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How to Construe a Myth: Neutrality Within the United Nations System Under Special Consideration of the Austrian Case

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Abstract

In the 19th century neutrality was a highly appreciated concept. In the 20th century it widely lost relevance and in principle it should be incompatible with UN membership. However, also under the UN system, some States have opted for neutrality and it can be argued that there is still space for this status within the universal peace order. In fact, this peace order is far from perfect. There are several lacunae in the prohibition of the use of force and this concept is open to different interpretations. New threats, such as international terrorism, are emerging that could threaten the absolute prohibition of the use of force. It is contended here that neutrals could play an important role when it comes to finding an interpretation of this prohibition that best could reconcile the goals of peace and security with the overall—still imperfect—structure of the UN system. These questions are analysed with primary reference to Austrian neutrality which on the one hand seems obsolete but on the other is forcefully looking for a new meaning.

I. Introduction

1. Neutrality is a concept once much discussed in international law doctrine but now more or less relegated to the margins. At the same time, a somewhat

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odd situation has materialized: While even larger manuals of international law often mention this concept only accidentally, at the same time they do not declare it obsolete altogether, although its concrete role in modern international law remains widely uncertain. On the one hand, the question must be posed whether neutrality does make any sense or is even possible in the UN peace order. On the other, we have a small number of States that stick to this concept and are even celebrating it. For some States, like Austria and Switzerland, this has historic reasons and over the years these States have become so endeared with this status that they are trying hard to attribute it a new relevance. Other States, even in the present day, are considering adopting this status anew, as in the case of the Ukraine. On the whole, these developments warrant a fresh look at neutrality from a perspective of the 21st century. To this end, particular attention will be dedicated to the case of Austria. It will be shown that this country's neutrality status came into being at a time when the heyday of neutrality was long over, but nonetheless it has been a valuable instrument for Austria to overcome the Cold War divide in her quest to regain full sovereignty. Once the Cold War suddenly came to an end, the first reaction was that in parallel neutrality had become obsolete. However, in the meantime, neutrality had become so much interwoven within Austrian identity—also due to the fact that previously politicians had to sell neutrality to the people not as a burden imposed by foreign powers but rather as the result of a free choice taken by this country to optimize the lot of the Austrian population—that the option of abandoning neutrality was no longer available. As a consequence, justifications for upholding neutrality were sought. The respective attempts were often detached from reality and could hardly withstand closer scrutiny. Over the years, however, the international setting in respect to the prohibition of the use of force—to which the concept of neutrality is strictly correlated—also underwent profound changes. Many of the hopes nurtured in the founding years at the end of WWII did not materialize while it became clear that new challenges to peace had come up, this time at the intra-State level, from non–State actors. Against this background and chiefly concentrating on the case of Austria it will be shown that neutrality is not totally outmoded in modern international law. It has survived in the niches of the enormous international law apparatus awaiting a come-back. Long derided by many as a relic of the past, as a myth out of touch with present-day legal reality, it is now back with specific relevance. It will be shown that the concept of neutrality has undergone a metamorphosis not fully appreciated in international law doctrine: What was originally seen as an alien element in a

new world order pretending to be perfect has transformed itself in a cornerstone of a real world order with many imperfections.

II. The history of the law of neutrality

2. As is well-known, neutrality is a concept that was at its prime in the 19th century,[1] in an era in which absolute sovereignty and the ensuing unconditional right to go to war set their mark on international relations. Notwithstanding the fact that going to war constituted a sovereign right, the desire for peace was, of course, deeply felt. To this end, simple or ordinary neutrality could constitute a pragmatic option in the face of an actual conflict. Manifold reasons could prompt a government to opt for neutrality: the consciousness of its own weakness, sympathy with one of the conflicting parties without having the power to offer sufficient assistance, sympathy with both parties perhaps associated with the hope of continuing good relations (also of a commercial nature) with both, or simply the desire to not be drawn into a conflict. Following such considerations, neutrality was a very wide-spread phenomenon in the 19th century with governments deciding from case to case what position to adopt in the face of ongoing conflict. Permanent neutrality, to the contrary, is future-oriented and typically declared (or recognized) in peace-time in order to obtain a higher degree of protection.

1 It is also known that neutrality as a concept is much older. It is mentioned already in Hugo Grotius's The Rights of War and Peace, vol. III (Richard Tuck (ed.), Indianapolis: Liberty Fund (2008)), Ch. XVII: Of Neuters in War: "[. . .] it is the Duty of those that are not engaged in the War, to sit still and do nothing, that may strengthen him that prosecutes an Ill Cause, or to hinder the Motions of him that hath Justice on this Side [. . .]". Cited according to Paul Seger, The Law of Neutrality, in: Andrew Clapham/Paola Gaeta (eds.), International Law in Armed Conflict (2014), 248-270 (250).

In 1780, at the initiative of Russia, the First League of Armed Neutrality was founded as an attempt to avoid prize taking by the Royal Navy during the American War of Independence against ships from other European countries suspected of contraband. Notwithstanding the overwhelming military superiority of the Royal Navy this agreement permitted free commerce, at least to some extent. It was, however, less the abstract recognition of the concept of neutrality that provided some protection than the (relative) military strength of this alliance that comprised i.a. Austria, Denmark, Sweden, and Prussia. The Second League of Armed Neutrality of 1800 was again initiated by Russia and directed against the Royal Navy, which attempted to impede contraband with France at next to any price. This agreement was less successful than the First League simply because the Royal Navy managed to impose its power (in particular against Denmark, in the first battle of Copenhagen of 1801). Nonetheless, the idea of neutrality has gained further hold.

Permanent neutrality should leave no doubt as to the future attitude of the neutral and therefore provide more far-reaching assurances. It should provide sort of a re-enforced, constitutional guarantee permitting all parties of a potential future conflict to anticipate well in advance the attitude other parties would take. As far as this situation could be qualified at all as a legal relationship it would have to be founded on the principle of good faith, on the prohibition of *venire contra factum proprium*.[2] Of course, in an international legal environment in which the recourse to war was a natural attribute of sovereignty, all these assurances based primarily on considerations of political expediency provided only limited guarantees, as in the background the question of political and military power always loomed large.

3. Therefore, in the past, three different alternatives for preserving peace were open to States: Stronger powers could protect themselves by further building up their military strength, smaller States by forging alliances, and for the weakest neutrality could become an interesting option: These States promised not to join the ranks of the (actual or potential) enemy at the price of being left alone. While the first two alternatives were of a genuinely political nature, the third one had some legal characteristics that could be further strengthened by an explicit recognition of the status of neutrality by other States (as was the case with Switzerland at the Vienna Congress of 1815). These approaches to achieve peace could also be combined and thereby be further strengthened, in particular if neutrals agreed on mutual defense as was the case in the First and in the Second League of Armed Defense of 1780 and 1800.[3] On the whole, therefore, a closer look at the situation in the 19th century reveals a picture of neutrality that is less glorious than usually portrayed. If this period's understanding of neutrality has been somewhat exalted, this may be justified only under the premise that a free sovereign right to go to war had created a situation in which any expedient to avoid being involved in a war was eagerly taken up by most States in order to escape this Hobbesian situation. This situation seemed to change only in 1907 when neutrality obtained recognition by two multilateral treaties, the Hague Convention (V) on the Rights and Duties of Neutral Powers in War on Land and the Hague Convention (XIII) on the Rights and Duties of Neutral Powers in Naval War.

2 In this sense, this situation could also be qualified as an "estoppel" construction. See on this concept Jörg P. Müller, Vertrauensschutz im Völkerrecht, Duncker & Humblot: Berlin (1971).

3 See above n.1.

4. It seemed that from then on neutrality could become a fully-fledged alternative to the previous situation where any State was a possible—and legitimate—target of another State's sovereign decision to go to war, as a simple "continuation of policy by other means".[4] In fact, these two conventions were in many ways ground-breaking as they imposed specific rights and obligations on all parties making sure that neutrals would be spared from any conflict involving other parties provided they respected their obligations. In this context, neutrals had not only the passive duty to abstain from any participation in a foreign conflict but actively to prevent the belligerents from using neutral territory and to disarm and detain any belligerent military personnel and equipment discarded on neutral territory.[5]

5. In reality, however, developments proved to go different ways: At the beginning of the 20th century sustained efforts were under way to reign in war. Step by step States lost their sovereign right to freely go to war. It was in fact at the same conference in The Hague in 1907 that the first important limitations to *jus ad bellum* were introduced.[6] Many more followed in the aftermath,[7] culminating finally in Article 2, para.4 of the UN Charter that outlawed not only (formal) war but the use of force in international relations in general.

