Swiss Neutrality in Practice - Current Aspects

Report of the interdepartmental working group of 30 August 2000

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1. INTRODUCTION

In the context of the Swiss policy on sanctions during the crisis in Kosovo in 1998/99, the Federal Council appointed an ad hoc working group to prepare an "interim report" which dealt with the significance of neutrality, i.e., the laws of neutrality in the framework of contemporary foreign and security policy in Switzerland[1]. In addition, the working group was requested to clarify whether or not to institute a new report on neutrality.

This report discusses and analyses Switzerland's neutrality practice in the nineties with particular reference to the experience gained in the Kosovo conflict. First, the latest developments in the international law of neutrality will be discussed, as well as the practice of Switzerland and other neutral States in Europe with respect to their participation in international sanctions. This will be followed by an in-depth analysis taking into account future questions relevant to the neutrality of Switzerland.

Finally, it is necessary to point out that academic research on the question of neutrality in both its contemporary and historical perspective has continued throughout the last few years. Also, within the framework of the National Research Programme 42 a number of studies have dealt with neutrality and its different aspects.

2. SWISS NEUTRALITY IN THE NINETIES

2.1 The 1993 report on neutrality

Changes in the sphere of Switzerland's foreign and security policy at the beginning of the nineties led to a partly new orientation of Swiss neutrality. The restrictive understanding of neutrality from the time of the Cold War was renounced in favour of an increased room for manoeuvre. The Federal Council's 1993 report on neutrality took this change of circumstances into account and has since served the Federal Council as the foundation for the conduct of its policy of neutrality.

[1] The working group was chaired by the State Secretary of the Swiss Federal Department of Foreign Affairs, F. von Däniken, and composed of the following departmental representatives:
Federal Department of Foreign Affairs: Ambassador Prof. N. Michel, Head of the Directorate of International Law; W. Thut, Deputy Head of Policy and Research Division, Swiss Agency for Development and Co-operation; R. Balzaretti, Head of International Legal Affairs Section, Directorate of International Law; A. Biscaro, Directorate of International Law.
Federal Department of Home Affairs: A. Spring, Deputy Head of the Legal Division, Swiss Federal Supervisory Board for Foundations.
Federal Department of Justice and Police: Prof. H. Koller, Director of the Federal Office of Justice.
Federal Department of Defence, Civil Protection and Sports: Ambassador P. Welti, Head of Security and Defence Policy, General Secretariat; Major General J. Schärli, Director for Peace Support and Security Co-operation, General Staff.
Federal Department of Finance: A. Karrer, Personal Adviser to the Minister of Finance.
Federal Department of Economic Affairs: O. Wyss, Head of Export Controls and Sanctions Division, State Secretariat for Economic Affairs.
Department of Environment, Transport, Energy and Communications: M. Carera, Personal Adviser to the Head of Department.

On 29 November 1993 the Federal Council adopted the *Report on Neutrality* (hereafter "the 1993 report"), which was published as an appendix to the *Report on Swiss Foreign Policy for the Nineties*[2]. Both reports take into account the new situation in foreign and security policy since the end of the Cold War. The 1993 report inaugurated a partly new orientation in the practice of Swiss neutrality, following Switzerland's comprehensive participation in the UN economic sanctions against Iraq, thereby taking into account changes in the security policy environment. As a result, the newly formulated concept of neutrality poses no obstacle to greater co-operation in security matters or to membership of the European Union or the United Nations. This is essentially based on the findings of the report that Swiss participation in the UN system of collective security and its involvement in non-military sanctions outside the UN (i.e., within the framework of the EU) do not contradict the principle of neutrality.

In view of the Swiss practice of sanctions, in the 1993 report the Federal Council confirmed its standpoint, already held in the eighties, that the law of neutrality does not render neutrality and participation in economic sanctions fundamentally incompatible. In addition it endorsed actual state practice and the current view in international law according to which the law of neutrality does *not* apply in the context of UN coercive measures. In the report the Federal Council announced Switzerland's willingness in principle to take part in future coercive measures against violators of the peace or law; in the report the following distinctions were dealt with:

- *Non-military UN sanctions*: Swiss participation "as long as they are pronounced by the Security Council (...) and widely supported by the international community";
- *Military UN sanctions*: Support "in one form or another would be possible; generally speaking Switzerland (...) would not obstruct military action (...)";
- *Economic sanctions outside the UN*: "Fundamental willingness, (...) to lend support to a relevant regional group of States against violators of the peace or law.

By means of the 1993 report the Federal Council established a new scope of action for the conduct of its neutrality policy. The restrictive understanding of neutrality from the time of the Cold War ("integral neutrality") gave way to more room to manoeuvre in foreign policy. In this way the report introduced a development in the understanding of Swiss neutrality which resulted in a concentration on the military core of neutrality.

The 1993 report was forwarded to Parliament to take note of and published. Apart from interested parliamentarians the report was practically exclusively analysed and commented on in academic circles. In particular, the report did not become the subject of wide public discussion, and even today it must be recognised that the conceptual adjustments dealt with in the 1993 report are not, or are only incompletely, known in wider public circles.

[2] Federal Journal (BB1) **1994** I 206.

2.2 Swiss neutrality in practice since 1990

In the nineties Switzerland consistently strengthened its security policy co-operation with other countries. Furthermore, since 1990 Switzerland has regularly taken part in sanctions imposed by the international community against violators of the peace or law insofar as such measures serve to restore international law and to protect Swiss interests.

2.2.1 Security-policy co-operation

In accordance with the Report on Swiss Foreign Policy of 29 November 1993, since the end of the Cold War the Federal Council has consistently extended its international commitments and cooperation in international security . Switzerland has intensified its involvement in multilateral bodies of arms control and disarmament (e.g., full membership of the Geneva Disarmament Conference, 1996). Switzerland regularly puts civil or military experts at the disposal of international peace missions (e.g., UN military or election observers for the OSCE). The Swiss presidency of the OSCE (1996) is an indication of Switzerland's increasing commitment to security policy; together with the OSCE, Switzerland moved in a politically sensitive environment in Bosnia and successfully fulfilled its presidential tasks.

