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# A Permanently Neutral State in the Security Council

HERIBERT FRANZ KOECK\*

On October 20, 1972, the Republic of Austria was elected, by the General Assembly of the United Nations, a non-permanent member of the Security Council.<sup>1</sup> This was the first time that a permanently neutral state had obtained a seat in the Council, which, since the advisory opinion of the International Court of Justice on the *Competence of the General Assembly for the Admission of a State to the United Nations*,<sup>2</sup> must be considered the leading political organ of the United Nations.

This recent step in the development of the United Nations position towards neutrality was certainly not foreseen by the founding fathers of the Charter. An analysis of the preparatory documents of the United Nations Charter proves, to the contrary, that the status of permanent neutrality was then considered incompatible even with simple membership in the Organization.<sup>3</sup>

If permanent neutrality was not expressly banished by the 1945 San Francisco Conference, the attitude towards neutral states was clearly shown by the fact that delegates from Switzerland were refused admis-

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1. 27 U.N. G.A. Provisional Records, plenary meeting, October 20, 1972.

2. Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8-9.

3. The committee which dealt with the purposes and principles of the Charter considered the question of neutrality at length and reported "that the status of permanent neutrality is incompatible with the principles declared in . . . the Charter." Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. 459-60 (1945). As a result, the problems of how and where in the Charter the principle was to be expressed were left unresolved.

sion to the meetings at San Francisco, even as observers.<sup>4</sup> Further proof of the original conviction that neutrality and participation in the Organization were incompatible is manifested by the practically unanimous opinion of those international scholars who dealt with the Charter of the United Nations or, more specifically, with the status of permanent neutrality, in the years after 1945. Both Goodrich-Hambro<sup>5</sup> and Kelsen<sup>6</sup> assumed that a neutral position was incompatible with the principle of collective security on which the Charter's peace-keeping system was based.<sup>7</sup> As late as 1966, by which time the attitude of the United Nations towards neutrality had already undergone a fundamental change, Chowdhury argued that "the recognition of a status of permanent neutrality of a member is not only inconsistent with but *ultra vires* to the provisions of the Charter."<sup>8</sup>

Yet, the intention of the San Francisco Conference and all of the conclusions drawn from it apparently have been overruled by twenty-seven years of practice within the Organization. It is, therefore, necessary to turn to this practice and examine the manner in which the Organization has interpreted, or rather re-interpreted, the relevant provisions of the Charter. Before doing so, however, a short restatement of the traditional status of permanent neutrality is appropriate.

4. M. NEF, *VERSCHIEDENE GESTALTEN DER NEUTRALITÄT* 3 ff. (1956). This hostility, among politicians, international lawyers, and the public, was a logical consequence of the experiences gained during World War II. As early as 1940, at a time when the United States had not yet become actively engaged in fighting, Quincy Wright had excluded neutrality as a proper position of a state in the re-organized international world to come: "In guaranteeing appropriate spheres both . . . to the state, and to the world community, international law must recognize that the whole is greater than its parts. This implies that states of war and neutrality, recognizing the power of the part through violence or indifference to invalidate the will of the whole, are by nature inconsistent with law." *The Present Status of Neutrality*, 34 AM. J. INT'L L. 391, 415 (1940).

5. L. GOODRICH & E. HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 108, 132 (2d rev. ed. 1949).

6. H. KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 94, 108 (1950).

7. It is significant that Kelsen, in the index to his book, makes no reference to neutrality except in the following connection: "Neutrality—Incompatible with the Charter." *Id.* at 896. With reference to the duties of neutrality or the status of permanent neutralization, Kelsen went so far as to argue from article 2(6) of the Charter (by which the obligations of article 2(5) are imposed on non-member states) that even the latter were not allowed to refuse to give assistance to an enforcement action by the United Nations against a member or non-member state, thereby ruling out permanent neutrality completely and quite independently from actual membership in the Organization. *Id.* at 108.

8. R. CHOWDHURY, *MILITARY ALLIANCES AND NEUTRALITY IN WAR AND PEACE* 207 (1966).

## I

## THE TRADITIONAL STATUS OF PERMANENT NEUTRALITY

Neutrality is of two kinds.<sup>9</sup> As the attitude of a state that does not participate in a war being waged between two or more other states, it is called *mere neutrality*. On the other hand, the position of a state that undertakes the international obligation not to enter into any future war between other states is called *permanent neutrality*.

Mere neutrality is historically the older form. Its legal shape developed during the eighteenth century when international legal writers such as Bynkershoek<sup>10</sup> and Vattel<sup>11</sup> insisted on the neutral's duty of real impartiality.<sup>12</sup> The classical period of neutrality extended from 1793 to 1919, *i.e.*, from the declaration of neutrality by the United States in the war between revolutionary France and the so-called First Coalition to the foundation of the League of Nations. Neutrality gained high esteem during the nineteenth century. A neutral state was regarded as being entrusted with the special task of strengthening peaceful relations among the members of the international community and as having the mission under international law to safeguard peace, national freedom, and progress in international relations.<sup>13</sup> It was called upon to aid the parties to a conflict that had already erupted by offering mediation to help restore peace.<sup>14</sup> Verosta, therefore, calls the policy of a neutral state—as the concept developed during the nineteenth cen-

9. The foundation of the law of neutrality did not develop before the Middle Ages, although *de facto* neutrality is certainly as old as the international community itself. *But see* 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 285 (7th ed. H. Lauterpacht 1952). Oppenheim considers the fourteenth century's *Consulato del mare* as the first source of what later came to be regarded as the law of neutrality. *Id.* § 286 n.1.

10. C. VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 67 (Book I, 1737).

11. M. DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* § 103 (Book III, 1758).

12. Earlier, it had been common for a neutral state to grant passage to the troops of a belligerent or to give some other support. 2 L. OPPENHEIM, *supra* note 9, at 285-86. This is proof that although Grotius had recognized neutrality as an institution of international law, it had not by then developed into a clear concept. H. GROTIUS, *DE INRE BELLII AC PACIS LIBRI TRES* § 3 (Book III, ch. 17, 1646).

13. Verdross, *Austria's Permanent Neutrality and the United Nations Organization*, 50 *AM. J. INT'L L.* 61, 64 (1956), referring to the evaluation made by the famous Belgian politician, Gustave Rolin-Jacquemyns, in a report to the Belgian Academy of Sciences in 1875.

14. *See* Hague Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 (1903), T.S. No. 392. *See also* Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, arts. II-VIII, 36 Stat. 2199 (1911), T.S. No. 536.

ture—*paciférance*, i.e., conduct of peace in contrast to the conduct of war.<sup>15</sup>

Mere neutrality, however, is unable to fulfill the high expectations set for a neutral state. Since this state has no obligation to refrain from entering into the war on whatever side it considers its interests to be best served, mere neutrality is a momentary status and, by that fact, contributes to international instability rather than to stability. It was the institution of permanent neutrality, then, that was used by the Great Powers in Europe to safeguard the equilibrium among themselves by permanently neutralizing certain parts of the continent. The first country to be permanently neutralized was the Swiss Confederation by its adherence to the declaration of the Allied Powers of March 20, 1815,<sup>16</sup> and by the Act of May 27, 1815.<sup>17</sup> Following the (second) Peace Treaty of Paris of November 20, 1815,<sup>18</sup> the Powers undertook to guarantee Switzerland's permanent neutrality.<sup>19</sup> By these actions Swiss neutrality, until then merely *de facto*, became a permanent *de jure* international institution, creating obligations for Switzerland as well as for the guaranteeing Powers.