6. It has further to be considered that the two conventions on neutrality of 1907 obtained only a small number of ratifications (Convention V has 35 State Parties, the last ratification was by Ethiopia in 1935; Convention XIII

4 See Carl von Clausewitz, On War, transl. Colonel James John Graham. New and Revised edition with Introduction and Notes by Colonel Frederic Natusch Maude, in: Three Volumes (London: Kegan Paul, Trench, Trubner & C., 1918). Vol. 1, chap. I: What is war?

5 See Ch. II Hague Convention (V), which stated in a peremptory tone that their territory was inviolable.

6 Thus, according to the Hague Convention III relative to the Opening of Hostilities of 18 October 1907, hostilities could not be opened before a declaration of war was issued; according to the Hague Convention II respecting the Limitation of the Employment of Force for Recovery of Contract Debt of the same day the recourse to force to recover contract debt was prohibited.

7 See only the so-called Bryan treaties concluded by the US in 1913/1914 that made hostilities and declarations of war conditional upon a prior conciliation attempt, the procedural limitations introduced by the League of Nations (foreseeing in Article 12 a "cooling-off" period of three months and finally the absolute outlawing of war by the Briand-Kellog Pact of 1928. See Hanspeter Neuhold, The Law of International Conflict, (Brill: Leiden/Boston 2015), 19.

has 35 State Parties, the last two ratifications were in 1935 by Ethiopia and in 1936 by Belarus).

7. No substantial revision of these texts has been subsequently achieved, so that there has been a halt in the normative development of the concept of neutrality for over a century. The profound changes in warfare that have occurred in the meantime found no reflection in the text of these treaties. For example, there are no rules on neutrality in air warfare in place.[8]

8. Due to very little practice on neutrality in the subsequent period—the League of Nations era being rather contradictory and ambiguous in this regard[9]—and a normative setting that, starting at the latest in 1945, was totally inimical towards neutrality, it can hardly be assumed that this branch of law would have experienced significant development by customary international law. If at all, this may have happened only in relation to very marginal aspects of the law of neutrality. And actual international practice has shown that not even this rather limited set of rules codified in 1907 got much respect in the ensuing wars: Belgium[10] and Luxemburg which were permanent neutral States were invaded both in WWI and in WWII by Germany; Denmark's neutrality was respected by Germany in WWI but not in WWII. Only Switzerland's permanent neutrality was fully respected during these wars. However, commercial relations and a strong Swiss defense capability, further sustained by the particularities of the geographic location, surely contributed much to this result.

9. Thus the sober conclusion at this point of the examination must be that in the history of international law neutrality has had some appeal especially in the era when unrestricted *jus ad bellum* was in force as it was associated with the—weak—promise of a preservation of peace, but eventually this goal was

8 Although there have been—unsuccessful—attempts to this end in 1923.

9 First, it seemed that neutrality would be irreconcilable with membership in the League of Nations and, in particular, with Article 16 of the Covenant of the League of Nations which foresaw no exclusion from the sanctions mechanism for neutral states. As a consequence, Switzerland had to find a special agreement with the Council of the League of Nations in order to be released from the ensuing duties. However, when sanctions were imposed against Italy following her aggression against Ethiopia, Switzerland recognized not to be able to participate and to remain neutral at the same time. In 1938 Switzerland returned to full neutrality and this was eventually accepted by the League of Nations in 1939. See Alfred Verdross, Austria's Permanent Neutrality and the United Nations Organization, in: 50 AJIL (1955), 61-68 (65).

10 On the Belgian neutrality see Frederik Dhondt, Neutralité permanente, interprétations mutantes: la neutralité belge à travers trois traités de juristes, in: 86 Revue d'Histoire du Droit (2018), 188-214.

obtained by military and political might. Only in 1907 did a hard rule transforming neutrality in a real peace instrument seem to come into being, but by this time the attention of the State community had already shifted towards more effective instruments. WWII again changed the overall setting, and when Austria opted for neutrality in 1955 it was under very particular circumstances when no other route seemed to be open to regain full sovereignty.

III. The coming into being of Austrian neutrality

10. At the beginning of the 1950s Austria was occupied both by troops from the East and the West. In those days the Cold War reached its first height and Austria held poor cards for regaining full sovereignty without making concessions to all sides. To this end, offering "neutrality" was an ideal gambit. Politically it was fairly clear what was to be intended by this promise; it should grant a sort of equidistance between the conflicting parties. As to the legal implications of the option of permanent neutrality, it can be doubted whether they were fully clear to the Austrian government and the Austrian Parliament.

11. Austria had come rather late to the concept of neutrality—at a moment in which, as shown, there was doubt what remained in force of its legal elements. Interestingly, however, it was not the first time that neutrality had come to be an option in Austrian politics. In fact, already towards the end of WWI this option had become a possibility that was, however, eventually discarded.[11]

12. The Austrian governmental delegation negotiating in Moscow in April 1955 the future State Treaty, by which Austria should regain full sovereignty, promised "internationally to practice perpetually a neutrality of the type maintained by Switzerland".[12] The State Treaty concluded one month later, on 15 May 1955, did not mention neutrality at all. Neutrality was introduced into the Austrian legal order only more than five months later, by the Federal Constitutional Law of 26 October 1955, which no longer referred to Swiss neutrality but tried to specify the content of neutrality along the lines devised by the Hague conventions of 1955:

> Constitutional Law on the Neutrality of Austria (26 October 1955)
> Article I

11 See Heribert F. Köck, A Permanently Neutral State in the Security Council, in: 6 Cornell Int'l L.J. (1972-1973), 137, 141, referring to Stephan Verosta, Die internationale Stellung der Republik Österreich seit 1918, in: Institut für Österreichkunde (ed.), 1918-1968: Österreich—50 Jahre Republik, 59.

12 Moscow Memorandum of 15 April 1955.

> (1) For the purpose of the lasting maintenance of her independence externally, and for the purpose of the inviolability of her territory, Austria declares of her own free will her perpetual neutrality. Austria will maintain and defend this with all means at her disposal.
> (2) For the securing of this purpose in all future times Austria will not join any military alliances and will not permit the establishment of any foreign military bases on her territory.

13. The essential elements of this specification of Austrian neutrality are the following:

- Austria declares her permanent neutrality "at her own free will";
- Austria will maintain and defend this with all means at her disposal;
- Austria will not join any military alliances "in all future times";
- Austria will not permit the establishment of any foreign military bases on her territory.

At first look these promises might reflect a clear programme, but nonetheless in the following years each of these elements has given rise to intense discussions.

III.A. Austria has adopted neutrality at her own free will

14. This is an often heard pivotal mantra of Austrian politics and it is quintessential for the definition of modern Austrian identity. It is intended to bear out that Austria has not been "neutralised". Austrian neutrality is not the result of an octroy. Austria has not accepted neutrality in a situation of weakened sovereignty and has not been conceded a sort of sovereignty of a lesser degree, a sovereignty burdened by obligations of neutrality. It was rather freely adopted by a national constitutional law of 26 October 1955 that was subsequently given international relevance by the notification of this act to all States with which Austria had diplomatic relations at that time. Many of these States directly or implicitly recognized this neutrality; a few States did not respond.[13] As a consequence, Austria should not be considered a neutralized

13 It may be of some interest to note that the United States was the main architect of this construction whose primary aim was easy to identify: Austria's sovereignty should not be limited by obligations towards the Soviet Union and no precedence should be created as to the future settlement of the German case. The US ambassador to Germany, John Foster Dulles, is reported to have told the following to his Russian counterpart: "If Austria wants to become a Switzerland, the U.S. will not

country, i.e. a country whose neutral status cannot be revoked without the consent of all States having accepted it. So the official characterization of the foundations of Austria's neutrality went.

15. Upon closer examination this conception does not appear to be really convincing. In fact, at the roots of Austrian neutrality surely stands the Moscow Memorandum of 15 April 1955 which unmistakably contains a pledge to permanent neutrality.

16. Official Austrian doctrine characterizes this pledge as a gentlemen's agreement—as a promise given by the members of the Austrian delegation in their function as politicians (and not as members of government) to endeavour to have Austria officially accept neutrality.

