

Neutrality Under Scrutiny in the Iraq Conflict

Summary of Switzerland's neutrality policy during the Iraq conflict in response to the Reimann Postulate (03.3066) and to the Motion by the SVP Parliamentary Group (03.3050)

of 2 December 2005

Overview

The purpose and the grounds for the overview

This summary explains the motives and the modalities of neutrality practice during the Iraq conflict in 2003. The Federal Council mandated the Federal Department of Foreign Affairs (DFA) to produce a summary of recent practice with regard to neutrality issues, i.e. the practice during the Iraq conflict. In doing so, the DFA is complying with the Reimann Postulate of 19 March 2003 (03.3066) and the motion of the parliamentary group of the Swiss People's Party (SVP) of 12 March 2003 (03.3050), which was transformed into a postulate at the request of the Federal Council.

The Iraq war and neutrality

The military operation against Iraq without the express authorisation of the UN Security Council was an armed inter-state conflict. According to the Hague Convention on the Rights and Duties of Powers and Persons in a War on Land (1907), Switzerland, as a permanently neutral state, would have to apply neutrality law in this conflict. As always in such cases, the Federal Council ensured that Switzerland very scrupulously fulfilled its obligations as a neutral state.

Legal obligations arising from neutral status

Neutrality law forbids Switzerland militarily to support a state that is engaged in an armed conflict. It is not allowed to provide troops or war material for such a state, nor may it allow such a state to use its territory, including its air space. According to a Federal Council decision, the conflicting parties were not allowed to fly over Swiss territory before and during this conflict. Moreover the Confederation was forbidden to export arms and services to states involved in the conflict.

Control of the export of war material and the provision of military services by private companies

Neutrality law permits private companies based in the territory of a neutral state to conduct trade with states that are at war. However, the Federal Council introduced an approval procedure for exports of war material to conflicting states by private companies based in Switzerland. The purpose of this measure was to prevent the use of war material produced in Switzerland from being used in the Iraq conflict. The Federal Council mandated a body consisting of employees of the FDEA, the DFA and the DDPS to control the export of such material.

Ascertainment of the end of the conflict

On 16 April 2003, the conditions for concluding that hostilities had ended were met in the view of the Federal Council. It is a matter for the neutral state to decide whether in the given circumstances a conflict should be regarded as having ended. The Federal Council found that neutrality law was no longer applicable and that the measures that it had taken during the conflict could be discontinued.

Switzerland's humanitarian activity

Neutrality should not be equated with indifference. This is why during the conflict Switzerland did everything in its power to persuade the conflicting states to comply with international humanitarian law. In addition, Switzerland organised two international conferences on humanitarian aid which provided opportunities to exchange information, to identify problems in the field and to facilitate the coordination of humanitarian aid in Iraq.

Guidelines on neutrality

Permanent neutrality as the guiding principle of Switzerland's foreign and security policy has proved itself. Switzerland is regarded as a credible neutral state by the international community, because the Federal Council consistently applies neutrality policy in all cases where it is required. The Federal Council therefore does not consider it necessary to re-define Swiss neutrality.

Report

1 Introduction

1.1 Background to the present summary

On 12 March 2003, the SVP parliamentary group presented to the National Council a motion which was submitted on 19 March 2003 in the form of a postulate by Councillor of State Maximilian Reimann. Both initiatives had the same wording:

"The Federal Council is requested to state its definition of Swiss neutrality and its position on this subject in a report to the National Councillors. This need arises in particular with regard to Switzerland's membership of the UN and the recent foreign policy decisions by the Federal Council in connection with the impending war in Iraq. An explanation should also be provided as to how the Federal Council proposes to reconcile this country's constitutionally enshrined neutrality with its declared goal of membership of the EU, which plans to implement a common security, defence and foreign policy. Moreover the report should outline how Switzerland can preserve its permanent, armed and non-allied neutrality."

On 28 May 2003, the Federal Council stated its position with regard to the two initiatives as follows:

"In its report on neutrality of 29 November 1993, the Federal Council gave a detailed account of its conception of neutrality and of its place in foreign policy. The 1993 Report on Neutrality serves the Federal Council today as the basis for the conduct of its neutrality policy. (...) In view of the consistent application of the principle of neutrality on the basis of the 1993 Report on Neutrality, which remains valid, the Federal Council sees no need to re-define Swiss neutrality and its position with regard to it and to produce a report on this subject. However, it is willing to mandate the Federal Department of Foreign Affairs to produce a summary of the most recent practice of neutrality – i.e. the reasons for the application of neutrality and for the manner in which it was applied in the Iraq conflict – and the current position with regard to future developments. In this regard the Federal Council is also willing to accept the identically-worded Reimann Postulate 03.3066 of 19 March 2003."

The Council of States adopted the Reimann Postulate on 18 June 2003. In its resolution of 16 December 2003, the National Council approved the transformation of the motion into a postulate.

The DFA has produced the present report in response to the Reimann Postulate and the motion of the SVP parliamentary group.

