrality in international law assumes a very unclear and uncertain position. Due to the shortcomings

⁷⁸ See: Hubert Isak: Academic Course. The EU as Global Actor - the Legal Framework. Vienna School of International Studies. Vienna, 2022; Id.: Academic Course. External Economic Relations and Foreign Policy in the European Union. Vienna School of International Studies. Vienna, 2023.

⁷⁹ See: Council of the EU: Strategic Compass. Brussels, 2022. <https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/de/pdf>.

and inefficiencies of the UN system (which the Russian aggression in Ukraine blatantly reveal), war did in fact not vanish from the international stage, which in turn justifies the survival of general laws of armed conflict, including the concept of neutrality.

Now despite there being a need for neutrality, its unclear legal dimension under international law poses some problems. While the Hague Convention provides a “framework for the modern law of neutrality”⁸⁰, also current customary international law needs to be taken into account. Even though neutrality was at times reduced “to a set of basic principles rather than a body of interlocking rights and duties”⁸¹, the vast majority of authors, including James Upcher, do not support that view and rather stick to the general conception of certain rights and obligations of neutrality, which have been laid down more extensively in the beginning of this paper.⁸²

Neutrality under international law is a long-standing legal concept that regulates the relationship between states during an international armed conflict. The main obligations of a neutral state during such a conflict is to not directly participate, e.g. become a belligerent party.

The classification as a belligerent party in an international armed conflict necessitates direct involvement. This includes for example the provision of sovereign territory to a belligerent party for an attack or troop deployment.⁸³ It is generally recognised that mere military support or the delivery of weaponry does not suffice for the classification as a belligerent party.⁸⁴

Nonetheless, neutral states are prohibited to indirectly provide military support a belligerent party to the detriment of the other. This includes in particular the prohibition of supplying war material, the provision of mercenary troops or neutral territory to a belligerent.

In the Russia-Ukraine war, the EU, and in tow Austria, granted unprecedented support to Ukraine and its armed forces on the one hand and implemented restrictive measures against the Russian Federation on the other. In light of this, it is pertinent to discuss how such supportive and restrictive involvement in an international armed conflict from the side of Austria is compatible with its neutrality. The following (sub)chapters focus on the conformity of Austria’s involvement in the war in Ukraine with its neutrality obligations. The following issues have been identified as most relevant: 1) Austria’s participation in support measures for the Ukraine

⁸⁰ Upcher, *Neutrality*, 2020, p. 72.

⁸¹ *Ibid.*, p. 70.

⁸² See: *Ibid.* p. 70-125.

⁸³ In the Russia-Ukraine War this was the case for Belarus, see: Michael Schmitt: Providing arms and material to Ukraine. Neutrality, Co-belligerency and the use of force. In: Lieber Institute West Point, 2022. <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>.

⁸⁴ See i.a.: Ralph Janik: Was von der Neutralität bleibt. Österreichs Beitrag zur EU-Sicherheitspolitik. In: Wiener Zeitung. 18 October 2022. <https://www.tagblatt-wienerzeitung.at/meinung/gastkommentare/2165317-Was-von-der-Neutralitaet-bleibt.html>; Wolff Heintschel von Heinegg: Neutrality in the war against Ukraine. In: Lieber Institute West Point, 2022. <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>.

and its armed forces; 2) Austria's participation in restrictive measures against the Russian Federation.

As all neutrality relevant action of Austria during this international armed conflict have been found to be based on decisions taken in the realm of CFSP, no domestic neutrality violations can be identified. This chapter consequently focuses mostly on the conformity of Austria's involvement in the war in Ukraine with its neutrality obligations under international law.

After a brief overview of the main aspects of the Russia-Ukraine War, the conformity of Austrian neutrality with its support and restrictive measures will be analysed.

3.1 Initial Remarks

When the Russian Federation invaded Ukraine on 24 February 2022, it fundamentally breached a key provision of international law, the prohibition of the use of force. Next to this crime of aggression and blatant disregard of territorial sovereignty, it seems likely that Russian authorities in the course of the armed conflict, committed crimes against humanity as well as war crimes against civilians and civil infrastructure in Ukraine.⁸⁵ Furthermore, substantial allegations on genocide are voiced.⁸⁶ Next to the clear crime of aggression, Russia is thus accused of the most serious crimes in international law: genocide, war crimes and crimes against humanity. In its external actions, the European Union aims for “peace, security (...) the protection of human rights (...) as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter” (Art. 3, TEU). As shown above, the illegal invasion of Ukraine by the Russian Federation not only leads to unjustifiable atrocities in Ukraine, threatens the international legal order and global (nuclear) safety but also directly destabilizes the immediate neighbourhood of the EU and thus, the security of the EU itself. In turn, the EU responded with swift and affirmative actions against the Russian Federation and to the support of Ukraine. So far, eleven sanction packages throughout various sectors against Russia and numerous military, financial, civilian and humanitarian support measures for Ukraine have been implemented in the realm of the Union's Common Foreign and Security

⁸⁵ See: UNHR Office of the High Commissioner: Press Release. War crimes, indiscriminate attacks on infrastructure, systematic and widespread torture show disregard for civilians, says UN Commission of Inquiry on Ukraine. 16 March 2023. <https://www.ohchr.org/en/press-releases/2023/03/war-crimes-indiscriminate-attacks-infrastructure-systematic-and-widespread>.

⁸⁶ See i.a. Council of Europe: Newsroom. The forcible transfer and ‘russification’ of Ukrainian children shows evidence of genocide, says PACE. 28 April 2023. <https://www.coe.int/en/web/portal/-/the-forcible-transfer-and-russification-of-ukrainian-children-shows-evidence-of-genocide-says-pace>; Ashish Kumar Sen: Is Russia Committing Genocide in Ukraine? Ukrainian Prosecutor General Andriy Kostin says there is growing evidence of genocide being committed by Russian forces. In: United States Institute of Peace. 2022. <https://www.usip.org/publications/2022/09/russia-committing-genocide-ukraine>; Kristina Hook: Why Russia's War in Ukraine Is a Genocide. Not Just a Land Grab, but a Bid to Expunge a Nation. In: Foreign Affairs, 28 July 2022. <https://www.foreignaffairs.com/ukraine/why-russias-war-ukraine-genocide>.

Policy. Next to the clear discursive and political support for Ukraine, Austria actively supported and carried out most of the actions.

In the following section, the interplay of neutrality obligations in the context of sanctions and support measures during an international armed conflict will be given. This will be followed by a detailed overview on the EU's and Austria's involvement and interference in the war in Ukraine. Subsequently an extensive discussion on the conformity of the undertaken measures with Austria's neutrality obligations will be given.

3.2 International Neutrality Law

3.2.1 Neutrality and UN Authorisation

It is generally recognised that UNSC authorized supportive or restrictive measures in an international armed conflict constitute a 'police action' and therefore do not violate neutrality law.⁸⁷ As the use of force is illegal and the defending states can count on the collective security system, a qualified neutrality understanding may apply, which allows third states to differentiate between an aggressor state and a victim state. A neutral state is consequently entitled to support (even militarily) the victim state. Such a differentiation between aggressor and victim, is evident when a legally binding Security Council decision on this matter is issued. Without the authority of the Security Council, the decision on aggressor state and defending state is more difficult; and so is the adoption of a qualified neutrality stance.

In the context of the Russia-Ukraine War, a decisive Security Council decision on aggressor state and defending state fails to materialize due to the Russian veto in the Security Council. Nonetheless, in the UNGA Resolution A/ES-11/L.1 most states found the Russian Federation to be responsible for the crime of aggression. For Heintschel, this situation is definitively "a game changer" for the development of the concept of neutrality and the UN system itself. Given the fact that a vast majority of states is convinced that the Russian Federation is guilty of the use of force in Ukraine, but prevents its own condemnation in the Security Council, Heintschel deduces implied Security Council authorisation. He therefore argues that there is no more obligation for neutral states to remain impartial. In light of the fundamental breach and disregard of international law by the aggressor state (Russia), neutrals like Austria would be permitted to support the victim state in its inherent right to self-defence.⁸⁸

This argumentation rests on shaky ground. While the essential elements of the process, in which UN authorisation exempts neutrality concerns during an international armed conflict, are

⁸⁷ See: Schilchegger, Neutralität nach Lissabon, 2011, p. 8; Öhlinger, Österreichs Neutralität in der EU, 2018, p. 631.

⁸⁸ See: Heinegg, Neutrality, 2022.

followed, the most decisive and authoritative step, the actual decision of the Security Council, is missing. Furthermore, the veto power of the P-5 in the Security Council, which to this day is a valid right within the UN system, would be fully undermined. Despite its inherent logic, the argument can therefore not be supported and is far from being generally recognised. Hence, in the Russia-Ukraine War, a generally recognised stance on qualified neutrality, and the unproblematic conformity of military involvement must be denied.

In the case of no valid UN authorisation for restrictive or supportive measures in an international armed conflict, it is to be examined how closely the duty of impartiality for neutrals needs to be observed.

3.2.2 Supportive Measures

Michael Schilchegger stresses that under international law of neutrality “any kind of support of an armed conflict, including any financial assistance”,⁸⁹ that is not authorized by the UN, is prohibited. The violation is however less grave if the support is of a non-military nature.

In his article, Seger claims that:

“a core principle is that the neutral state must treat the belligerents equally. Partial behaviour, through which the neutral state offers a military advantage to one or the other warring party, violates the law of neutrality and fundamentally undermines the credibility of the neutral power.”⁹⁰

While this applies to both, the aforementioned restrictive measures and support measures, it is stressed that this is specifically relevant when it comes to the restriction of economic relations of private citizens with the belligerent state, that are pertinent to the military sector of the belligerent.⁹¹ Both Schilchegger and Seger in this sense highlight an obligation of an impartial stance of neutral states towards belligerent parties, the aim of which is to not granting a belligerent party any substantial advantage. It is further highlighted that the seriousness of the violation increases with growing military relevance of the neutral’s support or sanction.

Cede for his part focuses only on the military dimension and argues that military support for one of the war parties is prohibited. Neutral states must therefore “not deliver troops and weapons nor grant war credits” to belligerent parties. When it comes to the supply of war material by private companies, the neutral state is only obliged to ensure a well-balanced support for all belligerent parties.⁹²

⁸⁹ Schilchegger, Neutralität nach Lissabon, 2011, p. 23 (“jede Art der Unterstützung eines bewaffneten Konflikts, somit auch jedwede finanzielle Unterstützung”, transl by the author).

⁹⁰ Seger, Law of Neutrality, 2014, p. 257.

⁹¹ See: Ibd.

⁹² Cede, Sicherheitspolitische Standortbestimmung, 2022, p. 6 („keine Truppen und Waffen liefern oder an sie Kriegskredite gewähren darf“; transl. by the author).

James Upcher similarly clarifies that impartiality is not a duty of neutral states but merely a principle for economic relations. He stresses that neither at the time of the Hague Convention, nor today, impartiality between the parties needed to be maintained or implemented. Admittedly, Art. 6, Hague Convention XIII provides that “[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.” This absolute prohibition of supplying weapons, ammunition and war material between states reflects customary law at the time and was gradually applied to private citizens as well. Today, as the arms industry is mostly controlled by states, it is disputed, if this prohibition should also apply to private sales of such war material. While it is clear that, for example, the support with ‘war material’ is forbidden for neutral states, it remains doubtful what exactly qualifies as such ‘war material’. According to Upcher it also remains disputed if a legal difference between the supply of lethal weapons and non-lethal defence capabilities of significant military impact can be made. While Upcher disagrees with a general duty of impartiality of neutral states, the supply of war material to belligerent parties during an international armed conflict is prohibited under neutrality law. However, the exact spectrum of what qualifies as ‘war material’ remains unclear.⁹³

Seger specifies that the prohibition of military support consists of “armed forces [incl. mercenary troops] or armament and ammunition coming from its own arsenals.”⁹⁴ The wording is misleading as it could mean both, 1) a separation of direct delivery of war material from the own arsenal and the financing of the same or 2) a distinction between sovereign and private war material. As the above quoted provision of the Hague Convention distinctly comprises direct supply and indirect financing and the scope regarding private sales is disputed, the latter interpretation is to be assumed.

The relevant entry in the MPEPIL stresses that ‘war material’ in the context of international armed conflicts “certainly and undisputedly covers all articles and materials that are directly and exclusively serving the killing and destruction of the enemy, such as weapons and ammunition.”⁹⁵

Due to the lack of a generally recognised definition of war material in international law and diverging expert opinions on the matter, this definition will be followed, as it provides the greatest possible certainty.

⁹³ See: Upcher, *Neutrality*, 2020, p. 70-125.

⁹⁴ Seger, *Law of Neutrality*, 2014, p. 255.

⁹⁵ Anke Biehler: *War Materials*. In: *Max Planck Encyclopedias of International Law*. 2013.

