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Operation RUBICON: An Assessment With Regard to Switzerland's Duties Under the Law of Neutrality

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Abstract

Under the guise of Swiss neutrality, the Swiss-based company Crypto AG for decades manufactured and supplied manipulated cipher machines to governments in over 120 States. The company was controlled by the U.S. Central Intelligence Agency (CIA) and the German Bundesnachrichtendienst (BND). The Swiss intelligence services had known about this intelligence operation since 1993 at the latest, had access to relevant information, and allowed the foreign intelligence services to continue their operation until 2018. For the permanently neutral State of Switzerland, this raises the question of how Operation RUBICON is to be assessed with regard to Switzerland's duties under the law of neutrality.

This author finds that it was unlikely that Switzerland, in its complicity in Operation RUBICON, violated its duties under the law of neutrality. However, if—and this is unlikely but cannot be completely ruled out—Crypto AG exported rigged cipher machines or offered maintenance services during (or immediately before) the Kosovo War in 1999 to the Federal Republic of Yugoslavia, or during (or immediately before) the Iraq invasion in 2003 to the Republic of Iraq, Switzerland would have violated its duties under the law of neutrality. At the very least, Switzerland's complicity in Operation RUBICON plays into its image as a Western neutral and is therefore relevant in terms of Swiss neutrality policy. In any case, it is crucial for Switzerland to refrain from complying with intelligence operations such as Operation RUBICON and to preserve (guided by equidistance, international law, and Switzerland's humanitarian tradition) its permanent neutrality, even during today's challenging circumstances.

List of abbreviations

AFSA	Armed Forces Security Agency
BND	Bundesnachrichtendienst
CIA	Central Intelligence Agency
CDel	Control Delegation
FIS	Federal Intelligence Service
ICRC	International Committee of the Red Cross
ILC	International Law Commission
NSA	National Security Agency
SND	Strategic Intelligence Service
SIS	Signals Intelligence Service

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[1] The author is expressing a personal point of view here. The opinions stated in this text should not be regarded as the official position of Switzerland or of the Swiss Federal Department of Foreign Affairs.

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1. INTRODUCTION

> "Without a doubt, it would be the only right thing for us neutrals to keep the same distance to all sides." – Carl Spitteler, Swiss poet (1845–1924)

April 1982: Argentine troops occupy the Falkland archipelago in the South Atlantic, which is under British administration. The Argentine forces use rigged cipher machines manufactured and delivered by Crypto AG, a Swiss-based company. Due to these rigged machines, the Argentine forces' communications can be read. The Americans, who are involved in Crypto AG and are able to read the communications, regularly pass on the associated intelligence to the British. The British government later reveals that this information was crucial to the sinking of the Argentine navy cruiser *ARA General Belgrano*. More than 300 people were killed in the attack. The sinking of the ship was a major loss for the Argentine navy.[2]

In February 2020, it became publicly known that under the guise of Swiss neutrality, Crypto AG for decades had manufactured and supplied manipulated cipher machines to governments in over 120 States. The company was controlled by the U.S. Central Intelligence Agency (CIA) and the German Bundesnachrichtendienst (BND).[3] The Swiss Federal Strategic Intelligence Service (SND), the predecessor organization of the Swiss Federal Intelligence Service (FIS), had known about this intelligence operation since 1993 at the latest. The Swiss intelligence services had access to information and allowed the foreign intelligence services to continue their intelligence operations until 2018.[4] In a secret report, the CIA called "Operation RUBICON" the intelligence operation of the century. The report stated, "Foreign governments paid the U.S. and West Germany good money for the privilege of having their most secret communications read."[5]

As a permanently neutral State, Switzerland has committed itself under international law to remain neutral in any future international armed conflict between two or more States, whichever the warring parties may be, whenever and wherever war may break out.[6] The fact that the Swiss intelligence services, and thus Switzerland, knew about this intelligence operation raises the question of how Operation RUBICON is to be assessed with regard to Switzerland's duties under the law of neutrality. Although some authors argue that there was likely a violation of the law of neutrality,[7] others argue against it.[8] In particular, the Swiss Federal Council denies that the law of neutrality was violated in this instance.[9]

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[2] Elmar Thevessen, Peter F. Müller, and Ulrich Stoll, "Operation Rubikon: #Cryptoleaks: Wie BND und CIA alle täuschten." *Zweites Deutsches Fernsehen (ZDF)*, February 11, 2020, https://www.zdf.de/nachrichten/politik/cryptoleaks-bnd-cia-operation-rubikon-100.html; Fiona Endres and Nicole Vögele, "Geheimdienstaffaire Cryptoleaks: Weltweite Spionage-Operation mit Schweizer Firma aufgedeckt," *Schweizer Radio und Fernsehen (SRF)*, February 11, 2020, https://www.srf.ch/news/schweiz/geheimdienstaffaere-cryptoleaks-weltweite-spionage-operation-mit-schweizer-firma-aufgedeckt.

[3] Greg Miller, "The intelligence coup of the century: For decades, the CIA read the encrypted communications of allies and adversaries," *Washington Post*, February 11, 2020, https://www.washingtonpost.com/graphics/2020/world/national-security/cia-crypto-encryption-machines-espionage/.

[4] Report of the Control Delegation (CDel), *Fall Crypto AG,* November 2, 2020, https://www.parlament.ch/centers/documents/de/bericht-gpdel-2020-11-10-d.pdf.

[5] *MINERVA: A history*. Internal CIA publication TOP SECRET (2004), quoted in Miller (2020), *supra* note 3.

[6] Alexander Spring, *The International Law Concept of Neutrality in the 21st Century: An Analysis of Contemporary Neutrality with a Focus on Switzerland* (Zurich/St. Gallen: Dike, 2014), 54 ff.

[7] Marco Sassòli, *"Der Fall Crypto AG und die schweizerische Neutralität"* (Expert Opinion, University of Geneva, February 23, 2021), 3; Dominik Landwehr, "Die Crypto-AG: Ein Spionage-Thriller aus dem Kalten Krieg," *Swissinfo*, December 15, 2020, https://www.swissinfo.ch/ger/crypto-ag-schweiz-usa-spionage-kryptografie-kalter-krieg_die-crypto-ag–ein-spionage-thriller-aus-dem-kalten-krieg/46216566.

[8] Paul Widmer, "Staatsräson legitimiert vieles – auch Abhören und Wegschauen," *Neue Zürcher Zeitung Magazin (NZZ Magazin)*, March 7, 2020, https://magazin.nzz.ch/hintergrund/crypto-affaere-staatsraeson-legitimiert-vieles-ld.1545063?reduced=true; Landwehr (2020), *supra* note 7.

[9] Interpellation 20.4456, *Jahrzehntelanger Bruch des Neutralitätsrechts durch den Nachrichtendienst: Konsequenzen und Risiken für die Schweiz*, accessed April 10, 2022, https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20204456.

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Today, the majority of relatively reliable State practice and *opinio juris* expressions related to the law of neutrality stem primarily from a few classic, permanently neutral States like Switzerland.[10] As a result, Switzerland has played and plays an important role in the development of the law of neutrality.[11] Therefore, the reappraisal of Operation RUBICON with regard to the law of neutrality is just as important for Switzerland as it is for the historical reappraisal. Furthermore, the international armed conflict between Russia and Ukraine shows that classic State-versus-State armed conflicts are still possible in the twenty-first century. Europe's security architecture is radically changing as can, for instance, be seen with the likely accession of Sweden and Finland to NATO. The law of neutrality is more topical than it has been for a long time, and the current situation will not continue without discussions about the duties under the law of neutrality in contemporary international law.

Therefore, the aim of this article is to add another piece to the reappraisal of Operation RUBICON as it relates to the law of neutrality, as well as to the current debates about Switzerland's duties under the law of neutrality in contemporary international law. This aim will be achieved by reviewing the publicly known facts about Operation RUBICON, analyzing this information on the basis of the relevant legal foundations of the law of neutrality, and outlining potential implications of the case for Swiss neutrality. The research objective will be achieved by means of an in-depth analysis of the relevant literature. An inductive approach is utilized.

The article is structured as follows: Chapter 2 describes the publicly available information on Operation RUBICON. Chapter 3 provides a theoretical overview of the legal basis with regard to the law of neutrality. Drawing on the previous chapters, Chapter 4 presents a legal analysis of Switzerland's duties under the law of neutrality. Chapter 5 then discusses the potential implications of Operation RUBICON for Swiss neutrality (with a particular focus on Switzerland's neutrality policy).

2. Operation RUBICON

Chapter 2 describes the publicly available information on Operation RUBICON and provides the factual basis for the assessment of the operation as it relates to the law of neutrality.

2.1. Background

The Gentleman's Agreement

In 1952, Boris Hagelin (born in a small town near Baku, Azerbaijan, in 1892), who, prior to moving to Switzerland, had lived in Sweden and the United States, established Crypto AG in the Swiss canton of Zug.[12] The year before, Hagelin had entered into a gentleman's agreement with the U.S. Armed Forces Security Agency (AFSA) on the sale of cipher machines. By 1957, the gentleman's agreement between Hagelin and the National Security Agency (NSA), which had succeeded the AFSA in 1952, generally included the limitation of sales of Crypto AG's most sophisticated, "secure" cipher machines (e.g., CX-52) to countries[13] approved by the United States. Countries not on the list would receive weaker, "less secure" cipher machines.[14]

The SPARTAN Program

In 1958, the CIA took the lead in the relationship with Hagelin and entered into a mutual "licencing agreement."[15] The agreement basically had the same content as the gentleman's agreement but was in writing. Hagelin could sell the stronger, more sophisticated machines to any NATO country, plus Sweden and Switzerland. Sales

[10] Spring (2014), *supra* note 6, at 115, 117, 119.
[11] *Ibid.*, 108 ff.
[12] Miller (2020), *supra* note 3; Crypto Museum, "Operation Rubicon" (December 12, 2019), https://www.cryptomuseum.com/intel/cia/rubicon.htm; Res Strehle, *Operation Crypto: Die Schweiz im Dienst von CIA und BND* (Basel: Echtzeit, 2020), 7, 20, 23, 25.
[13] NATO countries, plus Sweden and Switzerland, were allowed to buy the most sophisticated "secure" cipher machines. See Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.
[14] Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12; Strehle (2020), *supra* note 12, at 28–32.
[15] Crypto Museum (2019), *supra* note 12.

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to other countries (i.e., of the weaker cipher machines)[16] were arranged on a case-by-case basis. The CIA gave this project the cryptonym "SPARTAN."[17] In intelligence jargon, this was a classic "denial operation"—one designed to prevent adversaries from obtaining certain weapons, technologies, and/or information that would give them an advantage.[18] After 1967, the CIA and the NSA completely designed the inner workings (i.e., the cryptologic[19]) of the machines. Thereafter, Crypto AG always made at least two versions of its cipher machines: a secure model that was sold to U.S. allies and a rigged model that was sold to the rest of the world. By deliberately weakening Crypto's algorithms, the U.S. intelligence agencies were able to break the encryption of the machines in a matter of seconds—a task that might otherwise have taken months.[20] The significance of how the SPARTAN program developed is described in a classified, comprehensive CIA report[21] of the events: "Imagine the idea of the American government convincing a foreign manufacturer to jimmy equipment in its favor, talk about a brave new world."[22] The partnership between the U.S. intelligence agencies and Hagelin had evolved from a "denial operation" into an "active measures operation." Crypto AG was no longer just restricting sales of its best cipher machines; it was actively selling machines that were engineered to betray the customer.[23]

MINERVA

By the end of the 1960s, Hagelin was nearly eighty years old. His sale of the company was imminent. After the West German intelligence agency, BND, offered to buy Crypto AG in partnership with the Americans, Hagelin sold his shares to the CIA and the BND on June 4, 1970. The two intelligence agencies were now joint owners of Crypto AG and controlled nearly every aspect of the company's operations (i.e., hiring decisions, designing technology, sabotaging algorithms, and directing its sales targets). To cover the agreement, the CIA and the BND decided on a series of cryptonyms. Crypto AG was code-named "MINERVA."[24] The operation was code-named "THESAURUS,"[25] but in 1987, it was changed to "RUBICON"[26].[27] With the end of the Cold War and the Bühler affair,[28] the Germans decided to exit the operation. On July 4, 1994, the CIA became the sole owner of Crypto AG.[29] Due to a new change in the encryption market (i.e., a shift from hardware to software) and the emergence of the internet, it became increasingly difficult in the early 2000s for the CIA and NSA to maintain their dominant intelligence position with Crypto cipher machines. These developments made Crypto AG

[16] At some point, the weaker cipher machines had the same design as the stronger cipher machines. The only way to tell the difference was by the color of the casing and the inner workings of the machines. See, e.g., Strehle (2020), *supra* note 12, at 37.

[17] In reference to the former warriors in the south Peloponnese. Hagelin should behave as strictly and disciplined as the Spartans and henceforth renounce any self-authorized action in the export of cipher machines. See Strehle (2020), *supra* note 12, at 37.

[18] Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.

[19] The cryptologic is the heart of a cipher system (no matter if mechanical or electronical). It contains the algorithm based on which the system creates the encrypted messages. See Crypto Museum (2019), *supra* note 12.

[20] Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.

[21] The ninety-six-page CIA document with the title *MINERVA: A History* was written after the year 2000 and contains the account of the events until 1995 from the U.S. point of view and was obtained by the *Washington Post* and ZDF. MINERVA was the cryptonym the CIA used for the company Crypto AG. See, e.g., Thevessen, Müller, and Stoll (2020), *supra* note 2.

[22] *MINERVA: A history*. Internal CIA publication TOP SECRET (2004), quoted in Miller (2020), *supra* note 3.

[23] Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.

[24] "Minerva" is the ancient Roman goddess of wisdom and strategic warfare.

[25] The word "thesaurus" comes from Greek and means "treasury." Today, a thesaurus is a synonym for dictionary and stands for the "collection of words arranged according to sense."

[26] "Rubicon" is the name of the river Julius Caesar crossed in 49 BC to march on Rome. "Crossing the Rubicon" has stood for committing irrevocably to a grave course of action ever since (i.e., point of no return).

[27] Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.

[28] Iran, which had a long-standing suspicion that its Crypto machines were rigged, detained the unknowing company salesman, Hans Bühler, in Teheran on March 14, 1992. Bühler was released after nine months in Iranian detention. Crypto AG paid USD 1 million in bail to free Bühler. The money was secretly provided by the BND. See Thevessen, Müller, and Stoll (2020), *supra* note 2; Miller (2020), *supra* note 3.