Particularly noteworthy is Switzerland's participation in NATO's Partnership for Peace (*PfP*, 1996) and in the Euro-Atlantic Partnership Council (*EAPC*, 1997). The experiences of Switzerland and other neutral States in Europe in this matter illustrate cogently that neutrality is no obstacle to international co-operation in the military-political arena even when it amounts to institutionalised co-operation with NATO and its members as is the case with the PfP or the EAPC.

When it comes to taking part in international peace-keeping forces, Switzerland has supported the OSCE Mission in Bosnia-Herzegovina since 1996 with a logistics unit ("Yellow Berets"), and, since 1999, the Swiss army has been taking part in the multinational NATO-led protection force in Kosovo with its own detachment (KFOR/SWISSCOY).

At the end of the nineties, increasing international co-operation in security policy which had started in 1990 was confirmed in the Federal Council's report of 7 June 1999 on the security policy of Switzerland[3]. The report confirms that one of the main elements of the Federal Council's future strategy of security policy is intensified co-operation with other countries. Switzerland is to retain its neutrality while making full use of the room for manoeuvre inherent in the law of neutrality.

2.2.2 Participation in coercive measures

a) Non-military sanctions

The end of the Cold War led to an important change in the UN's sanctions policy which had a lasting effect on Switzerland's respective position. The trigger was

[3] Federal Journal (BBl) **1999** 7657.

Iraq's illegal annexation of Kuwait on 2 August 1990 and the consequent imposition of comprehensive UN sanctions against Baghdad. Switzerland autonomously joined in the economic sanctions. Participation in these coercive measures in the Iraq-Kuwait conflict indicated a change of policy in that it was the first time since WWII that Switzerland openly and fully participated, thereby breaking away from the earlier concept that Swiss neutrality and participation in sanctions were fundamentally incompatible. The Federal Council justified its participation *inter alia* on the need for international solidarity and Switzerland's interests in upholding the fundamental norms of international law. The Federal Council came to the conclusion that Switzerland's participation in coercive economic measures against Iraq was compatible with neutrality because in principle the law of neutrality is silent on duties in the economic sphere and, furthermore, for Switzerland to stand aside would be equivalent to partisanship in favour of the law-breaker. Of central importance in the politics of neutrality was the belief that, in this particular case, Switzerland was hardly in danger of being drawn into an armed conflict. In view of the united action of the international community, in the opinion of the Federal Council the danger no longer lies in participation in economic sanctions, but more so in standing aside, a consequence of which would be that in a future conflict the credibility of neutrality as well as Switzerland's neutral stance would be open to question.

The 1990 policy was continued in subsequent UN Security Council resolutions on sanctions. In applying the principles of neutrality-policy set out in the 1993 report, up until now Switzerland has consistently and autonomously adopted the Security Council's non-military sanctions (e.g., Yugoslavia 1992, Libya 1992, Haiti 1993, Sierra Leone 1997, Angola/Unita 1998, Afghanistan/Taliban 2000). In addition, Switzerland has also taken part in European Union sanctions imposed without corresponding UN resolutions which as a rule have been supported by the EFTA countries and States associated with the EU (Federal Republic of Yugoslavia 1998, Myanmar 2000).

b) Military sanctions

At the end of 1990 with the widening of the UN's sanctions regime against Iraq to include *military* measures, Switzerland was also faced with the question of possible participation in or, rather, support for this military operation by non-military means. In accordance with previous practice, Switzerland refused to allow military aircraft to fly over its territory (in contra-distinction to Austria which permitted military overflights, whereupon Iraq accused Austria of violating its neutrality). However, in this context, the Federal Council announced that it would conduct a fundamental examination of the question of the compatibility of neutrality and the UN's system of military sanctions.

Supported by the analysis of the law and politics of neutrality in the 1993 report, the Federal Council considered that, since then, not only was participation in economic sanctions compatible with neutrality, but even Swiss support for UN military coercive measures. Since 1993 Switzerland has allowed foreign troops the use

of Swiss sovereign territory for peace support operations, as long as the operation in question is backed by a UN Security Council mandate or authorisation (as the latter was not the case in NATO's military action against the Federal Republic of Yugoslavia in the spring of 1999, Switzerland did not grant NATO the right to fly over Swiss territory). Overflight and transit rights for UN mandated missions are in principle independently granted by Switzerland whether the UN measures in question are based on Chapter VI (peaceful settlement of disputes, i.e., *with* the agreement of the parties to the conflict) or Chapter VII of the UN Charter (coercive measures with the possibility of military force). Therefore, e.g., the operations of the NATO-led peace support troops in Bosnia-Herzegovina (IFOR/SFOR) and in Kosovo (KFOR) are based on the consent of the parties to the conflict and consequently do not constitute sanctions in the strict sense of the word (i.e., against the will of the affected state). Nevertheless, the relevant UN Security Council resolutions also comprise certain elements of force of a military nature, in so far as the implementation of the respective mandates are permitted, if necessary, against the will of the affected parties and by military means of enforcement.

On the basis of these considerations, the Federal Council granted overflight permits for military surveillance aircrafts mandated by the UN protection forces for Yugoslavia (UNPROFOR 1993) and on the occasion of the OSCE Mission in Kosovo (Kosovo Verification Mission 1998) as well as overflight and transit permits for the IFOR/SFOR (Bosnia-Herzegovina 1995) and KFOR (Kosovo 1999).

3. THE CONFLICT IN KOSOVO 1998/99

3.1 Questions relevant to neutrality in the Kosovo conflict

The gradual abolition of the autonomy of the province of Kosovo in the Republic of Serbia by the Federal government in Belgrade from 1989 on was accompanied by massive discrimination against the ethnic Albanian majority. During the nineties the civilian population of Kosovo was subjected increasingly to serious human rights violations. Consequently, especially from 1998 on, the international community increased its diplomatic, political and economic pressure on the Federal Republic of Yugoslavia. After the failure of intensive peace and mediation efforts (especially mediation by the Balkan Contact Group, the OSCE Verification Mission and the Rambouillet negotiations), the NATO member States agreed to military intervention in Kosovo. The air raids against Yugoslavia lasted from 23 March to 8 June 1999 and came to a formal end with the conclusion of a Military Technical Agreement with Yugoslavia, as well as the adoption of UN Security Council Resolution 1244 (1999) of 10 June 1999.