17. This position does not, however, truly stand up to facts and reason. Why should the Soviet Union content itself with a promise by politicians who happen to be members of government, and withdraw their troops on this basis alone from Austria? If this were the case no formalisation of the consent in the form it happened in the Moscow Memorandum would have been necessary. There can be no doubt that the members of the Austrian delegation were able to assume international law obligations for their country.[14]

18. Furthermore it is hard to see what was to be gained even in the case the Austrian official version were accepted. In fact, assuming, as the Austrian government does, that by the notification of the Austrian law on neutrality and the ensuing recognition of this neutrality by the addressees of this notification Austrian neutrality should have gained international legal status, again a legal bond would have been created. It is unfathomable what should be the difference between neutrality obligations accepted via a treaty and obligations of such a kind resulting from unilateral acts if also in the latter case the creation of a legal bond was intended. Why should the first case be seen as resulting in a—unwanted—neutralization, the second merely in a—positively connoted—international guarantee?

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stand in the way, but this should not be imposed." See Gerald Stourzh, From Vienna to Chicago and Back: Essays on Intellectual History and Political thought in Europe and America (Chicago University Press: Chicago 2010), 161.

14 This was surely the case for the head of the Austrian government, Chancellor Julius Raab who was also present in Moscow and signed the Moscow Memorandum. As is well known, according to the Vienna Convention on the Law of Treaties (VCLT), such a full-powers presumption is also now in force for the Foreign Minister. This was, however, not the case in 1955, as the VCLT entered into force only in 1980 and this specific provision, most probably, cannot be seen as an expression of customary international law.

19. It is apparent that the underlying intention of the Austrian contention is the desire to keep in command of the effects of neutrality and also to pursue a political agenda. Thus, throughout the history of Austrian neutrality the intent was clearly discernible: to maximize the benefits resulting from this status for this country and to minimize the burdens. So it might be assumed that the limitation of sovereignty that goes naturally hand-in-hand with the assumption of neutrality obligations is easier to bear if expressed towards a larger number of States. However, there can be no doubt that the Soviet Union (Russia) remains the State with the most pronounced interest in this status. Furthermore, it might be argued that it is easier to denounce an obligation towards a series of States with only weak interests in the preservation of this status than to withdraw from an obligation towards one (powerful) State with a rather strong interest of this kind. And it was actually the case that in Austria the assumption that this country could easily end the status of neutrality by *contrarius actus*, i.e. by notifying an act expressing such a will to all countries that originally accepted this country's neutrality, is regularly asserted. Again, this assumption also does not withstand closer scrutiny. It is hard to see why an international obligation could be simply terminated by the unilateral expression of such a will. While Article 56 of the VCLT acknowledges a denunciation of treaties, this right is limited to situations where it is established that the parties intended to admit such a possibility or where it may be implied by the nature of the treaty. This provision expresses a clear *favor contractus* and there is no reason why different considerations should apply to obligations created by reciprocal unilateral declarations. If any legal significance is to be attributed to the Austrian declaration of neutrality, no element can be found that would award the Austrian government a right to withdraw from these obligations at will.

III.B. Austria will maintain and defend this with all means at her disposal

20. This promise is a direct explication of the duties resulting from the Hague Conventions, in particular of Article 5 of Hague Convention (V) 1907. As a result, the Austrian government has always affirmed that Austrian neutrality has to be an armed neutrality. While practice did not fully live up to this promise (Austrian spending on military was always comparatively low)[15] Austria never left any doubt as to her formal commitment to this obligation.

15 For example, in 2015 world-wide spending on military amounted at 2,3% of the GDP (https://de.statista.com/statistik/daten/studie/150664/umfrage/anteil-der-mili

III.C. Promise not to join any military alliances "in all future times" and not to permit the establishment of any foreign military bases on her territory

21. Perhaps these promises were and continue to be the most delicate of all. First of all, the question arises here, what is a military alliance? This question can hardly be answered out of context with the specific international situation. As portrayed above, in the past neutrals well could form alliances for reciprocal defence. The obligations here to be discussed are not even mentioned in the Hague Convention (V) 1907. Only indirectly could they be derived from this document if it is assumed that a permanently neutral State has to take care already in peace time to be able to respect its obligations as a neutral in war time. In particular, reference is here to be made to Article 2 of Convention V (prohibition to conduct foreign troops through the territory of a neutral State), to Article 8 of Convention XIII (obligation of the neutral to employ the means at its disposal to prevent the fitting-out or arming of any vessel within its jurisdiction which it has reason to believe is intended to participate in war operation), to Article 9, para.2 of Convention V as well as to Article 9, para.1 of Convention XIII requiring reciprocity for restrictive measures. At a closer look, however, this assumption is again not really convincing. In fact, according to both conventions, neutrals do not only have the right to defend their neutrality but also the duty to do so.[16] It is hard to understand why a neutral should not be allowed to enter into an alliance that would enable it to effectively exercise its inherent right to self-defence and to defend thereby also its neutral status.

22. Of course, on the basis of these two conventions alone, as such, military alliances and the acceptance of foreign military bases would be problematic for a neutral State. But, as already mentioned, in the background of the Hague Conventions there was a completely different international situation. These conventions were the expression of an attempt to overcome a situation characterized by an unfettered right to go to war, as was in place in the 19th century (and, ironically, most probably no longer when this convention was agreed). According to the philosophy characterizing this era, military alliances could hardly ever be characterized as peace instruments. The preservation of

taerausgaben-am-bip-ausgewaehlter-laender/) while Austria spent 0,7% of its GDP on the military (see https://de.statista.com/statistik/daten/studie/300314/umfrage/anteil-der-militaerausgaben-am-bruttoinlandsprodukt-in-oesterreich/).

16 See Article 5 Convention V, Article 8 Convention XIII.

peace was, if at all, only one side of the coin, with the use of these alliances as an instrument to go to war remaining always an option, often even the prevailing one.

23. Conversely, military alliances formed after 1945 have a profoundly different nature, as they lack any offensive nature; otherwise they would be contrary to UN law. Their main aim is a defensive one and in the last decades some of these alliances have become active promotors of peace. At is seems, the drafters of the Austrian constitutional law on neutrality of 26 October 1955 had the older, pre-WWI type of alliance in mind when they declared them as incompatible with neutrality. The best—and most contentious—example is that of NATO.

24. At least in the last decades it was potential NATO membership that gave rise to discussions about the meaning and the extent of Austrian neutrality.

25. There can be no doubt that NATO was and continues to be primarily a defence agreement, even though on the one hand this institution developed further and on the other hand it has engaged in activities to put its very characteristics as a defence organization into doubt. As to the elements that contributed to its further development it can be said that they profoundly changed this organization's face, bringing it ever closer to the United Nation's main peace-guaranteeing functions.

26. Since the summits of Madrid 1997, Washington 1999, and Prague 2002, in the "new NATO" peace operations and crisis management for the UN and the OECD have become paramount.[17] Already Article 2 of the NATO treaty emphasizes that "[t]he Parties will contribute toward the further development of peaceful and friendly international relations [. . .]". According to Article 5 of the same treaty in case of an armed attack against one or more of the parties it is for each party to decide which action they will "deem necessary" in order to meet their obligation of mutual assistance.

27. Several neutral States, such as Ireland, Sweden, Finland, Malta, Switzerland, and also Austria, are cooperating actively with NATO within the "partnership for peace".[18]

17 See Gunther Hauser, Das europäische Sicherheits- und Verteidigungssystem und seine Akteure (2008), 22.

18 At the moment, 22 European and Asian States that are not members of NATO are members of this "partnership for peace" with NATO.

28. It is probably no longer possible to distinguish neatly between classical defence agreements to which neutrals traditionally could not adhere and systems of collective security, the most prominent being the UN. In this context it must not be forgotten that this latter system finds its roots in a defence agreement against fascist dictatorship in Europe and in Japan.[19]

29. At the same time, however, it cannot be denied that some of this organization's activities of the last decades stood at odds with UN principles. In this context reference has to be made to made, first of all, to NATO intervention in Kosovo in 1999. While most probably necessary on humanitarian grounds, in order to stop further massacres it was not authorized by the UN Security Council and constituted therefore an illegal "humanitarian intervention".[20] Intense discussion also came up as to the question whether NATO had exceeded the mandate given by SC Res. 1973 (2011) when intervening in Libya. It was argued that this resolution, while being broadly drafted to allow the use of all necessary means to protect civilians and civilian-populated areas against a threat of attack, did not give permission to regime change as the Operation Unified Protector eventually led up to.[21]

30. To sum up it could be argued that 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. It could even be argued that assistance of neutrals to other members of the defence agreement is compatible with UN law as this constitutes nothing other than an inherent sovereign right additionally confirmed by Article 51 of the UN Charter. Furthermore, neutrals would be under a qualified obligation to make sure that all activities carried out on the basis of the defence agreement are in strict conformity with UN law.