Switzerland did not remain for long the only permanently neutral state in Europe; Belgium was neutralized in 1831 and Luxemburg in 1867. Switzerland, however, has made the most significant contribution to the development of the international law of neutrality as it is now found.<sup>20</sup>

Permanent neutrality encompasses a number of special obligations for the permanently neutral state. Beyond the duties to obey the special international rules of neutrality derived from the duty of impartiality in wartime and to defend its territory by all means against foreign attack, so as not to permit any belligerent to gain a strategic advantage, the permanently neutral state is obliged not to enter into any peace-

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15. S. VEROSTA, *DIE DAUERENDE NEUTRALITÄT: EIN GRUNDRIS* 142 (1967).

16. Declaration of the Congress of Vienna on Switzerland, March 20, 1815, in 2 G. MARTENS, *NOUVEAU RECUEIL DE TRAITÉS DE PAIX* 157 (1818).

17. Act of Accession of the Swiss Confederation, May 27, 1815, *id.* at 173.

18. Peace Treaty of Paris, November 20, 1815, *id.* at 682.

19. Act by which the Allies Recognize the Neutrality of Switzerland, November 20, 1815, *id.* at 740.

20. The international law of neutrality is largely contained in two Hague conventions: Hague Convention on Rights and Duties of Neutrals in War on Land, October 18, 1907, 36 Stat. 2310 (1911), T.S. No. 540; and Hague Convention on Rights and Duties of Neutral Powers in Naval War, October 18, 1907, 36 Stat. 2415 (1911), T.S. No. 545.

time commitment that may involve the country in a future war.<sup>21</sup> On the other hand, the permanently neutral state is, within the borderlines thus drawn, completely free in determining its domestic and foreign policy. It is not bound to observe any ideological neutrality. It may have and freely announce its own opinion on any political or legal question concerning peace and good conduct in the international community.<sup>22</sup>

Austria's permanent neutrality is of relatively recent origin.<sup>23</sup> It dates from 1955, when the Austrian foreign office notified all the states with which Austria had diplomatic relations<sup>24</sup> that the Austrian parliament<sup>25</sup> had enacted a Constitutional Federal Law<sup>26</sup> declaring Austria permanently neutral "for the purpose of the permanent maintenance of its external independence and for the purpose of the inviolability of its territory."<sup>27</sup> The states so notified were asked to recognize the new Austrian status. Most of them, including the signatories of the

21. Thus, it may not enter into treaties of alliance or guaranty, or agreements establishing a supra-national economic system of high structural interdependence that might make the participating neutral an indirect supporter of a belligerent if one state of the community should go to war. For this reason, neither Switzerland nor Austria nor the de facto neutral states of Sweden and Finland has ever applied for full membership in the European Communities. On this question, see E. STEIN AND P. HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* 70, 74 (1967).

22. See Verdross, *supra* note 13, at 63-64; Zemanek, *Gutachten zu den von dem Volksbegehren zur Abschaffung des Bundesheeres (Bundesheervolksbegehren) Aufgeworfenen Neutralitätsrechtlichen und Neutralitätspolitischen Fragen*, 10 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK* 115, 124 (1970); G. KAMINSKY, *BEWAFFNETE NEUTRALITÄT* (1971); Verosta, *supra* note 15, at 13. The clarification of Switzerland's status of permanent neutrality has been enhanced in recent years by several official Swiss government statements based on the experiences of World War II. See in particular an official statement of the Swiss conception of neutrality, in Guggenheim, *La Pratique Suisse*, 14 *SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT* 127, 195-99 (1957).

23. Yet, various efforts to have Austria neutralized can be traced back to the end of World War I. Verosta, *Die Internationale Stellung der Republik Österreich Seit 1918, 1918-1968: ÖSTERREICH—50 JAHRE REPUBLIK* 59 (Institut für Österreichkunde ed. 1968).

24. For the text of the November 14, 1955 Austrian note to the State Department, see Recognition of Austrian Neutrality, Dep't of State Press Release No. 680, December 6, 1955, in 33 *DEP'T STATE BULL.* 1011 (July-Dec. 1955).

25. The Austrian notification was in fulfillment of a commitment undertaken by the Austrian delegation in the Moscow Memorandum of April 15, 1955, Memorandum Concerning the Results of the Conversation Between the Government Delegation of the Republic of Austria and the Government Delegation of the Soviet Union, 32 *DEP'T STATE BULL.* 1011 (transl. Jan.-June 1955), 49 *AM. J. INT'L L.* 191 (Supp. transl. 1955). This undertaking was in exchange for an agreement by the Soviet Union to ratify the State Treaty for the Re-establishment of an Independent and Democratic Austria, the text of which is reproduced in 49 *AM. J. INT'L L.* 162 (Supp. transl. 1955).

26. [1955] Austrian BGBl. 211.

27. Austria also declared its intention to defend this status with all possible means and never in the future to accede to military alliances or to permit the establishment of foreign military bases on its territory. The English version of this brief statute is given in Kunz, *Austria's Permanent Neutrality*, 50 *AM. J. INT'L L.* 418, 420 (1956).

Austrian State Treaty (France, the Soviet Union, the United Kingdom, and the United States), followed the request;<sup>28</sup> other states merely took cognizance of the Austrian act.<sup>29</sup>

This notification of Austria's intention to become a permanently neutral state, and the corresponding recognition by the other countries, created a system of multilateral international obligations which can be characterized as contractual or quasi-contractual. By this system Austria is bound to observe the rules of international law with regard to permanently neutral states. At the same time those members of the international community which have recognized Austria's special status are obligated to refrain from all acts that are incompatible with this status and which might endanger or make more difficult Austria's task of observing the strict international standard of permanent neutrality.<sup>30</sup>

## II

### THE POLITICS OF AUSTRIAN NEUTRALITY

Although bound by the wording of the Moscow Memorandum to practice a neutrality of the type maintained by Switzerland,<sup>31</sup> the Austrian approach to fundamental international questions differs from the Swiss model.<sup>32</sup> This is particularly true regarding the question of membership in the United Nations. While Switzerland has until now considered participation in the Organization as contrary to its cautious international neutral policy,<sup>33</sup> if not to its legal obligations as a per-

28. For the United States' recognition of Austria's permanent neutrality, see Recognition of Austrian Neutrality, *supra* note 24, at 1012.

29. Since Austria did not, at that time, entertain diplomatic relations with the People's Republic of China they were not notified of Austria's declaration and consequently did not directly take a position. Zemanek, *Neutral Austria in the United Nations*, 15 INT'L ORG. 408, 409 n.8 (1961).