<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e434?rskey=IpZlIbj&result=3&prd=OPIL>.

3.2.3 Restrictive Measures

Similarly to Upcher, Cede highlights the misconception of the ‘duty’ of impartiality. Whilst, for example, the restriction of ‘war material’, e.g. an arms embargo, is prohibited under international law, no general duty of impartiality needs to be observed, especially not of an economic kind.⁹⁶

Schmalenbach however argues that solely EU-mandated (e.g. non UN authorized) sanction regimes may be problematic, as there is no “coherent state practice”⁹⁷ on this matter in international law and only unclear provision in the Hague Convention. Certainly partisan, non-UN authorized sanctions on military goods and services, especially arms embargos, against a belligerent party violate neutrality obligations under international law on the basis of Hague Convention V, Art. 7 and Art. 9. Furthermore, Schmalenbach categorizes the freezing of state assets to fall into the “grey area of neutrality law”⁹⁸, as these assets may be of great military importance to the respective belligerent party. The sanctioning of civilian goods as well as smart sanctions, targeting individuals or private assets of state authorities, are, however not colliding with international neutrality obligations.⁹⁹

For sanctions and support measures alike, impartiality is imbedded in the inherent meaning of the term neutrality. Impartial considerations certainly play an important role in neutral foreign policy and can also be used as an inherent policy justification. To generally deny any relevance of the principle of impartiality within the concept of neutrality therefore seems out of way. But when approaching the topic in a strict legal sense, no sound arguments, neither regarding sanctions nor support could be made that would support a strict and absolute application of impartiality. When assessing the compatibility of restrictive or supportive interferences in an international armed conflict, the literature review highlights the role of their military dimension. Depending on the degree of the (potential) military impact of the restrictive or supportive measures taken, neutrality violations can be determined, or not. While actions such as the freezing of assets may have negative military implications for the respective belligerent party, this aspect falls under the ‘grey area’ of neutrality. Certainly prohibited to a neutral is the restriction of, or the support with ‘war material’. Here again, the problem arises that there is no generally recognised definition of what ‘war material’ constitutes. As it surely comprises all lethal weapons like arms and ammunition, it seems reasonable to apply this definition.

⁹⁶ See: Cede, *Neutralität und Sicherheitspolitik*, 1995, p. 11-14.

⁹⁷ Schmalenbach, *Unionsrecht und Neutralität*, 2015, p. 303 (“kohärenten Staatenpraxis”; transl. by the author).

⁹⁸ *Ibid.* („Im neutralitätsrechtlichen Graubereich“; transl. by the author).

⁹⁹ See: *Ibid.*, p. 303-304.

3.3 EU support measures for Ukraine

Under the headline of “EU solidarity with Ukraine and its people”, the EU implemented substantial support services for the Ukrainian economy, society, military and future development. The support can be subsumed in the two categories of military and civilian support measures. Altogether these measures so far amount to more than 77 billion EUR by the EU and its member states. While about 21 billion EUR of the aid are dedicated to military support, the majority constitutes economic assistance (38 billion EUR) and other civilian measures including the support for refugees and humanitarian aid (18 billion EUR).¹⁰⁰

The Ukraine Support tracker of the Kiel Institute for the World Economy¹⁰¹ provides datasets of military, financial and humanitarian support to Ukraine. Military support is understood as to comprise weapons as well as non-combat military equipment intended for the army like gasoline, bottled water or food. Humanitarian aid covers all aid for civilians. This mostly consists of food, medicines and similar necessities. Financial support that is clearly dedicated to the above categories of military or humanitarian needs is also understood as such. The remaining category of financial aid includes grants and (guaranteed) loans to the Ukrainian Government. For demonstrating the regional support of the EU as a whole, total EU aid is shown in the statistics. As the data-set is designed as a government-to-government tracker, the total EU aid is also assigned to its Member States according to their respective shares.

The total aid of a EU Member State therefore consists of its bilateral aid and the respective share of EU aid. Aid on the EU level comprises support in the EPF and the MFA.

3.3.1 The European Peace Facility

Military support measures for the Ukraine Armed Forces (UAF) are of utmost importance for this paper. Following Art. 41 TEU, military measures need to be funded outside the regular EU budget. The main instrument for financing such military (support) measures is the European Peace Facility (EPF) that replaced the EU's Athena Mechanism in 2021.

The EPF is an instrument that finances the EU's external action in the realm of military and defence and provides assistance to partners in peace missions around the world. The EPF is a multiannual financial framework with a current financial ceiling at 12 billion EUR from 2021-2027. In light of the Russia-Ukraine War this ceiling has steadily increased from initially 5

¹⁰⁰ See: European Council/ Council of the European Union: EU solidarity with Ukraine. 2023. <https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/>.

¹⁰¹ See: Christoph Trebesch et al.: The Ukraine Support Tracker: Which countries help Ukraine and how? Kiel Working Paper, 2218, 2023. <https://www.ifw-kiel.de/publications/the-ukraine-support-tracker-which-countries-help-ukraine-and-how-20852/>.

billion EUR (in prices from 2018). The EPF is financed by all Member States, including Austria, on the basis of the respective gross national product.¹⁰²

In the context of the Russia-Ukraine War, the EPF finances the common costs of the support of the Ukraine Armed Forces. In turn, EU Member States are reimbursed via the EPF for the delivery of lethal and non-lethal military equipment (including weapons) to Ukraine. These include “military equipment and maintenance, repair and refit services of military equipment” as well as “ammunition, military equipment and platforms designed to deliver lethal force, [...] transportation, custody, and maintenance and repair of the military equipment provided for supporting training”.¹⁰³ Lastly, the EPF is used to fund equipment for medical and engineering equipment, field hospitals, logistics, mobility, cyber security, and demining.¹⁰⁴

Hence, the EU does not directly support Ukraine but delegates action to its Member States who are subsequently reimbursed by the common fund, to which also Austria contributes according to its GNI. Furthermore, it seems clear that the decisions for such reimbursements are taken by unanimity in the Council. Nonetheless, in the working paper on the Ukraine Support Tracker it is stressed that there is “no systematic data collection” and that the exact procedure of the fund “remains unclear due to a lack of official information.”¹⁰⁵

3.3.2 Macro-Financial Assistance

Originally designed to support third countries with balance of payment issues with loans and grants, the Ukraine became one of the biggest beneficiaries of the macro-financial assistance (MFA). Already from 2014 to 2021, six MFA Programs for Ukraine were arranged.

The EU’s economic assistance for the Ukraine so far amounts to 38 billion EUR, which is made up of more than 7 billion EUR in loans and grants in 2022 and another promised 18 billion EUR throughout 2023 under the EU’s macro-financial assistance. This mainly aims at providing immediate help for financial and infrastructure issues in Ukraine as well as to initiate Ukraine’s reconstruction process and prepare it for an eventual EU membership in the future. Furthermore, about 2 billion EUR are dedicated to budget and project support. Moreover, the European Investment Bank and European Bank for Reconstruction and Development paid Ukraine 2

¹⁰² See: European Council/ Council of the European Union: Infographic - European Peace Facility. 2023. <https://www.consilium.europa.eu/en/infographics/european-peace-facility/>; European External Action Service: Questions & Answers. The European Peace Facility. Brussels, 2021; https://www.eeas.europa.eu/eeas/questions-answers-european-peace-facility_en. European Council/ Council of the European Union: European Peace Facility. 2023. <https://www.consilium.europa.eu/en/policies/european-peace-facility/>.

¹⁰³ European External Action Service: Factsheet. The European Peace Facility. 2023, p. 2.

https://www.eeas.europa.eu/sites/default/files/documents/2023/Factsheet-EU-peace-facility_2023-03.pdf.

¹⁰⁴ See: *Ibid.*

¹⁰⁵ Trebesch et al., Ukraine Support Tracker, 2023, p. 11.

billion EUR in grants and loans as well as about 630 million EUR in humanitarian aid. The remaining approx. 8 billion EUR are borne by the Member States. In addition, the EU has been granting Ukraine favourable trade concessions, such as the suspension of tariffs of certain goods as well as the possibility for the Member States to waive custom duties and VAT on imports from Ukraine. The EU's and its Member States' humanitarian aid in Ukraine amounts to about 2 billion EUR and aims to alleviate the suffering of civilians in the war.¹⁰⁶

3.3.3 CSDP Missions and Operations

In Ukraine there are currently two active CSDP missions and operations. The EU advisory mission for civilian security sector reform in Ukraine (EUAM Ukraine) has been providing advice on security-, police-, judiciary-, human rights-, anti-corruption- and prosecution-related issues since 2014. In 2022, EUAM Ukraine was complemented by task-forces on rule of law advice, humanitarian aid and the facilitation of migratory flows into the EU.¹⁰⁷

The EU Military Assistance Mission (EUMAM Ukraine) was set up in 2022 with the main objective of enhancing the Ukrainian Armed Forces' ability to protect Ukraine's territorial integrity within its recognised borders and to equip it with the necessary means to deter possible acts of aggression in the future. The military operation offers training to personnel of the Ukrainian Armed Forces from basic to specialized levels and covers areas like “medical assistance, CBRN, demining, logistics and communication, maintenance and repair”¹⁰⁸ as well as operational training. Furthermore, close cooperation with partner countries are ensured, as interested third states may participate in EUMAM. The training takes place on EU soil. Thus far, 24 EU Member States participate in the operation (not including Austria). Norway takes part as financial contributor, too. Thus far, more than 16,000 Ukrainian soldiers have been trained on EU soil. By the end of 2023, it is envisaged to complete the training for a total of 30,000 Ukrainian soldiers. The funding of military equipment, ammunition and platforms for delivery of weapons as well as all expenses for the training of the UAF, incl. transport and repair of military equipment, takes place under the EPF.¹⁰⁹

¹⁰⁶ See: European Council/ Council of the European Union: EU solidarity with Ukraine. 2023.

<https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/#economic>.

¹⁰⁷ See: European External Action Service: Factsheet. European Union Military Assistance Mission Ukraine. 2022. <https://www.eeas.europa.eu/sites/default/files/documents/2023-EUMAMUkraine.pdf>.

¹⁰⁸ Ibid.

¹⁰⁹ See: Id.: Foreign Affairs Council, 24 April 2023. Main results. <https://www.consilium.europa.eu/en/meetings/fac/2023/04/24/>.

Contrary to Hungary, who constructively abstained from Council Decision (CFSP) 2022/1968 on the establishment of EUMAM Ukraine, Austria agreed and thus, financially contributes via the EPF to the training of the UAF for the defence of the “territorial integrity”¹¹⁰ of Ukraine.¹¹¹

3.4 Austria’s role in support measures for Ukraine

3.4.1 Supply of war material

As Austria fully participates in the EPF, it needs to pay its shares on the basis of its gross national income (GNI). In order to bring the EPF-funding for the military support of the Ukraine in conformity with neutrality, an agreement was found that neutral countries are not called upon to finance actions that are associated with ‘lethal force’. This is why, in the context of the support for Ukraine, there are two distinct EPF funds: one including ‘military equipment and platforms, designed to deliver lethal force’ and one excluding such material. While Austria constructively abstained from the decision establishing the Ukraine assistance measure for ‘military equipment and platforms, designed to deliver lethal force’¹¹², it went along with the subsequent decision for general support for the Ukraine Armed Forces.¹¹³

This compilation merely represents a restructuration. Austria’s shares in the hypothetical participation in the first program were moved to the second program. However, while the amount for the assistance measure including lethal force is reduced, e.g. less money for lethal force can be granted, the amount of the whole support remains the same.¹¹⁴

As firstly, the total amount of the assistance measure did not change, secondly, Austria’s contribution to the EPF remains relatively low and therefore only caused little to no restructuring from lethal to non-lethal military equipment and thirdly, the assistance measures were probably intended to include lethal and non-lethal military equipment anyway, it can be concluded that the constructive abstention by Austria hardly changed the outcome of the program. Nevertheless, it appears that in refusing to finance the delivery of ‘war material’, e.g. lethal force to Ukraine and to focus on the financing of non-lethal support measures, Austria well balanced neutrality concerns with common and solidary EU foreign action.

¹¹⁰ [Council Decision \(CFSP\) 2022/1968](#)

¹¹¹ See: Maria Bartoloni: Simple Abstention and Constructive Abstention in the Context of International Economic Sanctions: Two Too Similar Sides of the Same Coin? In: European Papers, 2023. https://www.europeanpapers.eu/en/europeanforum/simple-abstention-and-constructive-abstention-in-context-of-international-economic-sanctions#_ftn31; Gerald John/ Tabea Hahn: Regierung uneins in Panzerfrage: Soll Österreich ukrainische Soldaten ausbilden? In: Der Standard, 13 February 2023.

<https://www.derstandard.at/story/2000143506408/regierung-uneins-in-panzerfrage-soll-oesterreich-ukrainische-soldaten-ausbilden>.