1.2 Structure of the summary

The report opens with a chronological overview of the main events in the Iraq conflict. This is followed by a presentation of the main elements of Swiss neutrality (neutrality law, neutrality policy, the place of neutrality in the federal constitution) and by a description of the application of neutrality in the various phases of the conflicts. Next, the legal position before, during and after the conflict is analysed. The summary's conclusions deal both with the Iraq conflict and international law.

2 Chronology of the main events of the Iraq conflict

29 January 2002: US President George W. Bush describes Iraq, Iran and North Korea as the "axis of evil".

12 September 2002: George W. Bush threatens a US attack if Iraq is not willing to destroy its weapons of mass destruction immediately; he also calls on the UN to pass a further resolution to make Iraq disarm.

16 September 2002: Iraq states that it accepts the return of UN inspectors without conditions.

20 September 2002: the US government re-affirms its new security strategy, which envisages the possibility of preventive strikes.

11 October 2002: the US Congress approves by a majority a resolution authorising the president to deploy armed force to disarm Iraq, if necessary without a UN mandate.

8 November 2002: the Security Council adopts Resolution 1441, which envisages a resumption of inspections and threatens Iraq with serious consequences if it does not produce a complete list of its war materials within 30 days.

3 November 2002: Saddam Hussein accepts the UN Resolution.

27 November 2002: the UN inspection team headed by the Swede Hans Blix starts work.

9 January 2003: Hans Blix informs the Security Council that it has not been possible to find any evidence of illegal weapons. However, he calls upon Iraq to produce evidence that it does not have any weapons of mass destruction.

27 January 2003: in their first report to the Security Council, Hans Blix and Mohammed El Baradei accuse Iraq of serious omissions in its report on its arms programme. They request the Security Council to prolong the inspection period for several months so that they can continue their work.

28 January 2003: in his State of the Union address, President Bush states that the United States are prepared for war. He also announces that on 5 February Secretary of State Colin Powell will present secret service material on the Iraqi arms programme to the Security Council.

5 February 2003: Colin Powell presents to the Security Council a number of documents, satellite photos and tape recordings that allegedly prove that Iraq possesses weapons of mass destruction and is therefore violating Resolution 1441.

14 February 2003: UN inspectors Hans Blix and Mohammed El Baradei present a second report to the Security Council, stating that they have been unable to find any weapons of mass destruction but are unable to rule out their existence.

21 February 2003: the Federal Council decides to prohibit US overflights of Switzerland for military purposes because such flights clearly serve the purpose of preparing a military operation.

24 February 2003: the United States, the United Kingdom and Spain submit a draft resolution to the Security Council calling on Iraq to comply with Resolution 1441 by 17 March. France, Russia

and Germany reply with a memorandum calling for a prolongation of the deadline and intensification of inspections in Iraq.

5 March 2003: following a meeting in Paris, the foreign ministers of Germany, France and Russia declare that they will not agree to a Security Council resolution authorising war. They inform the President of the Security Council of this decision.

7 March 2003: UN inspector Hans Blix submits his third report to the Security Council. In it, he refers to improved cooperation by Iraq and welcomes the destruction of the Al-Samoud rockets. The United States, the United Kingdom and Spain present a new version of their draft resolution. It threatens Iraq with military intervention if it does not completely disarm by 17 March. France rejects the draft resolution.

10 March 2003: Russia and France announce their veto of any form of resolution which authorises the use of force.

17 March 2003: the United States, the United Kingdom and Spain withdraw their draft resolution and abandon their diplomatic efforts to obtain a UN mandate for a military attack. Shortly before this, it had become clear that no majority in the Security Council could be obtained for a resolution justifying war against Iraq.

20 March 2003: At two o'clock, the ultimatum to Saddam Hussein by the US expires. Half an hour later the attack on Iraq begins. On the same day, the Federal Council declares the applicability of neutrality law and re-affirms its decision to ban coalition aircraft from overflying Switzerland; this ban also applies to surveillance and reconnaissance flights. However, overflights for humanitarian and medical purposes, including the transport of the injured, are permitted. The Federal Council also prohibits the Confederation from delivering war material or services to the conflicting parties and from providing troops that could be used in the conflict.

21 March– 9 April 2003: After aerial bombardment of Baghdad, US and British troops march into Iraq from Kuwait. On 6 April the port city of Basra falls to the British and on 9 April coalition forces take control of the capital Baghdad. During the conflict, Switzerland does not abate its efforts to persuade the warring parties to comply with international humanitarian law. On several occasions it makes representations to all the conflicting parties and calls on them to comply with international humanitarian law and in particular with the Geneva Conventions.

16 April 2003: the Federal Council notes that the Iraqi army has been defeated and that *de facto* hostilities have ceased. It therefore cancels the measures that were taken in accordance with neutrality law.

6 May 2003: the Swiss integration office in Baghdad resumes its activity. The Swiss coordinator for humanitarian aid in Iraq and two of his colleagues return to Iraq. Security conditions in the capital and in the rest of the country are considered sufficient for the resumption of these activities.

22 May 2003: the Security Council adopts resolution 1483. The United States and the United Kingdom are recognised as occupying powers and are granted all necessary powers for governing the country.