[29] Crypto Museum (2019), *supra* note 12.

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a less valuable asset for the CIA. Therefore, the CIA let Operation RUBICON play out[30] until the agency exited Crypto AG in 2018.[31]

2.2. Targets and Impacts

After the CIA and the BND acquired Crypto AG in 1970, Crypto AG became the world leader in the sale of cipher machines.[32] The initial agreement between the CIA and the BND was that NATO countries, plus Sweden and Switzerland, were allowed to buy secure (unreadable) cipher machines from Crypto AG. However, over time, an increasing number of countries were removed from the secure list (although the Germans were very reluctant to do this). Unsecured (readable) cipher machines were also sold to allies.[33] The CIA and the BND were able to read the diplomatic and military communications of many countries across the board. At its best, Crypto AG counted more than 120 governments, including numerous armed forces and intelligence agencies, among its customers[34].[35] With the electronic cipher machines that the Americans and Germans had manipulated, the NSA could read 96% of the intercepted communications.[36] At times, Operation RUBICON accounted for over 40% of the NSA's total machine decryptions, while for the Germans, the operation was even more important, accounting for 90% of the BND's intelligence reports on foreign affairs.[37]

Scientia potentia est[38]: Unsurprisingly, Operation RUBICON played a role in many historical events:

- On September 11, 1973, the Chilean socialist president, Salvador Allende, was overthrown in a bloody coup d'état by the military under the leadership of General Augusto Pinochet—with the active support of the CIA.[39] Chile owned rigged cipher machines from Crypto AG. The CIA was therefore able to use the collected information in its ongoing intelligence relationships with some of the coup's plotters.[40]
- On September 17, 1978, following twelve days of peace negotiations at Camp David under the guidance of the United States, Egyptian President Anwar Sadat and Israeli Prime Minister Menachem Begin signed the Camp David Accords, which led to the 1979 Egypt–Israel peace treaty. Due to Egypt's manipulated cipher machines from Crypto AG, the United States was able to read its communications with allied Arab States during the negotiations.[41] "How valuable was it to be able to read Egypt's diplomatic correspondence in 1979 during the Camp David negotiations between Israel and Egypt?" the CIA report asks. "The correct answer is: priceless."[42]
- Shortly after the start of the Iranian Revolution in 1979, students stormed the U.S. embassy in Tehran and took fifty-two employees hostage. They wanted to force the extradition of the overthrown Shah, who had fled to the

[30] Intelligence kept coming in. This was partly due to the bureaucratic inertia of many countries. Many governments simply did not change their cipher machines or unplug them. Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.

[31] Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.

[32] Thevessen, Müller, and Stoll (2020), *supra* note 2; Miller (2020), *supra* note 3.

[33] Miller (2020), *supra* note 3; Crypto Museum (2019), *supra* note 12.

[34] The CIA's MINERVA report does not include a comprehensive list of customers. However, sixty-two customers can be identified: The Americas: Argentina, Brazil, Chile, Colombia, Honduras, Mexico, Nicaragua, Peru, Uruguay, and Venezuela; Europe: Austria, Czechoslovakia, Greece, Hungary, Ireland, Italy, Portugal, Romania, Spain, Turkey, Vatican City, and Yugoslavia; Africa: Algeria, Angola, Egypt, Gabon, Ghana, Guinea, Ivory Coast, Libya, Mauritius, Morocco, Nigeria, Republic of the Congo, South Africa, Sudan, Tanzania, Tunisia, Zaire, and Zimbabwe; Middle East: Iran, Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, and the U.A.E.; Rest of Asia: Bangladesh, Burma, India, Indonesia, Japan, Malaysia, Pakistan, Philippines, South Korea, Thailand, and Vietnam. See Miller (2020), *supra* note 3.

[35] Thevessen, Müller, and Stoll (2020), *supra* note 2; Miller (2020), *supra* note 3.

[36] Crypto Museum (2019), *supra* note 12.

[37] Miller (2020), *supra* note 3; Strehle (2020), *supra* note 12, at 62.

[38] The phrase *scientia potentia est* is a Latin aphorism meaning "knowledge is power."

[39] The CIA had sought to instigate a coup in 1970 and worked to undermine the Allende government since that time. See Central Intelligence Agency, *CIA activities in Chile,* September 18, 2000, https://web.archive.org/web/20070612225422/https://www.cia.gov/library/reports/general-reports-1/chile/index.html.

[40] Thevessen, Müller, and Stoll (2020), *supra* note 2.

[41] [Fiona Endres and Nicole Vögele], "Weltpolitik mit manipulierten Chiffriergeräten," *Schweizer Radio und Fernsehen (SRF)*, February 12, 2020, https://www.srf.ch/news/international/geheimdienst-affaere-weltpolitik-mit-manipulierten-chiffriergeraeten.

[42] *MINERVA: A history*. Internal CIA publication TOP-SECRET (2004), quoted in *ibid*.

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United States. The hostages were freed after 444 days. The Iranians' rigged cipher machines played an important role in the hostage crisis as former NSA director and deputy CIA director, Bobby Ray Inman, confirmed to the *Washington Post*. President Jimmy Carter personally inquired almost daily about the latest findings from the surveillance of Iranian communications.[43]

– In April 1982, Argentine troops occupied the Falkland archipelago in the South Atlantic Ocean, which is under British administration.[44] Thanks to rigged cipher machines from Crypto AG, the Argentine armed forces' communications were readable. The information was then passed on by the Americans to the British. The British government later revealed that communications intelligence was crucial to Prime Minister Margaret Thatcher's decision to sink the *ARA General Belgrano*, an Argentine navy light cruiser, causing the death of more than 300 people. This was a major loss for the Argentine navy.[45]
– On April 5, 1986, a bomb exploded in the La Belle nightclub in West Berlin, which U.S. soldiers often frequented. Three people died and more than 200 were injured. After the attack, President Ronald Reagan blamed Libya for it: "Our evidence is direct, it is precise, it is irrefutable." He even referred to decoded communication transmissions between the Libyan embassy in East Berlin, which had received the orders to carry out the attack, and the foreign ministry in Tripoli. On April 15, 1986, the United States ordered retaliatory air strikes against Libya.[46]
– In December 1989, the United States invaded Panama to depose the country's ruler at the time, Manuel Noriega. Due to the Vatican's rigged cipher machines, the United States knew that Noriega was hiding in the Apostolic Nunciature of the Holy See. On January 3, 1990, Noriega surrendered to U.S. troops and was flown out to Miami where he was sentenced to forty years in prison for drug trafficking.[47]

The CIA in its report concluded that Operation RUBICON "was the intelligence coup of the century. Foreign governments were paying good money to the United States and West Germany for the privilege of having their most secret communications read by at least two (and possibly as many as five or six) foreign countries."[48]

2.3. Swiss Involvement

Following media revelations of Operation RUBICON in February 2020, the Control Delegation (CDel)[49] of the Swiss Parliament decided to conduct an inspection in connection with the cooperation between Crypto AG and foreign intelligence services.[50] The CDel adopted its inspection report[51] on the Crypto AG case on November 2, 2020.

The CDel's inspection report found that the Strategic Intelligence Service (SND), a predecessor organization of the Federal Intelligence Service (FIS), knew from 1993 onward that foreign intelligence services were behind Crypto AG. The CDel states that, after 2002, intelligence cooperation as foreseen in Art. 99, para. 6,[52] of the Federal Act on the Armed Forces and Military Administration of 1995,[53] between the American and Swiss intelligence services, has to be assumed. According to the CDel, the information that Switzerland was able to acquire thanks to its knowledge of the "weak" encryption procedures of Crypto AG's cipher machines, demonstrably

[43] Thevessen, Müller, and Stoll (2020), *supra* note 2; Miller (2020), *supra* note 3.
[44] In accordance with Chapter XI of the Charter of the United Nations (UN Charter), the Falkland Islands (Malvinas) has been on the United Nations list of Non-Self-Governing Territories since 1946. See United Nations, "Falkland Islands (Malvinas)" (May 15, 2019), https://www.un.org/dppa/decolonization/en/nsgt/falkland-islands-malvinas.
[45] Thevessen, Müller, and Stoll (2020), *supra* note 2; Endres and Vögele (2020), *supra* note 2.
[46] Thevessen, Müller, and Stoll (2020), *supra* note 2; Miller (2020), *supra* note 3.
[47] [Endres and Vögele] (2020), *supra* note 41; Thevessen, Müller, and Stoll (2020), *supra* note 2.
[48] *MINERVA: A history*. Internal CIA publication TOP SECRET (2004), quoted in Miller (2020), *supra* note 3.
[49] The Control Delegation (CDel), or Geschäftsprüfungsdelegation (GPDel), supervises activities in the field of State security and the intelligence services and supervises State activities in matters that must be kept secret because their disclosure to unauthorized persons might be seriously detrimental to national interests. See Swiss Parliament, "Control Delegation CD," accessed May 24, 2021, https://www.parlament.ch/en/organe/delegations/control-delegation.
[50] Swiss Parliament, "Fall Crypto AG," accessed May 24, 2021, https://www.parlament.ch/de/organe/delegationen/geschaeftspruefungsdelegation/fall-crypto-ag.
[51] Report of the CDel (2020), *supra* note 4.
[52] Formerly Art. 99, para. 3, let. C, Federal Act on the Armed Forces and Military Administration of 1995.
[53] Federal Act of February 3, 1995, on the Armed Forces and Military Administration, Art. 99, para. 6, CC 510.10 [Military Act, MA].

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provided Switzerland with an intelligence benefit over the years. The CDel states that, even though it was legally permissible for the Swiss intelligence services and foreign services to jointly use a company in Switzerland to obtain information about foreign countries, this cooperation had great political implications. As a result, the CDel considers it wrong that Switzerland's political leadership was not informed about the cooperation until the end of 2019. According to the CDel, the fact that this cooperation remained hidden from the Swiss Federal Council for such a long time also constitutes a deficiency in the Federal Council's leadership and oversight. As a result, the CDel in its report reached the conclusion that the Swiss government over many years shared responsibility for the export of "weak" equipment by Crypto AG.[54]

With regard to the findings of the CDel, a few points should be made. First, the Swiss intelligence services in the past systematically destroyed files. The CDel states that even though it had a sufficient information base to make a general assessment, the records of the Crypto AG case are not complete.[55]

Second, it is highly likely that several high-ranking individuals within the Swiss federal authorities knew the truth about Crypto AG early on. The CIA-MINERVA report states that high-ranking Swiss officials, in particular members of the intelligence services and the Federal Police (Bundespolizei), already knew about the operation at the end of the 1970s.[56] Furthermore, the CIA report states that Kaspar Villiger, a member of the Federal Council from 1989 until 2003, and head of the Federal Military Department[57] from 1989 until 1995, was informed about the true circumstances of Crypto AG.[58] According to the CDel, Kaspar Villiger denies having had any knowledge about the ownership structure of Crypto AG or the ongoing foreign intelligence operation.[59]

Third, two reports were prepared on the Crypto AG case: the CDel report of November 2, 2020, and a secret classified report by Niklaus Oberholzer, a former federal judge. For reasons of secrecy, the CDel was not ready to hand over the classified report to the entire Federal Council.[60]

Fourth, the CDel, in its analysis on the lawfulness of the Swiss intelligence services' conduct, focused on the domestic legal basis. Although the CDel acknowledges that Switzerland is bound by neutrality, the obligations under the law of neutrality and whether Switzerland violated these obligations were not part of the analysis. In fact, the word "neutrality" only appears once in the entire sixty-four-page report.[61]

3. The Law of Neutrality

Chapter 3 provides a theoretical overview of the law of neutrality and serves to set forth part of the legal basis for the assessment of Operation RUBICON.

3.1. The Contemporary International Law Concept of Neutrality

The word "neutrality" is derived from the Latin expression "*ne uter*," meaning neither the one nor the other.[62] Throughout history, different States used different conceptions of neutrality in different situations. Therefore, a common definition for the international law concept of neutrality does not exist.[63] Nevertheless, there is common

[54] Report of the CDel (2020), *supra* note 4.

[55] Report of the CDel (2020), *supra* note 4, at 2, 15.

[56] *MINERVA: A history*. Internal CIA publication TOP SECRET (2004), quoted in Res Strehle, *Operation Crypto: Die Schweiz im Dienst von CIA und BND* (Basel: Echtzeit, 2020), 48, 94.

[57] In 1998, the Federal Military Department was renamed the Federal Department of Defense, Civil Protection and Sport (DDPS).

[58] *MINERVA: A history*, *supra* note 56, at 101.

[59] Report of the CDel (2020), *supra* note 4, at 19.

[60] Statement of the Federal Council, *Fall Crypto AG: Bericht der Geschäftsprüfungsdelegation der eidgenössischen Räte vom 2. November 2020*, May 26, 2021, 4, https://www.parlament.ch/centers/documents/de/Stellungnahme-des-Bundesrates-vom-26-05-2021.pdf.

[61] Report of the CDel (2020), *supra* note 4, at 24–27, 30–31.

[62] See, e.g., Paul Seger, "The law of neutrality," in *The Oxford Handbook of International Law in Armed Conflict*, ed. by Andrew Clapham and Paola Gaeta (Oxford: Oxford University Press, 2014), 249.

[63] Spring (2014), *supra* note 6, at 33.