¹¹² [Council Decision \(CFSP\) 2022/338](#)

¹¹³ [Council Decision \(CFSP\) 2022/339](#)

¹¹⁴ See: Hilpold, Neutralitätsrecht Österreichs, 2022, p. 279.

In order to assess whether this approach does in fact not violate any neutrality obligations, its conformity with the prohibition of the supply of war material under the Hague Convention and the extent of its possible military impact will be examined.

As quoted in the previous chapter, Art. 6 of Hague Convention XIII, which is considered to reflect international customary law, provides: “The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.” For the purpose of this paper, this absolute prohibition on the direct or indirect supply of ‘war material’ to belligerents during an international armed conflict “covers all articles and materials that are directly and exclusively serving the killing and destruction of the enemy, such as weapons and ammunition.”¹¹⁵

Based on §2 of federal law BGBl. Nr. 540/1977¹¹⁶ on the import, export and transit of war material, the federal decree BGBl. Nr. 624/1977¹¹⁷ defines ‘war material’ for Austria. This list broadly comprises arms, their compounds and operating devices, ammunition, war vehicles, warships and war aircrafts. The listed objects such as rifles, machine guns, missiles and their launching systems, canons, grenades, mines, means of radioactive, biological or chemical warfare, armed vehicles, ships and aircrafts etc. fit well the definition on ‘articles and materials directly and exclusively serving the killing and the destruction of the enemy’ as well as ‘military equipment designed to deliver lethal force’.

Peter Hilpold is critical of such a differentiation of lethal and non-lethal military equipment in modern warfare. He stresses, that such justifications rather reflect moral views than legal arguments and advocates not to confuse the two. In modern warfare, he states, it is difficult to define what qualifies as combat or warfare relevant.¹¹⁸ While this argumentation seems logical, it was shown in the previous chapter that the differentiation of war material in lethal and non-lethal force does have some legal merit. The above-mentioned Austrian legal definition on war material makes another case for such a substantial differentiation. As it remains unclear what exactly falls under the definition of ‘war material’, it seems reasonable to follow what is definitely covered by ‘war material’, e.g. material that is designed to deliver lethal force.

As mentioned above, the exact proceedings, processes and decisions of concrete measures financed by the EPF remain classified. Upon explicit request to the Legal Office of the Austrian Foreign Ministry for insights regarding concrete support measures for the Ukraine under the EPF that were co-financed by Austria, no answer was given.¹¹⁹

¹¹⁵ Biehler, War Materials, 2013.

¹¹⁶ [BGBl. Nr. 540/1977](#)

¹¹⁷ [BGBl. Nr. 624/1977](#)

¹¹⁸ See: Hilpold, Neutralitätsrecht Österreichs, 2022, p. 279.

¹¹⁹ See: Helmut Tichy: Interview. Conducted by Felix Müller. 26-28 July 2023. See: Annex.

Insufficient public data on the exact implications of Austria's military support for Ukraine (to the detriment of the Russian Federation) under the EPF prevents a final assessment. However, potential neutrality violations can still be analysed in a more general manner.

With its financial contribution to the general (e.g. non-lethal) EPF assistance measure, Austria adds to the military advantage of Ukraine and consequently to the military disadvantage of the Russian Federation. According to Council Decision (CFSP) 2022/339, such measures comprise i.a. "personal protective equipment, first aid kits and fuel, to the Ukraine Armed Forces".

According to the Ukraine Support Tracker, Austria promised about 866 million EUR (0.196% of its GDP) to Ukraine bilaterally. Apart from €40 million in financial commitments, this mostly consists of humanitarian aid (€823 million) and about €3 million in military commitments. Furthermore, 1.01 billion EUR were contributed by Austria as a share of its EU commitment of which 160 million EUR are estimated to be of EPF commitments. The rest makes up the Austrian share in EIB commitments (50 mio. EUR) and other EU aid (800 mio. EUR). Hence, Austria thus far committed 1.8 billion EUR to Ukraine. The lion's share of which relates to mere economic and humanitarian assistance, which does not concern neutrality considerations. A maximum of 163 mio. EUR can be dedicated to military support to the Ukraine Armed Forces.¹²⁰ In a war that has been going on for almost 18 months at the time of writing and in which a single missile defense system like the US-Patriot, currently in use in Ukraine, costs more than 2.5 times that amount¹²¹ such a support from Austria seems negligible. This is in line with Schilchegger's conclusion that the seriousness of a potential violation of such nature depends on the scale of its military relevance (see section 3.2.2).

Nonetheless, the principle of impartiality during an international armed conflict is violated by the military support of one belligerent party to the detriment of the other. However, the seriousness of such a 'violation' remains negligible. While the principle of impartiality may be violated to an insignificant degree, this does not necessarily entail a violation of an obligation under international law. The supply of war material by a neutral to a belligerent during an IAC is forbidden. With its constructive abstention from the decision on the delivery of lethal force, Austria showed commitment to this obligation. At the same time, a case was made that "equipment and supplies not designed to deliver lethal force" for other State's armed forces are not covered by the definition of 'war material', and therefore do not fall under said prohibition. While this definitory issue cannot be finally resolved, it was shown that such a definition has

¹²⁰ See: Christoph Trebesch et al.: The Ukraine Support Tracker: 12th release (covering January 24, 2022 to May 31, 2023). Kiel Working Paper, 2218, 2023. <https://www.ifw-kiel.de/publications/ukraine-support-tracker-data-20758/>.

¹²¹ See: *Ibid.*: Index-tab Price List, Weapons & Items.

substantial legal merit. Therefore, and due to the general lack of clarity that befalls the term, it is here argued that the Austrian military support under the EPF does not constitute a violation of the customary international law provision on the prohibition of supplying war material to a belligerent party during an IAC. As the approval of the CFSP decision on delivery of lethal war material would have violated such an obligation under international law, Austria's constructive abstention was the right decision to balance EU solidarity with obligations under neutrality law. Furthermore, in a spirit of solidarity with other EU Member States and with the suffering of the Ukraine, Austria found a way of supporting the Ukraine with equipment that arguably does not feature as war material. Hence, Austria does not violate its respective obligations under international law. As discussed above, Austria is not obliged to prevent EU decisions that could be considered as violating neutrality. By making use of constructive abstention, the measure in question could be adopted, without violations of obligations under international neutrality law, albeit at the cost of insignificantly touching military impartiality considerations. From a constitutional point of view, military support under the EPF or its financing are unproblematic for Austria's neutrality. Potential neutrality obligations are derogated according to Art. 23j in the realm of CFSP action on the basis of Council Decision (CFSP) 2022/339 and Austria's full participation in the EPF on the basis of Council Decision (CFSP) 2021/509. For the specific case of the delivery of military equipment (of non-lethal force) into Ukrainian war zones, this reasoning is supported i.a. by a response by Austrian Chancellor Karl Nehammer to a parliamentary inquiry in May 2022.¹²² This view is fully in line with the analysis of this paper, regarding Austrian constitutional neutrality law, see especially section 2.2.

3.4.2 Transport of military material

Another pressing issue is that war material for Ukraine happens to be transported from one EU Member State through Austrian territory to Ukraine. The most prominent such case was that of the transport of US howitzers M109 (heavy artillery) from the Italian military through Austrian territory via other EU Member States to Ukraine that also made it to the news.¹²³

¹²² See: Karl Nehammer: Beantwortung parlamentarischer Anfrage vom 3. März 2022 betreffend „Lieferung von nicht-tödlicher militärischer Ausrüstung an die Ukraine.“ Mai 2022.

https://www.parlament.gv.at/dokument/XXVII/AB/9825/imfname_1443385.pdf

¹²³ See: Volker Reifenberger: Parlamentarische Anfrage betreffend „Rechtswidrige Durchfuhr von Kriegsmaterial durch Österreich an die Ukraine.“ April 2022. https://www.parlament.gv.at/dokument/XXVII/J/14868/imfname_1553781.pdf.

§3 (1)(a)4 KMG allows for the transport of war material, when International Organisations like the EU, NATO or the UN take action to “avert humanitarian catastrophes or grave and systematic violations of human rights.”¹²⁴

Furthermore, Art. 5 (2) of Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian armed forces (discussed above and supported by Austria) stipulates that: “The Member States shall permit the transit of military equipment, including accompanying personnel, through their territories, including their airspace.” As discussed in the first chapters of this paper, potential concerns relating to the constitutional law on neutrality are derogated in the realm of CFSP. This is also Austria’s official view as confirmed by Ambassador Tichy.¹²⁵

Under international law, the situation might differ. Here the question arises if the official Austrian position only considers constitutional aspects related to neutrality and consistently ignores international law aspects. Before continuing with a further elaboration on this matter, the following section scrutinizes the relation of the transport of military material through neutral Austrian territory into the Ukraine and relevant international law aspects thereto.

Art. 5 in conjunction with Art. 2 of Hague Convention V prohibits the movement of troops or transport of “munitions of war or supplies” of belligerents through neutral territory. Ralph Janik notes that neither the EU nor one of its Member States can be classified as a belligerent party in the Russia-Ukraine War. While there is substantial support for Ukraine, there is yet no direct involvement. As noted above, mere military support does not suffice for the status of belligerency, but only direct involvement. As this direct involvement, e.g. belligerency status is not reached by any EU Member State (and notoriously avoided), Art. V HC V does not apply in the case of the transport of war material from EU Member States towards the Ukraine. Consequently, such a transport seems not to violate neutrality obligations of Austria.

But Janik suggests that in this case, the spirit of the agreement is violated,¹²⁶ arguing that an unconditional pursuit of neutrality were to result in the prohibition of all delivery of military material through neutral territory. He stresses that due to its obligation of solidarity within the Common Foreign and Security Policy of the Union, Austria as a EU Member cannot be “absolutely neutral.”¹²⁷ Nonetheless, the permission to transport weapons to the Ukraine through Austrian territory constitutes a violation of international neutrality law. As attenuating factor it is added that the transport does not go directly from Austrian territory to Ukraine but needs to

¹²⁴ [BGBl. Nr. 540/1977](#) (“zur Abwendung humanitärer Katastrophe oder zur Unterbindung schwerer und systematischer Menschenrechtsverletzungen”; transl. by the author).

¹²⁵ See: Tichy, Interview, July 2023.

¹²⁶ This is i.a. supported by Heinegg, *Neutrality*, 2022.

¹²⁷ Janik, *Was von der Neutralität bleibt*, 2022, (“absolut neutral”; transl. by the author).

pass other EU Member States first.¹²⁸ The transport of such weapons is regulated in CFSP decision 2022/339 concerning non-lethal support of the UAF, which Austria approved. Cede is therefore correct when he argues that “it would be absurd if Austria approves the CFSP decision”¹²⁹ only to then prohibit the transport through its territory.¹³⁰

In order to avoid the ensuing violation of neutrality obligations under international law, Austria would have been required to constructively abstain from this CFSP decision as well. In approving the decision and consequently permitting the transport of war material through its territory, the spirit of the Hague Convention, thus international law, is violated. As attenuating circumstances to this violation, it needs to be kept in mind that the transport of war material (dedicated to Ukraine) is only transported from one EU country via Austria to another EU country and then to Ukraine, but never directly from Austria to Ukraine.

In a parliamentary enquiry response to the “unlawful transit of war material through Austria to Ukraine”, the Austrian Minister of the Interior, Gerhard Karner discloses that in the period from 24 February 2022 to 18 April 2023 a total of 75 permissions of transport have been issued, most of which concerned weapons, grenades and ammunition that fall under Austria’s definition of ‘war material’. During this period, “for a lack of grounds of denial, no request for transit of war material was rejected.”¹³¹ While the extent of war material dedicated explicitly to the Ukraine remains unclear, this statistic does not warrant neutrality concerns under constitutional or international law in respect of the potential transit of war material to the Ukrainian war zone through Austria.

The main legal basis for permitting the transport of war material from EU Member States to the Ukraine through Austrian territory is Art. 5 Council Decision (CFSP) 2022/339, which obliges Austria and other EU Members to allow such a transport of „military equipment.“ However, Art. 5 does not indicate whether such an obligation for transport permission relates to non-lethal or lethal support measures for Ukraine. As this CFSP decision only pertains to non-lethal assistance measures for Ukraine, an obligation to allow the transport of lethal war material through neutral (Austrian) territory to the Ukraine cannot be clearly assumed. Given the constructive abstention from Council Decision (CFSP) 2022/338 on the delivery of military

¹²⁸ See: Id., EU-Sicherheitspolitik, 2022, p. 8.

¹²⁹ Cede, Sicherheitspolitische Standortbestimmung, 2022, p. 7 („Es wäre ja absurd, wenn Österreich im Rahmen der GASP zustimmt“; transl. by the author).

¹³⁰ See also: Jandl, Neutralität – wozu, 2022.