For Switzerland, as for the other neutral or alliance-free European States, NATO's intervention precipitated questions about neutrality - especially their position in relation to the NATO operation and their participation in non-military sanctions. Furthermore, there was the question of the actual possibilities open to Switzerland to contribute to the cessation of conflict, e.g., by performing good offices.

3.2 Swiss participation in sanctions

Continuing its previous practice, in 1998 Switzerland took part in the UN's comprehensive arms embargo against Yugoslavia. In addition, Switzerland joined in further sanctions against Yugoslavia which had been adopted by the European Union and which were supported by numerous non-EU States. Even after NATO intervention began Switzerland maintained its sanctions policy and participated in further international measures as long as they were in accordance with the law of neutrality.

3.2.1 Participation in sanctions *before* the start of military intervention

a) Non-military measures

At the end of March 1998 the UN Security Council imposed an arms embargo against Yugoslavia. Until the conclusion of the agreement between NATO and Yugoslavia the arms embargo was the only coercive measure against Belgrade within the framework of the UN. On the other hand, further comprehensive diplomatic and economic sanctions were adopted especially by the European Union. Their adoption by the EU was accompanied by regular requests to the associate States as well as to the EFTA countries to join in the EU measures.

Owing to being particularly affected by the Kosovo conflict (influx of refugees, large Kosovar community in Switzerland), Switzerland's interest in a speedy and peaceful end to the crisis was particularly evident. Therefore, the Federal Council, in solidarity with the EU, declared its readiness to participate in the EU sanctions against Yugoslavia. In 1998, after a comprehensive consideration of all the interests at stake, it came to the conclusion that participation in the sanctions in question was permitted in international law and that it safeguarded Swiss interests. Consequently, Switzerland participated for the most part in the EU's coercive measures against Yugoslavia (e.g., embargo on goods of repression, prohibition of new investments, freezing of assets, visa restrictions).

By participating in these EU measures Switzerland formally imposed economic sanctions for the first time without a corresponding UN Security Council resolution. In the 1993 report the Federal Council had already announced that it would also take part in economic sanctions outside the United Nations, namely, through measures supported by a regionally significant group of States against a violator of the peace or law. In the Kosovo conflict before the NATO intervention such action was also reasonable in the light of certain aspects of neutrality: apart from the fact that the law of neutrality permits economic sanctions in principle, it was not applicable because until the start of NATO's intervention, the Kosovo crisis was *not* an international conflict according to the law of neutrality. Furthermore, Switzerland was in no immediate danger of being drawn into the violent clashes within Yugoslavia.

b) Military measures

Until the start of the NATO air raids against Yugoslavia, Switzerland permitted the overflights of NATO member States' aircraft protecting the OSCE Verification Mission in Kosovo (KVM) by means of an air-space control. To this end the OSCE Mission was based on a UN Security Council resolution and approved by Yugoslavia. Permission to fly over was therefore as unproblematic in international law as it was from the point of view of neutrality.

3.2.2 Participation in sanctions *during* the military intervention

In accordance with its former practice and in view of the actions of the NATO member States, in the spring of 1999 the Federal Council declared that the law of neutrality was applicable. This decision reflected discussions about the legality of such operations. Consequently, Switzerland had to observe its international duties as a neutral State, namely, the duty of non-discrimination (in relation to the export and transit of certain goods) and the prohibition of military support to the parties in conflict.

Accordingly, as seen from the outside the Federal Council's sanctions practice appeared somewhat incoherent and difficult to understand. However, this was not due to any wavering by the Federal Council on the policy of neutrality, but rather the fact that the only collective measure which the UN had agreed on was the arms embargo, and that as far as the other sanctions were concerned, Switzerland had to comply with the law of neutrality. Switzerland continued to join in the western community of States' sanctions in so far as they could be brought in line with the international duties of a neutral State. As a result, and bearing in mind its neutral status, Switzerland was able to participate in most though not all sanctions.

a) Non-military measures

In relation to the existing UN arms embargo the Federal Council decided to maintain the Swiss embargo against Yugoslavia without restricting future deliveries of war material to NATO States. In order not to take any economic advantage of NATO's intervention, however, caution had to be exercised in meeting new export requests for NATO States and export permits be denied if, due to the military operations, exports to NATO States participating in the conflict increased. In particular, continuation of the unilateral export prohibition against Yugoslavia did not violate the law of neutrality's rule of non-discrimination because the arms embargo was based on a corresponding UN resolution. Hence, the law of neutrality with regard to these sanctions was not applicable. As far as the rest of the sanctions imposed by Switzerland until then are concerned, they could likewise be retained because the sanctions in question were permissible according to the law of neutrality.

After the start of the air raids, the EU decided on additional restrictive measures which 14 further European States joined in and most of which were supported by Switzerland. The oil embargo was the only problem for the Federal Council as far as the law of neutrality was concerned. By participating in the oil embargo the law

of neutrality's principle of non-discrimination would have to be observed because the Federal Council regarded oil as a war asset (comparable to weapons and ammunition). In order not to have to use these sanctions equally against all parties to the conflict (and therefore also in relation to the NATO States) the Federal Council declined to impose an export ban on oil and oil products to Yugoslavia. However, it laid down compulsory notification for the conclusion of contracts on the trade, arranging and transport of such products that do not touch Swiss territory in order to prevent the evasion of EU sanctions.

b) Military measures

Following the outbreak of armed conflict between NATO and Yugoslavia, the Federal Council was of the opinion that the international law of neutrality applied because NATO's military sanctions were not supported by a corresponding UN Security Council resolution. The law of neutrality prohibits a neutral state from allowing its territory, including airspace, to be used for military purposes by a party to the conflict. In accordance with the former practice of Switzerland and other neutral States the Federal Council therefore refused the overflight of NATO aeroplanes for military purposes throughout the duration of hostilities. Overflights for humanitarian purposes, on the other hand, continued to be permitted.

After the cessation of hostilities and the adoption of UN Security Council Resolution 1244 on 10 June 1999, the Federal Council approved, following proven practice, the overflights and transit of UN-mandated NATO-led peace support troops for Kosovo (KFOR). In addition the Federal Council decided to participate in KFOR with its own contingent of troops (SWISSCOY).