30. See Kunz, *supra* note 27, at 422, 424.

31. See Moscow Memorandum, *supra* note 25.

32. Kunz, *supra* note 27, at 422, states that the reference to Switzerland in the Moscow Memorandum served only to define the status of permanent neutrality in general, because Switzerland was, at that time, the only example, of a permanently neutral state. He suggests that the Memorandum did not intend to bind Austria rigidly to the Swiss precedent. This appears to be correct; if Austria should follow a line of action that displeases the Soviet Union, for example, it could hardly excuse itself by pointing to similar conduct by Switzerland. This means that the standard of neutrality that Austria must observe is to be determined *objectively*, i.e., by reference to the norms of the international law of neutrality, and not *subjectively*, according to the conduct of any particular permanently neutral state.

33. Note the position taken on this question by Prof. Bindschedler, legal adviser to the Swiss Political Department (foreign office), in Bindschedler, *Grundlagen der Schweizerischen Aussenpolitik*, 4 ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK 75, 87-88 (1964).

manently neutral state, Austria was anxious to join the Organization as soon as possible.

Austria applied for admission to the United Nations in 1947, when it was still occupied by the four Allies; its status of full sovereignty was therefore quite doubtful.<sup>34</sup> Although the application was unsuccessful, the reason is to be found not in the fact of Austria's occupation, but rather, in the general deadlock that had developed in the Security Council after 1947 by reason of the Cold War, a factor which prevented many other states from joining the Organization. The Austrian State Treaty of 1955, however, contained two references which gave the Great Powers' support to Austria's membership in the United Nations: in the preamble the Four Powers promised "to support Austria's application for admission to the United Nations"; and in article 17 the phrase "after Austria becomes a member of the United Nations" was used. In fulfillment of this obligation<sup>35</sup> the Security Council, on December 14, 1955, unanimously recommended the admission of Austria to the United Nations.<sup>36</sup> On the same day, the General Assembly, by unanimous vote, admitted Austria to membership.<sup>37</sup> This admission was effected without granting Austria any special status within the Organization as a permanently neutral state; nevertheless, it took place in full cognizance of Austria's status and only a week after its permanent neutrality had been recognized by four of the five permanent members of the Security Council.<sup>38</sup>

As startling as the admission of a permanently neutral state to the United Nations has been to several observers, it does not appear illogical if considered in the light of the ten years of experience gained by the Organization between 1945 and 1955. The United Nations, originally an anti-fascist coalition of World War II participants, took a negative position towards neutral attitudes and tendencies.<sup>39</sup> In

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34. The Austrian application was deposited on July 2, 1947. Admission was, however, barred for the time being by the Soviet Union's negative vote in the Security Council. See REPERTORY OF UNITED NATIONS PRACTICE 170 (1955).

35. This did not occur without another Soviet veto of Austria's admission. Admission was finally accomplished as part of a package deal permitting the simultaneous entry of states aligned with both the Western and Eastern blocs.

36. Letter from the President of the Security Council to the President of the General Assembly, December 14, 1955, in 10 U.N. SCOR, 705th meeting 6 (1955).

37. G.A. Res. 995(x), 10 U.N. GAOR, Annexes, Agenda Item No. 21, at 7, U.N. Doc. A/Res./3 at 65 (1955).

38. See Zemanek, *supra* note 29, at 409. See generally Blechner, *Österreichs Weg in die Vereinten Nationen*, 1 ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK 351 (1961).

39. Taubenfeld wrote in 1953: "[S]uch a status, in the full traditional sense, is not



the context of a system of collective security that obligates each member state to cooperate in meeting aggression, neutrality appears as egotism and cowardice. Thus, the procedure under chapter VII of the United Nations Charter envisaging, if necessary, military measures against the aggressor state,<sup>40</sup> and the obligation of all members under article 25 "to accept and carry out the decisions of the Security Council in accordance with the present Charter," originally made membership by a permanently neutral state appear inconceivable. Such a strictly negative evaluation of the institution of permanent neutrality, derived from the point of view of collective security, was, however, dependent upon the ability of the United Nations to actually transfer into reality the principal of collective security. Since the outbreak of the Cold War, it has become unlikely that the United Nations could employ effective coercive measures,<sup>41</sup> principally by reason of the return to the traditional phenomenon of opposing power blocs. As first reflected in the Geneva Conventions of 1949, the return to the traditional power bloc thinking of belligerents and neutrals presupposed the existence of neutral states in a future war.<sup>42</sup>

Actually, the creation of multilateral defense agreements that could claim some legitimacy under article 51 of the Charter, affirming the inherent right of individual and *collective* self-defense against an armed attack, had, as its logical consequence, a balance-of-power system in which permanent neutrality was able to regain its previous status.<sup>43</sup> A

legally tenable for Members of the United Nations in the course of a unified action. . . . The actual position of neutrals has been on the decline in the overall picture since the first World War, and . . . must continue to decline." *International Actions and Neutrality*, 47 AM. J. INT'L L. 377, 395 (1953).

40. Article 42 of the United Nations Charter provides that in instances where measures not involving the use of armed force would be inadequate or have already proved to be so, the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."

41. Even the United Nations sponsored action in the Korean War was due to a vital misinterpretation by the Soviet Union of the legal effects of its absence from the Security Council and not to the proper functioning of the Organization. See L. SOHN, *CASES ON UNITED NATIONS LAW* 479 ff. (2d rev. ed. 1967).

42. First Geneva Convention, August 12, 1949, arts. 4, 8, 10, & 11, 75 U.N.T.S. 81, 33-38; Second Geneva Convention, August 12, 1949, arts. 5, 8, 10, & 11, 75 U.N.T.S. 85, 89-93; Third Geneva Convention, August 12, 1949, arts. 8, 10, & 11, 75 U.N.T.S. 135, 143-46; Fourth Geneva Convention, August 12, 1949, arts. 9, 11, & 12, 75 U.N.T.S. 287, 295-96.

43. On regional defense agreements, collective security, and neutrality see Kormanicki, *The Place of Neutrality in the Modern System of International Law*, 80 *RECUEIL DES COURS* 399, 483-90 (1952). Zemanek, *supra* note 29, at 411, states:

Because of their measurable quantities of manpower, industrial output and potential destructive force, these opposing pact-organizations established a

permanently neutral state could again consider its mission to be the facilitation of contacts between hostile camps and the promotion of initiatives for compromise solutions. Therefore, since the United Nations was incapable of realizing a pattern of collective security, a permanently neutral state that carried out a policy of *paciférance*—the steady promotion of peace and security—could become an effective means of achieving the Charter's primary object: international peace and security. Further, from the political point of view, it must be concluded that, because of political developments after 1945, the status of permanent neutrality is no longer incompatible with the goals and principles of the United Nations; membership of a permanently neutral country in the Organization is not as untenable as it had seemed to the framers of the Charter. This conclusion, however, is correct only as long as the political status quo that has developed in the post-war period remains essentially unchanged. A political breakthrough in the relations between the Great Powers that would end the deadlock in the Security Council and restore freedom of action to the United Nations would almost immediately result in a depreciation of neutrality and would, once again, put the permanently neutral state in a difficult position.

### III

#### LEGAL THEORIES OF UNITED NATIONS PARTICIPATION

While the door was thus *politically* open for the entry of permanently neutral Austria into the United Nations, various theories were advanced to explain how it was *legally* possible for a state with a permanently neutral status to participate in the Organization and, more particularly, what the legal implications connected with such participation were.

