

Swiss Neutrality and Sanctions

Neutrality is "the most beautiful and fragile flower of international law."

Peter Lyon, 1960

"It is true that collective security and neutrality are mutually exclusive. The more there is of the one, the less there is of the other."

Hersch Lauterpacht, 1936

by Niccolò Salvioni, Locarno, Switzerland, April 25, 2022 (English-language translation)

Foreword

On March 2, 2022, I published a reflection on "Swiss neutrality towards belligerents: a system of conflict limitation." The starting point was the surprise announcement of the Federal Council on February 28, 2022, in connection with the Ukrainian conflict, to adopt the economic sanctions packages of the European Union against Russia.

With this new research I wanted to deepen the concept of perpetual Swiss neutrality in relation to sanctions as an "economic weapon" from the political, historical, economic and legal point of view. The result derives from the integration of thoughts and concepts taken from different works, in terms of era and theme.

The here exposed text is intended to serve as food for thought to interpret the role of Swiss permanent neutrality in the context of the current Russian-Ukrainian conflict, a dramatic episode in contemporary history which has once again brought this delicate institution from the 18th century to the forefront of contemporary world politics.

Many interesting concepts, I have drawn them also partially translating abstracts, adapting them to the specific theme and integrating them, from the following valuable works, of great historical - scientific interest:

- *"An Age of Neutrals, Great power politics", 1815-1914", Maartje Abbenhuis, University of Auckland, New Zealand, Cambridge University Press, Cambridge, UK, 2014.*
- *"Neutrality in Contemporary International Law", James Upcher, Oxford University Press, Oxford, UK, 2020.*
- *"The Economic Weapon, the rise of sanctions as a tool of modern war", Nicholas Mulder, Yale University Press, New Haven and London, 2022.*
- *"European Neutrals and non-belligerents during the second world war" Neville Wylie, Cambridge University Press, Cambridge UK, 2002.*
- *"Die Schweiz, Das Nationalsozialismus und das recht – Zu den rechtlichen Grundlagen der Neutralität, I. Öffentliches Recht, Veröffentlichungen der UEK, Chronos Verlag, Zürich, 2001.*

- *“Economic Sanctions under International Law - Unilateralism, Multilateralism, legitimacy”* Ali Zarossi, Marisa Bassett, Editors, Springer, Den Hague, 2015.
- *“Droit Suisse des sanctions et de confiscation internationales”*, Sandrine Giroud, Héloïse Rordorf-Braun, Helbing und Lichtenhahn, Basel, 2020.
- *“Praxis des Völkerrechts”*, Jörg Paul Müller, Luzius Wildhaber, Stämpfli, Bern, 2001.
- *“Bundesverfassung”*, Basler Kommentar, Waldmann – Belser – Epiney (Hrsg.), Helbing und Lichtenhahn, Basel, 2015.
- *The "Neutrality Report" attached to the "Report on Swiss Foreign Policy in the 1990s" of the Swiss Federal Council, dated November 29, 1993.*
- *"Neutrality of Switzerland - current aspects" Report of the interdepartmental working group of August 30, 2000.*
- *Dossier "Neutrality of Switzerland" of March 4, 2022, published by the Department of Foreign Affairs.*

The responsibility for what is stated herein lies solely with the undersigned.

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The function of Swiss perpetual neutrality, a dynamic complex vital for the internal stability between cantons and for the foreign international policy of the Swiss Confederation, in the past a proven status in international public law and a characterizing component as a *pedigree* of Swiss foreign policy, seems, perhaps due to the long period of relative European peace after World War II, fallen somewhat into oblivion.

Permanent Swiss neutrality is not only a constitutional concept but also a concept of international public law, customary, conventional and historical. It has its origins in the Vienna Convention and the Paris Declaration of 1815, which were also signed by Russia among the other Great Powers.

Even before the Congress of Vienna in 1815 neutralized the Swiss cantons and loosely linked them together in the Swiss Confederation, the various Swiss regions had a long history of neutrality.