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ground on major aspects of neutrality, and legal scholars of the modern international law era have used the same core elements[64] to define the concept.[65] One good definition is provided in the *Max Planck Encyclopedia of Public International Law*, according to which "'neutrality' means a particular status, defined by international law, of a State not party to an armed conflict."[66] This status can be a permanent one and entails rights and duties for the so-called neutral State in relation to the belligerent State[67].[68] A permanent neutral status means that a State commits itself through international law not to participate in any future armed conflicts between two or more States. The status can either originate from bilateral or multilateral international treaties or unilateral declarations. The main difference between a permanent neutral status and a non-permanent neutral status lies in additional duties for the permanent State during times of peace (e.g., the permanently neutral State cannot accept obligations in times of peace that would render its duties of neutrality impossible to fulfill in times of conflict).[69]

Essentially, while the neutral State is not to take part in an armed conflict between two or more sovereign States (duty of non-participation[70]), and is to be impartial in its conduct towards warring parties (duty of impartiality[71]), the neutral State has the right to remain apart from, and not be adversely affected by, the international armed conflict.[72] Thus, the belligerent State is obliged to respect the sovereign rights of the neutral State (e.g., the inviolability of a neutral State's territory). The legal concept of neutrality therefore contains specific rules—that is, a reciprocal framework of corresponding rights and duties. These specific rules that stipulate the legal relationship between neutral States and belligerent States can be found in treaties and/or customary international law and together as a sum constituting the law of neutrality.[73]

The most important international treaties on the law of neutrality are the Hague Conventions from 1907. While certain provisions on neutrality can be found in several of the thirteen conventions, two were entirely devoted to the law of neutrality: i) Hague Convention V: The Rights and Duties of Neutral Powers and Persons in Case of War on Land; and ii) Hague Convention XIII: The Rights and Duties of Neutral Powers in Naval War. Although the Hague Conventions still provide the bases for the law of neutrality, they have certain juridical problem zones (e.g., only a part of customary international law was codified; only a small number of States ratified or acceded to Hague Conventions V and XIII; the provisions of the two conventions only apply between contracting powers and then only if all the belligerents are parties to the convention; and the world was a different one in 1907), limiting their importance as sources of law.[74] Today, due to the juridical problems and the outdated character of the Hague Conventions, customary international law is the most important source of law for the law of neutrality.[75]

On the one hand, the law of neutrality seeks to preserve friendly relations between neutral States and belligerent States. On the other hand, by drawing a clear distinction between neutral States and State parties to a conflict, the law of neutrality aims to prevent additional States from being drawn into the conflict and to minimize the

[64] Under the contemporary international law concept of neutrality, there are three core requirements. First, the concept only applies to States. Second, it is only applicable to a certain state of war between two or more States. Third, once a neutrality-relevant conflict breaks out, the neutral State must not participate in the conflict. See Spring (2014), *supra* note 6, at 34–35.

[65] E.g., Lassa Oppenheim, *International Law: A Treatise*, 7th ed., vol. 2, ed. by Hersch Lauterpacht (London: Longmans, 1952), 400; Michael Schweitzer, *Dauernde Neutralität und Europäische Integration,* (Vienna: Springer, 1977), 12.

[66] Michael Bothe, "Neutrality, concept and general rules," in *The Max Planck Encyclopedia of Public International Law*, ed. by Anne Peters (Oxford: Oxford University Press, 2021) (2015), para. 1.

[67] Within the law of neutrality, a belligerent State is a State that is engaged in an international armed conflict. It does not matter whether a formal declaration of war has been issued by that State. See, e.g., *Department of Defense Law of War Manual*, Washington, D.C., U.S. Department of Defense (2016), 947.

[68] Bothe (2015), *supra* note 66, para. 1.

[69] Spring (2014), *supra* note 6, at 39–40; Bothe (2015), *supra* note 66, paras. 15–18.

[70] Also called the "duty of abstention." See Spring (2014), *supra* note 6, at 152.

[71] Also called the "duty of non-discrimination." See *Ibid.*, 157.

[72] Bothe (2015), *supra* note 66, paras. 1–4.

[73] *Department of Defense Law of War Manual* (2016), *supra* note 67, at 947, 956.

[74] Spring (2014), *supra* note 6, at 108–113.

[75] Report of the interdepartmental working group, *Neutralitätspraxis der Schweiz: Aktuelle Aspekte*, August 30, 2000, at 15, https://www.eda.admin.ch/dam/eda/de/documents/aussenpolitik/voelkerrecht/BerichtNeutralitaetspraxis_Kosovo.2000.de.pdf; Spring (2014), *supra* note 6, at 113.

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adverse effects on States that are not parties to the conflict.[76] By not taking sides in an armed conflict and adhering to neutrality, States usually try to protect their territories, populations, and economies from the negative consequences of the conflict. Therefore, it is often militarily weaker States that make use of the concept of neutrality under international law.[77]

Notably, a differentiation must be made between the law of neutrality and neutrality policy. For permanently neutral States such as Switzerland, a coherent policy with their status under international law is highly important. In this regard, neutrality policy[78] (i.e., political decisions beyond the law of neutrality) serves as an instrument with the aim of protecting and/or fostering the effectiveness and credibility of a neutral status. In particular, the permanently neutral State aims to strengthen the confidence of third States about its permanent neutral status. This confidence should minimize the risk of violations of neutrality laws during times of conflict.[79] However, there is no duty to follow a policy of neutrality.[80]

3.2. Scope of Application

In general, the law of neutrality begins to apply with the outbreak of an international armed conflict[81] (i.e., an international armed conflict between two or more sovereign States). The existence of such a conflict is determined according to international humanitarian law.[82] However, there are several exceptions to, and restrictions on, this general rule:

- For *permanently neutral States*, certain peacetime provisions apply as well.[83]
- In practice, the *intensity threshold* for the application of the law of neutrality may be higher than the threshold for the application of international humanitarian law.[84]

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[76] Bothe (2015), *supra* note 66, para. 4; *Department of Defense Law of War Manual* (2016), *supra* note 67, at 948.

[77] Paul Seger (2014), *supra* note 62, at 250.

[78] There are different views on which policy is covered by neutrality policy. For Barz (1992, 9), only the policy of classic, permanently neutral States can be considered neutrality policy. Verosta (1967, 90) also includes policy of factual permanently neutral States. Gyger (1974, 13) goes even further and includes policy of non-permanently neutral States. The neutrality policy for such a State only appears in the case of an international armed conflict. See Andreas Barz, *Der Mythos Neutralität: Zu den Wechselwirkungen zwischen Anspruch und Wirklichkeit eines politischen Konzepts,* (Pfaffenweiler: Centaurus-Verlagsgesellschaft, 1992), 9; Stephan Verosta, *Die dauernde Neutralität: Ein Grundriss,* (Vienna: Manz, 1967), 90; Walter B. Gyger, *Schweizerische Neutralität in Vergangenheit, Gegenwart und Zukunft*, (Zurich: Schweizerischer Aufklärungs-Dienst, 1974), 13.

[79] Spring (2014), *supra* note 6, at 40, 193; Hans Haug, *Neutralität und Völkergemeinschaft* (Zurich: Polygraphischer Verlag, 1962), 53.

[80] Manfred Rotter, *Die dauernde Neutralität,* (Berlin: Duncker und Humblot, 1981), 107 ff.; Daniel Dürst, "*Schweizerische Neutralität und Kriegsmaterialausfuhr,*" (Diss., University of Zurich, 1983), 21.

[81] Traditionally, the law of neutrality has been linked to the existence of war between two or more States. However, over time, the notion of war and its terminology has changed. While traditionally, a formal state of war (i.e., war in the technical sense) was necessary for the application of the law of neutrality, this has changed since the middle of the twentieth century (in particular, due to the establishment of a system of collective security with the United Nations and the prohibition of the use of force). Today, States are very reluctant to recognize the existence of a formal state of war and the application of the law of neutrality relies on factual criteria such as extensive acts of violence (i.e., war in the material sense). Furthermore, following the Geneva Conventions, the term "war" has been replaced by the term "armed conflict." See, e.g., Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge: Cambridge University Press, 2005), 9 ff.; Nikolas Stürchler, "Der Begriff des Krieges im Völkerrecht: Spezifisch unter dem Gesichtspunkt des Neutralitätsrechts." *Schweizerische Zeitschrift für internationalen und europäisches Recht* 21(4) (2011): 627 ff.; Spring (2014), *supra* note 6, at 122–123, 129–131.

[82] Spring (2014), *supra* note 6, at 149.

[83] Cf. chapter 3.3.

[84] The majority of legal scholars recognize that there has been a convergence of the law of neutrality and international humanitarian law. See, e.g., Josef Köpfer, *Die Neutralität im Wandel der Erscheinungsformen militärischer Auseinandersetzungen* (Munich: Bernard & Graefe Verlag, 1975), 103; Adrian R. Schaub, *Neutralität und kollektive Sicherheit: Gegenüberstellung zweier unvereinbarer Verhaltenskonzepte in bewaffneten Konflikten und Thesen zu einem zeit- und völkerrechtsgemässen modus vivendi* (Basel/Frankfurt a.M.: Helbing & Lichtenhahn, 1995), 29; Spring (2014), *supra* note 6, at 133.

However, while today the law of neutrality does not apply to wars in the technical sense but to international armed conflicts in

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- As a rule of customary international law, the law of neutrality does not apply to international armed conflicts covered by *UN Security Council authorization* (i.e., pursuant to Chapter VII of the UN Charter).[85]

In general, the law of neutrality ceases to apply if the neutrality-relevant international armed conflict ends. However, it may also stop applying if the neutral State becomes a party to the conflict or if the UN Security Council decides to apply the Chapter VII enforcement measures of the UN Charter. For permanently neutral States, certain peacetime provisions continue to apply.[86]

3.3. General Rights and Duties[87]

Once the law of neutrality is activated, several rights and duties apply to the neutral State and also to the belligerents. For the neutral State, there is one general right, and there are two general duties:[88]

- General Right of the Neutral State: The neutral State has the *right to remain apart from, and not be adversely affected by, the armed conflict*.[89]
- General Duties of the Neutral State: The neutral State has the duties of *non-participation* and *impartiality*.[90]

The majority of the provisions under the law of neutrality derive from this general right and from these duties. Only a small number of exceptions exist.[91]

The right to remain apart from, and not be adversely affected by, the armed conflict

The right to remain apart from, and not be adversely affected by, the armed conflict is codified in Hague Conventions V and XIII of 1907.[92] Art. 1, Hague Convention V, stipulates that the territory of neutral powers is inviolable. Therefore, belligerents are prohibited from entering the territory of a neutral State militarily. Since the right defines itself according to the general rules of international law governing

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the material sense, State practice suggests that the law of neutrality is not congruent to humanitarian law (even if the same terminology is used). See Spring (2014), *supra* note 6, at 134–135.
For instance, this can be seen in the Swiss practice with regard to the export of war material. The conflict threshold within the meaning of the War Material Act is based first and foremost on the applicability of the law of neutrality. This means that the conflict must have a certain duration and intensity. See Swiss Federal Council, *Botschaft zur Volksinitiative «Gegen Waffenexporte in Bürgerkriegsländer (Korrektur-Initiative)» und zum indirekten Gegenvorschlag (Änderung des Kriegsmaterialgesetzes)* (21.021), 34, March 5, 2021, https://www.fedlex.admin.ch/eli/fga/2021/623/de.

[85] Today, most legal scholars are of the view that the law of neutrality does not apply to international armed conflicts covered by a UN Security Council authorization. This view is in line with current State practice (in particular Austria's and Switzerland's). See, e.g., Arnoldo Tinoco, *Völkerrechtliche Grundlagen dauernder Neutralität: Die dauernde aktive und demilitarisierte Neutralität Costa Ricas unter der Satzung er Vereinten Nationen* (Baden-Baden: Nomos, 1989), 101 ff.; Stürchler (2011), *supra* note 81, at 639; Spring (2014), *supra* note 6, at 138–139.

[86] Spring (2014), *supra* note 6, at 149–150.

[87] In legal doctrine, there are different ways to describe the basic and overarching guidelines of a neutral State. For instance, Spring (2014, 150) calls them "general rights and duties." For Verlinden, the *essentialia neutralitatis* in essence derive from three principles: impartiality, abstention (or non-participation), and prevention. According to Verlinden, the rights and duties can simultaneously be summarized as non-participation in hostilities, the inviolability of the neutral territory, the prohibition of assistance to the belligerent parties, and the duty of impartiality. Upcher, with reference to Fitzmaurice, points out that principles serve to guide the application of specific rules, and rules implement these principles. A principle under the law of neutrality can at the same time only be a rule if there is a specific duty under the law of neutrality. See Nele Verlinden, "The law of neutrality," in *Armed Conflicts and the Law*, ed. by Jan Wouters, Philip de Man, and Nele Verlinden (Cambridge: Intersentia, 2016), 85; James Upcher, *Neutrality in Contemporary International Law* (Oxford: Oxford University Press, 2020), 77.

[88] Spring (2014), *supra* note 6, at 150.

[89] Bothe (2015), *supra* note 66, paras. 1, 30.

[90] *Ibid*., para. 1; Adrian R. Schaub, "Aktuelle Aspekte der Neutralität," *Schweizerische Zeitschrift für internationales und europäisches Recht* 3 (1996): 357.

[91] Spring (2014), *supra* note 6, at 150.

[92] Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Art. 1, October 18, 1907 [Hague Convention V]; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, Art. 1, October 18, 1907, [Hague Convention XIII].