¹³¹ Gerhard Karner: Beantwortung parlamentarischer Anfrage vom 25. April 2023 betreffend „Rechtswidrige Durchfuhr von Kriegsmaterial durch Österreich an die Ukraine“ Juni 2023, p. 4. („wurden mangels Vorliegens von Abweisungsgründen keine Anträge auf Durchfuhr von Kriegsmaterial nach dem KMG abgewiesen.“; transl. by the author). https://www.parlament.gv.at/dokument/XXVII/AB/14379/imfname_1571482.pdf.

equipment of lethal force, it would be consistent to also take into account neutrality considerations under international law in respect to the permission of the transport of war material through neutral Austrian territory. Thus, the violation of the spirit of the Hague Convention, e.g. international neutrality law, is supplemented by an inconsistent application of constructive abstention within CFSP, marking the political balancing act in the decision making process.

3.5 Austria's role in EU sanctions against the Russian Federation

While considerable sanctions against the Russian economy, certain entities and individuals had already been in place since 2014, their scope and scale significantly increased following the full-scale Russian invasion in Ukraine in 2022. So far, eleven sanction packages have been implemented by the EU. They specifically target relevant economic sectors of the Russian Federation to inhibit its technological development and ability to engage in the war as well as smart sanctions on 'influential' individuals. The economic sanctions are mostly directed at financial, energy, transport or technological sectors. Next to the exclusion of the use of EU airspace and EU ports, Russian banks were banned from the international financial transaction system SWIFT and Russian media outlets from broadcasting within the EU. Furthermore, there are export restrictions on i.a. technological products relevant to defence and security sectors as well as other technological compounds and materials. Import prohibitions concern i.a. iron, steel, coal, wood, crude oil (with some exceptions) and gold products as well as the provision of certain services like legal advice or IT consultancy.¹³²

Smart, i.e. non-state sanctions could build up on the already existing sanction list since the illegal annexation of the Crimea in 2014 and thus far comprise almost 1800 individuals and entities, including government officials, MPs of the State Duma and other Russian institutions, oligarchs like Abramovich, Prigozhin (the late Head of Wagner Group militia) as well as President Putin or Foreign Minister Lavrov. Affected entities are i.a. banks, military and defence companies, political parties, paramilitary groups and media outlets. Smart sanctions focus on travel bans and the freezing of assets. In this context, more than 20 billion EUR of assets were frozen in the EU. In addition, together with the G7, the EU froze assets of the Russian Central Bank worth 300 billion EUR. The economic sanctions on exports are equivalent to approx. 44 billion EUR and imports of approx. 91 billion EUR.¹³³

¹³² See: European Council/ Council of the European Union: EU response to Russia's invasion of Ukraine. 2023. <https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/>.

¹³³ See: European Council/ Council of the European Union: EU sanctions against Russia explained. 2023. <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>.

The conception of having to pursue absolute impartiality during an IAC for a neutral power does not hold true. This means that most restrictive measures, especially those of an economic nature, do not pose any neutrality concerns. Nonetheless, some of the common EU restrictive measures seem problematic.

3.5.1 Freezing of assets

As mentioned above, according to Schmalenbach, the freezing, or more precisely the blocking of state assets falls into the ‘grey area of neutrality law’ when it surpasses a substantial threshold of military relevance. While the freezing of private assets does not collide with international neutrality obligations, the blocking of about 300 billion EUR in central bank assets of the EU and the G7 definitely reaches a certain military threshold for the Russian Federation as a belligerent party. Austria’s participation in this collective restrictive measure seems, thus, tangent to violating obligations under international neutrality law. Let us take a look at the details and figures.

In a superordinate function, international financial sanctions fall in the competence of the Austrian National Bank.¹³⁴ While no official public record on the exact figures of the blocking of Russian central bank assets by Austrian Banks can be found, Russia’s latest public Foreign Exchange and Gold Asset Management Report of 2022 suggests substantial involvement by Austria. According to the report, by 30 June 2021, Austria held 3% of Russia’s total foreign exchange and gold assets. The total amount of foreign exchange and gold assets by Russia is indicated with 585 billion USD. Consequently, Austria’s share in 2021 amounted to about 17,5 billion USD (approx. 16 billion EUR). Austria is in fact, the only non-G7 country listed by name next to China and the index-tab ‘International financial institutions’ in the graph of Russia’s foreign assets.¹³⁵

Already by 28 February 2022, Austria together with Canada, France, Germany, Japan, UK and the US took coordinated action and effectively blocked the access of the Russian Central Bank to its foreign assets.¹³⁶ For Austria, this action was based on “Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive

¹³⁴ See: Oesterreichische Nationalbank: Leitfaden der OeNB zu Russland/Belarus-Sanktionen. https://www.oenb.at/dam/jcr:ed237fdb-347c-4947-9d89-5cffe119b540/OeNB_Leitfaden_Russland-Belarus-Sanktionen_Version-13.pdf.

¹³⁵ See: Central Bank of the Russian Federation: Bank of Russia foreign exchange and gold asset management report, 1. Moscow, 2022. https://www.cbr.ru/Collection/Collection/File/39685/2022-01_res_en.pdf.

¹³⁶ See: Menno Kamminga: Confiscating Russia’s Frozen Central Bank Assets. A Permissible Third-Party Countermeasure? *Netherlands International Law Review*, 70, 2023. <https://link.springer.com/article/10.1007/s40802-023-00231-7#Fn4>.

measures in view of Russia's actions destabilising the situation in Ukraine"¹³⁷, which provides for the prohibition of transactions of Russia's Central Bank assets.

The figure of approx. 17.5 billion USD of blocked Russian Central Bank assets by Austria seems extraordinary, but is consistent with other data from *Statista*, ranking Austria before Canada (16 billion USD), only behind the UK (26 billion USD), US (38 billion USD), Germany (55 billion USD), Japan (58 billion USD) and France (71 billion USD) as of March 2022¹³⁸ as well as *Statista* data on Russian foreign exchange reserves for 2021.¹³⁹ It is further backed by Menno T. Kamminga's publication in the *Netherlands International Law Review*.¹⁴⁰

Altogether, the countries in one coordinated blow blocked almost 300 billion USD of Russian Central Bank assets, hence, almost half of all of Russia's foreign exchange and gold assets. While in total, this is a huge blow to Russia's economy and financial leeway, also Austria's share of blocking approx. 3% of Russia's total foreign central bank assets is enormous, given Austria's size and economic force.

This makes a strong case for a disproportionate, thus excessive restrictive measure by Austria. It seems plausible that the blocking of an estimated 17.5 billion USD may lead to substantial impairment of Russia's economic room of manoeuvre, including its military branch. As the seriousness of the violation of neutrality in this area depends on the degree of its adverse military effects to the sanctioned state, it may well be argued, that the Austrian measure over-stretches the breach of the principle of impartiality, and, thus, violates to some degree international neutrality law.

While Austria restrained itself in the support of Ukraine, e.g. it did not provide significant military advantage to Ukraine, Austria's leading role in this sanction regime generates noteworthy military disadvantages to the Russian Federation and therefore violates its neutrality.

Again, from the constitutional perspective, this action poses no neutrality problems, as the blocking of Russian Central Bank assets takes place in the realm of common EU-CFSP action.

3.5.2 Arms embargo

In reaction to the illegal annexation of the Crimea in 2014, the EU implemented an arms embargo against the Russian Federation, which was constantly extended and is still in force.¹⁴¹

¹³⁷ [Council Decision \(CFSP\) 2022/335](#)

¹³⁸ See: Statista Research Department: Frozen assets of Bank of Russia due to the war in Ukraine 2022. April 2023. <https://www.statista.com/statistics/1298593/frozen-assets-of-bank-of-russia-by-country/>.

¹³⁹ See: Id.: Statista Research Department: Bank of Russia foreign exchange and gold reserve share 2021-2022. June 2023. <https://www.statista.com/statistics/1293794/distribution-of-bank-of-russia-foreign-exchange-and-gold-reserves/>.

¹⁴⁰ See: Kamminga, Russia's Frozen Central Bank Assets, 2023.

¹⁴¹ See: Stockholm International Peace Research Institute: EU embargo on Russia. 2023. https://www.sipri.org/databases/embargoes/eu_arms_embargoes/Russia/EU-embargo-on-Russia.

As Schmalenbach states, non-UN authorized sanctions on military (related) goods and services, especially concerning arms embargos against only one belligerent party violate neutrality obligations under international law. According to this view, solely EU CFSP sanctions do not qualify as overriding neutrality concerns under international law. These are based on the Hague Convention V, Art. 7 and 9, and read:

Art. 7. A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.

Art. 9. 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. (...)

According to Schmalenbach, these provisions “prohibit without doubt the Austrian participation in autonomous CFSP arms embargos, which are directed at one state party to the conflict.”¹⁴²

While the Hague Convention on this matter seems rather clear, the circumstances seem less so. As previously stated, the Hague Convention originally only applied during an international armed conflict when both belligerents were party to the agreement. First, it is not generally recognized if the conflictual developments in 2014 already constituted an ‘international armed conflict’ or were of non-international nature. Second, Ukraine only ratified the Hague Convention in May 2015, so more than a year after the beginning of the Crimea crisis and almost a year after the EU’s arms embargo. As by now, the Hague Convention constitutes customary international law, the fact that Ukraine only joined the Hague Convention by 2015 is irrelevant in regard to neutrality concerns for Austria.¹⁴³

While the situation in Crimea from 2014 to 2022 between Russia and the pro-Russian Separatists on the one side and Ukraine on the other, has been described as an ‘armed conflict’ by most commentators¹⁴⁴, its international character due to the involvement of the Russian military was already pronounced.¹⁴⁵ Since the drastic escalation of the conflict with the full-scale

¹⁴² Schmalenbach, Unionsrecht und Neutralität, 2015, p. 303 („verbietet also zweifelsfrei die Teilnahme Österreichs an autonomen GASP-Waffenembargos, die sich einseitig gegen eine staatliche Konfliktpartei richten.“; transl. by the author).

¹⁴³ See: Tichy, Interview, July 2023.

¹⁴⁴ See i.a.: Center for Preventive Action: War in Ukraine. In: Council on foreign relations. 2023. <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>; Jonathan Masters: Ukraine. Conflict at the Crossroads of Europe and Russia. In: Council on foreign relations. 2023. <https://www.cfr.org/backgrounder/ukraine-conflict-crossroads-europe-and-russia>; Anton Bebler: The Russian-Ukrainian conflict over Crimea. In: International Institute for Middle East and Balkan Studies. 2015. <https://www.ifimes.org/en/researches/the-russian-ukrainian-conflict-over-crimea/3829>.

¹⁴⁵ See i.a.: Carina Lamont: What is War? Ukraine and the legal definition of war. In: FOI. Swedish Defence Research Agency. 2014. <https://www.foi.se/rest-api/report/FOI%20MEMO%205075>; Agnieszka Szpak: Legal

Russian invasion in Ukraine in February 2022, an international armed conflict is generally recognised. Ever since, the term Russia-Ukraine War has been widely recognised too, in media and academia alike.

The classification of a ‘non-international armed conflict’ in Crimea 2014-2022 means that Austria would not have been bound by the obligations arising from the Hague Convention, e.g. customary neutrality law, when it supported the CFSP decision on an arms embargo vis-à-vis the Russian Federation. But as the arms embargo is still in place and an international armed conflict can be definitely assumed since the escalation of the Russia-Ukraine conflict on 24 February 2022, Austria’s participation in this EU arms embargo now seems to seriously violate the above-mentioned neutrality provisions.

Albeit this discussion seems less relevant as according to Ambassador Tichy, Austria officially recognises the illegal annexation of the Crimea beginning in 2014, as an “interstate”, thus ‘international’ armed conflict.¹⁴⁶

Art. 2 (1) of the respective Council Decision (CFSP) 2014/512 of 31 July 2014¹⁴⁷ reads that:

“The direct or indirect sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts therefor, to Russia by nationals of Member States or from the territories of Member States or using their flag vessels or aircraft, shall be prohibited whether originating or not in their territories.”

In combination with Art. 2 (3) prohibiting the import of such “arms and related material of all types”, a fully fledged arms embargo has been implemented against Russia.

Austria’s ongoing participation in this embargo thereby blatantly clashes with Art. 7 of the Hague Convention V which obliges states not to “prevent the export or transport” of a belligerent party of arms and related material.

The official Austrian position on this matter, expressed by Ambassador Tichy, again highlights that Austrian neutrality in this context does not apply, as such sanctions are part of common EU action within CFSP. Art. 23j thus derogates neutrality considerations. This certainly holds true for the constitutional level of Austrian neutrality. The question whether common EU action

classification of the armed conflict in Ukraine in light of international humanitarian law. *Hungarian Journal of Legal Studies* 58, pp. 261–280, Budapest, 2017. <https://core.ac.uk/download/pdf/154883684.pdf>.