The cantons and Switzerland, located at the crossroads of central Europe and known as hotbeds of liberal revolutionary tendencies, were generally considered "volatile." The neutralization of Switzerland, complicated and full of intrigue, as Charles Webster put it, *"may be regarded as one of the most important achievements of the period, for the Great Powers had definitely recognized that their interests, as well as those of all Europe, were best served by the exclusion of a small state from participation in future conflicts."*

Each canton was also subject to the influence, hegemony, and sometimes sovereignty of neighboring states. If the neutralization of the cantons had increased the complexities of inter-cantonal politics, this could also have complicated the concert of Europe. (See *"An Age of Neutrals, Great power politics, 1815-1914"*, Maartje Abbenhuis, University of Auckland, New Zealand, Cambridge University Press, Cambridge, UK, 2014, p. 47.)

The conventional origin of 1815 enshrined Swiss neutrality as "*permanent*": that is, it is required to endure in both peacetime and war. "*Permanent neutrality*" does not mean that Switzerland cannot renounce neutrality: a renunciation of it is possible, but it must not intervene at an inopportune time, i.e. -for example- at the beginning of a conflict. Such a renunciation could represent a violation of the principle of observance of agreements and - with this - could give rise to a public international law liability of Switzerland for non-compliance with its status.

Renouncing neutrality for Switzerland, however, means losing the rights that flow from it, with the risk of the country being drawn into an armed conflict as a non-neutral, belligerent subject. Therefore, renouncing neutrality can mean the emergence of national security, foreign policy, defense and military problems. Switzerland, by losing its neutral status, risks becoming "touchable", even militarily.

Art. 1, para. 1 of the Swiss Embargo Act, states that the Confederation may take coercive measures to apply sanctions aimed at enforcing public international law, in particular human rights, adopted by the United Nations, or Switzerland's main trading partners. The European Union, after the United States of America, is Switzerland's main trading partner.

The present case is anomalous. In fact, the conflict arose between Russia, a member of the UN Security Council -with right of veto- and Ukraine, former territory of the Union of Soviet Socialist Republics, which became an independent republic in 1991 after the dissolution of the USSR.

Since Russia exercised its veto right in the context of the UN Security Council, the UN did not take sanctions against Russia. Switzerland was therefore unable to implement UN sanctions.

Economic sanctions against Russia have been taken by the European Union which consists of 27 member states. Twenty-one of these are also members of NATO, which in turn has 30 members.

In parallel with the European sanctions, some 25 states supply various types of weapons (both lethal and non-lethal material) to Ukraine, excluding Russia. Many of these states are part of the European Union. The European Union itself, for its part, participates with funding for the purchase of weapons for Ukraine, which has never happened before.

With the decision of the Federal Council of February 28, 2022, to continue to follow the escalation of sanctions packages adopted on February 23 and 25 by the European Union against Russia, the Swiss executive has adopted a singular foreign policy measure, contrary to the principle of abstention, i.e., the prohibition to help a belligerent in war. By economically sanctioning exclusively Russian citizens and entities close -or supposedly close- to the Russian president, Switzerland, which should remain neutral in the context of the conflict, indirectly interferes in the same.

It should be considered that the first Swiss sanctions against Russia on the Ukrainian theater date from 2014. After the annexation of Crimea, the Federal Council issued the

Ordinance establishing measures in connection with the situation in Ukraine. The first European sanctions also date from 2014. Thereafter, the sanctions were gradually adapted and tightened by both the European Union and Switzerland. It is, however, following the Russian military intervention in Ukraine at the end of February 2022, that the European sanctions were massively tightened, in particular by including financial restrictions against Russian persons and entities identified as close to the government, as well as against an indefinite number of persons in the form of a ban on the use of financial messaging services (SWIFT) and the obligation to report to SECO all banking relationships exceeding CHF 100,000 for the benefit of Russian persons or entities.