The difficulties were clearly seen at an early stage by both Verdross and Kunz. The former, writing before the admission of Austria had been completed in December 1955,<sup>44</sup> tried to draw conclusions from a comparison of the status of neutral states under the Covenant of the

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certain equilibrium between the blocs which, though unstable, assured at least temporarily the maintenance of international peace and security.

. . . Since they are legally obliged not to participate in future armed conflicts, permanently neutral states are outside this equilibrium; their weight does not count in the scales.

44. While his article was published in 50 AM. J. INT'L L. 61 (Supp. 1956), it apparently was written in 1955.

League of Nations<sup>45</sup> and under the United Nations Charter. The key provision of the Covenant was article 16, which obliged all member states to break off immediately and directly all economic and financial relations with any state which waged an aggressive war contrary to the Covenant's principles. While members were not compelled to participate in military action,<sup>46</sup> they were under an obligation to permit the transit of foreign troops carrying out military sanctions recommended by the Council of the League.<sup>47</sup> Furthermore, every member state was obliged to blockade the aggressor.<sup>48</sup> Under those circumstances, the continuation of impartial conduct vis-à-vis all belligerents was inconceivable, and with the loss of impartiality the basis of neutrality itself disappeared. How then had it been possible for permanently neutral Switzerland to enter the League?

In fact, admission was accomplished by a compromise. Realizing the special situation of Switzerland, the Council of the League declared that while all member states were obliged to take part in common actions (thereby making permanent neutrality incompatible with the Covenant), Switzerland was released from those duties that were most objectionable from a neutral point of view, *i.e.*, participation in military sanctions and permitting the transit of foreign troops. It was more than doubtful whether the Council was legally entitled to adopt such a view, but it proved extremely useful. Shortly thereafter,<sup>49</sup> the Swiss Government declared that, in exchange for the concession made by the Council, neutrality did not include an obligation to maintain economic equality. Thus, Switzerland was free to enter the League.<sup>50</sup> However, participation in the latter's economic and financial sanctions during the Italo-Ethiopian War of 1935/1936 proved disastrous to the Swiss economy and demonstrated with great impressiveness how difficult it was to take part

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45. See Witton, *La Neutralité et la Société des Nations*, 17 *REGUEIL DES COURS* 453 (1927).

46. Conclusion *e contrario* from the term "recommended" in article 16(2) of the Covenant.

47. Article 16(3) of the Covenant states: "[T]hey will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are cooperating to protect the covenants of the League."

48. Article 16(1) of the Covenant states: "... to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State . . . ."

49. On August 4, 1919; see D. ROBERT, *ETUDE SUR LA NEUTRALITÉ SUISSE* 88 (1950).

50. F. Glasl, *Die Neutralität der Schweiz im Sanktionssystem des Völkerbundes*, 1967 (unpublished thesis in Vienna University Library).

in sanctions against another state and at the same time to preserve the appearance of neutrality.<sup>51</sup> For this reason, the Swiss government, after careful consideration of all circumstances, sent a note to the League that it was no longer able to participate in economic measures.<sup>52</sup> Acceptance by the League of the Swiss statement allowed Switzerland to return to integral neutrality, but still remain in the League of Nations. Since April 29, 1938, the date of the Swiss notification, the League had, at least politically, a permanently neutral member whose neutrality was of the classical type. This political situation became a legal one on May 14, 1939, when the League formally accepted, without opposition, the contents of the Swiss communication.

Compared with article 16 of the League of Nations Covenant, membership of a permanently neutral state in the United Nations seems to be somewhat easier, in so far as the question of sanctions is concerned. While membership in the League meant an immediate and direct obligation to participate in economic measures against an aggressor state and to permit the transit of troops engaged in military sanctions, article 39 of the United Nations Charter provides that the Security Council, after having determined "the existence of any threat to the peace, breach of the peace, or act of aggression . . . shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." This means that the Security Council will determine whether a particular state will become involved in enforcement actions.

Enforcement measures under chapter VII of the Charter are of two kinds: measures not involving the use of armed force, according to article 41; and military measures in accordance with article 42. Both kinds, however, do not come into effect ipso facto; a Security Council decision is necessary to impose a duty upon a member state to apply such measures. This view is confirmed by the text of article 43(1) (emphasis added):

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, *on its call and in accordance with a special agreement or agreements*, armed forces, assistance, and facilities, including rights of

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51. These sanctions were only partially carried out and thereby did more harm to the reputation of the League than to the Italian economy.

52. 19 LEAGUE OF NATIONS OFF. J. 385 (1938). For an analysis of the development of the relationship between Switzerland the League, see Keppler, *Die Dauernde Neutralität der Schweiz*, 18 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 35 (1939).

passage, necessary for the purpose of maintaining international peace and security.

Paragraph three of the same article states that these agreements, which will govern the types, numbers, location, and other aspects of the forces and the nature of the assistance to be provided, shall be negotiated "on the initiative of the Security Council."<sup>53</sup> If, therefore, the Security Council does not call upon a member state to conclude such an agreement, the latter is freed from taking an active part in enforcement measures.<sup>54</sup> While the state still remains under the general obligation of the second part of article 2(5) to refrain from giving assistance to an aggressor state, this negative obligation does not, by itself, entail actions that would be incompatible with a neutral status.

As far as the non-military (*e.g.*, political and economic) measures provided for in article 41 are concerned, the question might be regarded as different because the Security Council, when calling upon the member states to apply non-military measures, would have to expressly exempt a permanently neutral member.

From this legal situation Verdross drew the conclusion that a permanently neutral state entering the United Nations does not even need a formal dispensation from participation in military enforcement actions such as that granted to Switzerland by the Council of the League of Nations.<sup>55</sup> Yet, he thought it would be useful if the Security Council specifically relieved the permanently neutral member from even the general obligation under article 2(5) "to give the United Nations every assistance in any action it takes in accordance with the present Charter," by a resolution recognizing the permanently neutral status of a member state and releasing it from the duty of implementing political and economic sanctions ordered by the Security Council.

Kunz, who generally agrees with the arguments presented by Verdross, expressed some doubt on whether the Security Council could be expected to adopt such a resolution.<sup>56</sup> Yet he considers such a step not absolutely

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53. Similarly, it depends upon a special agreement with the Security Council as to how and to what degree a member state should contribute to urgent military measures taken by the United Nations. See article 45: ". . . within the limits laid down in the special agreement referred to in article 43 . . . ."

54. Accordingly, article 48 provides that "[t]he action required to carry out the decisions of the Security Council . . . shall be taken by all Members of the United Nations or by some of them, as the Security Council may determine" (emphasis supplied).

55. Verdross, *supra* note 13, at 66.

56. At least implicitly; see Kunz, *supra* note 27, at 424. Kunz, who wrote his comment after the admission of Austria to the United Nations, had thus witnessed the

necessary for safeguarding the special legal status of a permanently neutral state within the United Nations. As far as the Austrian case is concerned, Kunz held that Austria's permanent neutrality was not endangered by its membership in the United Nations, although it was admitted without special allowance for its particular position. His argument is evidently based on a type of estoppel or *non venire contra factum proprium* theory. Accordingly, the United Nations would not be permitted to call upon Austria for participation in enforcement measures illegal under the law of neutrality.<sup>57</sup>

Zemanek sees in the admission of Austria to the United Nations by the unanimous votes of the Security Council and the General Assembly a specific interpretation of articles 2(2)<sup>58</sup> and 25<sup>59</sup> of the Charter; these provisions bind the Security Council "to use its discretionary power under articles 43 and 48 to exempt Austria from any action which would compel it to violate duties of permanent neutrality."<sup>60</sup> Furthermore, the obligation of respecting Austria's special status does not only fall upon the Security Council as a body, but also upon all the permanent and non-permanent members which have recognized the country's neutral position. Any of the permanent members of the Council, by casting a negative vote in connection with a proposal to have Austria participate in measures contrary to its duties as a permanently neutral state, exercises a veto preventing Austria from being called upon to take part in any enforcement actions.<sup>61</sup>

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entry of a permanently neutral state into the Organization without an express recognition of the country's special status within the Organization.