14 August 2003: in resolution 1500 the UN Security Council welcomes the appointment of an interim government on 13 July 2003.

16 October 2003: the Security Council adopts Resolution 1511; in it, it affirms Iraq's sovereignty and territorial inviolability and underlines the provisional nature of the exercise by the Coalition Provisional Authority of the responsibilities, authority and obligations according to international law set out in Resolution 1483 (2003). These would expire as soon as a representative and internationally recognised government elected by the people of Iraq took over the work of the Authority. At the same time the Security Council authorised a multinational force under joint leadership to take all necessary measures to ensure the maintenance of security and stability in Iraq.

8 June 2004: in its Resolution 1546 the Security Council welcomes the fact that by 30 June 2004 the occupation would end and Iraq's full sovereignty would be restored. Moreover, the Security Council noted the request by the designated interim government of Iraq that the multinational force under joint command created in accordance with Resolution 1511 (2003) should remain in the country. For this reason the multinational force is authorised to take all necessary measures to ensure security and stability in Iraq.

30 January 2005: turnout in the elections for the new Iraqi assembly is very high. The National Assembly must produce a new constitution, but first it must agree on the future government of Iraq.

29 April 2005: the transitional Iraqi government takes office.

3 Neutrality – a brief overview

Neutrality as a principle of foreign policy means that a state undertakes not to participate militarily in a specific inter-state conflict (temporary neutrality) or not to participate militarily in any future inter-state conflict (permanent neutrality). In return, the conflicting states undertake to respect the territorial inviolability of the neutral state. Switzerland is a permanently neutral state.

3.1 Neutrality law and neutrality policy

3.1.1 Neutrality law

The duties and obligations of neutral states and those of warring states are set out in the two Hague Conventions of 1907 (War on Land and War at Sea¹). The Hague Conventions are complemented by international customary law². These laws apply in periods of armed inter-state conflicts (i.e. not in civil wars). These rules are binding on states.

The rights of the neutral state: the territorial inviolability of neutral states is guaranteed. The private companies based in the territory of such a neutral state can freely conduct trade with states that are at war. This freedom also applies to the transit and the export of weapons and und munition by private companies.

¹ Convention of 18 October 1907 on the Rights and Duties of Neutral Powers and Persons in case of War on Land (SR 0.515.21); Convention of 18 October 1907 concerning the Rights and Duties of Neutral Powers in Naval War (SR 0.515.22).

² In accordance with international customary law, the provisions of the two Hague Conventions of 1907 concerning the Rights and Duties of Neutral Powers and Persons in case of War on Land and of Naval War can also be applied to aerial warfare. Article 2 of the 1907 Convention on the Rights and Duties of Neutral Powers in case of War on Land prohibits the belligerents from transporting troops, ammunition or supply columns through the territory of a neutral power. In the case of aerial warfare, this provision is interpreted as meaning that belligerent states must not use the air space of a neutral country for military purposes.

If a neutral state restricts trade in such goods, these restrictions must apply without distinction to both conflicting camps. By its relevant legal provisions, Switzerland controls the export of such goods.³

The duties of the neutral state: the neutral state must not become involved militarily in conflicts between other states. In particular it is not permitted to support conflicting states with war material or with troops. It may not allow conflicting states to use its territory or its air space for military purposes. In addition, the neutral state must be in a position to defend its territory militarily.

Additional duty of a permanently neutral state: the Hague Conventions do not regulate the status of permanently neutral states in times of peace. Customary law envisages only one additional duty for a neutral state: it must not put itself in a position where in the event of a future conflict it could be led to violate the obligations arising from its neutral status. In particular this means that it must not join a military alliance (such as NATO). If a partner in the alliance were attacked, it would have to support this partner militarily and it would therefore breach the first duty of a neutral state – the duty not to participate in an armed conflict.

Neutrality law and international sanctions: In accordance with the practice of neutral states and with legal consensus, neutrality law cannot be applied to economic sanctions. Switzerland can therefore apply sanctions imposed by the UN, the EU or any other group of states. Likewise, neutrality law is not applicable to military measures decided on by the UN Security Council in accordance with Chapter VII of the UN Charter.

When the UN decides to use force, such action is not to be regarded as an armed inter-state conflict as defined by neutrality law but rather as measures to enforce resolutions of the Security Council, which seeks to restore world peace and international security in the name of the community of nations. Neutrality law therefore does not prevent neutral states from applying military sanctions that the Security Council has decided on in accordance with Chapter VII of the UN Charter.

If there is no resolution by which the UN Security Council authorises military intervention, then the case is that of an armed inter-state conflict in the classical sense of the term. In such a case, Switzerland – as happened in the Iraq conflict – must exercise the rights and fulfil the obligations connected with its status as a neutral state.

3.1.2 Neutrality policy

The term neutrality policy denotes the set of measures which a permanently neutral state takes on its own initiative and regardless of obligations relating to neutrality law in order to guarantee

³ Art. 22 of the Federal War Material Act (SR 514.51): "The production, mediation, export and passage of war material for recipients abroad will be approved provided that this does not conflict with international law, international obligations and the principles of Swiss foreign policy."