19 See Helmut Türk, Österreich im Spannungsfeld von Neutralität und Kollektiver Sicherheit (1997), 26.

20 See Peter Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal, in: 12 EJIL (3/2001), 437-467; idem, R2P and Humanitarian Intervention in a Historical Perspective", in: Peter Hilpold (ed.), The Responsibility to Protect (Brill/Martinus Nijhoff: Leiden/Boston 2015), 60-122.

21 See Christine Gray, International Law and the Use of Force (OUP: Oxford, 4th edition 2018), 377. See also Natalino Ronzitti, Intervento in Libia, cosa è permesso e cosa no, in: Affari internazionali (20 March 2011), (https://www.affarinternazionali.it/2011/03/intervento-in-libia-cosa-e-permesso-e-cosa-no/ (last retrieved on 18 December 2018)) and Christian Henderson, The Use of Force and International Law (CUP: Cambridge 2018), 137.

IV. The development of Austrian neutrality

31. The development of Austrian neutrality is not a linear one and the many turns this process has taken can be seen on the one hand as proof to the fact that the concept of neutrality is strongly conditioned by the political environment where it is set and, on the other hand, as a demonstration of how sparse the hard legal norms are—if they exist at all—that should constitute their legal backbone.

IV.A. The establishment of Austria's neutrality and the discussion in the immediate aftermath (1955/1956)

32. As will be shown below, in this period the discussion about Austrian neutrality mainly concerned this country's position within the UN system, and therefore essentially the question whether and, respectively, to what extent neutrality could be reconciled with the system of collective security created by UN legal order.

IV.B. An attitude of negligence (1956-1967)

33. After Austria regained full sovereignty, the neutrality issue passed to the background. Austria had to find its place in the State community and potentially a larger number of options were open to this country. In the first years, even EEC membership was a realistic option and the reasons why this aspiration eventually foundered had nothing to do with this country's neutral status.[22] The prevailing opinion in Austria was that this country had an autonomous right to assess the duties flowing out of its autonomous status—a somewhat awkward opinion if a legal nature should be attributed to the concept of neutrality.[23] While the lack of a clear international legal setting for

22 As is well known, Austria's attempt to join the EEC at this early stage was countered by Italy in the early 1960s due to the growing tensions between these two countries over South Tyrol. Only in the late 1960s, when an agreement on this subject was reached, did Italy drop its resistance against Austria's EEC membership. At this time, however, Austria's politics was no longer in the mood to join the EEC. See Rolf Steiniger, Die Südtirolfrage (https://www.uibk.ac.at/zeitgeschichte/zis/stirol.html (last visited on 15 June 2017)).

23 See Thomas Desch, Neutralität vs. kollektive Sicherheit, in: Waldemar Hummer (ed.), Staatsvertrag und immerwährende Neutralität (2007), 215-241 (223).

neutrality gave some plausibility to this approach, this attitude seemed not to bode well for the sustainability of neutrality as a legal concept. Again, however, things developed differently than expected.[24]

IV.C. Exaggeration (1967-1989)

34. The escalation of the Cold War as a consequence of the war in Indochina also had repercussions on the neutrality discussion. The virtues of neutrality were exalted and from this situation far-reaching legal obligations were derived.[25] Most influential became the Swiss neutrality doctrine which reached at that time a point of extreme exaggeration: Neutrality had become the absolute State doctrine and practically any question of foreign policy came to be measured against this overreaching concept.[26] It was asserted that the status of permanent neutrality exerted far-reaching "advanced effects" ("Vorwirkungen") according to which any foreign policy measure and any internal act having consequences in the field of foreign policy should be assessed as to its compatibility even with future, potential, neutrality questions. The consequence was that neutrality became the overall imperative for next to any governmental action in the field of foreign policy as it could never be excluded that foreign acts should impinge on neutrality. This attitude translated into extreme prudence in foreign policy, in particular as far as superpowers' interests came into play. As recent public choice studies have shown, however, this policy also served particular interests at the internal level for which neutrality was nothing more than a pretext.[27] Over the years, however, anti-

24 It may be interesting to note that neither did neutrality fit well with Soviet Communism, at least as long as this ideology remained "orthodox" or "pure" (under Lenin). After WWII Communism became more pragmatic and eventually discovered virtue in neutrality, as explained above. See Wolfgang Mueller, The USSR and Permanent Neutrality in the Cold War, in: 18 Journal of Cold War Studies (2016), 148-179 (150).

25 As Theo Öhlinger remarked, there was a tendency to justify legally what seemed to be politically useful. See Theo Öhlinger, Kommentar zum Bundesverfassungsgesetz vom 26. Oktober 1955 über die Neutralität Österreichs, in: Karl Korinek/Michael Holoubek (eds.), Österreichisches Bundesverfassungsrecht (1999), para.7. See also Heinrich Neisser/Fritz Windhager (eds.), Wie sicher ist Österreich? (Österreichische Verlagsanstalt: Vienna 1982). David Kennedy/Leo Specht, Austrian Membership in the European Communities, in: 31 Harv.Int.L.J. (1990), 407-461.

26 See Alois Riklin, Neutralität am Ende?—500 Jahre Neutralität der Schweiz, in: 125 Zeitschrift für Schweizerisches Recht (5/2006), I, 583-598 (592).

27 This held in particular true for the protectionist demand by industry and agriculture as well as by the large public sector of the economy which feared privatization. See

protectionists, gathering within the association of industrialists ("Industriellenvereinigung") had become stronger, and they exerted considerable pressure on politics with the aim to obtain a re-dimensioning of neutrality and to consider an accession to the EU.[28]

IV.D. The end of the Cold War and the approaching of the EEC/EU (1989-1995)

35. Already towards the end of the 1980s accession to the EEC came to be discussed as a concrete option in Austrian politics. The sudden crumbling of the Iron Curtain augmented enormously the chances of such an endeavour. When the Austrian Government lodged the application to join the Community in 1989, confidence ran high that eventual accession would be possible under full preservation of Austria's status as a neutral. Austria even voiced the opinion that the EEC should be happy to have a (further) neutral among its ranks as Austria could best further the EEC's goals of strengthening peace and security in Europe. In practical terms, however, it turned out that Austria had to all but bury any hopes to be welcomed as a neutral member. Austria opined that it could rely on Articles 223 and 224 EEC (now Articles 346 and 347 TFEU) providing for security safeguards. It was, however, rightly contended that these provisions did not allow for measures in contrast to EEC law and neither could they allow for the maintenance of a neutrality status conflicting with obligations flowing from the EEC treaty.[29] The EEC Commission, in its avis on Austria's accession demand, left no doubt as to this country's obligation to fully accept the obligations flowing from the Common Foreign and Security Politicy (CFSP). Austria would have to unconditionally subscribe to this policy notwithstanding neutrality.[30]

Paul Luif, Der Wandel der österreichischen Neutralität. Ist Österreich ein sicherheitspolitischer "Trittbrettfahrer"?, 2nd rev. edition (1998), 23.

28 This association commissioned a legal opinion with two Austrian lawyers, Michael Schweitzer and Waldemar Hummer, that declared Austrian neutrality compatible with EEC law. This opinion afterwards constituted an important argumentative tool for the government in the attempt to convince public opinion of the soundness and the appropriateness of an EEC/EU accession.

29 See Natalino Ronzitti, Diritto internazionale dei conflitti armati (2006), 121.

30 As the Commission stated, the Community was required "to seek specific assurances from the Austrian authorities with regard to their legal capacity to undertake obligations entailed by the future common foreign and security policy". See Bulletin of the European Communities, Supp. 4/92, "The challenge of enlargement—

Eventually, this was exactly the position taken by the Austrian government. On 9 November 1993 Austria declared that it would fully accept the EU's CFSP. This declaration was integrated in the Final Act of the accession treaty of 25 June 1994. By the insertion of Article 23f into the Austrian constitution, the meaning of neutrality on the constitutional level was redefined in such a way as to make it compatible with the requirements of EU law. Related national provisions (in particular § 320 penal code on "threat to neutrality") were adapted accordingly.

36. The question then arose, what remained of Austrian neutrality? On the theoretical level the central question was whether there was a customary international law concept of "permanent neutrality" in force. Legal doctrine—both in Switzerland as in Austria—tried hard to deliver such proof, only to fail in the end.[31] Faced with such a situation, next to any option seemed open for politics when having to deal with neutrality.

IV.E. The re-consideration of neutrality: From near-abandonment to re-discovery and new exaltation?

37. Already in 1994, a leading Austrian politician, Jörg Haider from the Austrian Freedom Party FPÖ, declared Austrian neutrality "obsolete".[32] In 1997, the Federal Chancellor Wolfgang Schüssel opined that neutrality

Commission opinion on Austria's application for membership", SEC(91) 1590 final, 18.