57. Austria's permanent neutrality had only recently come into international legal existence by recognition by the majority of the permanent members of the Security Council and many other member states of the Organization. All states recognizing the special Austrian status had become bound to respect it, an obligation that was valid inside as well as outside the United Nations. Therefore, the Security Council could not call upon Austria to co-operate in the system of collective security. Verdross, *Neutrality Within the Framework of the United Nations Organization*, in *SYMBOLAE VERZIJL* 410, 416 (1958), where he avers that "[I]n order to obligate Austria to engage in non-military sanctions, all permanent members of the Security Council would have to disregard its permanent neutrality before recognized by them." See also Chaumont, *La Neutralité de l'Autriche et les Nations Unies*, 1 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 151-57 (1955), and, by the same author, *Nations Unies et Neutralité*, 89 *RECUEIL DES COURS* 5 (1956).

58. "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter." U.N. CHARTER art. 2, para. 2.

59. "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* art. 25.

60. Zemanek, *supra* note 29, at 414.

61. *Id.*

Yet, this is only one line of argument in which the theory of implied recognition and the principle of good faith lead to an acceptable solution to the problem of the compatibility of neutrality with membership in the United Nations.

The complexity of the problem was demonstrated during the Seventh Congress of the International Association of Democratic Lawyers held at Sofia, Bulgaria, in 1960. After a lengthy discussion of the position of neutrality in contemporary international law, a final resolution was adopted which tends to support the view that contemporary neutrality is consistent with the principles and purposes of the United Nations Charter.<sup>62</sup> In fact, however, the formulation used is evasive since it does not say which shall be controlling when the obligations under the Charter are in conflict with those of the permanently neutral status.

Both solutions, if reached by legal reasoning, are capable of being called consistent with international law in general, and the Charter in particular. At the Bulgarian Congress views similar to those of Verdross, Kunz, and Zemanek, were defended by Mr. Frederik from Belgium, while Mr. Gyula from Hungary and Mr. Georgiev from Bulgaria arrived at contrary conclusions.<sup>63</sup> Their views were probably based on the position taken in an article published two years earlier in the *Soviet Yearbook of International Law*.<sup>64</sup> There again, the opinion was stated that neutrality fully corresponded to the aims, spirit, and letter of the United Nations Charter. The reasoning, however, by which this conclusion was reached, was totally different:

[I]n 1955 Austria, a perpetually neutral country, was accepted as a member of the UN without any reservations. This signified that *all provisions of the Charter are binding upon it. Although* in cases of armed conflict arising between members of the UN in defense of peace, on the one hand, and states violating peace, on the other hand, *Austria cannot be impartial* and adopt an equal attitude to the belligerents as stipulated in the Hague Conventions of 1907; *this would not be, on its part, violation of international law.*<sup>65</sup>

This view is clearly based on the opinion that by admitting Austria to the United Nations all members of the Organization have renounced their right to rely on Austria's neutral status as far as sanctions under

62. VIIITH CONGRESS OF THE INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, LEGAL ASPECTS OF NEUTRALITY 7 (1963).

63. See Zemanek, *supra* note 29, at 414 n.28.

64. Galina, *Neutrality in Contemporary International Law*, 1958 SOVIET YEARBOOK OF INTERNATIONAL LAW 200. The article is published in Russian with an accompanying English summary at 225.

65. *Id.* at 228-29 (emphasis added).

chapter VII of the Charter are concerned, while Austria, by applying for membership, has renounced the right to invoke its permanent neutrality to evade participation in enforcement measures.

In this connection, it is noteworthy that Lalive had maintained as early as 1947<sup>66</sup> that participation by a neutral state in measures taken in conformity with a decision of the Security Council would not be a violation of its duty, as long as those measures did not involve the use of force. Non-military measures did not in themselves constitute an act of belligerency. The neutral could then find itself in a position which would be characterized as "qualified neutrality." Such a position would be similar to that of Switzerland between 1919 and 1938. Lalive also uses the argument of implied consent:

The state affected by these measures cannot legally complain of being the victim of an unfriendly act, nor could it legally adopt measures of retaliation. By its acceptance of the Charter it has in anticipation acquiesced in such measures.<sup>67</sup>

Because of the contradictory opinions as to the effects of a permanently neutral state's membership in the United Nations, the correct position cannot be conclusively ascertained from doctrine alone; there must be some reference to the political situation in Central Europe in 1955. An analysis of this situation proves that Austria was given her State Treaty only by reason of the Austrian delegation's promise in the Memorandum of Moscow that the country would adopt a permanently neutral status. This "neutralization" was the main purpose of the arrangement agreed upon by the Big Four and Austria, an arrangement in which the State Treaty, the declaration and notification of Austria's permanent neutrality, and her admission to the United Nations were interrelated steps. It was this permanent neutrality of Austria which the occupying Powers, and primarily the Soviet Union, were interested in, and not the strengthening of the system of collective security by the integration of Austria into that system. If, therefore, Austria's neutrality was the primary object and her cooperation in the United Nations system of collective security only the secondary object of the arrangement made in 1955, it is clear that the duties resulting from the "lower," or accidental obligation, will have to cede to the "higher," or essential

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66. Lalive, *International Organization and Neutrality*, 24 BRITISH YEARBOOK OF INTERNATIONAL LAW 72 (1947).

67. *Id.* at 80.



obligation. In the event of a conflict between the duties resulting, on the one hand, from Austria's neutrality, and, on the other, from her membership in United Nations, the former will prevail.<sup>68</sup>

#### IV

##### THE AUSTRIAN PRACTICE OF PERMANENT NEUTRALITY

Before turning to the question of a permanently neutral state in the Security Council, several illustrations of the Austrian practice as a permanently neutral member of the United Nations, which has developed over a seventeen year period, are in order.

##### A. SANCTIONS AGAINST RHODESIA

In disregard of the constitutional competence of the British Parliament and without respect for the aspirations of the colored majority of the nation's population, the government of Rhodesia—then a British dominion enjoying internal self-government and a few external powers<sup>69</sup>—declared its independence,<sup>70</sup> giving rise to reactions by both the United Kingdom and the United Nations.<sup>71</sup> This unilateral declaration was condemned by both the General Assembly<sup>72</sup> and the Security Council<sup>73</sup> and was declared to be null and void.<sup>74</sup> The United Kingdom was called upon to quash the rebellion. All other states were asked not to entertain relations with the illegal regime in Rhodesia and to cut off all economic ties with it. These measures having failed to crush the rebellion in Rhodesia, the Security Council, on December 16, 1966, passed another resolution containing much more stringent measures.<sup>75</sup> All member

68. This is, by the way, in conformity with the *official* Soviet doctrine regarding permanently neutral states and the United Nations. See THE INSTITUTE OF LAW, ACADEMY OF SCIENCES OF THE USSR, INTERNATIONAL LAW (F. Kozhevnikov ed. 1957).