Art. 5 of the Ordinance on War Material (SR 514.511): "In cases of approval of foreign transactions and of the conclusion of agreements according to Article 20 KMG, the following must be taken into account:

- a. the preservation of peace, international security and regional stability;
- b. the internal situation in the recipient country; in particular respect for human rights and renunciation of the use of child soldiers;
- c. Switzerland's efforts in the area of development cooperation;
- d. the behaviour of the recipient country vis-à-vis the community of states, particularly with regard to compliance with international law;
- e. the attitude of countries participating together with Switzerland in the international export control regime."

the effectiveness and credibility of its neutrality. In contrast to neutrality law, neutrality policy is not subject to any legal provisions. A credible and coherent neutrality policy mainly serves the purpose of convincing other states of the neutral state's capacity and willingness to remain neutral in the event of future armed conflicts.

3.2 Switzerland's perception of neutrality

3.2.1 Neutrality in Federal Constitution

Neutrality is enshrined in section 5 (Federal Authorities) of the Federal Constitution. According to Articles 173 and 185 (FC), the United Federal Assembly and the Federal Council take measures to guarantee the external security, the independence and the neutrality of Switzerland. The same wording is used for the section on neutrality in the federal constitutions of 1848 and 1874. Neutrality is an important means of preserving the sovereignty of a country. Nevertheless, the authors of the constitutions of 1848, 1874 and 1999 deliberately refrained from mentioning neutrality as one of the federal aims and principles of foreign policy. In documents on the hearing on the formulation of the first federal constitution of 1848 we read that "Neutrality is a means to an end; it is a rule that currently appears appropriate for ensuring the security of Switzerland."⁴

3.2.2 Swiss neutrality policy since the end of the Cold War

Since the end of the Cold War, the likelihood of a military conflict between the great European powers has diminished considerably. By contrast, the likelihood of different kinds of dangers requiring multilateral reactions has increased. Unstructured conflicts, wars outside Europe affecting our continent, terrorism, environmental destruction, etc are examples of this kind of threat.

After the fall of the Berlin Wall, the Federal Council published a report on neutrality in 1993 which analysed Switzerland's geopolitical situation. Its aim was to enable Switzerland to continue to pursue a neutrality policy capable of meeting the new requirements. The report concluded that neutrality would have to be complemented by the notion of "security through cooperation". The Federal Council was of the opinion that international cooperation needed to be strengthened in order more effectively to combat forthcoming dangers.

Switzerland therefore intensified its cooperation with international organisations active in the area of international security (in particular the UN and the OSCE). This orientation of Swiss neutrality policy has enabled our country to strengthen its commitment to peace policy as a stepping stone towards a fair and peaceful world order. In the wake of the Kosovo crisis of 1998/1999, an ad hoc working group established by the Federal Council published a report on Swiss neutrality practice in the above-mentioned conflict (Report of 30 August 2000).⁵

4 Switzerland and the Iraq conflict

4.1 Reasons for the application of neutrality law in the Iraq conflict

⁴ D. Schindler, Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874, Rz 27 zu Art. 8.

⁵ Report on Neutrality in Practice (DFA Internet site: <http://www.eda.admin.ch/eda/e/home/recent/rep/neutral/neut00.html>).

As explained in section 3.1.1, neutrality law does not apply to measures of a military nature in accordance with a resolution by the Security Council invoking Chapter VII of the United Nations Charter. By contrast, the intervention of the armed forces of a state or of several states in the territory of another state without the explicit mandate or authorisation of the UN Security Council is to be regarded as an armed inter-state conflict to which neutrality law applies⁶. The military operations of the United States and the United Kingdom against Iraq which started on 20 March 2003 undoubtedly satisfied the criteria of an armed inter-state conflict.

The question now arises whether the military operation against Iraq was compatible with the ban on the use of force set out in Article 2 paragraph 4 of the United Nations Charter, which is a fundamental element of the international legal order and is binding international law⁷. There are only two cases in which exemptions from the ban on the use of force are permitted: i) when the UN Security Council, invoking Chapter VII of the Charter, decides on the use of military force to restore world peace and international security; ii) in the event of the exercise of the right to self defence (Art. 51 of the Charter)⁸.

The following interpretation of the legal situation focuses on the central argument of the intervening power that they were authorised to intervene militarily in Iraq. It is an open question how the situation would have been evaluated if this had been an instance of the exercise of the right to self defence as defined by Article 51 of the Charter⁹. The material conditions for this had not been fulfilled, nor did the United States or the United Kingdom invoke the right of self defence to justify their military operation. Nor is there any need to go into the controversial issue of military measures against massive human rights violations ("responsibility to protect"). In contrast to the Kosovo conflict of 1999, in which the NATO states justified their military intervention on humanitarian grounds, this argument was not adduced in the case of the Iraq conflict.