31 See, for such an assessment, denying international customary law character to permanent neutrality, the statement of a leading Swiss theoretician, Dietrich Schindler, already in: Die Lehre von den Vorwirkungen der dauernden Neutralität, in: Emanuel Diez et al. (eds.), Liber Amicorum Rudolf Bindschedler (Staempfli: Bern 1980), 563-582. In the same sense see also Ove Bring, The Changing Law of Neutrality, in: Ove Bring/Said Mahmoudi (eds.), Current International Law Issues, Liber Amicorum Jerzy Sztucki (1994), 25-50 (42). As a consequence, an awkward situation formed out in doctrinal debate: In Austria, permanent neutrality, built upon the Swiss model, was recognized as having customary international law character, while this was denied in Switzerland where this concept originated. Those Swiss academics who argued for an international customary law character of permanent neutrality referred to the Austrian permanent neutrality which again, as mentioned, referred back to Swiss permanent neutrality. On the whole an impressive example of circular reasoning!

32 See Paul Luif, Die Neutralität: Taugliche sicherheitspolitische Maxime?, in: Waldemar Hummer (ed.), Staatsvertrag und immerwährende Neutralität Österreichs (Verlag Wien: Vienna 2007), 363-389 (364).

would not even be compatible with membership with the West European Union.[33] An Austrian constitutionalist specializing in neutrality considered Austrian neutrality to be terminated on the constitutional level.[34] If at all, neutrality had survived as a political concept. But exactly from this field came the great redemption for neutrality, eventually having repercussions also in the realm of law. In fact, the Presidency election of 2004 became, to a considerable extent, also an election upon the continuing adherence to neutrality, with the candidate Heinz Fischer in favour and his opponent Benita Ferrero-Waldner against. As is well known, Fischer won. From then on, politics began to look for new content for neutrality, as political support for this concept has proven strong. Thereby, a self-strengthening process was set in motion with avowals for neutrality growing continuously in strength and in emotionality. For lawyers this created problems of no little dimension. The easiest way to follow—and many lawyers did exactly this—was to ignore all doctrinal discussion of the last decade and to stick to neutrality as a legal concept as it was developed in the 1960s, as if it had been frozen in ice. Doctrinally this might not have been convincing but it might have been rewarding politically. Academically next to no risk was associated with such an approach because internationally hardly any interest could be discerned for Austrian neutrality. The other approach was to look for new spaces for Austrian neutrality within the pitfalls of an incomplete international legal order. This task may be daunting but it appears to be the only feasible option, and it is therefore followed here.

V. Austrian neutrality within the UN system

38. After WWII it was a widely held opinion that neutrality would be incompatible with UN membership.[35] This view was openly expressed at the UN

33 Ibid., 365.

34 See Peter Hilpold, Solidarität und Neutralität (2010), 47, referring to Theo Öhlinger and Stephan Griller.

35 In this, a striking parallel could be found to the situation after WWI. In an opinion given by Baron Albérie Rolin in 1924 to the Belgian Academy of Sciences, the following was stated:

> "The organization of the federation of states is the negation of neutrality. The Covenant of the League of Nations has abolished this neutrality. It will be the end of neutrality when all the nations which are not yet admitted to the League of Nations join the League and thereby make it a powerful organization."

As quoted in A. Verdross, above n.9, 64.

founding conference of San Francisco[36] as well as in academic literature of that time.[37]

39. Open resistance against neutrals within the UN was finally dropped—but not as a result of an explicit acceptance of neutrality but rather following the conviction that there was already enough in the Charter to exclude neutrality for UN members (in particular Article 2, para.5, according to which "[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action", and Article 25, which states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter").

40. As is well known, soon after 1945 new conflict lines arose, in particular between East and West, and the question of neutrality lost relevance without this subject having been legally clarified in any way. Subsequently a series of neutral States have become UN members without any major discussion as to their status as neutrals. Thus Sweden was accepted in 1946,

36 According to UNSG Trygve Lie, there was a complete antinomy between these two concepts. The French delegation to the San Francisco founding conference even proposed to explicitly enshrine this incompatibility in the UN Charter. The French delegation proposed the following wording: "La participation à l'organisation implique des engagements incompatible avec le statut de neutralitè." See Helmut Türk, Neutralität und Mitgliedschaft bei den Vereinten Nationen, in: Konrad Ginther et al. (eds.), Liber Amicorum Karl Zemanek (1994), 439-463.

37 See the results of the discussion within the International Law Association in Cambridge 1946 (with the Swiss representative Paul Guggenheim voting against) as well as the UN-Commentary by Hans Kelsen (1951), 108 (cited according to Ove Bring, The Changing Law of Neutrality, in: Jerzy Sztucki (ed.), Current International Law Issues (1994), 25-50, 34). It was said that the concept of neutrality was of a "shadowy existence" and led a "juridical half-life". See Dietrich Schindler, Ist das Neutralitätsrecht noch Teil des universellen Völkerrechts?, in: Liber Amicorum Karl Zemanek, (1994), 385-399 (386), referring to Richard Reeve Baxter, 1975 and to Patrick M. Northon, 1976. Also Goodrich/Hambro and Kelsen in their influential commentary denied compatibility between the UN Charter and neutrality; see also Leland M. Goodrich/Edvard I. Hambro, Charter of the United Nations: Commentary and Documents (1949), 108, 132 and Hans Kelsen, The Law of the United Nations (1950), 94, 108. Very pointedly the remarks by Howard J. Taubenfeld: "The actual position of neutrals has been on the decline in the over-all picture since the first World War, and, if the United Nations grows stronger, must continue to decline." See Howard J. Taubenfeld, International Actions and Neutrality, in: 47 AJIL (1953), 377, 395.

Austria, Finland and Ireland in 1955, Laos in 1962 and Switzerland in 2002.[38]

41. In Austria, internally, quite differently to the situation at the external level, an intense discussion as to the compatibility of neutrality with UN membership has taken place. This discussion that was practically ignored outside Austria found reflection in a series of international law articles, again widely ignored outside Austria. During the admission procedure, neither Austria nor the UN made any reference to this country's status as a neutral.

42. Initially Austrian international lawyers made the—highly illusionary—proposal to modify the UN Charter on the basis of Article 108 of the Charter or at least to request the SC to adopt a Resolution that would overcome this open discrepancy.[39]

43. Afterwards, the silence of 1955 and the impossibility to obtain any definite legal clarification in this field was subject to re-interpretation. From then on, "official doctrine" in Austria considered the seamless admission procedure as tantamount to tacit acceptance of a membership conditioned by neutrality with all the ensuing consequences.

44. According to this theory Austria would not be obliged to take part in measures of collective security (still considered to be incompatible with neutrality). Article 48 of the Charter, which allows the SC to exempt single States from such measures, would offer the basis for such a neutrality-saving approach. It was said that the UN would be "estopped" from requesting Austria to participate in such measures. However, it is hard to see what should be the basis of such an estoppel and of the underlying bona fides that would merit legal protection by this construction.[40]

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38 In 1977 Laos concluded, however, a defence agreement with Vietnam and denounced its neutral status.

39 See Josef L. Kunz, Austria's Permanent Neutrality, in: 50 AJIL (1956), 418-425 and Alfred Verdross, Die dauernde Neutralität Österreichs und die Organisation der Vereinten Nationen, in: JBl. (1955), 345 (348) as well as idem, Austria's Permanent Neutrality and the United Nations Organisation, in: 50 AJIL (1956), 61-68.

40 In Austria's international legal discussion, the estoppel concept enjoys remarkable popularity. One has, however, to be careful not to construe unilaterally a substitute for consensus where in reality no consensus is discernible. Another case where Austrian legal doctrine all too easily made recourse to the estoppel concept is that regarding the attempt to attribute international binding nature to the minority provisions contained in the South Tyrolean autonomy statute. See Peter Hilpold, Modernes Minderheitenrecht (2001). It has to be added, however, that in the meantime this result has been obtained through other, more "conventional" means.

45. The following years were characterized by a continuous re-interpretation of the relationship between neutrality and collective security: The extremely parsimonious use of collective measures by the UN, as a consequence of the Cold War, allowed for ad hoc interpretations of Austria's duties as a neutral without entering into the real substance of the problem.

46. Thus, UN sanctions against Southern Rhodesia in 1965 were supported by Austria with reference to the fact that the underlying conflict was of an internal nature and did not constitute a "war" that would activate obligations of neutrality. The ban on military exports towards South Africa in 1966 was considered to be irrelevant as Austria did not export military items to this country. Only when Austria had to comply with SC Resolution 678 of 1990, after the Iraqi invasion of Kuwait, did Austria state that neutrality would not be touched by UN collective measures without, however, taking note of the wider implications of this finding for the meaning of neutrality as such within the UN system.[41]

47. Nonetheless, for a short period of time it seemed that Austrian politics had come to terms with a fact that should have been obvious since 1955: Legally speaking, it was hard to attribute to neutrality a substantial role within the UN order, in particular as soon as the collective security system actually starts working.