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State territories (e.g., the primary norms of *sovereignty* and *non-intervention*), it implies that the entire territory of a neutral State (land, sea, and air) cannot be used for any kind of military operation, military transit, or any other military purpose.[93]

For permanently neutral States, the rights that exist during an international armed conflict between two or more States are analogous to the rights of non-permanently neutral States.[94] Additional peacetime rights are rather vague and have almost no importance in practice.[95]

The duty of non-participation

First and foremost, the duty of non-participation[96] prohibits a neutral State from actively participating in an international armed conflict between two or more States (e.g., the use of military force during hostilities).[97] Furthermore, neutral States must abstain from providing any military support to a belligerent in such a conflict (*duty of abstention*). Broadly speaking, this implies that the neutral State is not allowed to take any action that may impact the outcome of the conflict (e.g., enhancing the fighting power of a belligerent).[98] For instance, the neutral State is prohibited from supplying warships, ammunition, or any other war material to warring parties (cf. Art. 6, Hague Convention XIII[99]). A neutral State is also precluded from providing massive financial support to a conflict party.[100] Closely linked to the duty of neutral States to abstain from providing any military support to conflict parties is the prohibition on granting any rights to belligerents with regard to the use of the neutral territory for military purposes. This primarily includes any direct or indirect military use of the neutral territory. For instance, belligerents are not allowed to march through and fly over neutral territory or to transit troops, munitions, or other supplies through neutral territory (cf. Art. 2, Hague Convention V[101]).[102]

The general duty of non-participation is not only a passive duty but also an active one. While the neutral State has the right to remain disassociated from the armed conflict, it needs to ensure that belligerents do not use its neutral territory for military operations (*duty of non-toleration*[103]).[104] The standard[105] that a neutral State is required to exercise in order to fulfill its duty of non-toleration is based on the international law "obligation of due diligence."[106] Therefore, the neutral State is bound to reject, with all means at its disposal, any violation of its neutrality, including by force (cf. Art. 5, Hague Convention V; Arts. 3, 8, 9, 24, and 25, Hague Convention XIII).[107] However, the use of military force is only permissible in the case of legitimate self-defense pursuant to Art. 51 of the UN Charter.[108] Furthermore, the neutral State is not bound to take any defensive action that might endanger its existence as a State.[109]

[93] Spring (2014), *supra* note 6, at, 151; Bothe (2015), *supra* note 66, para. 30.
[94] Verosta (1967), *supra* note 78, at 17.
[95] Spring (2014), *supra* note 6, at 181.
[96] Also called the "duty of abstention." See *Ibid*., 152.
[97] Köpfer (1975), *supra* note 84, at 70.
[98] Michael Bothe, "The law of neutrality and non-belligerency," in *The Handbook of International Humanitarian Law*, ed. by Dieter Fleck (Oxford: Oxford University Press, 2008), 584; Köpfer (1975), *supra* note 84, at 73.
[99] Hague Convention XIII (1907), *supra* note 92, Art. 6.
[100] Bothe (2015), *supra* note 66, para. 36.
[101] Hague Convention V (1907), *supra* note 92, Art. 2.
[102] Spring (2014), *supra* note 6, at 153.
[103] Also called the "duty of prevention." See Köpfer (1975), *supra* note 84, at 76; James Upcher (2020), *supra* note 87, at 89 ff.
[104] Bothe (2015), *supra* note 66, para. 33; Köpfer (1975), *supra* note 84, at 76.
[105] The standard has two components. First, the neutral State must have knowledge of the violation of neutrality. "Knowledge" does not require actual knowledge but also encompasses constructive knowledge. Second, the neutral State must use all means at its disposal to respond to the violation. See Upcher (2020), *supra* note 87, at 90.
[106] *Ibid*., 89; Treaty for an Amicable Settlement of All Causes of Differences between the United States and Great Britain. June 17, 1871, 143 CTS at 145 [Treaty of Washington].
[107] Hague Convention V (1907), *supra* note 92, Art. 5; Hague Convention XIII (1907), *supra* note 92, Arts. 2, 3, 8, 9, 24, 25.
[108] Bothe (2015), *supra* note 66, para. 32.
[109] Haug (1962), *supra* note 79, at 22; Ulrike Pieper, *Neutralität von Staaten* (Frankfurt a.M.: Peter Lang, 1997), 66 ff.

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The duty of impartiality

The duty of impartiality[110] is reflected in Art. 9, Hague Conventions V and XIII.[111] First and foremost, it requires that all the neutral State's duties be applied to all parties in the conflict.[112] According to Oppenheim, "the duty of impartiality […] comprises abstention from any active or passive co-operation with belligerents."[113] Furthermore, the duty of impartiality entails a prohibition of discrimination. However, this does not include a duty of exact equal treatment.[114] This means that the neutral State must apply the specific measures it takes based on its neutral rights and duties in a subsequently equal way between the belligerents.[115]

Additional Duties of the Permanently Neutral State

For a permanently neutral State, there are additional duties under the law of neutrality. The two[116] primary duties are the following:

- The permanently neutral State is prohibited from participating in an armed conflict that activates the law of neutrality.[117]
- The permanently neutral State must activate the law of neutrality in all neutrality-relevant armed conflicts.[118]

Apart from the primary duties of the permanently neutral State, there are also secondary duties. The secondary duties aim to ensure that the permanently neutral State is able to uphold its primary duties in every future international armed conflict between two or more States. Therefore, these peacetime secondary duties constitute a *pre-effect*[119] of permanent neutrality and supplement the primary duties of the permanently neutral State.[120] Following the Swiss and Austrian positions, the following two secondary duties can be enumerated:[121]

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[110] Also called the "duty of non-discrimination." See Spring (2014), *supra* note 6, at 157.

[111] Hague Convention V (1907), *supra* note 92, Art. 9; Hague Convention XIII, *supra* note 92, Art. 9.

[112] Spring (2014), *supra* note 6, at 157.

[113] Oppenheim (1952), *supra* note 65, at 675.

[114] The neutral State is entitled to continue existing commercial relations (the concept of the so-called *courant normal*). See Bothe (2015), *supra* note 66, para. 4.

[115] *Ibid.*, para. 4.

[116] According to Stadlemeier (1991, 121), there is a third primary duty for the permanently neutral State to preserve its neutral status. However, Spring (2014, 182) argues that the duty to preserve the neutral status cannot be regarded as a primary duty of a permanently neutral State. According to Spring, it is instead an outflow of the other two primary duties mentioned by Stadlemeier as well as a secondary duty in times of peace. See Sigmar Stadlemeier, *Dynamische Interpretation der dauernden Neutralität* (Berlin: Duncker & Humblot, 1991), 121; Spring (2014), *supra* note 6, at 182.

[117] In most situations, participating in an armed conflict is limited by the *jus ad bellum*. However, with the status of permanent neutrality, there is no more disposition for the State regarding its status in international armed conflicts. For the permanently neutral State, the only option is to remain neutral. See Pieper (1997), *supra* note 109, at 94; Tinoco (1989), *supra* note 85, at 71; Schweitzer (1977), *supra* note 65, at 109.

[118] While for non-permanently neutral States there remains some room for manoeuvre (e.g., the political concept of non-belligerency), the only option for the permanently neutral State is to activate the law of neutrality. See *Ibid.*

[119] Legal scholars have disputed the nature of the *pre-effect* in the past. For some legal scholars, the pre-effect is nothing more than a political postulate and therefore only part of neutrality policy (i.e., *theory of prophylaxis*). According to this theory, under the law of neutrality, there do not exist any secondary duties for permanently neutral States during times of peace. See, e.g., Tinoco (1989), *supra* note 85, at 77 ff.; Hans-Rudolf Kurz, *Bewaffnete Neutralität: Die militärische Bedeutung der dauernden schweizerischen Neutralität* (Frauenfeld/Stuttgart: Huber, 1967), 35; Jürg Martin Gabriel, *Sackgassse Neutralität* (Zurich: vdf Hochschulverlag, 1997), 20; Paul Schweizer, *Geschichte der Schweizerischen Neutralität* (Frauenfeld: Huber, 1895), 87 ff. On the contrary, other legal scholars argue in favor of secondary duties for permanently neutral States during times of peace (i.e., *theory of obligation*). See, e.g., Bothe (2015), *supra* note 66, para. 17; Schaub (1995), *supra* note 86, at 21; Karl Strupp, *Neutralisiation, Befriedung, Entmilitarisierung* (Stuttgart: Kohlhammer, 1933), 214 ff.

[120] Spring (2014), *supra* note 6, at 182.

[121] Stadlemeier (1991), *supra* note 116, at 126; Swiss Federal Council, *Die Neutralität auf dem Prüfstand im Irak-Konflikt: Zusammenfassung der Neutralitätspraxis der Schweiz während des Irak-Konflikts in Erfüllung des Postulats Reimann (03.3066) und der Motion der SVP Fraktion (03.3050)*, December 2, 2005, 7005–7006, https://www.dfae.admin.ch/dam/eda/de/documents/aussenpolitik/voelkerrecht/NeutralitaetspraxisSchweiz.Irak-Konflikt.de.pdf.

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- A permanently neutral State must avoid attachments (e.g., membership in a military alliance with a reciprocity effect, such as NATO) that possibly inhibit the duty of abstention in case of an international armed conflict between two or more States (the so-called *secondary duty of abstention*).
- A permanently neutral State must prepare an effective defense (i.e., not necessarily armed forces) in order to comply with the duty of non-tolerance in the case of an international armed conflict between two or more States (the so-called *secondary duty of non-tolerance*).

It should be noted that the concrete arrangement of the secondary duties has varied extensively over time. Secondary duties are therefore highly influenced by neutrality policy. Thus, while secondary duties are in their core legal duties, they are wrapped in a political mantle.[122] As such, they can be placed in a *grey area* between the law of neutrality and neutrality policy.[123] It should also be pointed out that treaty law for permanent neutrality is either nonexistent or weak. Additionally, the arrangement of customary international law often lacks a uniform and widespread State practice.[124]

4. Assessment of Operation RUBICON with Regard to Switzerland's Duties Under the Law of Neutrality

Chapter 4 provides a legal analysis of Operation RUBICON with regard to Switzerland's duties under the law of neutrality.

4.1. Application of the Law of Neutrality

An assessment of Operation RUBICON under the law of neutrality must involve a determination of whether the law of neutrality applied to one of the situations where Operation RUBICON potentially played a role.

First, as described in section 3.2, the law of neutrality is generally only applicable to, and during, international armed conflicts between two or more sovereign States. Thus, possible internal armed conflicts (e.g., the Chilean coup d'état in 1973) and international tensions (e.g., the taking of U.S. hostages by a group of Iranian students in 1979 and the subsequent tensions between the United States and Iran) are not considered for the assessment of the case under the law of neutrality.[125]

Second, the international armed conflicts between two or more States must be of a certain *duration* and *intensity*.[126] Thus, the law of neutrality does not cover sporadic attacks and brief armed conflicts (e.g., the U.S. retaliatory air strikes against Libya in 1986).[127]

Third, the status of neutrality only applies to the relations between the neutral State and the belligerent States.[128] Relations between neutral States and non-belligerent States are therefore not subject to the law of neutrality, even during an international armed conflict between two or more States (e.g., Switzerland's relations with the United States during the international armed conflict between the United Kingdom and Argentina in 1982). Similarly, Switzerland cannot violate the law of neutrality in connection with the conduct of a belligerent State towards another neutral State, even if Switzerland facilitated the conduct (e.g., the alleged facilitation of the interception of the communications of the Holy See during the U.S. invasion of Panama in 1989). An exception to the rule that the status of neutrality only applies to the relations between the neutral State and the belligerent State could only be constructed if Switzerland knew that the United States would use Switzerland's conduct against one belligerent State in favor of another belligerent State (e.g., during the Falklands War in 1982, the United States passed intercepted information about Argentina's military plans to the United Kingdom). However, such knowledge is hard to prove.[129]

[122] Tinoco (1989), *supra* note 85, at 75; Haug (1962), *supra* note 79, at 52; Ulrich Scheuner, *Die Neutralität im heutigen Völkerrecht* (Wiesbaden: VS Verlag für Sozialwissenschaften, 1969), 43.

[123] Spring (2014), *supra* note 6, at 184.

[124] *Ibid.*, 197.

[125] Sassòli (2021), *supra* note 7, at 3; Marco Sassòli, "Die Schweizerische Neutralitat und der Fall Crypto AG," *Swiss Review of International and European Law* 31(4) (2021): 527.

[126] See chapter 3.2.

[127] Sassòli (2021), *supra* note 7, at 3.

[128] Bothe (2015), *supra* note 66, para. 1.

[129] Sassòli (2021), *supra* note 7, at 3.

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Finally, the law of neutrality does not apply to international armed conflicts covered by UN Security Council authorization (e.g., the military intervention against Iraq in 1991 or the 2011 military intervention in Libya).[130]

As a result, not many situations remain to which the law of neutrality applied, and Operation RUBICON potentially played a role. For two conflicts, the aforementioned requirements do apply:

- The military intervention by NATO States (including the United States) against the Federal Republic of Yugoslavia in 1999 (i.e., the Kosovo War).[131]
- The U.S. and U.K. invasion of the Republic of Iraq in 2003 (i.e., the Iraq War).[132]

During the Kosovo War, Switzerland applied the law of neutrality between March 23, 1999, and June 8, 1999. During the Iraq War, Switzerland applied the law of neutrality between March 20, 2003, and April 16, 2003.[133] Yugoslavia[134] and Iraq were both clients of Crypto AG during those periods and had received rigged cipher machines.[135] The United States, as one of the belligerent parties, was able to read the encrypted communications of the rigged Crypto AG cipher machines of one of the opposing belligerent parties.[136] Therefore, in both conflicts, Operation RUBICON played a role.

The CDel's 2020 inspection report shows that the Swiss intelligence services knew[137] from 1993 onward that foreign intelligence services were behind Crypto AG. According to the CDel, after 2002, intelligence cooperation between the U.S. and Swiss intelligence services must be assumed.[138] While the present author does not know whether rigged Crypto AG cipher machines were exported from Switzerland to the Federal Republic of Yugoslavia or Iraq after 1993, according to current and former intelligence officials, intelligence kept arriving. The CIA let Operation RUBICON play out until it exited Crypto AG in 2018.[139]

Since the law of neutrality was applicable to two conflicts where Operation RUBICON played a role (i.e., the United States as one of the belligerent parties was able to read the encrypted communications of the rigged Crypto AG cipher machines of one of the opposing belligerent parties), and Switzerland at those points in time knew about Operation RUBICON, and during the Iraq invasion even directly profited (i.e., according to the CDel, intelligence cooperation between U.S. and Swiss intelligence services has to be assumed after 2002) from the intelligence operation that was partly unfolding (i.e., the production and export as well as the maintenance of rigged cipher machines by Crypto AG) on its own territory,[140] an examination of how this conduct is assessed

[130] See section 3.2 and Sassòli (2021), *supra* note 7, at 4.

[131] Once the NATO States intervened with military force, Switzerland applied the law of neutrality to the conflict. See Report of the interdepartmental working group (2000), *supra* note 75, at 7.

[132] Once U.S. and U.K. forces attacked Iraq, Switzerland applied the law of neutrality to the conflict. See Swiss Federal Council (2005), *supra* note 121, at 7003.

[133] During the Kosovo War, Switzerland applied the law of neutrality between March 23, 1999, and June 8, 1999. During the Iraq War, Switzerland applied the law of neutrality between March 20, 2003, and April 16, 2003. See Report of the interdepartmental working group (2000), *supra* note 75, at 6; Swiss Federal Council (2005), *supra* note 121, at 7003.

[134] The Socialist Federal Republic of Yugoslavia with its capital in Belgrade was dissolved in 1992, amid the Yugoslav Wars. Serbia and Montenegro remained within a reconstituted State known as the Federal Republic of Yugoslavia. Therefore, it is very likely that at least part of the rigged cipher machines delivered to the Socialist Federal Republic of Yugoslavia remained with the Federal Republic of Yugoslavia.

[135] See chapter 2.2.

[136] As of 1994, the BND sold its shares in Crypto AG to the CIA. From this point in time, the CIA solely owned Crypto AG. See section 2.1.