3.3 Good Offices

The Kosovo conflict confirmed that the provision of "classic" good offices has not been the preserve of neutral States. Mediation efforts today are attended to principally by international organisations or groups of States. Apart from that, the activities undertaken by Switzerland in the Kosovo conflict show that in the modern conflict management of a State, the provision of classic good offices makes up only an extremely small part of its foreign and security policy activities.

The provision of "classic" good offices (protection of foreign interests, mediation and conference diplomacy) is traditionally associated with Switzerland's neutral status. In fact Switzerland has always contributed actively to peace with its good offices. But measured against the whole spectrum of modern foreign and security policy activities, the provision of such classic good offices in managing conflict and crisis situations recedes into the background. In the Kosovo crisis too it was confirmed that Switzerland's active contribution to peace hadn't been limited to the provision of classic good offices as an outlet for a traditional understanding of an "active" policy of neutrality. Long before the escalation of violence in Kosovo in the spring of 1999 Switzerland had undertaken various efforts to solve the conflict. Thus Switzerland participated in the Geneva-Yugoslavia Conference

1992/93 in the "Special Group on Kosovo". During its presidency of the OSCE it appointed the former Spanish Prime Minister, Felipe Gonzalez, to monitor the Serbian local elections and seek possible solutions to the problem of minorities. In addition, already in March 1998 Switzerland promoted the organisation of an international Kosovo Conference in the OSCE.

Following the outbreak of armed conflict between NATO and Yugoslavia, the Federal Council, at the request of France and the United States, decided to represent their interests in Belgrade. From the point of view of neutrality, also of interest was Switzerland's preparedness for supporting the Office of the UN High Commissioner for Refugees' (UNHCR) civil assistance for war refugees in Albania by providing three army helicopters including the accompanying personnel (Operation ALBA) - in spite of the proximity of the action to the conflict zone, as well as the heavy participation of NATO forces in the humanitarian operation. Because the Swiss operation was based on a UNHCR mandate, served a uniquely humanitarian purpose and was also clearly identifiable as such, this operation conformed with neutrality. Similarly, during the NATO intervention, Switzerland, together with Greece and Russia, launched the FOCUS initiative which provided aid for the impoverished civil population of Yugoslavia. Unlike ALBA, FOCUS was a humanitarian commitment by exclusively civilian means. The operation corresponded with the humanitarian aid principles of independence and neutrality traditionally upheld by Switzerland.

The Kosovo crisis showed that in modern conflicts there can still be a need for the provision of *traditional* good offices (especially in protecting the interests of third parties). However, in the Federal Council's experience, as noted in the 1993 report, the neutral status of a State rendering services can be an advantage, but is not a prerequisite. In armed conflicts today there are many others, especially international organisations, and not neutral States, who are approached to render services (e.g., Norway in the Middle East, UN and Australia in East Timor, OSCE in the Caucasus). Thus a "special role" for Switzerland or other neutral States in connection with the rendering of services based on their neutral status could not be observed in the Kosovo conflict; efforts to mediate were more often held at the multilateral level, whether by international organisations (UN, OSCE, EU) or by a group of States (Balkan Contact Group).

3.4 The conduct of other neutral States

The neutral or non-aligned EU member States participated unreservedly in the UN arms embargo as well as in all EU sanctions against Yugoslavia. They were affected in different ways by the NATO operation against Yugoslavia. Austria, like Switzerland, refused to place its sovereign territory at the disposal of NATO for military purposes.

In view of the geographical proximity of the conflict zone and the central role of the European Union in the Kosovo conflict, questions also arose for neutral States

in the EU concerning the status of their neutrality or non-alignment. There again the markedly qualified significance that neutrality has today in these States in political decision making, i.e., within the framework of the European Union, was confirmed.

As far as participation in *non-military sanctions* is concerned, the neutral EU member States complied with the UN Security Council arms embargo, without regarding this as a violation of the law of neutrality's duty of non-discrimination. Furthermore, Finland, Ireland, Austria and Sweden supported all declarations which the EU member States adopted within the framework of the Common Foreign and Security Policy (CFSP). Likewise, they lent their support before as well as after the start of the NATO operation to all the Union's decisions on sanctions, and implemented them comprehensively and unconditionally. The latter also applied to the oil embargo which was enacted by the EU *after* the start of the air raids. Unlike Switzerland, the neutral EU States didn't raise any questions relating to the law of neutrality in applying this measure. Because all neutral States in the EU assumed that decisions of the CFSP take precedence over the law of neutrality, the question of the compatibility of an EU measure with neutrality and the law of neutrality was not intensely scrutinised in connection with the enactment and transposition of EU sanctions.

With regard to participation in or support for NATO's *military measures*, the EU's neutral States were affected in different ways. Because these States are not members of the Alliance, active involvement in the NATO operation before the conclusion of the cease-fire agreement and the UN Security Council's resolution didn't come up for discussion. Given their geographical position, for Ireland, Sweden and Finland the problem of having to put their territory at the disposal of NATO measures was of a purely hypothetical nature. On the other hand, Austria was confronted with a number of requests to grant overflight rights for armed NATO military aircraft as well as the use of a military transmitter on Austrian territory. Austria refused both requests with reference to its neutrality. Austria therefore held the same position as Switzerland in relation to military sanctions.

4. SOURCES, CONTENT AND SIGNIFICANCE OF THE LAW OF NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW

4.1 Sources of law

The Hague Conventions of 1907 are the basis of the codified law of neutrality. But they can hardly take into account up-to-date developments in international law, and regulate only parts of the current law of neutrality. The latter is mostly determined by international customary law.

The law of neutrality is part of the international law of war which is based mainly on the relevant codifications in the second half of the 19th and the beginning of the 20th centuries. These rules - even though in the meantime frequently inade-

quate - still form an essential part of the norms of international law which are to be observed in an armed conflict.