Whether this military action could be based on a Security Council resolution was a matter of dispute. On 8 November 2002, the Security Council adopted resolution 1441, which envisaged the resumption of inspections in Iraq and threatened the country with "serious consequences" if it continued to fail to meet its obligations. In February 2003 the United Kingdom submitted a draft resolution to the Security Council. It was co-signed by the United States and Spain and supported by Bulgaria. This resolution was intended to authorise the use of armed force against Iraq. The draft pointed out that Iraq had seriously violated the obligations set out in resolutions 687 and 1441 and without setting any deadline it stated that Iraq had missed the last opportunity to avoid a war. A month later, the United States, the United Kingdom and Spain presented a new version of the draft in which they called on the Security Council to declare by 17 March at the latest that the regime of Saddam Hussein had not carried out the disarmament measures specified in resolution 1441. There was no formal mention of an armed intervention. No agreement was reached in the Security Council by 17 March, and so the three states withdrew

⁶ However, it is not defined as an inter-state conflict if the state expressly permits a military operation by foreign armed forces on its territory.

⁷ ICJ, *Nicaragua Case (Nicaragua v. United States of America)*, ICJ Reports 1986, Para. 268, S. 134: "The use of force is not a suitable means of asserting and of guaranteeing respect for these laws " [...] refrain in its international relations from any threat or use of force directed against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. (Art. 2 para. 4 of the United Nations Charter)".

⁸ ICJ, Judgement of 12 December 1996, *Oil Platform Case (Islamic Republic of Iran v. United States of America)*, Abs. 21–26: "[...] the principle of the prohibition of the use of force in international law and the limitations of this principle imposed by the right of self-defence."

⁹ According to international teaching and practice, self-defence is permissible only when an armed attack has taken place or is imminent. Although a state must not have to wait for an armed attack to take place, the military threat must be so immediate and so overwhelming that neither the choice of means is possible nor is there time for reflection (the still-valid Webster formula from the *Caroline Case* 1837).

their proposed resolution and ceased their diplomatic efforts to persuade Iraq to disarm by peaceful means.

The military operation by US and British forces in Iraq began on 20 March 2003. The United States declared that they had been authorised to take this action against Iraq by existing Security Council resolutions, in particular by resolutions 678 and 687¹⁰. Resolution 678 (1990) contained the authorisation by the Security Council of the use of force in the first Iraq war, while Resolution 687 (1991) regulated the ceasefire and subjected Iraq to a series of demands regarding disarmament and the destruction of weapons of mass destruction.

To justify the second Iraq war of March 2003, the US argued that the requirements of Resolution 687 had not been fulfilled and that the Resolution had been materially violated, as confirmed in Resolution 1441 (2002). As a result of the material non-fulfilment of Resolution 687, the basis for the ceasefire had ceased to exist, and this re-activated the authorisation contained in Resolution 678. Unlike the United States, the United Kingdom did not interpret this as an implicit authorisation¹¹. In the British view, military action was the last means available after it had become clear that Iraq could not by any means be induced to comply with its obligations.

The fact is that neither Security Council Resolution 1441 (2002) nor any other subsequent resolution before the outbreak of hostilities justified the use of force against Iraq. It is true that Resolution 1441 threatened Iraq with serious consequences in the event of non-fulfilment of its disarmament and inspection obligations, but it did not contain the formulation used in Resolution 678 (1990) that peace and security were to be restored "by all necessary means." Since that time the Security Council has used this term as a set phrase for authorisation of the use of military force.

To adduce Resolution 687 (1991) as the basis for an implicit authorisation of the use of force against Iraq appears to be questionable for material as well as for formal reasons. The material objection is that Resolution 687 was pursuing a specific objective and was adopted in a specific context, i.e. as a ceasefire resolution following the liberation of Kuwait. A re-interpretation of this resolution for the purpose of securing authorisation for a second Iraq war conflicts both with the history of this resolution and with its original goal. Moreover, a re-orientation and re-activation of Resolution 687 cannot be undertaken at the discretion of individual states but must be formally approved by the Security Council.

If a Security Council resolution is to serve as the legal basis for a military intervention, then given the overwhelming importance of the ban on the use of force it would have to contain an *explicit and unequivocal authorisation* or a mandate for a military operation in the given crisis situation.

As the military operation against Iraq could not be based on an authorisation by the UN Security Council, the Federal Council took the view that Switzerland had to remain neutral in the Iraq war. The President of the Confederation in a speech to the United Federal Assembly on 20 March 2003 explained the position of the Federal Council as follows¹²: "The coalition led by the United States of America has decided to use force without the agreement of the United Nations Security Council. It is therefore a conflict between states, and so neutrality law applies. (...) Our decision in favour of neutrality corresponds to a long tradition in Switzerland.

¹⁰ Submission by the Permanent Representative of the United States of America to the United Nations to the President of the Security Council, dated 20 March 2003 (S/2003/351).

¹¹ Submission by the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations to the President of the Security Council, dated 20 March 2003 (S/2003/350).

¹² Statement by the Federal Council on the Iraq crisis, AB **2003** N 531.