[137] The clearest case of attributing an action or omission to a State is when State organs, such as military or intelligence agencies, violate an international legal obligation. If the State organ acts in an apparently official capacity and breaches international obligations, the State bears the responsibility. This is even the case if the organ acts *ultra vires*—that is, it exceeds the authority granted by the State or contravenes its instructions. See International Law Commission (ILC), "Draft Articles on Responsibility of States for Internationally Wrongful Acts," *Report on the work of its fifty-third session*, art. 4(1) and art. 7, U.N. Doc. A/56/10, at 31 (2001).

[138] See section 2.3.

[139] See section 2.1.

[140] It is rather likely that the U.S. access to the encrypted communication of rigged cipher machines was direct and not via Crypto AG and Swiss territory. See Sassòli (2021), *supra* note 7, at 1.

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vis-à-vis Switzerland's duties under the law of neutrality is needed. The following assessment focuses on the duties most pertinent to the case.[141]

4.2. Duty to Refrain from Supplying War Material to Belligerents

Trade of war material under the law of neutrality

In current State practice, the limitation of the trade in war material is one of the most common practical applications of the law of neutrality.[142] As part of the duty of abstention (an outflow of the general duty of non-participation), Art. 6, Hague Convention XIII, stipulates that "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."[143] This rule is regarded as customary international law and is therefore analogically applied to land and aerial warfare.[144] As a result, the law of neutrality forbids the governmental trade of war material with one of the belligerents in an international armed conflict between two or more States.[145] The question is, however, whether this rule also applies to the private trade of war material.

Today, the distinction between governmental and private trade of war material under the law of neutrality is predominantly regarded as outdated in contemporary legal doctrine.[146] Compared to 1907, circumstances in terms of the trade of war material have changed. While the idea of a State controlling the private trade of war material through legal regulation did not exist in 1907,[147] nowadays international law (i.e., the Arms Trade Treaty [ATT][148]) obliges States to establish and maintain a national control system for all trade of conventional arms. Almost all States, including Switzerland, regulate the private trade of war material through domestic legal export licencing processes. Furthermore, this practice is also reflected in UN Security Council Resolutions,[149] establishing arms embargos according to Art. 41 of the UN Charter. Thus, the distinction between governmental and private trade of war material no longer reflects State practice.[150] Today, the State makes the final decision about the private export of war material. Therefore, private trade in war material can be attributed to the State.[151]

These developments led to the formation of new customary international law.[152] Art. 6, Hague Convention XIII, has evolved into a general prohibition on the trade of war material during international armed conflicts between

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[141] Additional theoretical background to the pertinent duties will be provided in the following chapter. This author is of the view that directly combining the theoretical background with the subsumption of the case is more reader friendly.

[142] Thomas Roeser, *Völkerrechtliche Aspekte des internationalen Handels mit konventionellen Waffen,* (Berlin: Duncker & Humblot, 1988), 225.

[143] Hague Convention XIII (1907), *supra* note 92, Art. 6.

[144] Roeser (1988), *supra* note 142, at 225; Pieper (1997), *supra* note 109, at 70.

[145] Spring (2014), *supra* note 6, at 199.

[146] James Upcher (2020), *supra* note 87, at 77–83; Verlinden (2016), *supra* note 87, at 93–94; Bothe (2015), *supra* note 66, para. 40; Spring (2014), *supra* note 6, at 204.

[147] Pieper (1997), *supra* note 109, at 73; Stefan Oeter, *Neutralität und Waffenhandel* (Berlin: Springer, 1992), 217.

[148] The Arms Trade Treaty (ATT), which was adopted by the UN General Assembly on April 2, 2013, regulates international trade in conventional arms, and Art. 5, para. 2, calls for each State party to establish and maintain a national control system to implement the provisions of the treaty. The treaty does not distinguish between governmental and private trade of arms. Today, the treaty counts 110 State Parties and 31 Signatories. See Arms Trade Treaty, Art. 5, para. 2, April 2, 2013, 3013 U.N.T.S. 269 [ATT].

[149] For instance, in UN Security Council Resolution 1521, the Council decided "that all States shall take the necessary measures to prevent the sale or supply to Liberia, by their nationals or from their territories or using their flag vessels or aircraft, of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned, whether or not originating in their territories." See S.C. Res. 1521, U.N. Doc. S/RES/1521 (December 22, 2003).

[150] Oeter (1992), *supra* note 147, at 174 ff., 256; Roeser (1988), *supra* note 142, at 26 ff.

[151] Roeser (1988), *supra* note 142, at 230 ff.

[152] Pieper (1997), *supra* note 109, at 74; Schaub (1995), *supra* note 85, at 19; Oeter (1992), *supra* note 147, at 216 ff.; George Politakis, "Variations on a myth: Neutrality and arms trade," *German Yearbook of International Law* 35 (1992): 503 ff.; Stadlemeier (1991), *supra* note 116, at 115; Walter Williams, "Neutrality in modern armed conflicts: A survey of the developing law," *Military Law Review* 90 (1980): 33; Köpfer (1975), *supra* note 84, at 111; Francis Deák, "Neutrality revisited," in

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two or more States.[153] It should be noted, however, that the Swiss Federal Council in its foreign policy reports still recognizes the separation of governmental and private trade of war material under the law of neutrality.[154] However, Switzerland has, through its domestic war material legislation, indirectly conformed to the newly developed customary international rule to prohibit all (including private) trade in war material to belligerents of international armed conflicts between two or more States.[155] Furthermore, the trade of war material under the law of neutrality has more practical relevance than other aspects of the law of neutrality, and, as a result, State practice and *opinio juris* are more extensive. Therefore, with regard to the export of war material under the law of neutrality, Switzerland is unable to almost single-handedly determine the course of customary international law. In addition, Switzerland's practice as to the export of war material has been inconsistent in the past.[156]

Today, it can be concluded that Switzerland (including its private sector), under the law of neutrality, has the duty to refrain from providing war material to belligerents in an international armed conflict between two or more States. Whether this duty already existed in 1999, during the Kosovo War, or the Iraq invasion in 2003, is open to debate. While it was argued in the early 1990s that a customary international rule had developed with regard to the equal treatment of governmental and private trade in war material under the law of neutrality,[157] at that point in time, the ATT did not exist. Furthermore, Switzerland had not yet implemented any domestic provision that would prohibit the private export of war material if the country of destination was involved in a neutrality-relevant international armed conflict.[158] However, an even bigger question mark with specific regard to the case of Operation RUBICON is the definition of war material under the law of neutrality.

Definition of war material under the law of neutrality

Another question requiring an answer is whether Crypto AG's cipher machines fall within the definition of war material under the law of neutrality. Art. 6, Hague Convention XIII, speaks of "war material of any kind whatever" and common Art. 7, Hague Conventions V and XIII, speak of "anything which could be of use to an army or fleet." The wording of the Hague Conventions suggests a broad interpretation of what constitutes war material under the law of neutrality.[159] The two World Wars reinforced a broad interpretation. Total economic warfare and economic sanctions coupled with far-reaching contraband lists led to a consolidation of a broad interpretation of war material under the law of neutrality.[160] Therefore, the older legal doctrine defined war material under the law of

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Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup, ed. by Wolfgang Friedmann, Louis Henkin, Oliver James Lissitzyin, and Philip C. Jessup (New York: Columbia University Press, 1972), 154.

[153] Spring (2014), *supra* note 6, at 204.

[154] Swiss Federal Council, "Neutralität," *Anhang 1 zum aussenpolitischen Bericht 2007*, 5558, June 2007, https://www.fedlex.admin.ch/eli/fga/2007/769/de; Swiss Federal Council, *Aussenpolitischer Bericht 2011* (12.014), 3027, January 18, 2012, https://www.fedlex.admin.ch/eli/fga/2012/405/de.

[155] According to Art. 22*a,* para. 2, let. A, of the Swiss War Material Act (WMA), licences for export trade of war material "shall not be authorized if the country of destination is involved in […] an internal international armed conflict." According to the dispatch of the Federal Council dated March 5, 2021, with regard to the amendment of the War Material Act (WMA), "the conflict threshold within the meaning of the War Material Act is based first and foremost on the applicability of the law of neutrality." This means that governmental as well as private exports of war material need to be halted if there is a neutrality-relevant conflict. See Federal Act of December 13, 1996, on War Material, Art. 22*a*, para. 2, let. A, CC 514.51 [War Material Act, WMA]; Swiss Federal Council (2021), *supra* note 84, at 34.

[156] Switzerland still distinguishes between governmental and the private export of war material. If war material is exported to a belligerent, Switzerland, pursuant to Art. 9, Hague Convention V, has a duty of non-discrimination. Nevertheless, Switzerland in the past exported war material to certain (Western) belligerents in the forefront of international armed conflicts between two or more States, or based on warranties by a conflict party that the war material would not be used in the ongoing neutrality-relevant international armed conflict (e.g., exports to the United States in the Korean and Vietnam Wars, to the coalition in the first Gulf War, and to NATO States in the Kosovo War). See Spring (2014), *supra* note 6, at 210, 212–215.

[157] See, e.g., Politakis (1992), *supra* note 152, at 505; Oeter (1992), *supra* note 147, at 174 ff., 256.

[158] Current Art. 5, para. 2, let. A, of the Swiss War Material Ordinance (WMO) was only introduced in 2008. See Ordinance of February 25, 1998, on War Material: Amendment dated August 27, 2008, OC 2008 5495.

[159] Oeter (1992), *supra* note 147, at 174 ff.

[160] During World War II, all goods except art and luxury items were regarded as contraband. See Dürst (1983), *supra* note 80, at 77 ff.

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neutrality as all goods that are of use in conflict situations or all conflict-relevant goods.[161] However, the newly developed customary international law rule to jointly assess governmental and private trade of war material also changed the traditional interpretation of war material under the law of neutrality. If the broad interpretation is used, this could factually lead to a trade embargo imposed by neutral States on belligerents in an international armed conflict between two or more States.[162] This would undermine the original free-trade character of the law of neutrality. The newer legal doctrine therefore follows a narrower interpretation of war material under the law of neutrality.[163]

For instance, Oeter defined war material under the law of neutrality as "military devices, which have the primary purpose of inflicting damage."[164] Following this narrow interpretation, dual-use and civilian goods, which can also be used for military purposes, cannot be defined as war material under the law of neutrality.[165] Such a narrow interpretation of war material is from 1980 onward reflected in State practice. For instance, in the Iran-Iraq conflict (1980–1988), both the United Kingdom and the Federal Republic of Germany followed a status of neutrality. Both States stopped the export of war material. For the United Kingdom, the export halt was limited to lethal arms, respectively, lethal items. For Germany, the export stop included all war material according to its domestic legislation as well as dual-use goods, which did have the primary purpose of killing people.[166] Switzerland has also adopted a narrow interpretation of war material under the law of neutrality. During the Iran-Iraq conflict, Switzerland halted the export of war material. An exception was only made for the export of training aircraft (i.e., mainly Pilatus PC-7s), nowadays considered to be so-called special military goods[167] under Swiss legislation.[168] During the military intervention against the Federal Republic of Yugoslavia in 1999,[169] and the invasion of the Republic of Iraq in 2003,[170] Switzerland also followed a narrow interpretation. Today, Switzerland interprets war material under the law of neutrality according to the Swiss Federal Act on War Material (AWM) and the Ordinance on War Material (WMO).[171] While Switzerland excludes special military goods from the definition of

[161] Erik Castrén, *The Present Law of War and Neutrality* (Helsinki: Finnish Academy of Science and Letters, 1954), 474; Ingo Wallas, *"Die völkerrechtliche Zulässigkeit der Ausfuhr kriegswichtiger Güter aus neutralen Staaten,"* (Diss., University of Hamburg, 1970), 55 ff.

[162] Today, in particular, where many goods (especially dual-use goods) can potentially be used for military purposes. The traditional interpretation of war material under the law of neutrality might for instance include computer equipment that may be used for cyber warfare. See Jörg Künzli, *Vom Umgang des Rechtsstaats mit Unrechtsregimes: Völker- und landesrechtliche Grenzen des Verhaltensspielraums der schweizerischen Aussenpolitik gegenüber Völkerrecht missachtenden Staaten* (Bern: Stämpfli, 2008), 422.

[163] Oeter (1992), *supra* note 147, at 228 ff; Roeser (1988), *supra* note 142, at 229; Dürst (1983), *supra* note 80, at 78.

[164] Oeter (1992), *supra* note 147, at 228.

[165] Künzli (2008), *supra* note 162, at 423; Pieper (1997), *supra* note 109, at 71; Oeter (1992), *supra* note 147, at 228; Dürst (1983), *supra* note 80, at 78.

[166] Oeter (1992), *supra* note 147, at 118–120.

[167] Special military goods do not fall under the War Material Act (WMA). They fall under the Goods Control Act (GCA) and are derived from the Wassenaar Arrangement's Munition List, defined as "goods that have been designed or changed for military purposes, but are neither weapons, ammunition, explosives nor any other direct means for combat, as well as training aircraft with suspension gear." See Federal Act of December 13, 1996, on the Control of Dual-Use Goods, Specific Military Goods and Strategic Goods, Art. 3, let. C, CC 946.202 [Goods Control Act, GCA].

[168] Künzli (2008), *supra* note 162, at 424; Politakis (1992), *supra* note 152, at 489.

[169] The Swiss position in the Kosovo War was that "in general, it can be assumed that Article 7 of the Conventions only covers goods and services that directly and in a militarily relevant way serve the combat capability of armies." See Report of the interdepartmental working group (2000), *supra* note 75, at 19.

[170] The Swiss position during the Iraq invasion was to prohibit the export of war material as defined in the Swiss War Material Act. However, with regard to the private trade of war material, the scope of the goods covered seemed to have been broader. The Federal Council stated that "no authorisation will be granted if the export of equipment or the providing of a service would contribute to the military operations in Iraq." See Swiss Federal Council (2005), *supra* note 121, at 7012–7013.

[171] War Material Act (1996), *supra* note 155, Art. 5; Ordinance of February 25, 1998, on War Material, Annex 1, CC 514.511 [War Material Ordinance, WMO].

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war material under the law of neutrality,[172] international law[173] includes it as long as it has the potential for lethal use during combat.[174]

Therefore, while cipher machines (categorized as dual-use goods under the Wassenaar Arrangement of 1996)[175] could have been subsumed under the broader definition of war material under the law of neutrality in the first half of the twentieth century, they are unlikely to fall under the narrower interpretation of State practice from 1980 onward.