This ordinance is to be differentiated from the *Ordinance on the freezing of assets in the context of Ukraine* (O-Ukraine), which was first enacted on 25 May 2016, amended 13 times and is still in force today. The latter, unlike the Measures Ordinance, was issued in application of the Federal Act on Assets of Unlawful Origin, administered by the Federal Department of Foreign Affairs, and is intended to assist the Ukrainian judicial authorities as an interested state in forwarding, in the context of criminal investigations, a request for mutual assistance in criminal matters to Switzerland.

It should be noted that the economic measures implemented by the European Union -and until now also taken up by the neutral Switzerland- seem to collide with principles of the law of war, and better with art. 33 of the *Geneva Convention – on the protection of Civilian Persons in Time of War* which prohibits the adoption of collective punishment for crimes not committed personally.

The measure concerning the prohibition to provide the specialized financial messaging services SWIFT, as well as the one prescribing the reporting to SECO by June 3, 2022 of any account in the possession in Switzerland of a Russian citizen or entity with more than CHF 100'000, go beyond what can be considered as a measure aimed at striking personal responsibility, it indiscriminately affects thousands of civilians without any fault other than that of being citizens of the Russian Federation.

From the recent book published by Nicholas Mulder "*The Economic Weapon*", it emerges that only 20/25% of sanctions succeed in reaching their objectives. Not reasoning all over the world according to the parameters of *Homo economicus*, but often contributing political, social and cultural values to overcome material deprivation, these often have the upper hand over the suffering determined by economic constraints (See "*The Economic Weapon, the rise of sanctions as a tool of modern war*", Nicholas Mulder, Yale University Press, New Haven and London, 2022, page 295 - 296.). This may be all the more true for solid and resilient populations, tempered by years of the past communist regime.

The social costs of economic sanctions can also be very high, and can in turn result in suffering, deprivation, and death, particularly to the most fragile and marginalized groups affected. This can contribute to generating new conditions of social and political instability which, in turn, can lead to new outbreaks of unrest, war with new fronts of violation of basic human rights and instability, thus reducing foreign and national security, in Europe and Switzerland.

The perpetually neutral Switzerland, with the decision of the Federal Council to participate in the escalation of the European Union economic sanctions, has chosen to treat unequally a belligerent, Russia, which by virtue of the old agreements had made itself Powerful co-guarantor of Swiss perpetual neutrality. In the context of the Locarno Peace Treaties of 1925 - catalyzed by Switzerland's neutral status, among other things - Germany did not want to participate in economic sanctions against Russia because these meant taking sides in a conflict: for Germany, protecting ties with Moscow was a matter of honoring old treaty commitments that preceded Germany's arrival in the Geneva League of Nations. The Federal Council, at the outbreak of the armed conflict between Russia and Ukraine, decided to participate in economic sanctions against Russia, without considering the old commitments of the past as a permanently neutralized state.

As Winston Churchill recalled on December 3, 1944, during World War II, "*Switzerland was the only international force that connected the horribly separated nations.*" The distinguishing quality of Swiss neutrality for the U.K. statesman was to be found in democratic Switzerland, its armed neutrality, its commercial activities, and its humanitarian mission. (cf. "*European Neutrals and non-belligerents during the second world war*" Neville Wylie, Cambridge University Press, Cambridge UK, 2002, in Chapter 14 "Switzerland a neutral of distinction, p. 351 ff).

The anomaly of Swiss neutrality, launched by the Federal Council with its decision to follow the escalation of European economic sanctions against Russia on February 28, 2022, has determined:

- **Political neutrality:** an apparent momentaneous blurring of Switzerland's capacity for self-determination of his political neutrality as an independent and sovereign entity under international public law in respect of its status as perpetual neutral State. As a result of its neutral, neutralized position, in popular depictions, Switzerland is often represented as a placid nation lacking agency, heroism or heart.
- **Armed neutrality:** a questioning of Switzerland's ability to **defend itself with weapons**, in parallel with a threat to the national security of the country in relation to Russia as a belligerent superpower with nuclear capabilities. With regard to Russia, the expectation of consistent neutral behavior as a perpetually neutral state seems to have been missed. By applying a restrictive approach to the principle of equal treatment, Switzerland has apparently violated neutrality by considering that, in the present case, the belligerent subject to sanctions is historically a bearer of the decision to grant Switzerland the status of a perpetually neutral country, and, in addition to being a permanent member of the UN Security Council with veto power, is also a nuclear superpower. Switzerland, militarily, is not able to compete with Russia. Switzerland, in this particular situation, in order to protect its neutrality, should have applied **autonomously** and extensively the principle of equal treatment, dissociating itself from continuing to systematically follow European sanctions escalation. As a perpetually neutral country, Switzerland, from the point of view of political history and international public law, cannot become a member of a defensive military alliance, in particular NATO, unless it renounces its character as a perpetually neutral state. Similarly, to protect its neutrality and independence, it cannot follow sanctions applied by a supra-national body which politically and materially supports Ukraine as a

belligerent to the detriment of another. This seems to represent, for Switzerland, a violation of political neutrality, combined with the prohibition to supply -indirectly- weapons to a belligerent party and to be -indirectly- part of a defensive league, supporting it.

- **Economic neutrality:** the actions taken by the Federal Council are equivalent to a sudden decoupling of economic relations with Russia as a belligerent. A similar decoupling did not take place with respect to Ukraine as belligerent. By breaking with the principle of maintaining the normal course of business with both belligerents, Switzerland apparently has not honored the duty that should have resulted from its perpetual neutrality, particularly with regard to Russia. This decision, which was detrimental to the principle of permanent neutrality and to the expectations that could have been derived from it, suddenly alienated, economically and socially, Russia from Switzerland and Europe. This was a disservice to Switzerland and Europe as a whole. Russia has been forced to find new solutions and markets towards the East and the many states not aligned with the sanctions: once the conflict is over, Europe, and Switzerland, will remain distant from economic and social Russia for many years to come.
- **Active neutrality:** the foreclosure of economic contacts of Russia with neutral Switzerland determines the impossibility for the Federal Council itself to have an active diplomatic role in the context of contacts between the belligerents aimed at finding peaceful solutions to the conflict. Or, in any case, the unbalanced position seems to hinder activities or initiatives to protect also Russian (or Byelorussian) soldiers and civilians. Switzerland, as a result of sanctions, has been precluded from acting fully as a liaison between "*horribly separated nations*". Switzerland's humanitarian active neutrality function has been put on jeopardy by the uncritical adoption of European economic sanctions. At the same time, the absence of neutrality may hinder the work of the historic international structures based in Switzerland, including the International Red Cross. Structures that, in order to function freely on the various fronts of a conflict, need to be able to rest on a basis of neutrality, which is fundamental in order to benefit from the trust of all the belligerents. Unfortunately, the abrupt decision of the Federal Council to follow the escalation of economic sanctions of the European Union, which is aligned with arms supplies to Ukraine, has generated a neutrality-imbalance that will hinder a full implementation of active neutrality actions. In order to protect human rights in support of a belligerent, Switzerland has momentarily failed in its commitment to basic impartiality, in order to lay the foundation to alleviate suffering and pain for all belligerents on the ground. The functional anomaly of Switzerland's neutrality in this particular context prevents it from acting fully as a **Protective power**, a role in which it had excelled during the two previous world wars and particularly during the first one.

The Swiss "technical" law on embargoes, it seems that, in the concrete case, has been until now used in a careless way by the Federal Council, omitting to consider some basic principles of government, also historically, proper to Switzerland. Immediately giving priority to the respect for fundamental human rights, over the principles of government policy which in a combined manner should contribute to shaping Swiss neutrality, and which form its delicate construct. Neutrality has thus been debased from its role. The

protection of the freedom and rights of the Swiss people, the security of the country, the protection of the population, the independence and sovereignty of Switzerland, foreign policy, have been considered of secondary importance compared to the desire to apply the European economic sanctions escalation against Russia also on Swiss soil.