69. See 1964 BRITISH PRACTICE IN INTERNATIONAL LAW 123 (E. Lauterpacht ed.), containing a statement to this effect made by the British Secretary of State for Commonwealth Relations.

70. On November 11, 1965. On the previous situation see J. & S. FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW (1963).

71. As a "racist" regime, the government in Rhodesia shares unpopularity with South Africa. On questions concerning apartheid, domestic jurisdiction, and Article 2(7) of the United Nations Charter, see Koeck, *Ist Artikel 2 Ziffer 7 Satzung der Vereinten Nationen Tot?*, 22 ÖSTERREICHISCHE ZEITUNG FÜR ÖFFENTLICHES RECHT 327 (1971).

72. G.A. Res. 2024 (XX), 20 U.N. GAOR Supp. 14, at 55, U.N. Doc. A/6014 (1965).

73. S/Res. 216, [1965] S.C. RES. & DEC. 8, U.N. Doc. S/INF/20/Rev. I.

74. S/Res. 217, [1965] S.C. RES. & DEC. 8, U.N. Doc. S/INF/20/Rev. I.

75. S/Res. 232, [1966] S.C. RES. & DEC. 7, U.N. Doc. S/INF/21/Rev. I.

states of the United Nations were ordered to stop the importation of certain Rhodesian commodities and to cease exporting war matériel, military aircraft and vehicles, oil, and oil products to Rhodesia. In this resolution member states were reminded "that the failure or refusal by any of them to implement the present resolution shall constitute a violation of article 25 of the Charter."<sup>76</sup> Finally, all states, even those not members of the United Nations, were called upon "not to render financial or other economic aid to the illegal racist regime in Southern Rhodesia."<sup>77</sup>

The measures taken by the Security Council were "measures not involving the use of armed force" under article 41; they were the first enforcement measures Austria had to face since admission to the Organization, and the Security Council had not made special allowance in the resolution for Austria's permanently neutral status.<sup>78</sup>

The government of Austria, after careful consideration of all the legal questions involved, decided to participate in these sanctions.<sup>79</sup> In its report relating to the implementation of Security Council Resolution 232 (1966),<sup>80</sup> however, the Austrian government emphasized that this could not be regarded as constituting a precedent for the future.<sup>81</sup>

Austria's decision to participate in the sanctions against Rhodesia seems to have been based primarily on the ground that there did not exist an international war; Rhodesia was not yet an independent country. This opinion is derived from the view that, under international law, a secession cannot be regarded as successful, and the seceding territory as a state, as long as the original sovereign has not given up his efforts to regain control.<sup>82</sup> Neither the United Kingdom nor any other state had recognized Rhodesia as a "state" or even as a "belligerent."

76. *Id.* at ¶ 3.

77. *Id.* at ¶ 5.

78. See Zemanek, *Das Problem der Beteiligung des Immerwährend Neutralen Österreich an Sanktionen des Vereinten Nationen, Besonders im Falle Rhodesiens*, 28 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 16 (1968) [English summary at 30].

79. In previous years, Austria had imported mainly tobacco from Rhodesia, together with unsubstantial amounts of copper and asbestos. These imports were stopped. Austria had never been engaged in the export of war matériel of any kind to Rhodesia.

80. Made by the Permanent Representative of Austria to the United Nations on February 28, 1967.

81. U.N. Doc. S/7795 (mimeo 1967), substantive portion reproduced in 22 U.N. SCOR, Supp. Jan.-Dec. 1967, at 74, 155-56, U.N. Doc. S/7781/Add. 2 (1967).

82. Zemanek, *supra* note 78, at 24, relying on G. DAHM, I VÖLKERRECHT 136 (1958); Bindschedler, *Die Anerkennung im Völkerrecht*, 4 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 8 (1961); and A. VERDROSS, VÖLKERRECHT 248 (5th ed. 1964).

Thus, the rebellion in Rhodesia did not qualify as a war as the term is used in international law. Because obligations arising from the status of neutrality in wartime presuppose the existence of such a war, no neutral duties had arisen for Austria.<sup>83</sup>

Zemanek, however, claims the Austrian attitude was correct in this case even under the assumption that the Rhodesian conflict must legally be regarded as a war.<sup>84</sup> It will be remembered that the Security Council's resolution referred both to imports from, and exports to, Rhodesia. As far as imports are concerned, the neutral state does not have any obligation to continue them at previously established levels. While a reduction in imports would be contrary to the declared Swiss policy of the *courant normal*, Zemanek regards the latter as a political, not a legal principle, binding not even Switzerland.<sup>85</sup> With regard to exports, the situation would be different. A neutral country is obliged to treat both belligerents equally as far as war matériel is concerned. However, since Austria had never exported banned material to Rhodesia, the problem of whether Austria could have imposed restrictions on these exports remained hypothetical.

It is clear that the case of the Rhodesian sanctions does not provide a final answer to the correct legal attitude of a permanently neutral member state of the United Nations towards enforcement measures taken by the Security Council under chapter VII of the Charter. Yet, it permits some interesting observations.

*First*, the membership of a permanently neutral state in the Organization favors its participation in enforcement measures. Thus, Austria took part in the sanctions against Rhodesia while Switzerland refused to do so. *Second*, as a member of the United Nations, the permanently neutral state is inclined to adopt a legal view of the situation that permits it to concur with the Security Council's decision. In the case

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83. Zemanek, *supra* note 78, at 32. It might be interesting to note, in this connection, that permanently neutral Switzerland decided to refrain from either participating in the sanctions imposed or aiding the object of the sanctions, Rhodesia: e.g., the decision taken by the Swiss government on February 10, 1967, permitting the continuation of trade with Rhodesia to the traditional extent, i.e., the *courant normal*. See Bindschedler, *Das Problem der Beteiligung der Schweiz an Sanktionen der Vereinten Nationen, Besonders im Falle Rhodesians*, 28 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 ff. (1968) [with English summary at 15]. Bindschedler thinks that the question whether the Rhodesian conflict is to be considered as an international or an internal one is irrelevant for the solution of the problem.

84. Zemanek, *supra* note 78, at 29-30.

85. *Id.*

of Rhodesia, this meant that Austria seemingly proceeded on the legal ground that Rhodesia was not a "state" and the conflict not an "international war." *Third*, the position taken by the permanently neutral member is not likely to meet with criticism within the Organization as long as this member supports the Organization in carrying out its enforcement measures. *Fourth*, the Rhodesian situation does not shed light on the problem of whether the position of the permanently neutral member would be equally comfortable if the Organization were divided on the question of whether or not to take enforcement measures, and the measures were adopted against the opposition of a significant minority.

If the case of Rhodesia proves that a permanently neutral member of the United Nations does not have to remain inactive in the cause of peace, even in the case of sanctions under chapter VII of the Charter, the various possibilities open to such a neutral member can be illustrated by a further example.