Conclusion

Switzerland, in its complicity in Operation RUBICON, did not violate its duty under the law of neutrality "to refrain from providing war material to belligerents."

4.3. Duty Not to Tolerate on Neutral Territory Communication Stations or Other Apparatuses for the Purpose of Communicating with Belligerents

In general, the neutral State is bound to repel with all means at its disposal any violation of its neutrality and if necessary by force (this so-called duty of non-toleration is an outflow of the general duty of non-participation).[176] According to Art. 3, let. A, Hague Convention V, "belligerents are […] forbidden to erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea." Pursuant to Art. 3, let. B, Hague Convention V, "belligerents are likewise forbidden to use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages."[177] Art. 5, Hague Convention V, stipulates that "a neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory."[178]

While rules of the law of neutrality in the Hague Conventions of 1907 do not address modern problems of communication technology, the rules contain principles and purposes that remain valid today.[179] To adapt the rules of the law of neutrality to new circumstances, old rules must, where possible, be interpreted by analogy.[180] Thus, Art. 3, Hague Convention V, must also apply to modern communication technology as it exists today.[181] Such logic can also be observed in other treaties. For instance, the commentary of the International Committee of the Red Cross (ICRC) emphasises that "telegraphic" correspondence and communication in Articles 81 and 124 of the Geneva

[172] It should be noted that, with regard to the international armed conflict between Russia and Ukraine, Switzerland decided to adopt the European Union's sanctions against Russia and prohibit the export of special military goods as well as dual-use goods to Russia and Ukraine. See Ordinance of March 4, 2022, on Measures in Connection with the Situation in Ukraine, CC 946.231.176.72.

[173] The definition of war material under the law of neutrality is nowadays very much aligned with the definition found in international non-proliferation regimes (e.g., the Wassenaar Arrangement). Weapon embargos of the UN Security Council (e.g., SC Resolution 1521) or the ATT (i.e., Arts. 2 and 3) use similarly narrow definitions for conventional arms and ammunition. See Künzli (2008), *supra* note 162, at 423.

[174] Spring (2014), *supra* note 6, at 206.

[175] Switzerland is a participating State of the Wassenaar Arrangement and adopts the lists of controlled goods into its national legislation. See Ordinance of June 3, 2016, on the Export, Import and Transit of Dual-Use Goods, Specific Military Goods and Strategic Goods, Annex 2, CC 946.202.1 [Goods Control Ordinance, GCO].

[176] Spring (2014), *supra* note 6, at 153.

[177] Similar to Art. 3, Hague Convention V, Art. 5, Hague Convention XIII, states that "belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea." See Hague Convention V (1907), *supra* note 92, Art. 3; Hague Convention XIII (1907), *supra* note 92, Art. 5.

[178] Hague Convention V (1907), *supra* note 92, Art. 5.

[179] Bothe (2015), *supra* note 66, para. 50.

[180] Peter Hostettler and Olivia Danai, "Neutrality in Land Warfare," in *The Max Planck Encyclopedia of Public International Law*, ed. by Anne Peters (Oxford: Oxford University Press, 2021) (2015), para. 23; Spring (2014), *supra* note 6, at 245.

[181] Hostettler and Danai (2015), *supra* note 180, para. 23; Spring (2014), *supra* note 6, at 249.

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Convention III, relative to the Treatment of Prisoners of War, today includes transmissions by facsimile and e-mail.[182] With regard to Art. 3, Hague Convention V, the main purpose is to prevent the use of neutral territory for military communications.[183] Adopting this rule to today's circumstances means that no communication[184] station or other apparatus for the purpose of communicating with belligerent forces is allowed on neutral territory.[185]

Crypto AG's cipher[186] machines are considered cryptographic equipment. The purpose of these devices is to encrypt and decrypt information to secure the communication.[187] As these machines not only secure messages but also transmit them, cipher machines must be regarded as communications technology. Although they are not "stations" *per se*, they may also be used for communications between armed forces. In the context of cyber warfare, it is argued that cyber infrastructure, such as computer networks used for military purposes, falls under Art. 3, Hague Convention V.[188] Thus, if cipher machines are used for the purpose of communicating between armed forces, they could be regarded as "other apparatus for the purpose of communicating with belligerent forces on land or sea."[189]

The set-up of cipher machines on neutral territory for the purpose of communicating with belligerent forces could therefore fall under the provision. However, as the core of the provision lies in the prevention of military message transmissions from or to neutral territory by belligerent forces, the establishment and operation of a company manufacturing cipher machines (which are not considered as war material under the law of neutrality) on neutral territory would likely not fall under Art. 3, Hague Convention V. Although in the particular case of Operation RUBICON, the manufacture of cipher machines and the communication with cipher machines may be intertwined, as they are two different acts.

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[182] International Committee of the Red Cross (ICRC), Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War (Cambridge: Cambridge University Press, 2021), paras. 3540, 4879.

[183] Spring (2014), *supra* note 6, at 153.

[184] It should be noted that, according to Art. 8, Hague Convention V, "a neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals." Today, Art. 8, Hague Convention V, is said to include general telecommunications infrastructure (including internet infrastructure). This rule reflects the fact that it is likely impossible for a neutral State to control the extraterritorially initiated use of publicly accessible transnational communication networks. Therefore, belligerents may continue to use non-military communications infrastructure (e.g., GPS, servers, communication satellites, etc.), even for military purposes. However, if access is limited for one belligerent, according to the duty of impartiality, access needs to be limited for all belligerents. In such a case, Art. 9, Hague Convention V, stipulates that "a neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus." See *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, ed. by Michael N. Schmitt and Liis Vihul, 2nd ed. (Cambridge: Cambridge University Press, 2017), Rule 151, 557; Johann-Christoph Wohltag, "Cyber Warfare," in *The Max Planck Encyclopedia of Public International Law*, ed. by Anne Peters (Oxford: Oxford University Press, 2021) (2015), para. 18; Bothe (2015), *supra* note 66, paras. 50–51, 103.

[185] *Manual of International Law Applicable to Air and Missile Warfare, Program on Humanitarian and Policy and Conflict Research*, Cambridge, MA, Harvard University (2009), 52; George K. Walker, "Neutrality and information warfare," *International Law Studies* 76 (2001): 236–237.

[186] A "cipher" describes the algorithm used to encrypt or decrypt information. The word "cipher" also refers to an encrypted message or code. See Crypto Museum, "Glossary of crypto terminology" (February 27, 2022), https://www.cryptomuseum.com/crypto/glossary.htm.

[187] *Ibid*.

[188] *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017), *supra* note 184, Rules 151 and 152, 556–560.

[189] It should be noted that Art. 3, Hague Convention V, uses the terms "station" and "installation." This wording suggests the requirement of a certain infrastructure. However, the term "apparatus" may refer to a "device" or "machine." For instance, the *Cambridge Dictionary* (https://dictionary.cambridge.org/) defines "apparatus" as "a set of equipment or tools or a machine that is used for a particular purpose." Such an interpretation was, for instance, applied by Sweden in 1916, when it prohibited vessels in Swedish ports from using their wireless apparatus. Therefore, a single cipher machine on neutral territory for the purpose of communicating with belligerent forces could be regarded as an "apparatus" within the meaning of Art. 3, Hague Convention V, and therefore would violate the provision. This would be in line with the purpose of Art. 3, Hague Convention V, to prevent the use of neutral territory for military communication. See Oppenheim (1952), *supra* note 65, at 749.

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Subsuming Operation RUBICON under Art. 3, Hague Convention V, poses two further obstacles:

The first obstacle is in connection with Art. 3, let. B, Hague Convention V. The question is whether Crypto AG's cipher machines served "purely military" purposes in peacetime.[190] Under the law of war, an object serves a military purpose if it is expected to be used for military ends.[191] The primary purpose of cipher machines is to secure the communication of confidential information. Whether the cipher machines serve a military or a civilian purpose depends on the context.[192] This also becomes evident when looking at Operation RUBICON. Crypto AG's rigged cipher machines were not only sold to armed forces but to all kinds of government entities[193] and private companies. Furthermore, the communication that the United States intercepted was used in a variety of contexts (e.g., peace negotiations at Camp David in 1978 and the Iranian hostage crisis in 1979). Therefore, it is rather unlikely that the purpose of Crypto AG's cipher machines used during peacetime was "purely military."

The second obstacle is connected to Art. 3, let. A, Hague Convention V. The issue is whether the act of establishing a cipher machine for the purpose of communicating with belligerent forces during the Kosovo War or the Iraq invasion was committed on Swiss territory. As described above, the main purpose of Art. 3, Hague Convention V, is to prevent the use of neutral territory for military communication. Crypto's manufacture of (rigged) cipher machines does not likely fall under Art. 3, Hague Convention V. Furthermore, most of the Crypto AG cipher machines were set up and used by belligerents on their own territories or abroad. While it cannot be completely ruled out, there is no information to suggest that belligerents in the Kosovo War or the Iraq invasion, such as the United States, used cipher machines on Swiss territory for the purpose of communicating with their armed forces. In addition, there is no information suggesting that the United States' interception of communication from rigged Crypto AG cipher machines was conducted on Swiss territory.

It is therefore difficult to establish that, in connection with Operation RUBICON, a belligerent (in particular, the United States) violated Art. 3, Hague Convention V, during the Kosovo War or the Iraq invasion. Without such a violation, Switzerland's duty of non-toleration stipulated in Art. 5, Hague Convention V, was not triggered.

Conclusion

Switzerland, in its complicity in Operation RUBICON, did not likely violate its duty under the law of neutrality "not to allow on neutral territory communication stations or other apparatuses for the purpose of communicating with belligerent forces."

4.4. Duty Not to Tolerate Military Intelligence Services in Favor of Belligerents on Neutral Territory

On the one hand, according to the special provision in Art. 3, Hague Convention V, in connection with Art. 5, Hague Convention V, the neutral State has the duty not to tolerate on neutral territory, communication stations or other apparatuses for the purpose of communicating with belligerent forces. On the other hand, the neutral State has the general duty of non-toleration. The neutral State must ensure that belligerents do not use its neutral territory for

[190] This problem was already highlighted during the Hague Peace Conference in 1907. For instance, the Russian delegate remarked, "It will always be difficult if not impossible to prove that installations for telegraphic communication established in time of peace on foreign territory by a Government or by grantees and ressortissants of a State which has become belligerent, may have been constructed solely with a view to war." See *Proceedings of the Hague Conferences: The Conference of 1907*, ed. by Carnegie Endowment for International Peace (New York: Oxford University Press, 1921), 32.

[191] International Committee of the Red Cross (ICRC), Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Dordrecht: Kluwer Academic Publishers Group, 1987), para. 2022.

[192] This is the reason to regard cipher machines as dual-use goods (i.e., goods that may be used both for civilian and military purposes). See, e.g., Goods Control Act (1996), *supra* note 167, Art. 3, let. c.

[193] In particular, embassies are often equipped with cipher machines to securely communicate highly confidential information with their respective governments. An example with regard to Operation RUBICON is the attack on the La Belle nightclub in West Berlin in 1986. After the attack, then U.S. President Ronald Reagan blamed Libya for it and referred to decoded communication transmissions between the Libyan embassy in East Berlin, which received the orders to carry out the attack, and the foreign ministry in Tripoli. See section 2.2.

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military operations.[194] As an outflow or combination of these rules, the great classic works of international law have argued that the neutral State has the duty not to tolerate one belligerent's espionage activities against another on its territory.[195] Domestic legislation of permanently neutral States seems to indirectly confirm such a duty. For instance, the permanently neutral States of Austria[196] and Costa Rica[197] both have domestic legislation prohibiting espionage on their territories. Switzerland, too, in its domestic legislation, criminalizes espionage (including military espionage against a foreign State). Art. 301 of the Swiss *Criminal Code* states that "any person who conducts or organizes the conduct of military intelligence gathering services on Swiss territory for a foreign state against another foreign state, and any person who recruits persons for or facilitates such services, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty."[198]

The primary purpose of Art. 301 is the protection of Swiss neutrality.[199] Military intelligence targeted against other States is prohibited because it could disrupt Switzerland's relations under international law with the respective State. It is unnecessary to prove that Switzerland's relations with other States under international law have actually been disrupted. Mere endangerment is sufficient.[200] According to Omlin, an intelligence service operating in Switzerland's territory that benefits a belligerent State, or a State intending to wage war, is incompatible with the concept of neutrality. It should be noted, however, that Omlin also indicates that Art. 301 constitutes a provision that international law does not require.[201] However, whether such a domestic provision is required by international law can be disregarded for the current assessment under the law of neutrality. Although part of international law, the law of neutrality contains specific rules (i.e., a reciprocal framework of corresponding rights and duties) regarding the relationship between the neutral State and the belligerents in an international armed conflict between two or more States. The duties under the law of neutrality impose additional restrictions on the affected States. Therefore, a divergence between the duties under the law of neutrality, and duties under general international law, may exist (e.g., the duty to refrain from supplying war material to belligerents or the general duty of impartiality).[202]

To determine the scope of the duty not to tolerate military intelligence services in favor of belligerents on neutral territory, there are a number of sources that can be examined: UN Resolutions,[203] manuals,[204] handbooks,[205] and other instruments[206].[207] For instance, according to the Helsinki Principles on the Law of Maritime Neutrality, a neutral ship renders a non-neutral service "if it is incorporated into or assist[s] the enemy's intelligence system."[208] A similar interpretation for the war on land would suggest a rather broad interpretation. To further understand what the duty not to tolerate military intelligence services in favor of belligerents on neutral territory could exactly mean (at least from a Swiss perspective), a look at domestic court interpretations is recommended.[209] The Federal Supreme

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[194] Bothe (2015), *supra* note 66, para. 33; Köpfer (1975), *supra* note 86, at 76.

[195] Oppenheim (1952), *supra* note 65, at 750; Paul Fauchille, *Traité de droit international public,* vol. 2 (Paris: Rousseau et Cie, 1921), 753.

[196] Federal Act of January 23, 1974, on Acts Punishable by Law, § 319 [Austrian Criminal Code].

[197] Penal Code of the Republic of Costa Rica, Nr. 4573, Art. 295.

[198] Swiss Criminal Code of December 21, 1937, CC 311.0, Art. 301.