By siding **unilaterally** with the European Union, the Federal Council seems to have abandoned the political neutrality of the country. By means of its own sanctions it wants to interfere politically with Russia as a belligerent, not only with regard to the thousand people considered politically responsible, but also by means of collective economic measures against the Russian population, in Russia, abroad and on Swiss soil. In doing so, Switzerland has sided with the European Union. The latter supplies Ukraine with weapons, as do many EU member states, at the same time members of the NATO defense alliance that provide arms to Ukraine, as opposed to Russia.

By assisting a belligerent in war, the Federal Council has not complied with its **obligation to abstain, not to participate and not to influence**. On the basis of Article 185 paragraph 1 of the Constitution, the Federal Council takes measures to protect the neutrality of Switzerland. By adopting economic sanctions exclusively against Russia, the Federal Council seems to have infringed the **principle of equal treatment** of belligerents as well as that of **political neutrality**. Recalling that Russia as a belligerent is also a Nuclear Superpower, where the United Nations against it was deactivated by exercising its right of veto, the principle of equal treatment should be applied in this particular case, with an **extensive** approach. Therefore, the economic sanctions adopted by Europe against Russia, for Switzerland, represent from the point of view of perpetual neutrality, an inadmissible difference of treatment between belligerents and as such should not be applied.

The political-administrative blocking of more than 7.5 billion Russian assets implemented by the Federal Council through the SECO, the parallel activation of national and international judicial working groups, conventional or ad hoc, aimed at evaluating how to manage from the point of view of ordinary and war criminal law the multiple problems reported from various sides in the theater of conflict, suggests that the story of the blocked assets has just begun, and will be played out in the chessboard of international public law. In addition to the territorial and physical contention on the theater of war, other judicial-economic contests on future war reparations are being added, whose profiles are progressively starting to emerge. The war dispute between Russia and Ukraine strongly risks extending as a planetary judicial dispute.

The outcome of the conflict, the modalities of its end, the characterization or not of winners and losers, may in turn drag towards one, the other or third party, the blocked assets, considered in whole or in part as "spoils" of war. This new economic component can only exacerbate even more the conflict between the belligerents, since it increases the stakes, inserting the conflict, apart from the territorial claims, also on the economic-financial ones towards the goods currently administratively blocked in different countries. If they will not be the object of conventional partition in the context of an international peace convention, they could also be so in the context of ordinary criminal or law of war proceedings, national or international, at one or more judicial forums and tribunals, yet to be identified.

For the time being, the Federal Council of neutral Switzerland finds itself dealing with 7.5 billion blocked administratively of persons hypothetically considered close to the Russian government as belligerent. No one knows what the next move of the Swiss executive will be, considering that the measure appears to be normatively devoid of legal connection with eventual future political decisions of administrative confiscation of the European Union, which in any case will hardly be able to exert any autonomous legal effects in Switzerland, lacking a conventional basis.

The question arises as to whether, in the light of the current imbalance of sanctioning behavior in relation to the duties of neutrality, Switzerland can still be considered neutral, and whether in the future the Federal Council can once again find the balance between foreign policy and neutrality that distinguished Switzerland in the past. After the "whirlwind" of events in the immediate aftermath of military operations in the Ukraine by Russia, the Swiss government must find its way back to the historical role and mission of permanently neutral Switzerland as a protecting power. This is for the benefit of a full development of the international policy of active neutrality as a protecting power, in aid of all belligerents and victims of conflicts, military and civilian, awaiting and in aid of peace.

Politics is probably one of the most complex and difficult human activities, also because it is often polarized. Swiss political neutrality, moving in the context of international politics, as a result of the many as vast and difficult to ponder human, technical, economic, sociological, religious, political and legal, both internal and external to the country, that need to be considered, is perhaps one of the most intangible and difficult to describe political balancing act.

I hope, with this summary, to have provided some hints to better identify which is the perimeter of government action of Switzerland, in the context of economic sanctions, in relation to neutrality.

Niccolò Salvioni, Locarno, Canton of Ticino, Switzerland, the April. 25, 2022.

(The thoughts expressed herein bind the writer only)