This tradition is consistent with international law and is an expression of our commitment to compliance with the UN Charter. Our neutrality cannot be equated with indifference to the serious threats posed by the proliferation of weapons of mass destruction and by large-scale acts of terrorism. (...) We also acknowledge that the use of force may be the last means available to bring a very dangerous situation to an end. But the use of arms must be justified. And to be justified it must be explicitly approved by the Security Council or it must be a means of legitimate self defence. Swiss foreign policy is based on international law. This fact gives it a solid basis and clear outlines and makes it predictable."

4.2 Switzerland's actions in connection with the Iraq conflict

4.2.1 Before the military operation

On 13 February 2003, the Embassy of the United States in Bern asked Switzerland to grant the USA general permission for various kinds of aircraft to overfly Swiss territory. Neutrality law requires Switzerland not to make its territory, including its air space, available to a warring state. There is general agreement that overflights for military purposes and for war preparations should not be approved. The Iraq war had not broken out but the US request was clearly prompted by military logic.

The United States had repeatedly stated that they were willing to act against Iraq alone and without the authorisation of the Security Council, and that they already had large numbers of troops stationed in the region.

On 21 February 2003, the Federal Council therefore decided not to permit US aircraft to overfly Swiss territory for military purposes, on the grounds that the overflights were clearly intended to prepare for a military operation in Iraq. The Federal Council took the view that Switzerland should not make its territory available to a state which was preparing without the authorisation of the Security Council to engage in an armed conflict.

According to a decision by the Federal Council on 12 February 1997, only overflights for the purpose of surveillance or reconnaissance could be approved¹³. The Federal Council also decided that in the event of the outbreak of an Iraq conflict without the agreement of the UN Security Council, overflights of Swiss territory for humanitarian purposes would continue to be permitted. If the Security Council agreed to a military operation before the outbreak of the Iraq conflict, the Federal Council said that it would decide on whether to permit overflights for military purposes after it had taken all circumstances into account.

4.2.2 During the military operation

During the Iraq conflict, the Federal Council took measures on the question of overflights and of the control of the export of war materials and the provision of services of a military nature in connection with the conflict.

i) Ban on overflights

One of the obligations of neutrality status is that the neutral state must not make its territory, including its air space, available to a conflicting party. In accordance with this principle, the

¹³ The Federal Office of Civil Aviation, in consultation with the air force and then Directorate of International Law of the Federal Department of Foreign Affairs, can issue an overflight permit for aircraft equipped with surveillance or reconnaissance devices.

Federal Council confirmed its decision of 21 February 2003 on 20 March 2003, the first day of the Iraq war.

It banned allied aircraft from overflying Swiss territory in the following cases:

- if the aircraft were flying in connection with the Iraq conflict
- and if the number of applications for overflying permission exceeded the "courant normal", i.e. the average number in normal times.

In contrast to the decision of 21 February 2003, the ban applied to surveillance and reconnaissance flights. In accordance with the decision of 21 February 2003, overflights for humanitarian and medical purposes, including the transport of the wounded, were declared to be permissible.

ii) Export controls

It is a further duty of neutral states not to provide warring states with war material¹⁴. This is why on 20 March the Federal Council forbade the Confederation to supply the conflicting parties with war material or to provide them with military services.

However, neutrality law does not restrict freedom of trade¹⁵. This means that private companies are allowed to sell conflicting parties goods and services for military purposes. However, as the Federal Council wished to prevent companies based in Switzerland from supplying warring states with war materials and services that could be used in the Iraq conflict, it introduced an approval scheme for war material and military services that private companies based in Switzerland wished to export.

According to the War Material Act, approval must be granted for the export of war material. To prevent war material for which permission had already been granted from being used for military operations in Iraq, the Federal Council decided to set up a control unit to look again at approvals that had already been granted. It also decided to delete from annex 2¹⁶ of the War Material Ordinance countries that provided troops or materials for the conflict. This would have meant that a technology transfer from Switzerland to such countries would have been subject to approval and the avoidance of a possible export ban would have been impossible. The application by the FDEA to have six countries deleted from annex 2 (United States, United Kingdom, Australia, Denmark, Poland and Spain) was no longer dealt with by the Federal Council, because it coincided with the termination of the measures.

¹⁴ In connection with neutrality law in the case of a war on land, there is no written law that regulates exports by a state. However, there is a provision in customary law based on Article 6 of the Hague Convention of 1907 concerning neutrality in the event of a war at sea which prohibits exports by a state (Art. 6: "*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*").

¹⁵ According to Article 7 of the Hague Convention of 1907 on Neutrality in the event of a War on Land, "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet." Article 9 of this Convention states that "Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents."

However, if the UN Security Council has imposed sanctions on one of the belligerents, the principle of equal treatment is not applicable. Switzerland is therefore not required, simply on the grounds that it adhered to the sanctions imposed by the UN on Iraq (Embargo for military equipment intended for Iraq – Resolution 661 of the Security Council of 6. September 1990) to restrict its exports to third countries.

¹⁶ This annex contains a list of states for which no specific approval for the export of war material is required. Accordingly from this date onward the export of war material to the conflicting states required special approval.