The 1993 report emphasises that the legal relationship between neutral States and those participating in an international armed conflict is regulated essentially by the 1907 Hague Conventions on neutrality[4]. Today, however, the significance of the Hague Conventions is partly qualified and international customary law is regarded as the decisive source of law for the contemporary law of neutrality. One of the reasons for this is that when the Hague Conventions were being drawn up customary law *then* was only taken account of incompletely, and an important component of modern warfare (aerial warfare) was not included at all. In addition, the changed manifestations and consequences of modern conflicts up until now are not covered by the Conventions. The same applies to the further development of international law in the 20th century, especially in the area of the relations between States and human rights (prohibition of the use of force and the UN's system of collective security; Geneva Conventions; emergence of peremptory norms of law; recognition of the universality of fundamental human rights). Their effects on the law of neutrality are not regulated by the Hague Conventions but by customary law.

In the 1993 report it is emphasised that the law of neutrality enacted in the Hague Conventions has, since its codification, remained incomplete, it has not been adapted to the realities of the outgoing 20th century and corresponds only inadequately to the needs of today's international community. In fact, the Hague Conventions are capable of regulating only some parts of the law of neutrality in force today. Nevertheless, the conventions still have a certain significance today in that some articles of the conventions reflect or concretise current international customary law.

4.2 Scope of application

The scope of application of the law of neutrality is restricted to armed conflict between States. The law of neutrality is not applicable in internal conflicts. The same applies when the UN decides on coercive measures in case of a threat to international security or a threat to, or breach of the peace. In the absence of such a UN resolution, the military actions of individual States or a group of States are in principle prohibited, and the law of neutrality is, according to the international law in force, applicable.

The legal effects of the law of neutrality come into force immediately upon the outbreak of a international armed conflict. The scope of application of the law of neutrality thereby restricts itself to *international* armed conflict, i.e., to conflicts between States as defined by international law. If there is *no* State involved in an

[4] *Convention respecting the rights and duties of neutral Powers and Persons in case of war on land, 18 October 1907* ("V. Hague Convention"), SR 0.515.21; *Convention concerning the rights and duties of neutral Powers in naval war, 18 October 1907* ("XIII. Hague Convention"), SR 0.515.22.

armed conflict (apart from the State on whose territory the conflict takes place), then the law of neutrality does *not* apply. Consequently, in purely intra-State clashes the law of neutrality does not limit the neutral State's scope of action. Regardless of these clear criteria of application it must be emphasised that in practice certain difficulties of delimitation between internal and international conflict are unavoidable (e.g., in a conflict of secession).

In the context of the UN's system of collective security it is recognised in international customary law that, with respect to coercive measures within the framework of the UN, the law of neutrality is not applicable. This leads to the result that, according to opinion and practice up to now, in an international armed conflict the question whether the law of collective security or the law of neutrality is applicable depends upon a decision of the UN Security Council. The question whether the law of neutrality in certain cases does not apply even when military measures are taken *without UN involvement or UN-authorisation*, manifested itself in an especially evident manner in the NATO intervention in Kosovo. Among the neutral States at least Austria and Switzerland concluded that the law of neutrality basically applied according to current international law. The practice of these two neutral States, but also the different opinions regarding the legality of such military operations, suggest that today a new generally recognised rule of international law does not yet exist regarding the non-applicability of the law of neutrality in the case of interventions without a UN mandate. From the outset this does not exclude the possibility that the Kosovo conflict triggered a further corresponding development of international customary law (compare with further details paragraph 5.1).

4.3 Content of the law of neutrality, esp. the duties of neutral States

The duties of neutral States in the international law in force are limited in essence to non-participation in military action. In the economic sphere the law of neutrality's principle of non-discrimination is to be observed; this, however, is to a large degree, restricted to the delivery of goods which serve the combat capability of armies in a direct and militarily relevant manner.

From the law of neutrality generally recognised today, two fundamental duties for the neutral State can be derived:

- the duty not to intervene militarily in the conflict (*prohibition of direct military assistance*), as well as
- the rule not to provide support for the military operations of the parties to the conflict (*prohibition of indirect military assistance*).

The prohibition of *direct* participation in conflict with one's own forces is undoubtedly the most fundamental element of the concept of neutrality and does not need to be stated more precisely. It is debatable, however, how far the law of neutrality governs measures which at the very least could influence the conflict *indirectly* to the advantage or disadvantage of a party to the conflict (e.g., transit and

overflight, the establishment of military bases). Indisputable is the duty of a neutral State not to place its sovereign territory at the disposal of a party to the conflict for military purposes and operations. Less obvious, on the other hand, is to what extent the law of neutrality governs the export and transit of armaments. Based on the present generally recognised practice of neutral States, the limits of the relevant room for manoeuvre are reached when the *one-sided* delivery of arms collides with the law of neutrality's principle of non-discrimination. This principle is a classic consequence of the concept of impartiality, which forms the basis of neutrality and is still recognised as a principle of customary law today. Even though this principle was concretised in the Hague Conventions, its current scope in individual cases is disputed (see paragraph 5.2 below).

With respect to the existence and extent of the duties of neutrality which are *not* specified in the Hague Conventions, there is a certain discrepancy between theory and actual state practice. As a consequence, sometimes a considerable widening of the scope of application of the law of neutrality as well as the legal duties of neutral States (namely in the economic sphere) is postulated. On the other hand, the practice of neutral States shows that the duties in the law of neutrality are in principle to be interpreted restrictively and that the law of neutrality should not restrict the freedom of action more than is absolutely necessary in order to preserve the status of neutrality. This legal opinion manifested by the neutral States appears to have been accepted by the other States; as an indication of this, during the Kosovo conflict neither Switzerland nor the neutral EU States were accused of violating their international law duties of neutrality by participating in the comprehensive economic sanctions.

To summarise, the generally acknowledged duties of neutrality in contemporary international law are restricted mainly to the *military core* of neutrality. The duty not to participate militarily continues to include not only a prohibition on taking part in the conflict with one's own forces, but also extends to *indirect* armed assistance; the latter, however, is limited to the duty of non-discrimination (regarding export restrictions on certain goods) as well as the prohibition of territorial and personnel support for military operations.