48. For some years, leading Austrian politicians were pretty outspoken as to this fact[42] and the academic community followed suit.[43]

As to the strict conditions for the estoppel principle to apply, see Judge Spencer in the ICJ Temple case 1962 where he stated the following:

> [T]he principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which that other State, was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.

Case concerning the Temple of Preah Vihear (Cambodia vs. Thailand), Dissenting Opinion of Sir Percy Spender, ICJ Reports 1962, para.143.

41 For these cases see Hanspeter Neuhold, Außenpolitik und Demokratie: "Immerwährende" Neutralität durch juristische Mutation?, in: St. Hammer et al. (eds.), Demokratie und sozialer Rechtsstaat in Europa, Liber Amicorum Theo Öhlinger (2004), 68-91 (79).

42 For example, in 1994, FPÖ-chairman Jörg Haider, then a very influential politician, declared Austrian neutrality as "obolete". Wolfgang Schüssel, in 1997, then the Austrian Foreign Minister, considered neutrality to be incompatible with membership in the Western European Union, a military alliance.

43 In 1999, Theo Öhlinger, a leading Austrian public lawyer, declared that "legally, neutrality is no longer a valid characterization of Austria's position in the state community". See Theo Öhlinger, Kommentar zum Bundesverfassungsgesetz vom

49. This change of mind did not come, however, as a sudden illumination in respect to the hard legal facts but rather as a consequence of the definite will to join the European Union and, respectively, to defend this decision once it was taken. On the way to the European Union, neutrality could become a decisive obstacle—the same as it has been in the past for a membership with the EEC.

VI. Joining the EU—the consequences for neutrality

50. Austria's eventually successful approach towards the European Union came exactly during the period when this institution started building up a Common Foreign and Security Policy (CFSP) that would also comprise a Common Defence Policy and, eventually, a Common Defence, a goal not yet fully realised. At first glance such a policy would be in contrast with Austria's obligation not to enter into any military alliance. However, for several reasons, such a conflict can be excluded in practice:

- First of all, in Article 42, para.7 of the EU treaty, a salvation clause, the so-called "Irish clause" (introduced to protect Irish neutrality but, of course, available also for other neutrals) was introduced. According to this clause the "obligation of assistance" contained in this provision "shall not prejudice the specific character of the security and defence policy of certain Member States." On this basis neutrality should become a justification not to participate in military operations deemed by the neutral to be incompatible with its particular status.
- Furthermore, it is to be said that also the EU has to respect UN law and the Union leaves no doubt that it has also the clear and unconditional intent to do so when Article 42, para.1, introducing the provisions on the CFSP, states that "[t]he Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter."
- Finally, as has been stated above, a neutral State being part of a military alliance that either acts directly at the service of the UN or provides assistance to a member acting in self-defence according to Article 51 of the Charter can never be considered as violating its specific obligations resulting from the status as a neutral.

51. It could be argued that the modification of Austria's international neutrality commitments could create a conflict with her constitutional neutrality

26. Oktober 1955 über die Neutralität Österreichs, in: Karl Korinek/Michael Holoubek (eds.), Österreichisches Bundesverfassungsrecht (1999).

obligations as they result from the neutrality law of 1955. In reality, however, Austria has adapted her constitutional law accordingly in the course of her EU accession. On the basis of Article 23f of the Austrian Constitution, introduced in the course of the EU accession, Austria fully and unconditionally takes part in the EU Common Foreign and Security Policy (CFSP), thereby fulfilling its obligations assumed in 1994 in the wake of the accession process,[44] where Austria expressed no "neutrality reservation". In the aftermath, Austria's constitutional neutrality obligations were further restricted in parallel to the strengthening of the CFSP.[45] Thus, Austria's constitutional neutrality obligations are in any case EU-compatible. If at all, a conflict of neutrality obligations with international law could arise if Austria were induced by the EU to behaviour prohibited by international neutrality law. It might be sustained that this could engender also an international responsibility by the European Union. Due to the uncertainties surrounding international neutrality law portrayed above, it appears, however, to be highly improbable that such a violation could convincingly be argued.

VII. The NATO option

52. Immediately after becoming an EU Member Austria embarked on a process approaching NATO and even considering NATO membership. This was a bilateral process as NATO, by the mid-1990, started a partnership process with non-members, launching in 1994 the "Partnership for Peace" (PfP) initiative in the ambit of which, in the meantime, 22 non-members, among them Austria, are now cooperating with NATO on nearly all subjects falling into NATO competence. Since 1995 Austria has been participating in two of the three NATO core tasks: Crisis Management and Cooperative Security.[46] Austria is furthermore an important troop contributor to NATO-mandated

44 See Declaration no. 1, OJ C (1994/241), 381.

45 This happened first as a consequence of the Treaty of Amsterdam in order to allow participation in "combat troop missions for crisis management" and again, following the Treaty of Lisbon, Austria assumed the constitutional obligation (now in Article 23j of this Constitution) to fully implement the CFSP as it results from this latter treaty. See Gerhard Jandl, Neutralität und österreichische Sicherheitspolitik, in: Gerald Schöpfer (ed.), Die österreichische Neutralität—Chimäre oder Wirklichkeit?, Leykam: Graz (2015), 199.

46 See Gerhard Jandl, 20 Years of Austrian Partnership with NATO, in: 61 Politorbis (1/2016), 75-80 (76), pointing out that NATO's third core task as defined in its 2010 Strategic Concept, Collective Defense, is for members only.

missions such as KFOR and has also actively participated in devising new strategies for further developing the partnership agenda.[47]

53. According to Austria's 2001 Security and Defence Doctrine even NATO membership was a concrete option.[48] This is no longer the case for the 2013 Security Strategy that replaced the 2001 document. NATO membership is now no longer mentioned. Neither is it explicitly excluded but the overall political environment in which this strategy has been drafted and come into being strongly suggests that this option is now no longer on the table.[49]

VIII. New challenges

54. At this point it might seem that neutrality has totally lost importance and that neutrality advocates are following an absolutely irrelevant chimera. Any effort to engage further in this discussion should consequently be more or less futile. At a closer look, however, a different finding, which could be more conciliatory towards the neutrality concept, could also be reached.

55. At the beginning of the 21st century the theory of neutrality was in total disarray. The question whether a neutral Austria could join the EU was no longer an issue because membership had already become an inconvertible fact. At the same time, abandonment of neutrality was no longer an option as it had become clear that there was a broad consensus among the Austrian population to stick to neutrality, whatever its actual meaning should be. From its very beginning, the Austrian neutrality concept was loaded with ambiguity and it could be filled with any content that appeared to be useful to politics at a certain moment in time. Over the years, the Austrian population came to identify the meaning of neutrality as a main trait of Austrian identity. It was

47 See G. Jandl, above n.46, 77, who refers to two relevant papers in this field: the Austro-Irish-Swiss paper "For a Euro-Atlantic Partnership looking to the Future—Proposals for NATO's new Strategic Concept" of 2010 and the Austro-Swiss "Non-Paper on the Development of our Partnership with NATO post-2014" of 2014.

48 See the Security and Defence Doctrine of 12 December 2001, section "Foreign Policy Aspects of Security Policy", 9, para.14: "Austria will continuously assess the value of NATO membership for its security and defense policy and the option of joining NATO will be kept open". Ibid., (available at https://www.bka.gv.at/DocView.axd?CobId=3604 (accessed on 3 June 2017)).

49 On the ambiguity of the 2013 Strategy as to a possible NATO membership see Gerhard Jandl, Österreichs Sicherheitspolitik zwischen Neutralität und Solidarität—die neue Österreichische Sicherheitsstrategie, in: Dietmar Halper/Arnold Kammel (eds.), Quergedacht, Liber Amicorum Werner Fasslabend (Verlag Noir: Vienna 2014), 233-258 (244).

tantamount to an instrument that permitted independence and survival of this Republic after 1955 in a highly difficult era. The perception was that abandoning neutrality would leave Austria unfit to combat new challenges that might arise in the future.