#### B. PEACEKEEPING OPERATIONS

On June 30, 1965, a Federal Constitutional Law was passed by the Austrian Parliament which empowered the Austrian Government to send military and other personnel abroad for the purpose of participating in international actions taken under the responsibility of an international organization.<sup>86</sup> The first paragraph of this Law provides that the government, when making use of its powers under the Law, shall have due regard to Austria's permanent neutrality as declared in 1955. The preparatory documents<sup>87</sup> that were before the House, together with the text of the statute, laid special emphasis on the necessity of the Austrian Government proceeding with the utmost caution so as not to endanger the nation's neutral status.<sup>88</sup>

While the Explanatory Remarks expressed the opinion that such participation was, in itself, not inconsistent with the Austrian obligations resulting from permanent neutrality, it was still considered neces-

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86. [1965] Austrian BGBl. 173.

87. These documents are known in this form as *Erläuternde Bemerkungen* [hereinafter referred to as Explanatory Remarks].

88. *Erläuternde Bemerkungen zur Regierungsvorlage vom 25 Februar 1965* (633 der Beilagen zu den Stenographischen Protokollen des Nationalrates, X. Gesetzgebungsperiode), partly reprinted in 6 ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK 35-36 (1966).

sary that the Law explicitly refer to the 1955 Declaration of Neutrality to make certain that the former's provisions would not be construed so as to abrogate the latter. This caution demonstrated that the Austrian Government which had prepared the new Law for consideration in Parliament felt it was taking a step into the border area of neutrality and international solidarity, an area in which it was particularly important to make clear that support of one law did not signify abandonment of the other.

Following the adoption of this Law, an agreement was concluded between Austria and the United Nations concerning an Austrian contingent to be made available for the United Nations Force in Cyprus.<sup>89</sup> This Force was operationally established in Cyprus on March 27, 1964, pursuant to a Security Council resolution of March 4, 1964,<sup>90</sup> passed after consultations with the governments of Cyprus, Greece, Turkey and the United Kingdom.

In a lecture given to the Austrian Chamber of Commerce in Zurich on June 14, 1966,<sup>91</sup> the Austrian Foreign Minister, Tončić-Sorinj, declared that his country not only considered its participation in the "peacekeeping operations" of the United Nations as compatible with its neutral status, but that cooperation in actions like this had come to be regarded as a special function of the neutral or non-aligned states within the Organization. "Peacekeeping operations" of the United Nations are not directed against any state; they take place only in answer to a specific request of the countries concerned and with the express consent of the state on whose territory the peacekeeping force will be stationed. Thus, they are not "enforcement measures" for the maintenance or restoration of peace under chapter VII of the Charter. Rather it is a surrogate for such actions which have become impossible because of the deadlock in the Security Council. Yet the purpose of the "peacekeeping operations" is similar to that of "enforcement measures," for the function of the peacekeeping forces is the maintenance of inter-

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89. The agreement took the form of an exchange of notes between the Secretary General and the Permanent Representative of Austria to the United Nations and became effective on February 28, 1966. The original English version is reprinted in 6 ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK 38-40 (1966).

90. Resolution Adopted on 4 March 1964 Concerning the Situation in Cyprus, 19 U.N. SCOR, Supp. Jan.-Dec. 1964, at 102, U.N. Doc. S/5575 (1964).

91. In *Die Gemeinsamkeiten und Verschiedenheiten der Schweizerischen und der Österreichischen Neutralität*, 6 ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK 169 (1966).

national peace and security. The military actions taken by ONUC<sup>92</sup> in the Congo, and in particular those to prevent the secession of the Katanga province, had a disturbing similarity to the "enforcement measures" that would be taken against a recalcitrant state, even though the legal circumstances in the two cases are quite different.

What might have been the position of neutral Austria had it sent to the Congo not a medical corps (the Austrian Constitution did not then provide for the participation of fighting units in actions under United Nations command), but military personnel proper? What if the Austrian soldiers had become engaged in combat? What if the United Nations action had proved abortive and Katanga had become an independent state? These questions raise the problem of whether participation in mere "peacekeeping operations" is really an absolute guaranty of becoming involved only in actions that are carried out "for peace" and "against nobody." Might not such participation put the permanently neutral state, under certain circumstances, in a position which is, at least in fact if not in law, quite similar to that of participation in military enforcement measures?

Yet, Austria considers participation in "peacekeeping operations" of the United Nations a special function of a neutral state in the system of the Organization. It is submitted that in this attitude may be seen one of the keys for understanding the legal position that made Austria's entry into the Security Council possible. We now turn to this question.

## V

### AUSTRIA'S CANDIDACY FOR MEMBERSHIP IN THE SECURITY COUNCIL

Austria's candidacy for a non-permanent seat in the Security Council began in 1970.<sup>93</sup> At that time, however, it was unsuccessful, probably because it lacked the political preparation necessary to withstand the pressure of a time deadline.<sup>94</sup> Recognizing that its chances were ex-

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92. ONUC stands for the United Nations Organization in the Congo (abbreviation based on the French).

93. It had been during a press conference on April 28, 1970, that Austria's new Foreign Minister, Rudolf Kirchschräger, confirmed rumors to the effect that the Permanent Representative of Austria to the United Nations had been instructed to declare his country's intention to run for one of the non-permanent seats in the Security Council which traditionally belong to the group of "Western European and Other States." Cf. *Chronik zur Österreichischen Aussenpolitik*, 10 ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK 97, 109 (1970).

94. Mr. Kirchschräger explained to the Austrian Parliament on November 26, 1970,

tremely limited, Austria withdrew in favor of the two original candidates from the group of "Western European and Other States," Belgium and Italy, but registered its intention to run again for the 1973-74 period. The group acknowledged Austria's "spirit of solidarity" and assured Austria of its support in 1972.<sup>95</sup>

The Austrian Foreign Minister, Mr. Kirchschräger, took every opportunity to explain that Austria's application was not an act motivated by ambition, but one dictated by strong feelings of responsibility.<sup>96</sup> Because of its permanently neutral position, it was particularly appropriate for Austria to enter the Security Council. Since Austria is both a country with great historical experience (but one that had never taken part in colonialism) and an impartial state that has played an active part in international life, it was especially suited for the role of mediator and conciliator. Austria was therefore determined to take advantage of the opportunity offered to it to make a valuable contribution to international relations. Austria should not live in permanent fear that complications could arise in connection with its neutral status. In an address to the *Österreichische Gesellschaft für Aussenpolitik* (a private association dealing with matters of foreign politics) Mr. Kirchschräger said:

Since the days of 1955, when I had the opportunity to cooperate in the phrasing of the Neutrality Law . . . I have always supported this permanent neutrality . . . because I consider it to be the most adequate status for Austria. But I am equally convinced that this permanent neutrality does not constitute only a plurality of obligations for Austria; it offers also a great number of opportunities and rights. Among those there is the opportunity to assume functions which demand impartiality and, at the same time, energy of decision, and for which a certain historical experience is useful. For the exercise of those functions, the Security Council, the central organ for the maintenance of world peace, is the [proper] forum. For long years we had to struggle to obtain membership in the United Nations; should we now be the only state in the Organization reduced to a second-class member that is not permitted to take part in the UN's leading body? I think that our country and our foreign policy are too good for such a role.<sup>97</sup>

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that it had been necessary to reach a quick decision on the question of the Austrian candidacy, for the government had to deal with the issue only one week after having taken over from the caretaker government that was in office following the recently-held general elections.