¹⁴⁶ Tichy, Interview, July 2023; “The generic term ‘international armed conflict’ encompasses all manifestations of interstate use of armed force.” See: Wissenschaftliche Dienste Deutscher Bundestag: Die völkerrechtliche Definition von Krieg. Sachstand. 2007, p.4. („Der Sammelbegriff „internationaler bewaffneter Konflikt“ umfasst sämtliche Erscheinungsformen zwischenstaatlicher Anwendung von Waffengewalt.“; transl. by the author). <https://www.bundestag.de/resource/blob/494606/1e69675dfb469de68e2ba1d507324395/WD-2-175-07-pdf-data.pdf>.

¹⁴⁷ [Council Decision \(CFSP\) 2014/512/CFSP](#)

may derogate obligations under international neutrality law for Austria will be discussed in the following chapter.

3.6 Austrian CFSP participation in relation to international neutrality law

Austria's EU Membership and full and active CFSP participation and its relation to its neutrality obligations under international law remain an open issue. This specifically concerns the matter "whether Austria, as a neutral state, is required to abstain from EU Council decisions"¹⁴⁸ on measures in violation of international neutrality obligations. As the paper has shown, such potential violations include the financing of military equipment, the delivery or transport of war material to belligerent territory, the freezing of central bank assets of a belligerent party during an international armed conflict or an arms embargo against a belligerent party. Ralph Janik stresses that a "robust"¹⁴⁹ pursuit of neutrality is not compatible with such acts within the CFSP. On the contrary, he argues that the development of the EU since Austria's accession, especially with the conclusion of the Treaty of Lisbon, and the restrictions of Austrian neutrality resulting therefrom, due to a lack of objections and protests of third states, were accepted by the international state community by acquiescence.¹⁵⁰

When confronted with possible violations of Austrian neutrality under international law during the Russia-Ukraine War of 1) financing the supply of military material to Ukraine, 2) the transport of war material through Austrian territory to Ukraine, 3) the freezing of Russian Central Bank assets in a magnitude of potentially severe military effects, and 4) the arms embargo against Russia, Ambassador Tichy, representing the official Austrian position, constantly reverted to the argumentation that according to constitutional Art. 23j, Austrian neutrality does not apply to actions within the framework of the CFSP. This can mean two things: either that Art. 23j not only derogates Austrian neutrality on the constitutional level, but also on the international law level, e.g. Austria's thereto relating obligations under international law. This, however, should not be possible, since states are not permitted to limit their obligations under international law by domestic law. Another possibility would be that obligations under international law are simply ignored and not taken into account. Such an approach, however, would be odd for a generally international law-abiding country like Austria.

¹⁴⁸ Janik, EU-Sicherheitspolitik, 2022, p. 9 („ob Österreich als neutraler Staat dazu angehalten ist, sich bei EU-Ratsbeschlüssen [...] zu enthalten“; transl. by the author).

¹⁴⁹ Ibid.

¹⁵⁰ See: Ibid.

Ambassador Tichy counters the former interpretation as follows: “Our EU membership and our obligations arising therefrom (including those restricting neutrality) are known and have been accepted by the international community.”¹⁵¹

This reflects the above-mentioned view by Ralph Janik, in which the international community of states acquiesced in the outright derogation of Austrian neutrality obligations under international law by Austria’s full and active participation in the CFSP.

Spun further, it could be argued that the international community of states already accepted by acquiescence the fading of Austrian neutrality under international law, as this “accession was accompanied by an explicit commitment of Austria to a common foreign and security policy, which already back then implicitly aimed at a common defence”¹⁵². This is countered by the fact that Austria “never formally repealed”¹⁵³ its neutrality under international law under *clausula rebus sic stantibus*, nor via notification of *actus contrarius*.¹⁵⁴

While the argument of acceptance of Austria’s neutrality restrictions by acquiescence taken all things into consideration, still seems plausible and justifiable, its incompatibility with the prohibition of a state to unilaterally limit its obligations under international law remains unanswered. Thus, one has to assume that both theoretical stances and their practical applications persist side-by-side in an irreconcilable manner. While Austria makes a strong, real-live case for its position, the latter argument is not taken up or advocated for so far, leaving the Austrian position unchallenged. However, this makes a potential violation of international law not any less irrelevant.

In his article, Schulyok highlights the ever-growing divergence between the Austrian understanding, interpretation, and pursuit of neutrality on the one hand, and the international law concept of neutrality on the other. When it is now argued that certain steps in the Russia-Ukraine War within CFSP are ‘in line with neutrality’, “then the constitutionally adapted version according to Austrian legal understanding is invoked, which moves further and further away from the legal understanding of international law.”¹⁵⁵

¹⁵¹ Tichy, Interview, July 2023 („Unsere EU-Mitgliedschaft und unsere daraus erwachsenden (auch neutralitätseinschränkenden) Verpflichtungen sind der internationalen Gemeinschaft bekannt und wurden von dieser akzeptiert.“; transl. by the author).

¹⁵² Öhlinger, Österreichs Neutralität in der EU, 2018, p. 632. („dieser Beitritt von einem expliziten Bekenntnis Österreichs zu einer Gemeinsamen Außen- und Sicherheitspolitik begleitet war, die schon damals das Ziel einer gemeinsamen Verteidigung implizierte“; transl. by the author).

¹⁵³ *Ibid.* („formell nie aufgehoben“; transl. by the author).

¹⁵⁴ See: *Ibid.* 632-633.

¹⁵⁵ Bernhard Schulyok: Österreichs Verständnis der Neutralität im Widerspruch zur GSVP der EU? Teil I. In: The Defence Horizon Journal, 2022, p. 9. <https://www.thedefencehorizon.org/post/%C3%B6sterreich-verst%C3%A4ndnis-neutralit%C3%A4t-widerspruch-gsvp-eu?lang=de>.

While the rights and obligations of neutrality under international law persist, they seem to be alienated from public political discourse as well as from the general legal neutrality conception of Austria, as represented by Ambassador Helmut Tichy, Head of the Legal Office of the Foreign Ministry.

In addition, it must be mentioned that the legal framework of the CFSP allows for leeway for the respect of neutrality concerns. While in the realm of the ‘mutual defence system’, this is reflected in the ‘Irish clause’ (see Chapter 2), in the area of sanctions or support measures for third states, this is reflected by TEU Art. 31, i.e. the possibility of a constructive abstention. In such a scenario, the CFSP decision in question is not applied by the Member State but still “commits the Union” and obliges the Member State in “a spirit of mutual solidarity” to “refrain from any action likely to conflict with or impede Union action based on that decision”. The official Austrian view that the international community of states accepted Austria’s EU accession and its recent developments, implies acceptance, recognition or knowledge of third states of all relevant legal aspects, including such ‘escape’ clauses.

Based on the persisting neutrality obligations under international law, it could be argued that third states have a legitimate expectation towards a constructive abstention of Austria from CFSP measures, which conflict neutrality obligations under international law. Which, as a result, balances EU-solidarity and obligations under international law.

It is clear that on EU level such a decision for a constructive abstention by Austria is only of a political but not a legal nature¹⁵⁶, as there are no legal provisions that would force Austria to revert to such an abstention. The position might however change if CFSP actions collide with neutrality obligations under international law. As States may not unilaterally limit obligations under international law, neutrality obligations under international law within the realm of CFSP are not derogated. They therefore co-exist next to solidarity obligations under EU law. In the event of CFSP measures conflicting with such co-existing neutrality obligations under international law, it is here argued that third states had a legitimate expectation of Austria to constructively abstain from the respective CFSP decision. In not applying but also not preventing the decision, neutrality obligations under international and solidarity obligations under EU-law were fulfilled.

Ralph Janik only speaks of a ‘political’ and not a legal decision of Austria to abstain in such events. Thus, he does not take such a legitimate expectation into account, which would put legal barriers to Austria’s CFSP participation. Furthermore, Ambassador Tichy does “not see such a legitimate expectation of third states, thus no violation of neutrality by Austria.” He continues

¹⁵⁶ See i.a.: Janik, EU-Sicherheitspolitik, 2022.

that Austria is only then neutral when neither the United Nations nor the European Union act. Hence, it has a “selectively derogated neutrality”.¹⁵⁷

According to this view, Austria would not be subject to any legal neutrality barriers in the realm of the Union’s CFSP, as long as such action does not violate the Charter of the UN.¹⁵⁸

While it is commonly agreed upon that neutrality does not apply in the realm of action authorized by the UN Security Council, this does not hold true for common EU action.

The section on restrictive measures, especially on unilateral EU sanctions, of this paper has shown that legal doctrine is far from generally recognising such a derogation of neutrality obligations under international law by EU action, the reason being that a necessary threshold of *opinio iuris* on the matter has not yet emerged. The Austrian position in this regard is, therefore, not fully convincing.

Just like on the basis of the protection of trust and good faith in international law, Austria is not completely free in defining its status of neutrality, but needs to adhere to general obligations under international law, such as the non-participation in armed conflicts¹⁵⁹. Austria, based on the same principle, may also not forego relevant neutrality obligations via CFSP action.

The Austrian practice in the course of the Russia-Ukraine war has shown that even in critical cases where neutrality is breached, such as the arms embargo, Austria has (with one exception) not made use of the constructive abstention from CFSP decisions. Since third states have practically experienced they cannot legitimately expect Austria’s reversion to constructive abstention (e.g. compliance with neutrality obligations under international law), Austria has, from a legal point of view, credibly stripped off the last legal barrier of its neutrality within the EU. By means of (unlawfully) evading neutrality obligations under international law during the Russia-Ukraine War through CFSP action, Austria’s respect for neutrality has been credibly undermined and has reached its almost complete erosion. On the basis of which neutrality violations under international law have arguably reached a new quality. Furthermore, the reversion to constructive abstention in only one single instance portrays the inconsistency of the Austrian position, which possibly results from mere political considerations.

On the other hand, Austria has to adhere to the principle of loyalty and solidarity in the pursuit of common goals in external action. As has been shown, single instances of constructive abstention motivated by neutrality consideration may balance well EU solidarity and neutrality. A “systematic obstruction”¹⁶⁰ of the pursuit of common external action goals under Art. 21 (2)

¹⁵⁷ Tichy, Interview, July 2023 („punktuell derogierte Neutralität“; transl. by the author).

¹⁵⁸ See i.a.: [UN Charter](#) Art. 103: Supremacy Clause of the UN Charter; TEU Art. 21 (1): Respect for the principles of the UN Charter, or in the realm of CSDP Art. 42 (1).

¹⁵⁹ See: Schilchegger, *Neutralität nach Lissabon*, 2011, p. 8.

¹⁶⁰ Öhlinger, *Österreichs Neutralität in der EU*, 2018, p.624 („systematische Obstruktion“; transl. by the author).

TEU, like the consolidation and support for the principles of international law, human rights, the strengthening of international security, the assistance of populations and countries confronted with man-made disasters etc., which can i.a. be achieved via common EU-support or restrictive measures, could not be justified by neutrality concerns, as EU obligations derogate neutrality obligations.¹⁶¹

According to the official Austrian position as expressed by Ambassador Tichy, Austria is only committed to its neutrality when there is neither EU nor UN action. The question remains whether such a perforated concept has a *raison d'être* in today's geopolitics. But an even more fundamental question is whether such a concept can credibly achieve the higher goals of the underlying neutrality law: independence and inviolability of its territory.

Neutrality is a long-standing concept under international law regulating the relations between states. It is therefore fundamentally international in nature. It does not seem convincing that Austria may limit its adherence to its obligations towards third states unilaterally via Art. 23j through the participation within CFSP. Insufficient *opinio iuris* on the stance that EU membership and CFSP participation may derogate neutrality obligations under international law further counter that view.

Austria's participation in CFSP action in relation to its neutrality obligations under international law is the most fundamental and crucial aspect to potential neutrality violations. It is, therefore, frustrating that there is no final answer. As Theo Öhlinger clarifies, the continuous change in interpretation of Austrian neutrality as part of foreign policy is not subject to the jurisdiction of the Austrian Constitutional Court. The Constitutional Court of Austria can therefore hardly shed light on that question.¹⁶²

If, however, other states came to the conclusion that such a derogation of international neutrality obligations within common EU action has not occurred and determine violations of neutrality obligations under international law by Austria during, for example, the Russia-Ukraine War, the issue could be brought to the International Court of Justice (ICJ). According to Art. 35 of the ICJ Statute, all parties to the Statute of the International Court of Justice, currently 193 States including Austria, may appear before the Court. While this paper cannot deliver a final answer on the steadiness and validity of international customary neutrality law, such an ICJ ruling could be enlightening on the matter. Especially, as the ICJ hardly ever deals with neutrality considerations. In only two cases did the ICJ recognize that neutrality law is part of customary international law, i.e., the 1996 advisory opinion on the *Threat and Use of Nuclear*

¹⁶¹ See: *Ibid.* p. 624-625.

¹⁶² See: *Ibid.* p. 632.