4.4 Conclusion

In modern legal practice the codified law of neutrality has lost much of its former significance. This is the case with respect to the scope of application as well as to the range of the international rights and duties of neutral States. Nevertheless, the law of neutrality still has to be viewed as a part of contemporary international law today. In inter-State conflicts these rules are still applicable and must be observed by Switzerland as a neutral State.

The significance and content of the law of neutrality today is mostly determined by international customary law which is marked by state practice, namely that of Austria and Switzerland. The Hague Conventions of 1907 still have significance

in so far as their rules really reflect and concretise the current accepted customary law. With regard to the range of today's duties of neutrality, State practice and the legal conviction expressed therein shows that the duties of neutral States are essentially restricted to *military* non-participation.

In the course of the 20th century, the law of neutrality as such has lost much of its original significance because it does not apply to most modern armed conflicts. In the event of its application it only regulates the military aspect of the legal relationship between neutral States and parties to the conflict, without covering the other, today by far more important, areas of inter-State relations (e.g., economy, diplomacy). Beyond that, State practice in the last decade indicates that the rules of the law of neutrality are in actual fact only invoked expressly by the permanent neutral States of Austria and Switzerland. In view of these facts, the question can be raised whether the law of neutrality today can still claim universal validity at all. What is certain is that in modern international law the law of neutrality has a less important role or respectively has lost some of its relevance.

In spite of this diminished relevance and the further development of international law, certain international customary law rules of neutrality still exist today: as long as the adoption of the formal status of neutrality by a State, or the institution of neutrality is permitted in international law and recognised by the international community, there is also a need for the regulation of legal relations between the parties to the conflict and those States which have decided to adopt this status of neutrality. The significance and finally also the existence of this area of law in contemporary international law depends decisively upon the *political will* of every individual State, to regard itself in inter-State conflicts as "neutral" in the legal sense and to follow the rules of the law of neutrality consciously and consistently.

5. ANALYSIS OF CONTROVERSIAL QUESTIONS

In the recent past the Federal Council has repeatedly had the opportunity to analyse in detail the reasons for and significance of Swiss neutrality and thereby to also take into account the developments in the international community and in the European sphere in the nineties (e.g., the Report on Swiss Accession to the European Community 1992, the 1993 Report on Neutrality, the Integration Report 1999, the Security Policy Report 2000). In remarkable ways the practice also itself developed further during the nineties, as illustrated above.

Considering this, it is unnecessary to re-examine comprehensively the *raison d'être* and the effects of neutrality in the international community today. Of importance, however, is a critical analysis of questions concerning the law of neutrality which arose in the Kosovo conflict which meant that Switzerland had to make difficult decisions: the question of permitting the overflight of foreign military aircraft as well as the question of participation in the oil embargo against Yugoslavia. The first raised the problem of the application of the law of neutrality, while the second concerned the scope of the law of neutrality in the economic sphere.

5.1 Applicability of the law of neutrality

The NATO air raids against Yugoslavia in the spring of 1999 showed that in special circumstances even without an explicit UN mandate NATO deems itself authorised to intervene militarily in the name of regional security and fundamental human rights. The legality of such intervention is highly controversial and can also have consequences regarding the application of the law of neutrality. An exception to the applicability of the law of neutrality is only conceivable when military measures are in conformity with prevailing international law.

The 1993 report on neutrality assumes that Swiss support for military coercive measures is only permissible when the sanctions are based on a decision of the UN Security Council. This concept is based on the United Nations Charter where the use of force between States - apart from self defence - is permitted only within the framework of the UN's system of collective security.

NATO's military operation against Yugoslavia in the Kosovo conflict was patently not based on a corresponding resolution of the UN Security Council. Therefore the Federal Council considered the law of neutrality applicable.

The NATO member States' air attacks provoked, not only in Switzerland, widespread debate about the legality of so-called "humanitarian interventions". An intense examination of these complex problems which still await a generally accepted solution would be beyond the scope of the present report. Still, some elements regarding such considerations should be mentioned here. Certain restraint, however, must be exercised: the debate about the legality of such interventions remains open and is dealt with in legal doctrine in a correspondingly controversial way; furthermore, Yugoslavia's claim against various NATO States at the International Court of Justice must be considered where, should it deem itself competent to deal with the case, the Court will also discuss the question of the legality of the air attacks.

As a preliminary remark it is to be emphasised that the term "humanitarian intervention" is controversial, at least in reference to military measures such as that of NATO in the Kosovo conflict. Up until now the term has generally been reserved for genuine humanitarian operations even when these operations have been carried out with military support. Classic military operations on the other hand have not been termed "humanitarian". A change in the traditional terminology would be regarded as confusing and prone to misunderstandings.

In order to examine the legality of military operations such as the operation in the Kosovo conflict it is helpful to start with a clarification: we are not dealing here with the legality or illegality of "humanitarian interventions" in a general sense. In humanitarian situations where there is a threat to peace and international security in terms of the UN Charter, even measures of a military nature are allowed in international law as long as these have been carried out or authorised by the UN Security Council. The fundamental question of the legality of intervention will not be asked in future as long as the Security Council is in a position to carry out its

responsibility. With respect to Swiss neutrality in such instances, practice up until now can be followed without difficulty.

The problem of the legality of military measures as a reaction to genocide, crimes against humanity or massive and systematic violations of human rights and international humanitarian law poses itself only in exceptional circumstances where the UN Security Council hasn't either the will or the capability to act. Of central importance here is the question which organs in such situations are legitimised to become active and make decisions in lieu of the UN Security Council.

From the ethical point of view, States and international organisations are of course expected, within the limits of their possibilities, to lend support to a population exposed to grave mistreatment. The legal basis and the conditions for such a duty to help and assist, namely, in the case of an obstruction of the UN system of collective security, are not yet settled and concretised in contemporary international law. Incidentally, the measures of international organisations in favour of humanity, peace and international security also correspond with the meaning and spirit of neutrality.

With regard to the law of neutrality, in such situations our country will have to decide, based on current international law, whether or not Switzerland should consider the law of neutrality applicable. It is, however, hardly conceivable that Switzerland would consider the law of neutrality *not* applicable in a conflict where the violent action of an international military force ensued in an unlawful manner. On the other hand, if the measures in question are in accordance with international law, then for Switzerland the question would be whether in such a situation the intervening States are operating in lieu of the Security Council and whether Switzerland - analogous to the situation in which the Security Council acts according to the UN Charter - should consider the law of neutrality not applicable.