In its decision of 20 March 2003, the Federal Council stated that no approval was granted for the export of military equipment and services by private companies in the following cases:

- if the export of this equipment or the provision of this service would contribute to military operations in Iraq
- if the export of this equipment or this service exceeded the "courant normal", i.e. if because of the Iraq war these exports resulted in an increase of the average volume of these goods to the country concerned.

A further restriction was imposed on RUAG because of the organisation's special status¹⁷. The Federal Council insisted that RUAG and companies in which it held a more than 50 % interest should at the time of application submit a written confirmation that the material to be exported and the services were not to be used in the Iraq conflict.

The Federal Council requested the DFA and the FDEA to establish a joint control body that would update annex 2 of the above-mentioned ordinance on war material as the conflict developed and would also decide on the basis of the Federal Council criteria on the applications for export permits submitted by RUAG and by private companies. During the brief period of its existence (28 March–15 April 2003), the control body consisting of employees of the FDEA, the DFA and the DDPS approved all the export applications that were submitted to it.

This can be explained by the fact that compared to other countries Switzerland produces only a small number of complete weapons systems that can be deployed directly in military operations. In addition, the applications often refer to war material for police forces, exhibitions or private persons and therefore did not need to be suspended or rejected.

Finally, not all the required declarations for already approved licences had been submitted to see by the termination of the BRB on 16 April. In particular, declarations for exports to Great Britain were still outstanding. If the Federal Council had not cancelled the export restrictions on 16 April, the licences would have been revoked after the expiry of the deadline for legal hearings on 17 April.

iii) Neutrality and international humanitarian law

Neutrality should not be equated with indifference. This is why during the conflict Switzerland did everything in its power to persuade the conflicting parties to comply with international humanitarian law.

In its capacity as a High Contracting Party to the Geneva Convention of 1949 and in view of its humanitarian tradition, Switzerland reminded the conflicting parties of their obligation to comply with and to ensure compliance with this convention. Although neither Iraq nor the United States have adhered to the additional protocols to the Geneva Conventions, numerous provisions of the first additional protocol are customary law and applicable as such. The entire body of these rules is the minimum standard to be applied in times of armed conflicts. The Security Council expressly referred to these principles in its Resolution 1472.¹⁸

¹⁷ RUAG was formerly an arms company owned by the Confederation. On 1 January 1999, it was transformed into a public limited company in which the Confederation holds a majority of shares.

¹⁸ Resolution 1472 of the Security Council of 28 March 2003. This resolution states that the occupying power according to Article 55 of the Fourth Geneva Convention Relative to the Protection of Civil Persons in Times of War of 12 August 1949 is required to ensure the supply of the population with food and medicines by all means available to it. In particular it is required to import food, medical equipment and other necessary items if the sources of such items in the occupied territory are insufficient.

The principle of observing the distinction between civilians and combatants and the principle of commensurability are particularly important. It is forbidden to use civilians as human shields. Prisoners of war must at all times be treated humanely. In particular they must be protected against violence, intimidation, insults and the curiosity of the public.

Moreover, Switzerland stresses that international humanitarian law restricts the methods and means that are permissible for carrying out hostilities and that the use of weapons that cause unnecessary suffering is prohibited. It also calls on conflicting parties to refrain from any use of weapons of mass destruction. Furthermore, Switzerland emphatically called for a careful selection of military goals, to ensure that neither the civil population nor civil goals were affected.

During the conflict it also advocated the opening of and respect for humanitarian corridors. It also insisted on humane treatment for all prisoners, in compliance with the Geneva Conventions. It called on the conflicting states to ensure the protection of cultural goods.

Before the conflict and during the conflict, Switzerland organised two international conferences on humanitarian aid which provided an opportunity to exchange information, to identify problems in the field and to facilitate the coordination of humanitarian aid in Iraq.

4.2.3 After the military operation

i) Establishing that the conflict had ended

In the absence of a definition in international law of the end of a military conflict, formal and practical elements have to be used as criteria. In formal terms, a conflict ends with a capitulation agreement or with a ceasefire. Ultimately the decisive factor is that hostilities have ceased¹⁹. This may be the case for example when one party is no longer in a position to defend itself militarily (*debellatio*). Defeat may lead to a military occupation.

It is up to the neutral state to decide whether in the circumstances the conflict has ended in terms of neutrality law and whether the relevant measures may be terminated. As the Federal Council had decided on the application of neutrality law and on a series of related measures, it was now its responsibility to establish that the conflict had ended and to decide on the termination of the measures.

The duties of a neutral state end when hostilities have ceased, the region is under the control of the warring state and enemy troops are no longer in a position to offer organised and substantial resistance. On 16 April 2003, the Federal Council took the view that the conditions for concluding that hostilities had ceased had been met. As a result, neutrality law no longer applied and the measures that the Federal Council had taken before and during the conflict could be discontinued.

However, it is important to point out that the ascertainment of the end of hostilities did not mean that international humanitarian law ceased to apply. Article 6 of the Fourth Geneva Convention envisages that the Convention should apply in occupied territory for a period of one year after the general end of military operations. After this period, the occupying power is bound only to the extent that it assumes the functions of a government.