56. The Austrian Government was now in the awkward position that it had to look for a new justification for neutrality and to undergird this discussion with a legal meaning, although no solid theory was at hand. Puzzling at it may be in a discussion on an international law concept, no international partners were there that manifested any substantial interest to participate in this discussion. As a consequence, this controversy taking place in Austria was primarily directed towards an internal audience, while it was widely neglected by other international subjects that should, at least in principle, primarily be affected by the obligation of neutrality. Politics was aided in this, to some extent, by the shortcomings of academic discussion in Austria that had not been able to devise solid content and structure for this concept.[50]

57. This failure is closely related with the broader position the use of force assumes within the law of the United Nations. As has been shown, since the advent of the prohibition of the use of force, neutrality has no longer been a singular concept but can rather survive only in the niches of this system, alongside its deficiencies, in so far as this prohibition, out of factual or legal reasons, does not fully come to bear. If reference to the prohibition of the use of force is made the inter-State situation first comes to mind. It is for this context that the prohibition of the use of force has been ideated first. As is well-known, in 1945 the use of force in international relations was strictly outlawed and the Security Council was attributed police powers to make sure that violations of this prohibition could be sanctioned by a central authority. It was the factual deficiencies of this system that opened some, limited space for an Austrian neutrality discussion, and it is no coincidence that Austrian

50 The reasons why Austrian international law academia could not or would not provide clarity in this field are manifold. One explanation for this might be found in the fact that in Austria, as in many other countries, there is a rather close relationship between the international law academia and the foreign ministry. Furthermore, and closely related to the first consideration, it has to be mentioned that a remarkable number of Austrian international lawyers has made their career on the basis of academic theses on neutrality. For a detailed account see Peter Hilpold, Solidarität und Neutralität (2010), 11. As it stands to reason, any new contribution had to discover and to develop new elements of the neutrality concept which over time came to develop a life on its own, widely detached from actual developments on the factual legal ground.

neutrality euphoria reached its low when the Chapter VII mechanism suddenly peaked in efficiency in the early 1990s. In fact, if there is an absolute prohibition of the use of force, neutrality seems to lose any relevance. In any case, no State has a choice to lawfully side with the aggressor (or, even worse, to act itself as an aggressor) and if the Security Council adopts sanctions according to Chapter VII against an aggressor State these sanctions are binding also for the State that qualifies itself as a neutral State—whatever the specific role, the SC attributes to the neutral in the ambit of these measures.

58. Over the decades, however, the prohibition of the use of force on the one hand and the sanctions mechanism according to Chapter VII on the other have further evolved and have come to display a series of complexities that were originally not noticed. Thereby new space was opened up for a possible resurgence of the neutrality position.

59. First of all, this happened with regard to cases of internal use of force, of civil war situations. It can hardly be doubted that originally Chapter VII measures were originally not be thought to cover such situations. For many years it was hotly disputed whether the Security Council could authorize sanctions according to Chapter VII of the UN Charter in front of a civil war situation characterized by massive human rights violations but with no further transborder repercussions.[51]

60. It was only with the introduction of the Responsibility to Protect (R2P) that this question was finally settled: While there are still many ambiguities surrounding this concept[52] it was obvious from the very moment of its introduction in 2005[53] that clearing this specific question would be one the most important achievements to be brought about by this approach: From now on it should be beyond any doubt that the SC was empowered to authorize the use of force if one of the most serious human rights violations, as defined by the Outcome

51 As is well known in such situations the SC took recourse to the construction that a transborder refugee problem, resulting from the internal conflict situation, should be avoided but it was immediately apparent that this was only an auxiliary construct to justify intervention. See Peter Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal?, in: 12 EJIL (3/2001), 437-467 (at 445), with regard to SC Res. 688 of 1991.

52 For a recent stock-taking see Peter Hilpold (ed.), The Responsibility to Protect (Brill/Martinus Nijhoff: Leiden/Boston 2015).

53 As is well known, this concept was adopted by consensus at the World Summit of September 2005, A/RES/601/1 of 24 October 2005, paras.138 and 139.

Document, were to occur. [54] In such cases, the United Nations would be legitimated to proceed to a so-called "multilateral humanitarian intervention" according to traditional terminology.[55] With regard to the topic here of closer interest this meant that again the space for neutrality was further reduced. If the SC adopted sanctions according to Chapter VII in the face of one of the human rights violations described above, no leeway for neutrality should remain.[56]

61. In the meantime, however, with terrorists having become a transnational actor displaying unprecedented destructive power, often comparable to that of a medium-range governmental military force, a new challenge to the prohibition of the use of force has emerged.

62. It started with the Twin Towers attack of 11 September 2001, to which the SC responded the day after with Res 1368, which expressly referred to the inherent right of individual and collective self-defence in accordance with the Charter.[57] While this resolution made clear that States were allowed to exercise self-defence also against terrorists, it remained unclear under which circumstances and in which form such acts of self-defence could be taken

54 See para.139 of the Outcome Document: "[. . .]we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

55 See Peter Hilpold, The duty to protect and the Reform of the United Nations—a new step in the development of International Law?, in: 10 Max Planck Yearbook of United Nations Law (2006), 35-69.

56 Still open to debate is the question what should be the specific obligations of SC Members in situations that unleash the responsibility to protect. For some, such situations generate an obligation for all SC Members to vote in favour of resolutions that would activate such a responsibility by the SC. The prevailing opinion seems, however, to go in the opposite direction as SC Members essentially exercise a sovereign political function in the ambit of which their voting rights cannot be made subject to restrictions of any kind. See, for example, Enzo Cannizzaro, Responsibility to Protect and the Competence of the UN Organs, in: Peter Hilpold (ed.), Responsibility to Protect (R2P) (Brill: Leiden/Boston 2015), 207-218 (213).A specific question in this context, which seems as of yet not examined in literature, would be what could be the role of a neutral in such a situation in the SC. It is argued here that the neutral is also fully free to vote within the SC according to its political preferences, its powers not being restricted in any way by its neutral status.

57 A similar wording is to be found in Resolution 1373 of 28 September 2001. See also Report of the Secretary General's High-level Panel on Threats, Challenges and Change: "A More Secure World: Our Shared Responsibility", 2.122004, UN Doc. A/59/565, 15.

recourse to. In the rare cases in which the ICJ tackled these questions, the Court could neither give useful answers, either because the perspective was too State-centred (such as in the Nicaragua case of 1986) or because the essential elements were missed (such as in the *Wall* Opinion of 2004 where the Court seemed to assume that no right to self-defence was given outside inter-State relations). While no need is felt to show excessive prudence against terrorists (outside, of course, human rights or humanitarian considerations) problems in this context arise out of the fact that terrorist attacks are usually carried out from areas that are protected by State sovereignty. Even if the respective State is not acting in complicity with the terrorists it may be the legitimate target of acts of self-defence as otherwise the right to self-defence would become meaningless. The difficulty lies, however, in the challenge to devise criteria that should balance all the interests involved in an adequate, acceptable way. What should be the role of the harbouring State in the context of terrorist acts in order to justify measures of self-defence against its territory by States hit by these attacks? In view of the mounting terrorist threat and the ever-growing destructive power it unleashes it seems that the threshold that State contribution should meet is continuously lowered, now having reached the point that it should suffice the harbouring State is "unable or unwilling" to prevent a terrorist act departing from its territory. As the Chatham House document on "Principles of International Law on the Use of Force by States in Self-Defence"[58] points out, "the right to self-defence is an inherent right and is not dependent upon any prior breach of international law by the State in the territory of which defensive force is used".[59] In form (albeit not in substance), more prudent in this regard are the "Bethlehem principles".[60]

63. Sir Daniel Bethlehem reaffirms that " [S]tates are required to take all reasonable steps to ensure that their territory is not used by nonstate actors for purposes of armed activites [. . .] against other states and their interests."[61] As a matter of principle, according to Bethlehem, "a state may not take armed action in self-defence against a nonstate actor in the territory or within the jurisdiction of another state [. . .] without the consent of that state".[62] As an

58 ILP WP 05/01, Elizabeth Wilmshurst, October 2005.

59 Ibid, 12.

60 Daniel Bethlehem, Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors, in: 106 AJIL (2012), 770.

61 Ibid., principle n. 9.

62 Ibid., principle n. 10.

exception to this rule, however, Bethlehem also accepts the "unable or unwilling"-criterion.[63]

64. The same holds true for the so-called "Leiden Policy Recommendations on Counter-terrorism and International law" published by Nico Schrijver and Larissa van den Herik in 2010.[64]

65. Of course, all these statements are not normative in a strict legal sense but their authority is rather based on the strength of the underlying argumentation and the reputation of the respective academics. It can hardly be stated that the "unable or unwilling"-criterion constitutes customary international law as governments seem to adopt different positions as to this question depending on the specific political situation they are confronted with.[65] In the end, it will probably be hard to find a "one size fits all"-rule in this field, as not only will the dimension of the harbouring State's responsibility have to be taken into consideration, but also the dimension of the threat stemming from this foreign territory. This question is therefore a multidimensional one and offers an ideal ground for the application of the proportionality principle. This being the case it can be argued that the use of force against terrorists in international relations is regularly suited to give rise to a series of thorny issues that require intense reasoning and measured ponderation. This holds all the more true as this is a field widely dominated by unilateralism with international courts and other institutions only exceptionally having a chance to make clarifying contributions.[66] States declaring themselves as "neutral" could exercise in this area an important moderating role, as the use of force against terrorism is, contrary to that between States, not fully and/or not clearly

63 Ibid., principle n. 12.

64 See para.32 of the "Leiden Recommendations": "It should be emphasized that states considering the use of force against terrorists must take due account of the exceptional nature of military action on foreign territory. The territorial state's consent to military action is required, except where the territorial state is unable or unwilling itself to deal with the terrorist attacks".