Switzerland's decision here necessitates a careful and comprehensive weighing up of all the interests involved. In so doing, the prevention of and action against international crime, respect for the prohibition of force and consolidation of the UN's system of collective security will be as important as Switzerland's interest in a coherent, consistent policy which - at least at present - seems completely guaranteed only by a purely formal approach (i.e., existence of a decision by a legitimised organ).

5.2 The scope of neutrality in the economic sphere

According to the current law of neutrality participation in economic sanctions is, in principle, permitted. Compliance with the duty of non-discrimination, whose scope in the law of neutrality is not, however, clearly defined, constitutes the only limit. Generally speaking therefore, it extends only to those goods and services which serve the combat capabilities of armies in a directly and militarily relevant way.

As far as neutrality in the economic sphere is concerned, questions posed for neutral States today are limited: at issue is not the general compatibility of neutrality

and economic sanctions *per se*; for neutral States to participate in economic sanctions is generally accepted, especially as such sanctions do not as a rule fall within the law of neutrality's scope of application. Similarly, we may omit the problem of the export of goods in war zones which is the subject of special rules (e.g., legislation on war material and dual-use goods). The important question to solve relates to which goods and services fall under the law of neutrality's duty of non-discrimination with regard to the parties to the conflict. Here both a restrictive as well as a broad approach is conceivable.

A *narrow interpretation* of goods and services that fall under the duty of non-discrimination means that the duties in the law of neutrality tend to be interpreted restrictively because they limit the sovereignty of neutral States. Consequently, Article 7 of the neutrality Conventions of 1907 which regulate the export of goods and services useful to the parties to the conflict, would be exclusively applicable to goods and services that directly and in a militarily relevant manner serve the combat capabilities of armies, as is particularly the case regarding the delivery of weapons and ammunition.

If, on the other hand a *broader interpretation* is chosen then, in the economic sphere, the neutral State must refrain from anything which could be advantageous to a party to the conflict with regard to the outcome of the hostilities. The starting point for such considerations is the importance of the economy which has a significantly more important role in today's conflicts than was the case when the law of neutrality was codified at the beginning of the 20th century. The economic measures of neutral States which in concrete cases are capable of impairing the targeted State's ability to conduct the hostilities, would therefore also be subject to the law of neutrality's duty of non-discrimination.

The advantage of a *narrow* interpretation of the principle of non-discrimination for the neutral State lies in the greater room for manoeuvre open to it within the bounds of a neutrality relevant conflict. On the one hand, however, the neutral State's greater freedom to manoeuvre impairs the credibility of its neutrality; this relates to the perception of neutrality by the third State affected by the measures as well as to public opinion in the neutral State itself. On the other hand, a *broad* interpretation of the duty of non-discrimination limits the neutral State's room for manoeuvre, although it does increase the credibility of its neutrality.

Differences in understanding with respect to the actual consequences of the duty of non-discrimination are based mainly on the question of the interpretation of a legal rule which was codified at the beginning of the 20th century. Therefore, it would generally be dangerous to commit oneself to one or other of the possible interpretations. It can however be emphasised that the concrete circumstances of the use of force or the type of conflict, are certainly decisive for the question of the application of the law of neutrality, but not for the concretisation of Article 7 of the neutrality Conventions. However, the importance of Article 7 of the Conventions is limited, in particular because this regulation is applicable to inter-State conflicts only. Generally speaking though, it can be assumed that Article 7 of the Conventions concerns only those goods and services which serve the combat abil-

ity of armies in a *directly and militarily relevant way*. Therefore, the principle of non-discrimination does not apply in the non-military spheres of a conflict.

6. CONCLUSIONS

The Federal Council's neutrality related decisions in the Kosovo conflict corresponded with the guidelines of the 1993 report and the practice of neutrality in the nineties. The controversial legality of the NATO intervention led to the application of the law of neutrality. This, as well as differences in the practice of UN and EU sanctions, meant that the Federal Council's policy appeared in part inconsistent and difficult to understand.

For as long as Switzerland wishes to maintain its status of permanent neutrality, also in a future neutrality related conflict, it will have to observe the prevailing law of neutrality. Switzerland's support for military measures while simultaneously safeguarding its neutrality, is conceivable only if these measures are compatible with the generally recognised international law in force.

Swiss public opinion about the way in which the Federal Council handled neutrality during the Kosovo conflict varied. Some felt that the Federal Council had given up neutrality, while others reproached the government for hanging on to an out-dated concept. The coherence of the Federal Council's policy was found difficult to understand; for example, in view of the Federal Council's decisions concerning participation in sanctions, refusal of overflight permits or the different treatment of NATO States on the one hand and Yugoslavia on the other hand concerning the export of war material. In the following, the causes of these difficulties will be analysed, before testing the need for working on a new neutrality report.

6.1 The changing status of neutrality

The difficulties outlined at the beginning may be attributed to the following causes: firstly, there is still ignorance in wide circles about the new practice of neutrality introduced by the Federal Council at the beginning of the nineties. Secondly, in the Kosovo crisis the UN Security Council was temporarily paralysed, and thirdly, neutrality today is perceived as an instrument of limited use only to respond to certain contemporary conflict situations.

6.1.1 The 1993 report on neutrality

Discussions during the Kosovo conflict showed that the re-orientation of Switzerland's neutrality practice and especially the Federal Council's 1993 report on neutrality had been insufficiently debated and understood. Whilst during the Kosovo conflict the Federal Council continued its practice introduced at the beginning of the nineties and explained in detail in 1993, a considerable part of the public still laboured under an extremely restrictive understanding of neutrality from the time of the Cold War. The consequences of the ensuing development in the Federal Council's neutrality policy were apparently not recognised in these circles.