¹⁹ Article 6 paragraph 2 of the Fourth Geneva Convention of 12. August 1949 (SR **0.518.51**) refers to the "general close of military operations".

ii) Sale of F-5E/F (Tiger) to the United States

In a parliamentary initiative, (03.1043) National Councillor Andreas Gross asked whether the sale of F-5E/F planes to the United States did not pose a problem for neutrality policy. In its reply, the Federal Council stated that there were no problems in connection with neutrality and war material legislation, as the first delivery of the aircraft occurred after the Federal Council had ascertained that the Iraq conflict had come to an end (16 April 2003).

Moreover, the USA had stated officially and in writing that the aircraft would not be used for military deployments in Iraq or elsewhere, that they would be stationed at the Marine Corps Air Station in Yuma (Arizona) and that they would be used exclusively for exercises.

5 The legal situation in Iraq during the occupation

In its Resolution 1483 of 22 May 2003, the Security Council noted that the United States and the United Kingdom had taken over joint control of Iraq as occupying powers, and it called upon them "to promote the welfare of the Iraqi people by the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future (para. 4). In para. 5 the Resolution called on "all concerned to comply fully with their obligations under international law, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."

On 14 August 2003, the Security Council adopted Resolution 1500 (2003), in which it welcomed "the establishment of the broadly representative Governing Council of Iraq on 13 July 2003 as an important step towards the formation by the people of Iraq of an internationally recognized representative government that will exercise the sovereignty of Iraq." Moreover the Security Council also decided to establish a UN assistance mission for Iraq (UNAMI) to help the Secretary General to accomplish his mandate in accordance with Resolution 1483 (2003). Despite the presence of the occupying forces and the formation of a governing council consisting of Iraqis, fighting in various parts of the country continued. There were violent local clashes with resistance groups and several lethal terror attacks.

In view of the tense situation, the Security Council in its unanimously adopted Resolution 1511 of 16 October 2003 established a multinational force which it authorised to "take all necessary measures to contribute to the maintenance of security and stability in Iraq" (para. 13) and it called on UN member states to provide this multinational force with support, including military forces.

According to the Federal Council decision of 16 April 2003, neutrality law could not be applied in Iraq from this point on, because hostilities between Iraq and the allies had ceased. Although the situation in Iraq continued to be marked by violent unrest and in some cases by uprisings which affected several provinces and towns, these armed confrontations cannot be regarded as an inter-state conflict to which neutrality law would apply. In its efforts to restore public order, the occupying power fulfils police functions entrusted to it within the framework of the occupation statutes. Moreover the legal situation has changed as a result of the adoption of Resolution 1511 of 16 October 2003. As the Security Council declared the use of force to be permissible in Iraq in order to maintain security and stability in Iraq, neutrality law in accordance with Federal Council practice could no longer be applied to these measures.

6 The restoration of Iraqi sovereignty

A new phase began with the adoption of Resolution 1546 of 8 June 2004, which is based on Chapter VII of the UN Charter. In this resolution the Security Council referred to the end of the occupation on 30 June 2004, the restoration of Iraq's sovereignty and the formation of an interim government. In addition, the resolution defined the role of the UN in the transitional period up to the democratic elections on 31 January 2005; it also affirmed the authorisation of the multinational force under US leadership and specified its mandate.

However, the presence of this force depends on the agreement of the Iraqi government. The Security Council stated unequivocally that it would end the mandate at an earlier stage if requested to do so by the Iraqi government. (Para. 12 der Resolution 1546). Like previous Iraq resolutions by the Security Council, Resolution 1546 (2004) in accordance with Article 25 of the Charter is binding on Switzerland. In paragraph 21 of the resolution, the arms embargo against Iraq was lifted insofar as it concerned weapons and material destined for the Iraqi government or for the multinational force.

Despite the continuing unstable security situation in Iraq, there is no neutrality-relevant armed conflict in the country which would justify the application of neutrality law. Security Council Resolution 1546 means that neutrality cannot legally be applied.

However, this evaluation of neutrality law does not dispense Switzerland from the responsibility to judge decisions according to its own neutrality policy principles, which are based on ensuring the predictability and coherence of Switzerland's neutrality (cf. section. 3.1.2).

7 Conclusions

The international military operation against Iraq was undoubtedly an armed inter-state conflict. As the intervention of the USA and of its allies took place without the authorisation or the mandate of the Security Council, the Federal Council concluded that neutrality law was applicable. This was not a decision against the United States or for Iraq but a decision in favour of international law and the UN system of collective security and against unilateralism.

During the Iraq conflict, Switzerland practised neutrality coherently and consistently. Its position was understood and respected abroad. Neutrality has therefore proved its worth as an instrument for preserving Switzerland's independence and security.

Neutrality did not prevent Switzerland from acting on behalf of the civilian population, war victims and prisoners before, during and after the armed conflict. Switzerland has always endeavoured to contribute to respect for human rights and compliance with international humanitarian law. For these efforts, Switzerland has received widespread respect and recognition.