[199] Esther Omlin, "Art 301," in *Basler Kommentar: Strafrecht II*, 4th ed., ed. by Marcel A. Niggli and Hans Wiprächtiger (Basel: Helbing Lichtenhahn, 2019), 5260.

[200] *Ibid.*, 5261.

[201] *Ibid*.

[202] Oppenheim (1952), *supra* note 65, at 655.

[203] E.g., UN General Assembly Resolution 58/80 A of 1995. See G.A. Res. 58/80, U.N. Doc. A/RES/58/80 (December 12, 1995).

[204] E.g., *Sanremo Manual on International Law Applicable to Armed Conflicts at Sea*, Sanremo, Italy, International Institute of Humanitarian Law (1994); *Manual of International Law Applicable to Air and Missile Warfare* (2009), *supra* note 185.

[205] E.g., *Sanremo Handbook on Rules of Engagement*, Sanremo, Italy, International Institute of Humanitarian Law (2009).

[206] Helsinki Principles on the Law of Maritime Neutrality, "Committee on Maritime Neutrality," 68 *International Law Association Report of the 68th Conference,* at 496, Taipei: 1998.

[207] Seger (2014), *supra* note 62, at 251–253.

[208] Helsinki Principles on the Law of Maritime Neutrality, *supra* note 206, at 5.1.2.

[209] German Interests in Polish Upper Silesia (Germany v. Poland), 1926 P.C.I.J (ser. A) No. 7, 52; Aldo Zammit Borda, "A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals," *European Journal of International Law (EJIL)* 24(2) (2013): 657, 659.

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Court of Switzerland uses a broad interpretation of intelligence services.[210] Legal doctrine mentions that, in the digital age, intelligence services also include the creation, ordering, placement, or installation of spy software.[211] Art. 301 of the Swiss *Criminal Code* also includes facilitating the conduct of military intelligence-gathering services. According to established case law of the Federal Supreme Court of Switzerland, it is sufficient that the conduct of the person involved can somehow be included in the chain of acts that collectively comprise the establishment or operation of the intelligence service.[212] Furthermore, it is sufficient if the offense is partially committed in Switzerland, and the main offense occurs abroad.[213] Thus, the manufacture and maintenance of rigged cipher machines that allowed the United States to intercept secret communications of another State may fall within the scope of Art. 301 of the Swiss *Criminal Code*.[214]

However, it is only possible to speak of a violation of neutrality obligations under international law if the rigged cipher machines were manufactured or maintained for a certain customer during a neutrality-relevant conflict and were supplied for the purpose of benefiting the United States during that conflict.[215] As mentioned in section 4.1, in both relevant conflicts in this instance, the law of neutrality only applied for a very limited period of time.[216] Therefore, it is rather unlikely that Crypto AG manufactured and exported rigged cipher machines or offered maintenance services to the Federal Republic of Yugoslavia or the Republic of Iraq during these short periods of time. However, this cannot be completely ruled out.

Although Art. 301 of the Swiss *Criminal Code* also covers intelligence services operating on Swiss territory benefitting States "intending" to wage war, the application to such a case may require certain immediacy.[217] The general provision of intelligence during peacetime for a potential future belligerent cannot be contrary to neutrality. Such a prohibition would contradict the spirit of the law of neutrality, which in peacetime does not prohibit a State from supplying weapons that could foreseeably be used against another State. This means that, while the manufacture and export of rigged cipher machines or the maintenance of such machines for, and to, possible opponents of the United States in an imminent neutrality-relevant conflict would be covered by the duty not to tolerate military intelligence services in favor of belligerents on neutral territory, the indiscriminate manufacture and export of rigged cipher machines cannot fall under this duty.[218] In the case of the Iraq invasion, this pre-effect would probably expand the relevant timeframe to be considered for a violation of the law of neutrality by one month.[219] In the case of the Kosovo War, the expansion of the relevant timeframe to be considered for a violation of the law of neutrality is more difficult to establish, but it would probably not be much longer than that of the Iraq invasion.[220] Thus,

[210] BGE 82 IV 158; BGE 101 IV 177; Spring (2014), *supra* note 6, at 115.

[211] Markus Hussmann, "Art 272," in *Basler Kommentar: Strafrecht II*, 4th ed., ed. by Marcel A. Niggli and Hans Wiprächtiger (Basel: Helbing Lichtenhahn, 2019), 4983.

[212] BGE 101 IV 177, E. I.2 p. 189.

[213] Omlin (2019), *supra* note 199, at 5264.

[214] The CDel points out that under current Swiss law (the Federal Act on the Intelligence Service was enacted in 2015), it is permissible for the Federal Intelligence Service (FIS) and a foreign intelligence service to jointly use a company in Switzerland to obtain information about foreign States (cf. Art. 34, para. 2, Federal Act on the Intelligence Service). Accordingly, in the context of an operation supported by the FIS, the activities of the foreign intelligence service would no longer fall under the criminal offense of prohibited military espionage against a foreign State (cf. Art. 301, Swiss *Criminal Code*). See Report of the CDel (2020), *supra* note 4, at 3, 31; Federal Act of September 25, 2015, on the Intelligence Service, Art. 34, para. 2, CC 121 [Intelligence Service Act, IntelSA].

[215] Sassòli (2021), *supra* note 7, at 9.

[216] During the Kosovo War, Switzerland applied the law of neutrality between March 23, 1999, and June 8, 1999. During the Iraq War, Switzerland applied the law of neutrality between March 20, 2003, and April 16, 2003. See Report of the interdepartmental working group (2000), *supra* note 75, at 6; Swiss Federal Council (2005), *supra* note 121, at 7003.

[217] The Swiss Federal Council had already denied the United States overflight rights shortly before the U.S. attack on Iraq since its request clearly followed a military logic with regard to the future war. See Swiss Federal Council (2005), *supra* note 121, at 7011.

[218] Sassòli (2021), *supra* note 7, at 9–10.

[219] During the Iraq War, Switzerland applied the law of neutrality between March 20, 2003, and April 16, 2003. However, the Federal Council had already denied the United States overflight rights on February 21, since its request clearly followed a military logic with regard to the future war. See Swiss Federal Council (2005), *supra* note 121, at 7002–7003.

[220] During the Kosovo War, Switzerland applied the law of neutrality between March 23, 1999, and June 8, 1999. NATO's decision to start a bombing campaign against the Federal Republic of Yugoslavia was made after the Rambouillet negotiations failed on March 18. See Report of the interdepartmental working group (2000), *supra* note 75, at 6.

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this would not significantly change the fact that for both neutrality-relevant conflicts, the timeframe to be considered for a violation of the law of neutrality was extremely short.

Conclusion

It is unlikely that Switzerland, in its complicity in Operation RUBICON, violated its duty under the law of neutrality "not to tolerate military intelligence services in favor of belligerents on neutral territory." However, it cannot be ruled out that Crypto AG manufactured and exported rigged cipher machines or offered maintenance services to the Federal Republic of Yugoslavia or the Republic of Iraq during the relevant timeframes to which the law of neutrality applied.

4.5. Duty Not to Deliberately Favor a Belligerent to Offer a Military Advantage

The law of neutrality is based on the fundamental principle that the neutral State must treat all belligerents during an international armed conflict between two or more States in the same way.[221] In its actions, the neutral State must be impartial towards the belligerents.[222] The principle of impartiality is expressed, for example, in the preamble to Hague Convention XIII, according to which "it is, for neutral Powers, an admitted duty to apply these rules impartially to several belligerents."[223] Furthermore, the principle is reflected in Art. 9, Hague Conventions V and XIII, according to which the neutral State must apply the specific measures it takes based on its neutral rights and duties in a subsequently equal way between the belligerents.[224] According to Upcher, it is the principle of impartiality that guides the application of the duty of abstention and the duty of non-toleration.[225]

However, the question is whether apart from their implementation through Art. 9, Hague Conventions V and XIII, legal duties can be based directly on the principle of impartiality. Oppenheim's famous definition of neutrality seems to answer the question in the affirmative. According to Oppenheim, neutrality is "the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents, such attitude creating certain rights and duties between the impartial State and the belligerent."[226] Furthermore, according to Verlinden, the majority view in contemporary legal doctrine is that a general duty of impartiality exists and that legal obligations can be derived from the principle of neutrality.[227] This seems logical since a new customary norm based on the principle of impartiality can always develop through customary international law.

It seems clear that partial behavior, through which a neutral State offers a military advantage to one of the belligerents, violates the law of neutrality.[228] For instance, although a neutral State does not have to eliminate differences in commercial relations with different belligerents of an international armed conflict between two or more States,[229] an exceptional economic preference or discrimination of one of the belligerents should generally be regarded as an interference (since it may offer a military advantage) and therefore violates the law of neutrality.[230] Thus, on the basis of the foregoing, a duty not to deliberately favor a belligerent to offer a military advantage can be inferred from the principle of impartiality.[231] In view of the basic nature of such a duty, the neutral State's adherence

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[221] Hostettler and Danai (2015), *supra* note 180, para. 8; Sassòli (2021), *supra* note 7, at 10.

[222] Robert W. Tucker, *The Law of War and Neutrality at Sea,* Washington D.C.: United States Government Printing Office, 1955, 205.

[223] Hague Convention XIII (1907), *supra* note 92, Preamble.

[224] Hague Convention V (1907), *supra* note 92, Art. 9; Hague Convention XIII (1907), *supra* note 92, Art. 9.

[225] In his book, Upcher uses the terminology "duty of prevention." See Upcher (2020), *supra* note 87, at 77.

[226] Oppenheim (1952), *supra* note 65, 400; Schweitzer (1977), *supra* note 65, at 653.

[227] Verlinden (2016), *supra* note 87, at 94–95.

[228] Seger (2014), *supra* note 62, at 257.

[229] Bothe (2015), *supra* note 66, para. 3.

[230] Exceptions exist for UN sanctions under Chapter VII of the UN Charter and may also apply in cases where economic sanctions are implied towards a belligerent that violated *erga omnes* international legal obligations in a serious way. See Spring (2014), *supra* note 6, at 167–168; Patricia Egli, "Aktuelle Leitsätze zur Neutralität," *Jusletter* 21, (2006), para. 32; Pieper (1997), *supra* note 109, at 80, 409; Schweitzer (1977), *supra* note 65, at 105 ff.

[231] Wolfgang Graf Vitzthum and Alexander Proelß, *Völkerrecht*, 8th ed. (Berlin/Boston: De Gruyter, 2019), 854; Verlinden (2016), *supra* note 87, at 91; Pieper (1997), *supra* note 109, at 80; Sassòli (2021), *supra* note 7, at 11.

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is absolutely necessary with regard to the preservation of the status of neutrality.[232] Deliberately offering a belligerent the potential to conduct a military intelligence operation on neutral territory would therefore violate the law of neutrality.[233]

As a result, it can be argued that if Switzerland, during the Kosovo War or the Iraq invasion, with the consent and participation of its own authorities, supplied or maintained a Trojan horse (rigged cipher machines) that the United States used against the Federal Republic of Yugoslavia or the Republic of Iraq, such conduct would violate the law of neutrality.[234] However, as mentioned in section 4.1, in both cases of neutrality-relevant conflicts, the law of neutrality only applied for a very limited period of time.[235] Therefore, it is rather unlikely that Crypto AG exported rigged cipher machines or offered maintenance services to the Federal Republic of Yugoslavia or the Republic of Iraq during these short periods of time. However, this cannot be completely ruled out.

Similar to sections 4.3 and 4.4, a pre-effect of such a duty during peacetime can only be postulated with great caution. First, the neutrality-relevant conflict would need to be imminent (requirement of immediacy). Second, it would need to be clear that both the advantaged State as well as the disadvantaged State by the Trojan horse would become belligerents in that imminent neutrality-relevant conflict. Third, the manufacture and supply of the Trojan horse would need to serve a military purpose that could offer a military advantage.[236] For the Iraq invasion, this would probably expand the relevant timeframe to be considered for a violation of the law of neutrality by one month.[237] For the Kosovo War, the expansion of the relevant timeframe to be considered for a violation of the law of neutrality is more difficult to establish, but it would probably not be much longer than for the Iraq invasion.[238] Thus, this would not significantly change the fact that, for both neutrality-relevant conflicts, the timeframe to be considered for a violation of the law of neutrality was extremely short.

Conclusion

It is unlikely that Switzerland in its complicity with Operation RUBICON violated its duty under the law of neutrality "not to deliberately favor a belligerent to offer a military advantage." However, it cannot be ruled out that Crypto AG exported rigged cipher machines or offered maintenance services to the Federal Republic of Yugoslavia or the Republic of Iraq during the relevant timeframes to which the law of neutrality applied.

5. IMPLICATIONS OF OPERATION RUBICON FOR SWISS NEUTRALITY

Although it is unlikely that Switzerland with its complicity in Operation RUBICON—as the analysis has shown—violated its duties under the law of neutrality, questions remain as to what the case means for Swiss neutrality in general (and in particular, neutrality policy).

As mentioned in section 3.1., the aim of the permanently neutral State is to strengthen the confidence of third States in its permanent neutral status. The greater this confidence is, the smaller the risk is for violations of neutrality laws in times of conflict.[239] The instrument used to achieve this aim is neutrality policy. Switzerland describes

[232] It should be noted that, following the practice of neutral States, the duties under the law of neutrality are to be interpreted restrictively. The law of neutrality should only limit the freedom of action as far as absolutely necessary in order to preserve the status of neutrality. See Report of the interdepartmental working group (2000), *supra* note 75, at 14.

[233] Sassòli (2021), *supra* note 7, at 11.

[234] *Ibid.*

[235] During the Kosovo War, Switzerland applied the law of neutrality between March 23, 1999, and June 8, 1999. During the Iraq War, Switzerland applied the law of neutrality between March 20, 2003, and April 16, 2003. See Report of the interdepartmental working group (2000), *supra* note 75, at 6; Swiss Federal Council (2005), *supra* note 121, at 7003.

[236] Sassòli (2021), *supra* note 7, at 11.

[237] During the Iraq War, Switzerland applied the law of neutrality between March 20, 2003, and April 16, 2003. However, the Federal Council had already denied the United States overflight rights on February 21, since its request clearly followed a military logic with regard to the future war. See Swiss Federal Council (2005), *supra* note 121, at 7002–7003.