*Weapons and the Nicaragua case.*¹⁶³ Due to the general disinterest towards Austria's neutrality¹⁶⁴ on the international plane, such a development seems however highly unlikely and politically hazardous.

In the course of the Russia-Ukraine War, Austria makes a real-life, practical case for the derogation of neutrality obligations under international law when acting within the Union's CFSP. While such a derogation is generally agreed within the UN, this is certainly not the case for the EU. In particular, it remains disputed, if, for example, the participation in EU sanctions without an EU mandate is in line with neutrality obligations under international law.

In this sense, the subject of Austrian neutrality in international law reaches a new dynamic. Similarly to the general acceptance that UN action takes precedence over neutrality obligations (as enshrined in Art. 103 UN Charter), such international customary law could evolve for Austrian neutrality on EU level. Time will show, if this state practice by Austria (and other states) will be accompanied by sufficient *opinio iuris* on the matter. As this is not the case to date, the present author does not share the Austrian position which, in his view, quite blatantly violates international law.

4. Outlook on neutrality and potential security options

This paper has shown substantial violations of Austrian neutrality obligations under international law. Next to the participation in the EU-military alliance, this is particularly the case for the ongoing arms embargo over the belligerent party Russia, the allowance of the transport of war material through neutral Austrian territory into war zones in Ukraine and the blocking of Russian Central bank assets.

But even if Austria were to opt for the most serious violation of its neutrality, e.g. to directly participate in an international armed conflict like the Russian-Ukraine War, this would not mean the automatic end of its neutrality; "just like the non-observance of a contract does not constitute its termination."¹⁶⁵ Neutrality obligations persist and remain and constantly oblige Austria to end the respective violations.¹⁶⁶

¹⁶³ See: Seger, *Law of Neutrality*, 2014, p. 252.

¹⁶⁴ See: Janik, *EU-Sicherheitspolitik*, 2022, p. 9.

¹⁶⁵ Schilchegger, *Neutralität nach Lissabon*, 2011, p. 12 („so wenig wie die Nichteinhaltung eines Vertrages dessen Ende bedeutet.“; transl. by the author).

¹⁶⁶ See: *ibd.*

4.1 Termination of Austrian Neutrality

The termination of the federal constitutional law on neutrality of Austria requires a two-thirds majority in the National Council, thus broad political consent. The termination of obligations in the international dimension is more complex.

The issue of the legal foundation of Austrian neutrality law is particularly relevant in regard to possible alterations or its termination. This question is paramount, as there is currently a remarkable debate on the future form (and substance) of Austrian neutrality in light of the Russia-Ukraine War.

Amongst others, Peter Hilpold makes the case that Austrian neutrality law begins with the general, higher goal of sovereignty and inviolability of Austrian territory, for whose attainment certain neutrality measures are undertaken. Such as non-participation in armed conflicts or non-military-alliance. If Austria were to come to the conclusion that perhaps in the 21st century the higher goal could be better achieved otherwise, its termination would need to follow suit. In this context, it is of importance that Austria was not neutralised but implemented neutrality, at least legally, on its own free will.¹⁶⁷

A termination of permanent neutrality is generally considered as to be possible. If only, it is not carried out ‘untimely’, e.g. during or just before an armed conflict for example.¹⁶⁸ This means that even if Austria wanted to terminate its neutrality just before the Russia-Ukraine War or during the last months, it would be hindered to do so, as untimely circumstances are certainly given. Once the war in Ukraine ends, also these untimely circumstances end and would enable Austria to terminate its neutrality.

As discussed above, it is generally assumed that the foundation of Austria’s neutrality was of domestic nature. By means of a unilateral declaration to the state community, it subsequently developed legal force under international law. The revocability of unilateral acts presents a legal challenge. The majority opinion is that its revocation is possible on the basis of the ‘*contrarius actus*’ principle, e.g. a legal action that revokes a former one in the same way or form. This is also based on ‘*clausula rebus sic stantibus*’, e.g. a clause that allows for altering binding agreements in the event of fundamentally different circumstances. Given the passing of almost seven decades since the entrance into force of Austria’s neutrality law and the completely different geopolitical context, this procedure seems convincing. In order to uphold the legal doctrine of legal certainty, it would be most plausible to terminate neutrality on the basis of a unilateral act,

¹⁶⁷ See: Hilpold, *Neutralitätsrecht Österreichs*, 2022.

¹⁶⁸ See: *Ibid.*; Seger, *Law of Neutrality*, 2014, p. 260.

including sound reasons of the change in the geopolitical landscape, which is ‘timely’ notified to the international state community.¹⁶⁹

The termination of Austrian neutrality under today’s circumstances is highly unlikely. The reasons are twofold and have a domestic and an international dimension. First, the (distorted, almost mythical) concept of Austrian neutrality is part of the Austrian identity and enjoys high popularity amongst the Austrian population. Its termination is, thus politically unfavourable. Secondly, the legal procedure and implications are not fully clarified. While currently most (Austrian) legal scholars are convinced that Austria may terminate its neutrality unilaterally, i.e. without the consent and agreement of other states, some argue that mere notification does not suffice. As, for example, Peter Hilpold shows, in such a scenario, the termination of neutrality could be objected by other states.¹⁷⁰ Even in the unlikely event of high domestic support and political will in favour of the termination of neutrality, its successful international implementation is not guaranteed. Austria thus finds itself trapped in neutrality with seemingly insurmountable domestic and international obstacles.

Faced with this argument, Ambassador Tichy replies that the termination of Austrian neutrality would be unproblematic if there was the necessary political will. “Objections [of other states] would be irrelevant.”¹⁷¹

This strengthens the conviction that the shaping of Austria’s neutrality is the sole responsibility of Austria. Alongside with the promise of the Russian Deputy Foreign Minister in 1995 that the future of Austrian Neutrality is Austria’s sovereign decision¹⁷², such a standpoint seems convincing. This promise is specifically relevant as Russia was historically and presently is most affected by Austrian ‘neutrality’ in the international context.

4.2 Outlook on Security options

But why would Austria even want to terminate its neutrality? The primary sense of neutrality pertains to its main objectives, which are laid down in the first sentence of Art. 1 of the federal constitutional law of neutrality and reads: “For the purpose of the permanent maintenance of her external independence and for the purpose of the inviolability of her territory”.

The ultimate goal and meaning of neutrality is, thus, to ensure external independence and territorial inviolability. When discussing the ideal form of Austrian neutrality today, the question

¹⁶⁹ See: Schilchegger, *Neutralität nach Lissabon*, 2011, p. 13.

¹⁷⁰ See: Hilpold, *Neutralitätsrecht Österreichs*, 2022, p. 271-272.

¹⁷¹ Tichy, Interview, July 2023 („Einsprüche wären irrelevant.“; transl. by the author).

¹⁷² See: Schilchegger, *Neutralität nach Lissabon*, 2011, p. 14-15.

needs to be posed how its inherent goal can be best fulfilled. Depending on whether this question is answered by keeping or ending neutrality, certain options for future policies arise.

By reviewing the literature on possible alternatives¹⁷³, the following main policy options have been identified. When remaining neutral, Austria could formally 1) keep neutrality as it is 2) change the neutrality status from permanently neutral to non-aligned or 3) refocus to full adherence to neutrality (Öxit, e.g. leave EU). Within those options, Austria could a) push for a more convincing armed neutrality, b) opt for unarmed neutrality, or c) not change at all.

When terminating neutrality, legally valid options for entering or establishing military alliances arise, amongst which joining NATO or a fully fledged EU army/defence union would be most likely. The following section will briefly touch on the legal implications of the various options. Given the current political atmosphere and the broad public support for neutrality, option 1 seems to be most likely. Chancellor Karl Nehammer repeatedly stressed that Austria ‘was neutral, is neutral and will stay neutral.’¹⁷⁴ In a survey from March 2022, more than 90% of the population stated that the Austrian neutrality was ‘important’ (very important or rather important) to them.¹⁷⁵ Furthermore, a termination of neutrality could be “gravely misunderstood”¹⁷⁶ on the international scene. This indicates little political will to impose a termination of Austrian neutrality on the population.

In October 2022, an increase of 680 million EUR or more than 22% of the annual defence budget for 2023 was announced. This means an increase of the Austrian defence budget from approx. 2.7 billion EUR in 2022 to approx. 3.3 billion EUR in 2023. Step by step, the military budget of Austria is planned to be increased to approx. 4.7 billion EUR in 2026.¹⁷⁷

This budgetary increase might promise a tendency towards a more convincing armed neutrality. Despite the notoriously underfunded defence budget over the last decades, this approach is also in line with the obligation of Austria’s neutrality law to actively ensure the maintenance and defence of its neutrality.

The opposite approach of an unarmed neutrality would not be consistent with this positive obligation. Furthermore, such a scenario would increase Austria’s security freeriding and render

¹⁷³ See especially: Cede, Sicherheitspolitische Standortbestimmung, 2022.

¹⁷⁴ See i.a.: Stenographisches Protokoll: 169. Sitzung des Nationalrates der Republik Österreich. XXVII. Gesetzgebungsperiode. 8. Juli 2022. S. 36. https://www.parlament.gv.at/dokument/XXVII/NRSITZ/169/fnameorig_1532111.html#TEXTOBJ_274706.

¹⁷⁵ See: Martin Mohr: Wichtigkeit der Neutralität in Österreich 2022. In: Statista. <https://de.statista.com/statistik/daten/studie/992825/umfrage/wichtigkeit-der-neutralitaet-in-oesterreich/>.

¹⁷⁶ Öhlinger, Österreichs Neutralität in der EU, 2018, p. 634 („grob missverstanden; transl. by the author).

¹⁷⁷ See: Martin Mohr: Geplantes Verteidigungsbudget in Österreich bis 2026. 2022. In: Statista.

<https://de.statista.com/statistik/daten/studie/1337622/umfrage/geplantes-verteidigungsbudget-in-oesterreich/>; Conrad Seidl: Österreichs Verteidigungsbudget steigt 2023 um 680 Millionen Euro. In: Der Standard. 6 October, 2022. <https://www.derstandard.at/story/2000139731806/oesterreichs-verteidigungsbudget-2023-steigt-um-680-millionen-euro>.

it more dependent on other, neighbouring militaries in regard to conventional and non-conventional warfare and attacks. This strategy therefore seems less recommendable.

A significant increase in military spending could also prepare Austria for a time after its neutrality. Should Austria once decide to see its security interests, its independence and the inviolability of its territory best secured in a military alliance, it would be important to be a valuable partner in that alliance. An ailing army would not be very attractive for potential military partners.

With a two-thirds majority in parliament, Austria could terminate its neutrality. Due to the constantly elevated public support for neutrality, a referendum could be held to back the political decision even though this is not required by the law. Subsequently, via unilateral declaration in a ‘timely’ manner, Austria could inform the international community of its decision. According to Ambassador Tichy, objections by third states would be “irrelevant.”¹⁷⁸ From today’s point of view, in such a scenario, the joining of NATO or a fully fledged Defence Union would be the most plausible options. According to TEU Art. 42 (2) such a ‘Common Defence’ could be implemented, if the European Council unanimously so decides. Hence, such a step is possible without treaty amendment. The conformity of such a step with the prohibition of joining a military alliance for a neutral state is questionable. As such a decision finds its legal basis in CFSP, even conformity with Austrian neutrality could be argued, albeit most likely provoking a new quality in violating its permanent neutrality status under international law.

Regarding NATO, an accession treaty would need to be concluded and ratified by all NATO Members. Based on NATO’s close cooperation with UN peace-keeping, Hilpold concluded in 2019 that a “participation in a defence agreement should be possible also for a neutral State as long as this agreement operates in conformity with UN law or carries out peace operations for the UN.”¹⁷⁹ While this view is questionable and blatantly clashes with permanent neutrality obligations to not join such military alliances, both from a constitutional and international law perspective, since the Russia-Ukraine War and NATO’s revived role in deterring Russia as the successor state of the Soviet Union, this possibility of a permanently neutral state to join NATO seems ever more clearly to be off the table.

Lastly, Austria could change its permanent neutrality towards non-alignment. While this could still conflict with Austria’s EU membership, e.g. a Defence Alliance ‘in statu nascendi’, as this paper has shown, such a status better reflects the latest Austrian interpretation of neutrality. While on its face such a step does not garner any benefits, as neither security guarantees arising

¹⁷⁸ Tichy, Interview, July 2023.

¹⁷⁹ Hilpold, *Neutrality within the UN*, 2019. p. 259.

from the rights of neutral countries, nor from the joining of a military alliance would increase, Austria's practice would be better in line with its obligations under international law. As non-aligned states do not need to remain neutral in all upcoming wars, but may decide on a case by case basis on their engagement. Furthermore, the unresolved tension between CFSP action and neutrality obligations under international law would be eased.

Conclusion

What do we talk about when talking about neutrality?