65 For example, after 9/11 the United States forcefully supported the "unwilling or unable" criterion, but when Russia relied on this criterion to justify her attack on Chechen rebels in Georgia, the US flatly rejected this argument. See Christine Gray, International Law and the Use of Force (2008), 231.

66 An important exception was SC Resolution 2249 of 20 November 2015 by which the Security Council provided important clarifications as to the way measures of self-defence against ISIS terrorism in Syria would be permissible. See Peter Hilpold, The fight against terrorism and SC Resolution 2249 (2015): towards a more Hobbesian or a more Kantian International Society?, in: 55 IJIL (4/2015), 535-555.

regulated by UN law. As has been shown, in inter-State relations there is next to no space left for a "third way" for neutrals when the use of force is at issue, exactly because the UN system with its absolute prohibition of the use of force and the centralizing of any "police powers" in international relations has become full circle. As to the newly-emerged task to fight terrorism by military force on an international scale, this objective has not (yet) been fully implemented. Neutrals could play an essential role when it comes to finding a way for forging a compromise between the many conflicting goals and interests here at play.[67]

IX. Conclusion

66. What is left to say about Austria's position as a neutral within the United Nations? What role does neutrality have at all in UN law at the beginning of 21st century? As has been shown, Austria's obligations as a neutral State during the Cold War have been interpreted in an extremely extensive way. Following the Swiss example, it was assumed that there were "advanced effects" of neutrality, so that a neutral had to treat other States equally even in time of peace in order to make possible neutrality in time of conflict. This also had consequences on economic relations. No basis for such an attitude can be found for this in international law.

67. Generally, the question should be posed, what is left of the assumed legal obligations for a permanent neutral within the United Nations system? As has been evidenced, there is still a certain role for neutrals within present-day UN law, although this role is probably by far not so extensive as sometimes portrayed.[68] Neutrality can be a useful instrument when a country has to assert its sovereignty notwithstanding being torn between two rival blocs.[69]

67 Contra P. Seger, above n.1, 253.

68 See recently Elizabeth Chadwick, Neutrality revisited, in: Rain Liivoja/Tim McCormack (eds.), Routledge Handbook of the Law of Armed Conflict (Routledge: London and New York 2016), 455-473, who argues that SC "inaction leaves states free to remain impartial, so neutrality continues to play a vital role in inter-state diplomacy during times of war" (at 457), that the concepts of aggression and self-defence remain "somewhat undefined in absolute legal terms", "and are notionally directed solely at states in any event." (Ibid. at 461). One has, however, to be careful with such statements. Inaction by the SC is not per se able to revive a legal notion of neutrality and as shown it is more than doubtful that self-defence should be notionally directed solely at states.

69 Here, an old dictum by Henri Brocher on the meaning of neutrality fits well. According to him, neutrals are "ceux qui restent les amis des deux adversaires sans

For acceptability from the viewpoint of a modern national sovereignty concept based on the right to self-determination, at least the appearance should be created that this status was adopted freely and has not been imposed. Such an appearance was masterly crafted by the architects of the Austrian State Treaty of 1955 where neutrality was not even mentioned.[70]

68. From the perspective of UN law in general, as a matter of principle, neutrality is hardly reconcilable with an international peace order equipped with a centralized peace enforcement mechanism that really works. For this reason, already soon after the end of WWII there was the assumption that in a values-oriented international peace system with hierarchical structures and a central peace-enforcing system built upon the contribution of individual peace-loving States, neutrality had become obsolete or was even no longer permissible as this system could survive only if actively sustained by its members. Neutrality became accepted again when the original illusions disappeared and many imperfections of the international peace order surfaced. A similar situation, in an accentuated form, set in after WWII, when hopes ran high that war as an instrument of international politics could definitely be overcome. Again, these hopes had to be disappointed, and as a consequence space reopened for neutrality to re-appear. In this sense, neutrality mirrors imperfection—it is an expedient of pragmatism, it thrives on lacunae of an international order that pretends to be flawless but turns out to be inadequate in many senses.[71] On the universal level, neutrality is the realm of realists, of pragmatists and even of cynics, while the detractors of neutrality claim to be

devenir les ennemis d'aucun". See Henri Brocher, Les principes naturels du droit des gens, in: 5 Revue de droit international et de legislation compare (1873), 566, cited according to F. Dhondt, above n.10, 189.

70 Up to 2014 attempts were underway to transform the Ukraine into a neutral state according to the Austrian model. After the Russian annexation of Crimea in March 2014 it was no longer possible to pursue such an attempt, as a declaration of neutrality could have been interpreted as an acceptance of the Russian intervention in Crimea and in the Eastern Ukraine. See Johanna Rainio-Niemi, Cold War Neutrality in Europea, in: Heinz Gärtner (ed.), Engaged Neutrality—An Evolved Approach to the Cold War (Lanham et al.: Lexington Books 2017), 15-36 (30, n.6 and 7) as well as Adrian Hyde-Price, Geopolitics and the Concept of Neutrality in Contemporary Europe, in: Heinz Gärtner (ed.), Engaged Neutrality—An Evolved Approach to the Cold War (Langham et al.: Lexington Books 2017), 121-142 (131).

71 On the many incoherencies characterizing the modern jus ad bellum regime see the recent contribution by Monica Hakimi and Jacob K. Cogan, The Two Codes on the Use of Force, in: 27 EJIL (2/2016), 257-291.

the advocates of principles and values—and these values need not necessarily be those of present highly-evolved democracies.[72] Conversely, in Austria, the myth of neutrality is perceived as an expression of idealism, as a quest for utopia. At the end, however, this ostensible conflict can be overcome if the contributions are taken into account that neutrals can provide for mending an international order with high aspirations but characterized by many flaws.

69. There can be no doubt that participation in the system of collective security does not violate any obligation of a neutral. To breach the prohibition of the recourse to force would be such a violation but, as we know, this restriction applies also to non-neutrals.

70. Neither does participation in the European defence policy constitute a problem, even leaving apart the Irish clause, as the EU also has to respect UN law if it takes recourse to military action.

71. The same holds true for the fight against terrorism. As has been stated, there is no neutrality in the fight against terrorism. This is true, but perhaps here neutrality evinces at best its continued value even in a UN system with a more or less functioning system of collective security. The fight against terrorism often goes to the outer borders of Article 2, para.4 of the UN Charter, especially if measures against so-called "harbouring states" are taken.[73] In these cases neutrality could demonstrate its special value: As an intellectual tool to refine the sensitivity of what is permitted and of what is not within the UN system in the field of the use of force. Similar considerations can be made for the position of neutrals within the EU: These countries can and should pay particular attention that EU military measures remain within the rules set by the UN order to which the EU also promised to stick.

72. The prohibition of the use of force and the very notion of a peace order governed by UN law reveals an ever-growing complexity the more the State community tries to come closer to these concepts by the implementation of some of its most basic tenets. It becomes evident that giving life to these ideals is regularly associated with a myriad of compromises and with difficult ponderations that easily become distracted by power politics. Neutrals find here a

72 As shown above, neutrality was, for example, also irreconcilable with early "orthodox" Soviet Communism under Lenin (see above n.21).

73 See Olivier Corten, A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism, in: EJIL Talk!, 14.7.2016 (https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/ (last visited on 16 June 2017)). See also Anne Peters/Christian Marxsen, Editors' Introduction: Self-Defence in Times of Transition, in: 77 ZaöRV (2017), 3-13.

new role in the sense that may try to sort out the real meaning of UN law in this field and to identify the structural balance that qualifies this system. It is sort of an irony of history that they are destined to become the prime guardians of a system that originally was intended to make them superfluous.