[238] During the Kosovo War, Switzerland applied the law of neutrality between March 23, 1999, and June 8, 1999. The decision by NATO to start a bombing campaign against the Federal Republic of Yugoslavia was made after the Rambouillet negotiations had failed on March 18. See Report of the interdepartmental working group (2000), *supra* note 75, at 6.

[239] Spring (2014), *supra* note 6, at 40, 193; Haug (1962), *supra* note 79, at 53.

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neutrality policy as "the totality of measures taken by the permanently neutral [S]tate on its own initiative and irrespective of the duties associated with the law of neutrality in order to ensure the effectiveness and credibility of its neutrality."[240] The manner in which the neutrality policy is implemented is at the neutral State's discretion.[241] Therefore, the interpretation of what is to be considered "effective" and "credible" neutrality lies squarely in the hands of the neutral State.[242] Although these interpretations vary over time and from State to State, there is a consensus that certain neutrality policy measures enhance the *effectiveness* and *credibility* of the permanent neutral status. While most measures enhance both aspects concurrently, the ultimate objective is a coherent neutrality policy.[243] Generally, the neutrality policy of permanently neutral States includes, but is not limited to, the following measures:

i) an extensive peace policy, including good offices or protective power mandates;[244]
ii) a restrictive neutrality policy regarding conflict-related (including non-international armed conflicts or even regional instabilities) subjects, such as the export of war material, the provision of private security and military services, or military and intelligence service collaborations;[245]
iii) an autonomous national defense policy.[246]

With regard to the export of war material, the Swiss Federal Council recently stated that "if, in certain constellations, war material exports are perceived by the community of States as clearly favoring a party to the conflict, such a perception could—irrespective of the legal qualification of the conflict—have a negative impact on the credibility of Swiss neutrality with regard to future inter-[S]tate conflicts."[247] Thus, if a permanently neutral State took an action that resulted in a non-neutral perception (the international community's), such an action could potentially weaken the confidence of third States in its permanent neutral status.

With regard to the matter at hand, according to the CDel, cooperation between the U.S. and Swiss intelligence services—as foreseen in Art. 99, para. 6,[248] of the Federal Act on the Armed Forces and Military Administration of 1995[249]—has to be assumed after 2002. Since such a measure is within the context of a conflict-related subject, it might have an impact on the effectiveness and credibility of Swiss neutrality. The national[250] and international[251] press coverage and reporting[252] on Operation RUBICON, as well as the triggered debates[253] questioning Switzerland's neutrality, seem to suggest that the credibility of Swiss neutrality in particular was undermined by Switzerland's complicity in Operation RUBICON. Although the Federal Council in its statement about the CDel report pointed out that "there were hardly any reactions from third States towards Switzerland on the corresponding reporting" and that therefore "the case has not affected Switzerland's foreign policy or its credibility,"[254]

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240 Swiss Federal Council (2005), *supra* note 121, at 7006; Swiss Federal Department of Foreign Affairs (FDFA). *Die Neutralität der Schweiz*, 2022, 5, https://www.eda.admin.ch/eda/de/home/aussenpolitik/voelkerrecht/neutralitaet.html.

241 Swiss Federal Council, "Bericht zur Neutralität," *Anhang zum Bericht über die Aussenpolitik der Schweiz in den 90er Jahren* (93.098), November 29, 1993, 213, https://www.fedlex.admin.ch/eli/fga/1994/1_153__/de; Swiss Federal Council. *Bericht des Bundesrates an die Bundesversammlung über die Sicherheitspolitik der Schweiz* (10.059), June 23, 2010, 5170, https://www.fedlex.admin.ch/eli/fga/2010/876/de.

242 Spring (2014), *supra* note 6, at 194.

243 *Ibid.*

244 Swiss Federal Council (1993), *supra* note 241, at 216; Report of the interdepartmental working group (2000), *supra* note 75, at 9.

245 Spring (2014), *supra* note 6, at 195.

246 Swiss Federal Council (1993), *supra* note 241, at 210, 221, 234; Report of the interdepartmental working group (2000), *supra* note 75, at 22.

247 Swiss Federal Council (2021), *supra* note 84, at 31.

248 Formerly Art. 99, para. 3, let. C, Federal Act on the Armed Forces and Military Administration of 1995.

249 Federal Act of February 3, 1995, on the Armed Forces and Military Administration, Art. 99, para. 6, CC 510.10 [Military Act, MA].

250 See, e.g., Landwehr (2020), *supra* note 7.

251 See, e.g., Miller (2020), *supra* note 3.

252 See, e.g,. Report of the CDel (2020), *supra* note 4.

253 See, e.g., Interpellation 20.4456, *supra* note 9.

254 Statement of the Federal Council (2021), *supra* note 60, at 6.

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comes as no surprise considering the ubiquitous[255] and clandestine[256] nature of intelligence operations as well as the legal uncertainties[257] of espionage under international law.[258] In addition, raising a breach of Switzerland's duties under the law of neutrality twenty and sixteen years after the respective violation makes little sense, both from a legal,[259] as well as a political,[260] point of view. The absence of political reactions aimed at Switzerland can therefore not be equated with not affecting the credibility of Swiss neutrality. From the coverage and reporting of Operation RUBCION and the accompanying "gut feeling" of wrongness, it seems clear that Switzerland's complicity in Operation RUBICON at the very least plays into its image as a Western neutral[261].[262]

However, as neutrality implies a stance of renunciation,[263] Switzerland's complicity in Operation RUBICON, as shown in the previous chapters, is more than just a mere stance for actions taken by the West. There is a difference between pragmatism and hypocrisy. Switzerland's complicity in Operation RUBICON may raise a legitimate question as to whether Switzerland will adhere to the fundamental principle of impartiality in any future international armed conflicts between two or more States. Whether Operation RUBICON lastingly influenced the confidence of third States in Switzerland's permanent neutral status remains to be seen. Given Switzerland's new non-permanent seat on the UN Security Council, and the international armed conflict in

[255] Since many States spy on one other, they often refrain from invoking its unlawfulness. See Patrick C. R. Terry, "The Riddle of the Sands – Peacetime espionage and public international law," *Georgetown Journal of International Law* 51(2) (2020): 412.

[256] On the one hand, by necessity, States conduct espionage clandestinely. Invoking the unlawfulness of an intelligence operation could reveal a country's own capabilities. On the other hand, invoking the unlawfulness of an intelligence operation could at the same time portray the image of a weak domestic intelligence service that did not detect the said intelligence operation.

[257] While some rules on wartime espionage exist, no treaties or firm rules of customary international law on peacetime espionage exist. Among legal scholars, three broad strands of argumentation with regard to the legality of peacetime espionage under international law can be identified: i) lawful; ii) unlawful; and iii) neither lawful nor unlawful. See Terry (2020), *supra* note 255, at 381–385.

[258] *Ibid*., 390.

[259] The violation of a duty under the law of neutrality constitutes an internationally wrongful act.
Therefore, on the one hand, in case of such a violation by a neutral State, the aggrieved belligerent has a wide range of possibilities at its disposal. Depending on the unlawful action or omission, the options range from mere complaining to countermeasures and possibly even the use of force—however, only in accordance with the UN Charter and in a proportionate way. Most of these options aim to end the unlawful action or omission and to preserve the rights of the injured State. Furthermore, a breach of an international obligation is limited in time (cf. Art. 14, Draft Articles of State Responsibility for Internationally Wrongful Acts). With regard to Operation RUBICON, Switzerland's potential violation of the law of neutrality ended twenty and sixteen years ago, respectively. See Verlinden (2016), *supra* note 87, at 96.
On the other hand, according to Art. 31 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, the responsible neutral State would have the obligation to make full reparation for the injury caused by the internationally wrongful act. However, due to the elapsed period of time, as well as the difficulties in proving the concrete injuries suffered as a result of Operation RUBICON (among other issues), raising such a claim for instance before the International Court of Justice (ICJ) or the Permanent Court of Arbitration (PCA) would seem to be extremely difficult. See International Law Commission (2001), *supra* note 139, Art. 4(1) and Art. 31.

[260] Operation RUBICON ended in 2018. The potential violations of the law of neutrality occurred in 1999 and 2003. Since that time, the injured States have changed their governments. Legally, reparations are difficult to achieve. Thus, in sum, the political benefit, and therefore the incentive of officially raising Switzerland's complicity in Operation RUBICON and the potential violation of its duties under the law of neutrality, seem to be rather small. In the case at hand, maintaining good relations with Switzerland seems to be of greater importance. In addition, since many States spy on one other, they often refrain from invoking its unlawfulness.

[261] In the years following World War II, Switzerland was caught in between the Western and Eastern blocs. Despite publicly proclaiming a far-reaching understanding of neutrality (integral neutrality), Switzerland *de facto* practiced a restrictive understanding of neutrality (differential neutrality) on several occasions (e.g., with regard to the CoCom regime the West installed in 1949 or the UN sanctions imposed against South Rhodesia in 1966). This led to its image of being a Western neutral. See Spring (2014), *supra* note 6, at 64, 66.

[262] Micheline Calmy-Rey, *Die Neutralität: Zwischen Mythos und Vorbild* (Basel: NZZ Libro, Schwabe Verlagsgruppe, 2020), 37.

[263] *Ibid*., 14.

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Ukraine, which prompted Switzerland to adopt vast measures against a major geopolitical power, and Swiss politicians' discussions about the possible export of war material to Ukraine,[264] Switzerland's neutrality seems to be at a decisive point (similar to the aftermath of the Cold War and, in particular, the 1991 Gulf War[265]).[266]

6. Conclusion

Based on the author's knowledge, it is unlikely that Switzerland in its complicity in Operation RUBICON violated its duties under the law of neutrality. However, if Crypto AG exported rigged cipher machines or offered maintenance services during (or immediately before) the Kosovo War in 1999 to the Federal Republic of Yugoslavia, or during (or immediately before) the Iraq invasion in 2003 to the Republic of Iraq, Switzerland would have violated its duties under the law of neutrality. Specifically, it would have violated its duty not to tolerate military intelligence services in favor of belligerents on neutral territory, as well as its duty not to deliberately favor a belligerent to offer a military advantage.

In this author's view, it would have been up to the CDel to assess whether such exports or services were provided within the very short, but relevant, timeframes. However, from the content of its published report, it seems rather unlikely that the CDel conducted such an assessment. As a result, a full and transparent reappraisal of Operation RUBICON in the context of the law of neutrality is still lacking. Only an in-depth analysis of the Swiss Federal Archives would likely provide an answer (if the Swiss intelligence services have not already destroyed the relevant documents). Due to the limited scope of this paper, and the closure periods of the Federal Archives, this author was not able to conduct such an assessment.

Switzerland's complicity in Operation RUBICON, at the very least, plays into its image as a Western neutral. However, as neutrality implies a stance of renunciation, Switzerland's complicity in Operation RUBICON is more than just a mere stance for actions taken by the West. Whether Operation RUBICON lastingly influenced the confidence of third States in Switzerland's permanent neutral status remains to be seen.

Even though war in itself has mainly steered away from classic inter-State clashes on battlefields and towards asymmetric and proxy warfare in the twenty-first century, the current conflict between Russia and Ukraine demonstrates that classic State-versus-State armed conflicts are still occuring. The law of neutrality is more topical than it has been for quite a long time. However, similar to the Cold War period, it is difficult to remain neutral between blocs. As evident now, this is a difficult balancing act. How can a State remain neutral (legally, politically, and morally) regarding the gross violations of international law that Russia has committed? Since Art. 51 of the UN Charter (self-defense) applies to the defense of Ukraine, and Russia has been identified as the aggressor by the UN General Assembly,[267] would this not lead to an exceptional case of the inapplicability of the law of neutrality and provide Switzerland with the option (or even the duty) to discriminate against the aggressor (for instance, by supplying war material to Ukraine)?[268] And if answered in the affirmative, would this not contradict the main purpose of the law of neutrality (i.e., to constrain the scope and the adverse effects of war)?

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[264] Christina Neuhaus, "Ist Neutralität mit Haltung neutral?" *Neue Zürcher Zeitung (NZZ)*, March 4, 2022, https://www.nzz.ch/meinung/neutralitaet-im-ukraine-krieg-wo-genau-steht-die-schweiz-ld.1672971.

[265] In 1991, the coalition (thirty-five States) fighting against Saddam Hussein asked Switzerland for overflight rights for their military aircraft. Switzerland—in continuation of its position during the Cold War—refused. The military operation was authorized by the UN Security Council. Switzerland reacted contritely to the international incomprehension of its position and subsequently conformed. The roles in this war were as clearly divided as they are now in the Russia-Ukraine case. Switzerland adjusted its position and henceforth considered passive military support for UN military operations and the adoption of UN economic sanctions to be unobjectionable in terms of the law of neutrality and neutrality policy. See Oliver Diggelmann, "Wie könnte die Schweizer Neutralität im 21. Jahrhundert aussehen," *Neue Züricher Zeitung (NZZ)*, May 7, 2022, https://www.nzz.ch/schweiz/wie-koennte-die-schweizer-neutralitaet-im-21-jahrhundert-aussehen-ld.1682343; Swiss Federal Council (1993), *supra* note 241, at 241–242.

[266] Tobias Gafafer, "Für Russland ist die Schweiz nicht mehr neutral – der Bundesrat sucht in der Krise seine Rolle." *Neue Züricher Zeitung (NZZ)*, April 8, 2022, https://www.nzz.ch/schweiz/fuer-russland-ist-die-schweiz-nicht-mehr-neutral-der-bundesrat-sucht-in-der-krise-seine-rolle-ld.1678456.

[267] G.A. Res. ES-11/L.1, U.N. Doc. A/RES/ES-11/L.1 (March 1, 2022).

[268] Spring (2014), *supra* note 6, at 142–143.

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Unfortunately, history has taught us that armed conflicts will continue to happen. In today's polarized world, States that effectively and credibly (and thus in a neutral way) bridge the gaps between the poles to uphold or enhance the dialogue remain crucial. Therefore, it is vital for permanently neutral Switzerland to refrain from complying with intelligence operations such as Operation RUBICON and to preserve its permanent neutrality, even during today's challenging circumstances. As Carl Spitteler mentioned in his famous speech "Our Swiss standpoint" in Zurich on December 14, 1914, "Without a doubt, it would be the only right thing for us neutrals to keep the same distance to all sides."[269] This credo of equidistance, paired with the upholding of public international law and Switzerland's humanitarian tradition, should remain the needle of Switzerland's neutrality compass.

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