Neutrality is a concept of international law that regulates the relationship between states during an international armed conflict and goes along with certain rights and obligations. The most fundamental obligation of neutrality is not to become a belligerent party in the given conflict. Thus, neutrality in essence is of an international nature.

In Austria, discussions about neutrality are mostly concerned with domestic implications and effects, and a good amount of nostalgia. To avoid an entanglement in the latter, this paper focused on the legal aspects of neutrality from a constitutional and an international law perspective. Domestically, Austrian neutrality law was enacted on 26 October 1955. Via subsequent unilateral declaration to the international community, Austrian neutrality developed international legal effect. Throughout the years, Austrian neutrality underwent different phases, ranging from restrictive ('corset doctrine') to exaggerated ('osmosis doctrine') to unrestricted ('sinnatra doctrine) interpretations, adapted identity-forming elements ('identity doctrine') and eventually reoriented to the central military aspects ('avocado doctrine'), that encompasses: no military alliance, no military bases of foreign troops on Austrian territory as well as the maintenance and defence of neutrality.

A military alliance in this paper is defined as „an explicit agreement among states in the realm of national security in which the partners promise mutual assistance in the form of a substantial contribution of resources in the case of a certain contingency the arising of which is uncertain.”¹⁸⁰ Art. 42 (7) of the Treaty on European Union (TEU) provides for mutual assistance by member states by 'all means in their power', in the case of an armed aggression, which naturally amounts to a threat to national security. Hence, Art 42 (7) meets all definitory requirements of a military alliance. While the 'Irish clause' enables leeway for neutral states with regards to mutual assistance, EU solidarity obliges members to provide substantial aid, even if it is of non-military nature. Thus, the necessary requirements for a military alliance are still met.

¹⁸⁰ Stefan Bergsmann: The concept of Military Alliance. s.l., 2001, p. 29.

Furthermore, most legal experts define the EU as a ‘defence union’, ‘ad hoc military alliance’, a ‘military pact’ or as a genuine ‘military alliance’. The legal framework is further backed by substantial military instruments and frameworks that were put in place or were announced, such as PESCO, RDC or EPF.

Art. 23j of the Austrian Constitution effectively derogates the Federal Constitutional Law on Neutrality of Austria in the realm of the Union’s CFSP. Constitutionally, this establishes no legal boundaries for actions in violation of neutrality, as long as such measures are consistent with UN law. For a military engagement of Austria in an international armed conflict it is still disputed if the authorisation of the UN Security Council is needed, or if commitment to the UN Charter suffices. The stationing of foreign military bases or even the active military participation of Austria in an international armed conflict (non-observance of neutrality) could be justified in accordance with domestic law.

In sum, where Austria finds itself as a member to a military alliance (EU), which in the realm of its common foreign and security policy can fully derogate Austrian neutrality, it is argued that from a constitutional point of view, neutrality almost vanished. This starkly contrasts the importance of Austrian neutrality to its population and the firm commitment to it by leading politicians.

This paper mainly aimed at identifying potential neutrality violations by Austria in the Russian-Ukraine war in order to assess whether the latest developments in that regard have produced a new quality of neutrality violations. As almost all neutrality-relevant actions were taken within the realm of CFSP, from a constitutional point of view, no neutrality violations can be identified. Art. 23j or supremacy of EU law derogates domestic neutrality law in the realm of CFSP. Thus, covers possible neutrality concerns. This paper has shown that the official Austrian neutrality interpretation assumes this derogation of neutrality obligations within the realm of CFSP, for the international law level too. As Ambassador Tichy stated: “Our EU membership and our obligations arising from that membership (including those restricting neutrality) are generally known and have been accepted by the international community.”¹⁸¹ This perception is expressed by the concept of a ‘selectively derogated neutrality’ which only applies when neither the UN, nor the EU act. This interpretation however cannot be followed. A derogation of neutrality obligations under international law in the realm of the Union’s CFSP cannot hold up to the principle that states may not unilaterally limit their obligations under international law. On this basis, it is argued that neutrality obligations for Austria under international law remain in

¹⁸¹ Tichy, Interview, July 2023 („Unsere EU-Mitgliedschaft und unsere daraus erwachsenden (auch neutralitätseinschränkenden) Verpflichtungen sind der internationalen Gemeinschaft bekannt und wurden von dieser akzeptiert.“; transl. by the author).

place. If such obligations are breached, whether based on action within CFSP or not, Austria remains constantly bound to cease the respective violation.

In the course of the Russia-Ukraine War, two supportive measures for Ukraine and two restrictive measures against the Russian Federation have been identified as most likely to violate neutrality obligations under international law.

Support measures:

1) With its participation in the European Peace Facility, Austria (financially) contributes to the support of military equipment to the Ukraine Armed Forces. Art. 6 of the Hague Convention XIII and international customary law respectively, clearly prohibits the direct or indirect supply of 'war material' of any kind by a neutral power to a belligerent party. In this context, Austria decided to constructively abstain from the CFSP decision on support measures of lethal-force and only (financially) supports such support measures that are of non-lethal nature. In defining what constitutes 'war material', it has been shown that such a differentiation has sufficient legal merit. Hence, the direct supply or indirect financing of military equipment (of non-lethal nature) to Ukraine does not violate neutrality obligations under international law. Here, Austria managed to balance (lawful) support to Ukraine, EU solidarity in common external action as well as neutrality obligations under international customary law.

2) In allowing the transport of war material from other EU Member States through Austria towards Ukraine, the spirit of the Hague Convention (pursuant to Art. 5, the Hague Convention V) is violated. It needs to be stressed that the fact that no EU Member State qualifies as a belligerent party in the conflict and that no direct transport of war material from Austrian territory into Ukraine takes place has an attenuating effect. Nonetheless, this measure constitutes a violation of neutrality obligations under international law. In order to avoid such a violation, Austria would have been required to constructively abstain from the relevant legal basis, i.e., Council Decision (CFSP) 2022/339. Crucially, however, this decision established the above mentioned compromise between EU solidarity and neutrality concerns.

Restrictive measures:

3) Recent and accessible data suggests that Austria held 3% of the Bank of Russia's total foreign assets (approx. 17 billion USD). Pursuant to Council Decision (CFSP) 2022/335 of 28 February 2022, Austria effectively blocked these assets. Thus, Austria played a key role in the blocking of almost half of foreign Russian Central Bank assets by the EU and the G7. The 'freezing' of a belligerent's central bank assets has been identified as being in the 'grey area' of neutrality violations. This breach of the principle of impartiality increases with the impact on the military branch of the belligerent. Given the size of Austria, a blocking of 17,5 billion USD in reserves

seems to be of excessive magnitude, that arguably significantly impacts on Russia's capability of financing its military sector. As the degree of adverse military effects seems excessive, a pronounced violation of neutrality obligations under international law can be identified.

4) The most obvious and serious violation of neutrality obligations under international law concerns Austria's participation in the EU arms embargo against the Russian Federation. Pursuant to Arts. 7 and 9 of the Hague Convention V, reflecting international customary law, a neutral state may not impose an arms embargo on a belligerent party during an international armed conflict. At least since the drastic escalation of the Russian-Ukraine war, but arguably already since 2014, Austria's ongoing participation in the embargo blatantly clashes with this obligation under international law.

While executive actions in the realm of UN authorised sanctions, assistance or involvement measures are universally accepted to derogate neutrality, this is not generally recognised for the EU. In combination with the principle that a state may not unilaterally limit its obligations under international law, this paper objects to the purported conclusiveness of the apparent Austrian interpretation. According to the neutrality understanding of this paper, EU membership or full and active CFSP participation in response to the war cannot resolve violations under international neutrality law. Michael Schilchegger concluded that Austria's potential participation in an international armed conflict within the realm of CFSP without an UNSC authorisation would not only constitute a grave violation of Austria's neutrality obligations under international law, but even a violation of international law by all other EU Member States for not respecting the neutrality of Austria.¹⁸² While Austria's violations of neutrality obligations under international law is not of direct participation, e.g. belligerency, the above mentioned violations should, following the same logic, also constitute minor violations of all other participating EU Member States for not respecting Austria's neutrality obligations under international law.

It also needs to be mentioned that Austria carefully weighs the violating extent of every action. Up to now, Austria categorically declines the most serious violations of neutrality, such as: direct support with war material, the training of Ukrainian troops on Austrian soil or any other provision of Austrian territory for Ukrainian armed forces as well as the deployment of Austrian soldiers. Furthermore, it needs to be stressed that neutrality obligations under international law today remain vague and unprecise, which complicates full adherence. Moreover, Ambassador Tichy's conclusion that such minor violations can be regarded as negligible in the context of the most serious breaches of international law in the 21st Century by Russia seems convincing. With the invasion in Ukraine, the Russian Federation fundamentally violated the prohibition of

¹⁸² See: Schilchegger, *Neutralität nach Lissabon*, 2011, p. 12.

the use of force and the territorial integrity of the Ukraine, in the course of which most likely war crimes, crimes against humanity and perhaps even genocide were committed.

In addition, a constant constructive abstention of potentially neutrality violating CFSP measures in the context of the Russian-Ukraine War is contrary to the aims and goals of common external actions of the European Union, i.e., solidarity and loyalty. This imposes the difficult challenge on Austria to balance violations of international neutrality law and EU law. As 1) few third states seem to care about Austria's neutrality and its respective adherence to therefrom arising obligations and 2) the EU level has more every-day political relevance, Austria's tendency towards EU law seems reasonable.

This paper worked out the constitutional and international law framework of the concept of neutrality in the 21st Century and applied it to the case-study of Austria in the Russia-Ukraine War in order to work out potential violations of neutrality law. While constitutionally, no violations during the Russia-Ukraine war have been identified, this differs from an international law perspective. In order to fully comply with international law, Austria would have been required to constructively abstain from 1) the Council Decision (CFSP) 2022/339 on allowing the transport of war material through Austria towards Ukraine, 2) the Council Decision (CFSP) 2022/335 on the blocking of Russia's Central Bank assets of about 17,5 billion USD and 3) Council Decision (CFSP) 2014/512 on the arms embargo against the Russian Federation. The fact that Austria only chose to constructively abstain from Council Decision (CFSP) 2022/338 on the supply of war material to the Ukraine armed forces but not from the above-mentioned decisions demonstrates firstly, Austria's commitment to neutrality concerns under international law and secondly, its inconsistent application. The reason for the latter could be of political nature, as the direct or indirect supply of 'war material' sends a stronger signal of military involvement than the other measures.

As has been shown, the Art. 31 TEU, i.e., constructive abstention from CFSP decisions, may well balance EU solidarity and neutrality concerns under international law in the Russia-Ukraine War. On that basis, this paper argues that third states, like Russia, should have a legitimate expectation that Austria will constructively abstain from CFSP decisions that might violate international neutrality law. Ambassador Tichy's argument that third states have accepted by acquiescence Austria's EU membership and the obligations ensuing therefrom, disregards that this was done in light of leeway for adherence to neutrality obligations provided by i.a. the Irish clause and the tool for constructive abstention.

The Austrian practice in the course of the Russia-Ukraine War has shown that even in the context of serious violations of neutrality, such as the arms embargo, Austria will hardly ever make

use of constructive abstention from the respective CFSP decisions, thus showing third states that they cannot legitimately expect Austria to do so. With such practice, Austria credibly stripped off the last legal limitation of its neutrality within EU CFSP action.

This paper argues that this development, in combination with international neutrality violations in relation to the arms embargo, the freezing of assets and the transport of war material through Austria towards Ukraine, warrants the conclusion that the violation of Austria's neutrality reached a new quality. While the consequences of these actions remain unknown as of the time of writing, it might well be that third states actually do not mind.

Austria's current interpretation of neutrality is that of 'selectively derogated neutrality', that only applies when neither the UN nor the EU acts. The question however remains when this will ever be the case. In this context, I am inclined to update Franz Cede's metaphors of Austrian neutrality since the 1950ies.

With its policy of applying a 'selectively derogated neutrality' during the Russia-Ukraine War, Austria has underpinned its readiness to ignore neutrality obligations under international law in exchange for EU solidarity within CFSP. While I personally welcome this approach, especially as a response to the unjustified invasion of Ukraine by the Russian Federation, this interpretation of neutrality arguably is tantamount to a new level of violation of international neutrality law that further perforates Austria's status as a permanently neutral country.

When coupled with the generally recognised derogation of neutrality in the context of UN action, this leads to two substantial gaps in Austria's neutrality. This situation bears a striking resemblance to swiss cheese rather than a well-established legal concept. In addition to Cede's historical categorizations of Austria's neutrality concepts, such as the 'corset,' 'identity,' or 'sinatra doctrine,' I propose that the current interpretation of Austrian neutrality is to be referred to as the 'swiss-cheese doctrine.'