6.1.2 The role of the UN Security Council

Due to the obstruction of the UN Security Council at the beginning of the NATO air raids and in the first phase of the armed conflict, Switzerland saw itself left in a difficult position. This was because the conduct of the UN Security Council constituted a central reference point in Switzerland's new neutrality practice which had been established in 1993. For the application of the law of neutrality in the Kosovo conflict, the absence of a Security Council decision was, among other factors, decisive. Therefore, the status of Swiss neutrality in the Kosovo conflict was relevant in different ways depending on whether the UN system of collective security functioned or not. In focussing on the UN Security Council as its point of reference, Swiss policy was, therefore, consistent and straightforward; nevertheless, for outsiders this coherence couldn't be perceived and understood easily.

6.1.3 The perception of neutrality today

One of the main reasons why the Federal Council's neutrality policy seemed in part difficult to understand lies in the different perceptions of neutrality held by the population. At least a part of the public regards neutrality as an instrument of limited use to establish an adequate policy in today's conflict situations. There are three reasons for this:

Firstly, it is difficult to justify neutrality's *raison d'être* when the international community resorts to violent means to counter serious and systematic violations of human rights. Moreover, these measures have to be compatible with international law which, in the Kosovo conflict, was a matter of controversy.

Secondly, the neutrality of a State only then makes sense when it is able to make a contribution to its own security. That means that neutrality must constantly be adapted to the security political environment of the neutral State. When, as in Switzerland's case, all the neutral State's neighbours work together very closely in peaceful co-existence and within a common framework and decide upon common measures to improve their security, it is indeed hard to see how far the neutral State with its odd behaviour can actually still contribute to its own security.

Thirdly, the fact that the codification of the law of neutrality stems from the year 1907 adds to the perception that neutrality is inadequate. It is true that the wording of numerous regulations of the Hague Conventions is out-dated. They are therefore subject to interpretation. Such interpretations can, however, only be carried out in accordance with the law of neutrality's customary law and the common principles upon which it is based. Whatever significance one attributes to the applicable rules of neutrality, they are always to be applied in accordance with the fundamental duties of non-interference and impartiality. Even when the concretisation of the principle of non-discrimination relating to the export of goods and services now and again causes difficulties, this principle of the law of neutrality cannot be ignored simply on the grounds that it was codified nearly 100 years ago.

It should also be recalled that in the Kosovo conflict several neutral States in their capacity as EU members participated without restrictions in all the European Un-

ion measures. It would, however, be rash to deduce from that that these States deemed their participation in all EU measures as compatible with the legal status of permanent neutrality. On the one hand this is so because the majority of the neutral EU members merely subscribe to a *political* neutrality. On the other hand, the question of the compatibility of the EU measures with their neutrality did not arise for these States at all because they started from the premise that EU decisions take precedence over the law of neutrality. With respect to the Union's measures in the Kosovo conflict, therefore, they made the political decision not to take the international law of neutrality into account. But experience also shows that even when a neutral State in the European Union waives application of the law of neutrality in a particular situation, this does not at the same time mean that it places its territory at the disposal of the parties to the conflict, nor that it gives up its own active policy of promoting peace and rendering good offices.

For whatever reason neutrality in certain conflict situations today is perceived as inadequate, it must be pointed out that in the course of the nineties several States appealed expressly to their neutral status. Even the United Nations General Assembly after the admission of a new member confirmed its neutrality explicitly. Of even greater interest for Switzerland is the legal position the EU Treaty of Amsterdam granted neutral EU members which they continue to claim in the course of on-going efforts to strengthen European Foreign and Security Policy. Certainly the neutral EU States have adapted their neutrality to their new surroundings; at the same time, however, they make sure that in the context of military measures their independent autonomous room for manoeuvre in the EU remains intact.

An analysis of the *raison d'être* and meaning of neutrality is only then complete when it also includes the global aspect. It must also especially take into account the perception of neutrality by other States and by multilateral institutions such as the UN or the OSCE. Even from this point of view, during the Kosovo conflict Switzerland had to comply with the law of neutrality consistently. Otherwise, there was a danger that the credibility and predictability of Swiss neutrality would have been seriously jeopardised.

Finally, it may be stressed that even when a part of public opinion no longer regards the status of neutrality as appropriate in view of the developments in the international community and the European sphere today, an equally considerable part of the population still feels close ties to neutrality. It is necessary to take into account these differing attitudes because important developments in foreign policy must always be based on sufficient support in the population. As in the past, the evaluation of the role of neutrality will develop further in the forthcoming years. Although it would be risky to rely solely on rapid change there is nothing to stop the attempt to speed up development so that neutrality corresponds to Switzerland's real needs.

6.2 A new report on neutrality?

The Swiss practice of neutrality consolidated in the nineties and the knowledge gained therein form the basis of a solid and suitable foundation for the future implementation of neutrality at the beginning of the 21st century. The most important elements of the 1993 report have proved themselves and are still relevant. For this reason the working group does not at this stage recommend the preparation of a new report on neutrality.

The most important elements which permitted a re-alignment of Swiss neutrality policy at the end of the Cold War were dealt with in the 1993 report. The report undertook an in-depth analysis about the aim and object of Swiss neutrality, taking into account developments within the international community and in our country's European sphere. It laid down the decisive basis for the establishment of our policy of neutrality in the last decade. The analysis of federal practice and the corresponding collective experience show that the fundamental elements of the 1993 report proved themselves and are still valid. These elements were stated more precisely and expanded upon in subsequent Federal Council reports on the UN, on European integration and especially in the most recent report on security policy. In addition, the Foreign Policy Report 2000 offers the opportunity to define the position and classify neutrality within the whole context of Swiss foreign policy.

More than a year after the end of the NATO operations against Yugoslavia, the question of the legality of these measures of coercion in international law is still open and cannot be decided upon in the near future. At the moment it is hardly conceivable that a new report on neutrality could provide the Federal Council with a similarly clear, legally and politically broadly based foundation for a neutrality-relevant legal and political judgement on such military measures as was the case for the 1993 report regarding UN sanctions. Furthermore, a report which dealt exclusively with neutrality would convey an erroneous picture of a separate subject taken out of context.

For these reasons the working group does not recommend a new report dealing exclusively with neutrality now. However, the working group regards it as advisable to concentrate on the dissemination and clarification of the Federal Council's policy on neutrality followed since the nineties as well as on the latest relevant developments. In this context the on-going debate about Swiss accession to the UN can also be taken advantage of to remedy this lack of information in the public arena.

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