On the one hand, in the current geopolitical context of the Russian-Ukraine War and a paralysed UN Security Council, neutrality has proven to remain a relevant tool that may offer useful, additional strategies in complex international relations. Hence, solely UN derogated neutrality has proven to remain important. The well-functioning response of the EU in the Russian-Ukraine War and Austria's perforated pursuit of neutrality has shown, on the other hand, that within such a machinery, neutrality does hardly come into play and renders the Austrian 'swiss-cheese doctrine' rather pointless.

Neutrality is not a one-state policy, but must always be understood in an international context. As Austria repeatedly invokes the "hard core" of permanent neutrality, it deceives itself, its citizens, and the international community of states. Indeed, Austria may abstain from military

alliances such as NATO, direct military involvement in an international armed conflict as well as the establishment of foreign military bases on its territory. However, the legal capacity within the framework of the Common Foreign and Security Policy to circumvent any neutrality-related concerns under constitutional as well as international law, as long as they are compatible with UN law, renders even these fundamental tenets of Austrian neutrality legally non-viable.

To conclude, it has become evident that within CFSP action, Austrian neutrality is confined solely to a case-by-case political decision, thus imbuing its infringement with an entirely new dimension, or new quality. While neutrality violations in the Russian-Ukraine War are more than understandable and morally justifiable, given the atrocious context, such a status does not appear sustainable for an international law abiding country like Austria. This paper therefore suggests that future governments should put an end to this absurd, ongoing and burgeoning violation of international law and terminate the Austrian neutrality on the basis of the change in the geopolitical context over time.

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ANNEX

Interview with Ambassador Helmut Tichy

Ambassador Helmut Tichy currently holds the position of Head of the Legal Office of the Austrian Foreign Ministry. The interview was conducted via email from 26 July to 28 Jul 2023. Following, the interview in full quote.

Author/Interviewer: 26 July, Vienna

Sehr geehrter Herr Botschafter Tichy,

wie bereits im Mai/Juni in Ihrem Kurs "International Law: Practical Case Studies (Préalable Vorbereitung)" an der Diplomatischen Akademie Wien angesprochen, würde ich Sie gerne um Ihre Expertise zu folgenden neutralitätsrechtlichen Fragestellungen im Kontext des Russland-Ukraine Krieges ersuchen. Ich schreibe gerade an meiner Master-Arbeit zu diesem Thema.

Da die MA-Arbeit in Englisch verfasst wird, sind die folgenden Fragen in Englisch gestellt. Über jede Antwort, Hilfestellung, Empfehlung oder jeden Tipp würde ich mich sehr freuen!

Anbei finden Sie auch ein Word Dokument mit den identen Fragestellungen. Sie können mich auch jederzeit unter der Nummer [REDACTED] erreichen.

Vielen Dank für Ihre Bemühungen.

Mit freundlichen Grüßen,
Felix Müller

Ambassador Helmut Tichy/Interviewee: 27 July

Meine Antworten sh. bitte unten.

MfG Helmut Tichy

Author/Interviewer: 26 July, Vienna

Supply of War Material

It seems clear that Art. 6, Hague Convention XIII prohibits “the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power of (...) ammunition, or war material of any kind whatever.”

Though, the discussion on the definition of ‘war material’ is less clear. How exactly is ‘war material’ understood/defined for Austria? And on what grounds?

Ambassador Helmut Tichy/Interviewee: 27 July

Kriegsmaterialliste der EU, davon leicht abweichend auch KriegsmaterialVO aufgrund des KMG.

Author/Interviewer: 26 July, Vienna

Arms embargo

Non-UN-authorized restrictive measures on military goods and services, especially concerning arms embargos, against a belligerent party seem to violate neutrality obligations under international law on the basis of the Hague Convention V, Art. 7 and Art. 9.

In response to the illegal annexation of the Crimea by Russia, the EU implemented an arms embargo against the Russian Federation in 2014, which was constantly extended and is still in force. First, it is unclear and not generally recognized if the conflictual developments in 2014 already constituted an ‘international armed conflict’. Second, Ukraine only ratified the Hague Convention by May 2015, so more than a year after the beginning of the Crimea-crisis and almost a year after the EU’s arms embargo. This means that Austria would not necessarily have been bound by the obligations arising from the Hague Convention when it supported the respective CFSP decision. But as the arms embargo is still in place, Ukraine effectively became party to the Convention and an international armed conflict can be certainly assumed since the escalation of the Russia-Ukraine ‘conflict’ on 24 February 2022, Austria’s participation in this EU arms embargo now seems to seriously violate the above-mentioned neutrality provisions of the Hague Convention. Do you agree?

Ambassador Helmut Tichy/Interviewee: 27 July

Nein. Das Neutralitätsrecht gilt auch gewohnheitsrechtlich. Der Überfall auf die Krim war ein zwischenstaatlicher bewaffneter Konflikt.

Gemäß Art. 23j B-VG kommt die österr. Neutralität immer dann nicht zum Tragen, wenn die EU im Rahmen der GASP handelt, etwa durch Sanktionen.

Author/Interviewer: 26 July, Vienna

Freezing of State assets

While the freezing of private assets does not collide with international neutrality obligations, the freezing of about €300 billion in Russian central bank assets by the EU and the G7 arguably amounts to some ‘military importance’ for the belligerent party, the Russian Federation.

Austria’s participation in this restrictive group measure is, thus, tangent to violating obligations under international neutrality law. Or as Kirsten Schmalenbach puts it in the “grey area”¹⁸³ of violating neutrality obligations. Is Austria willingly exploiting grey areas in international law or is it certain that such practices do not violate neutrality obligations under international law?

Ambassador Helmut Tichy/Interviewee: 27 July

Nein, sh. oben. EU-Ausnahme von der Neutralität.

Author/Interviewer: 26 July, Vienna

Justice

Are violations of international (neutrality) law (morally) justifiable? When pursued in reaction to the most severe violations of international law (crime of aggression, war crimes, crimes against humanity, genocide (??))?

Ambassador Helmut Tichy/Interviewee: 27 July

Ja.

¹⁸³ Kirsten Schmalenbach: Unionsrecht und Neutralität. In: Griller et al. (Eds.): 20 Jahre EU-Mitgliedschaft Österreichs. Auswirkungen des Unionsrechts auf die nationale Rechtsordnung aus rechtswissenschaftlicher, politikwissenschaftlicher und wirtschaftswissenschaftlicher Sicht. Vienna, 2015, p. 303.

Author/Interviewer: 26 July, Vienna

Termination of Neutrality (International Law)

While most legal scholars agree that Austria may terminate its neutrality unilaterally, therefore without consent and agreement of other states, some scholars argue that mere notification does not suffice. In such a scenario, Austria's abolishment of neutrality could be objected by other states. Could Austrian neutrality be easily terminated under international law?

Ambassador Helmut Tichy/Interviewee: 27 July

Ja. Einsprüche wären irrelevant.

Author/Interviewer: 26 July, Vienna

European Peace Facility

While Austria fully participates (according to its GNI) in the European Peace Facility, in the realm of military support for Ukraine, Austria only finances measures of 'non-lethal force'.

The Ukraine Support Tracker of the Kiel Institute for the World Economy stresses that there is "no systemic data collection" of the EPF and the exact procedure of the fund "remains unclear due to a lack of official information."¹⁸⁴

Could you provide some insights to concrete support measures for Ukraine that were co-financed by Austria under the EPF?

Ambassador Helmut Tichy/Interviewee: 27 July

Nein.

Author/Interviewer: 26 July, Vienna

Transport of military material

Art. 5 in reference to Art. 2 of the Hague Convention V, prohibits the movement of troops or transport of "munitions of war or supplies" of belligerents through neutral territory. While other EU-countries do not qualify as belligerents in the Russia-Ukraine War, the spirit of the Hague Convention is arguably¹⁸⁵ violated by the transport of weapons from EU-countries towards Ukraine through Austria. As an attenuating factor it can be said that weapons are never transported directly from Austrian territory in to the Ukraine. Still, the question needs to be posed if Austria here simply accepts (minor) violations of neutrality obligations for solidarity policy on EU-level (and with Ukraine)?

Ambassador Helmut Tichy/Interviewee: 27 July

Sh. GASP-Beschluss 339/2022. Waffentransit ist von der EU ermächtigt und daher neutralitätsrechtlich irrelevant.

Author/Interviewer: 27 July, Vienna

Sehr geehrter Herr Botschafter Tichy!

Herzlichen Dank für Ihre raschen und präzisen Antworten!

Wenn ich Sie richtig verstehe, durchbricht Art. 23j B-VG also nicht nur die verfassungsrechtliche Ebene der österreichischen Neutralität, sondern auch die diesbzgl. völkerrechtlichen Verpflichtungen Österreichs.

¹⁸⁴ See: https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/-ifw/Kiel_Working_Paper/2022/KWP_2218/KWP_2218_Trebesch_et_al_Ukraine_Support_Tracker.pdf (p.11).

¹⁸⁵ See: Ralph Janik: <https://www.wienerzeitung.at/meinung/gastkommentare/2165317-Was-von-der-Neutralitaet-bleibt.html>

Durch die Notifikation des Neutralitätsrechts an die internationale Staatengemeinschaft entstand ein Gewebe an rechtlichen Bindungen der Neutralität mit den einzelnen Staaten. Wenn die oben genannten Szenarien also im Rahmen der GASP gedeckt sind, heißt das, meinem Verständnis nach, dass Art. 23j B-VG völkerrechtliche Verpflichtungen derogiert. Eigentlich sollte dies aber nicht möglich sein, da Staaten ihre völkerrechtlichen Verpflichtungen nicht selbst limitieren dürfen.

Für eine Erklärung dieses Aspekts wäre ich Ihnen sehr verbunden.

Mit freundlichen Grüßen,
Felix Müller

Ambassador Helmut Tichy/Interviewee: 27 July

Unsere EU-Mitgliedschaft und unsere daraus erwachsenden (auch neutralitätseinschränkenden) Verpflichtungen sind der internationalen Gemeinschaft bekannt und wurden von dieser akzeptiert.

MfG Helmut Tichy

Author/Interviewer: 28 July, Vienna

Sehr geehrter Herr Botschafter Tichy,

vielen Dank! Bitte gestatten Sie mir noch eine letzte Frage:

Im Kapitel der EUV zur GASP findet sich Spielraum zur Wahrung neutralitätsrechtlicher Bedenken. Hätten Drittstaaten nicht eine berechtigte Erwartung, dass sich Österreich bei neutralitätsbedenklichen GASP-Entscheidungen konstruktiv enthält? (Da zwar die EU-Mitgliedschaft und die damit einhergehenden neutralitätseinschränkenden Verpflichtungen bekannt sind, aber die völkerrechtlichen Neutralitätsverpflichtungen dadurch doch nicht verschwinden.)

Andernfalls würde das bedeuten, dass Österreich keinerlei neutralitätsrechtlicher (auf völkerrechtlicher Ebene) Grenzen im Rahmen der GASP unterliegt, solange dies mit VN-Recht konform ist.

Da sich in der österreichischen Praxis im Zuge des Russland-Ukraine Krieges seit 2014 gezeigt hat, dass sich Österreich auch in kritischen neutralitätsverletzenden Fällen wie z.B. dem Waffenembargo (mit der einen Ausnahme der Bereitstellung Kriegsmaterials tödlicher Gewalt) nicht auf die Möglichkeit der Wahrung der völkerrechtlichen Neutralitätsverpflichtungen bezogen hat, könnte man argumentieren, dass im Zuge dieses Krieges die völkerrechtliche Verletzung der Neutralitätsverletzungen Österreichs eine neue Qualität erreicht hat.

Da Drittstaaten praktisch erfahren haben, dass es ihrerseits keine berechtigte Erwartung gibt, dass sich Österreich um konstruktive Enthaltung (und damit um Einhaltung der Neutralitätsverpflichtungen) bemüht.

Womit nicht von einer immerwährenden Neutralität Österreichs, sondern höchstens von Bündnisfreiheit (auch fraglich nach EU-Beitritt) gesprochen werden kann.

Mit freundlichen Grüßen,
Felix Müller

Ambassador Helmut Tichy/Interviewee: 28 July

Kluge Frage, aber nein: Ich sehe keine solche berechtigte Erwartung von Drittstaaten und keine Neutralitätsverletzung Österreichs. Wir sind immer dann neutral (und nicht bündnisfrei), wenn

die VN oder die EU nicht handeln, so etwa 2003 im Irakkrieg (anders als 1990). Wir haben eben eine punktuell derogierte Neutralität.

MfG Helmut Tichy

Author/Interviewer: 28 July, Vienna

Sehr geehrter Herr Botschafter,

alles klar, herzlichen Dank für Ihre Hilfe! Dürfte ich Sie zu den besprochenen Aspekten auch zitieren?

Mit freundlichen Grüßen,
Felix Müller

Ambassador Helmut Tichy/Interviewee: 28 July

Sehr gern! War mir ein Vergnügen.

Ist nicht nur meine Meinung, sondern die österr. Position.

MfG Helmut Tichy