95. Cf. *Chronik zur Österreichischen Aussenpolitik*, *supra* note 93, at 330-31. On the question of a possible Austrian membership in the Security Council and a comparison of the pro's and con's thereof, see Koeck, *Der Gefährliche Balanceakt Zwischen Wien und New York*, 8 POLITISCHE PERSPEKTIVEN 10 ff. (1972). This comment was written before the final decision on Austria's candidacy had been taken.

96. See, e.g., 10 ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK 248 (1970).

97. *Id.* at 414 (author's translation).

Austria's decision to run for a seat on the Security Council was certainly influenced by the experiences of both Sweden (a member of the Council during 1957-58) and Finland (a member of the Council during 1969-70). While not permanently neutral in a legal sense, these two countries traditionally followed a policy of neutrality.<sup>98</sup> Both countries were very satisfied with the opportunity offered to them through their membership on the Security Council to play a conciliatory role and, at the same time, to strengthen their own political positions within the Organization.<sup>99</sup> If both Sweden and Finland had found it possible and even convenient to sit in the Council, why should this not be equally true for Austria?

The Austrian candidacy was presented again in 1972 and this time was successful.<sup>100</sup> For the period of 1973-74, the Security Council will be faced with the situation of having a permanently neutral member. What are the political and legal implications of this situation, both for the Organization and for Austria? Is participation in the work of the Security Council nothing more than the extension of activity essentially identical to that carried on for seventeen years in the various other organs of the United Nations? Or is cooperation in the activities of the Council fundamentally different from that in other United Nations organs?

## VI

### MEMBERSHIP IN THE SECURITY COUNCIL

There can be no doubt that membership in the other organs of the United Nations, especially in the General Assembly and in the Economic and Social Council, also creates problems from the point of view of a neutral policy. Here, too, Austria is called upon to take a stand and state her position regarding such difficult issues of international politics as decolonization, apartheid, and Rhodesia, and to cast her vote on questions of utmost importance, such as the transfer of the Chinese seat in the Organization from the Taipei to the Peking government. It would be incorrect to assume that the position Austria assumed con-

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98. See generally H. BLIX, *SOVEREIGNTY, AGGRESSION AND NEUTRALITY* (1970); and M. JAKOBSON, *FINNLANDS NEUTRALITÄTSPOLITIK ZWISCHEN OST UND WEST* (1969).

99. See Wildhaber, *Die Mitgliedschaft Dauernde Neutraler Staaten im UNO-Sicherheitsrat*, 11 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK* 131, 142 (1971).

100. See note 1 *supra*.



cerning those problems has no effect on her neutral status. Considerations of this kind have made Switzerland hesitant until now to apply for admission to the United Nations. On the other hand, permanent neutrality is not synonymous with an unprincipled international attitude; the permanently neutral state should not be regarded as bound to keep complete silence in all questions of international law and morality. Austria has never tried to conceal her convictions and yet has been successful in steering an independent course. This success in maintaining an independent neutrality has also been recognized by Switzerland which, though not participating in the United Nations, is a member of various Specialized Agencies. In these agencies Switzerland is quite often called upon to vote on questions having strong political implications without, so far, having suffered any political damage or any loss of credibility as a neutral country. The Swiss government has therefore come to the conclusion that "the risks connected with membership in the United Nations should not be overrated."<sup>101</sup>

The situation in the Security Council, however, is quite different. While this organ has various functions under the Charter its main task—its *raison d'être*—is the maintenance and restoration of peace.<sup>102</sup> For this purpose it participates under chapter VI of the Charter in the settlement of international disputes, and determines under chapter VII those measures that are necessary for the realization of international peace and security. Quick and efficient action on the part of the Security Council is, however, dependent upon the ability of the Council members to arrive, within an appropriate time, at a satisfactory agreement among themselves about the necessary steps to be taken.

Decisions of the Security Council are of two kinds:<sup>103</sup> those on procedural matters; and those on substantive matters. Decisions of the Security Council on procedural matters require the affirmative vote of nine of its fifteen members; decisions on substantive matters can be adopted only by an affirmative vote of nine members including the

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101. [1969] Swiss BBl. 1570 (author's translation).

102. Article 24(1) of the U.N. Charter: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primarily responsibility for the maintenance of international peace and security. . . ."

103. The electoral procedure for filling the seats on the International Court of Justice—which requires, in the Security Council, an absolute majority of votes (i.e., eight) without making any distinction between permanent and non-permanent members of the Council—provides a third voting formula to be applied by this body, but is of comparatively lesser importance. I.C.J. STAT. art. 10, para. 1.

concurring vote of all five permanent members.<sup>104</sup> It appears from these provisions that decisions of the Security Council in all important matters depend primarily on the cooperation among the members holding a permanent seat. If only one of them exercises its right of veto the proposal is not adopted.<sup>105</sup> However, the permanent members cannot adopt any proposal alone; they need the support of at least four of the members holding non-permanent seats. Therefore, the latter's attitude might become crucial, especially where certain permanent members, although not voting against a draft resolution, demonstrate their disapproval by abstention. Since, in such a case, a non-permanent but aligned member can be expected to follow the lead of the Great Power to which it has close military, political or economic ties, a proposal might be lost, not by reason of any veto, but simply because of the lack of sufficient support marshalled by it. This, of course, is a legitimate process in the system of international democracy; a proposal that cannot gather sufficient support should fail to be carried.

Membership of a permanently neutral state in the Security Council, however, distorts this legitimate democratic process of international decision-making. It has, until now, been undisputed that permanently neutral states in the Council may not, because of their special international status, vote in favor of employing measures under chapter VII of the Charter against a state that had been determined by the Security Council to be guilty of threatening, or having breached the peace, or having committed an act of aggression.<sup>106</sup> When faced with a proposal to take sanctions against an aggressor the permanently neutral state has no choice but to abstain. However, if the permanently neutral state abstains in such a situation its membership in the Security Council becomes nonsensical, since this member may prevent, by its abstention, the adoption of a proposal aimed at the fulfillment of the Council's main function. This abstention would be exercised contrary to the spirit, if not the letter, of the Charter, since it would not be based on any grounds connected with the specific case in question, but rather on legal and political grounds related to the status of neutrality, *i.e.*, on grounds unrelated to the case being considered by the Council. This

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104. U.N. CHARTER art. 27, para. 2.

105. Contrary to the wording of Charter article 27(3), the mere abstention of a permanent member of the Council does not prevent the adoption of a decision if it has otherwise obtained the required majority. See L. SOHN, *supra* note 41, at 135-48.

106. See Wildhaber, *supra* note 99, at 140.

means that the permanently neutral state would have to cast its vote not with respect to the merits of the problems being dealt with by the Security Council, but with regard to its own status, which obligates it to treat all parties to a dispute equally.<sup>107</sup>

It is clear that neither Austria, when she announced her intention to run for a non-permanent seat in the Council, nor the General Assembly, when it elected Austria to this position, were unaware of the situation just mentioned. Yet, both considered it desirable that Austria enter the Council. Why?

If the problem is examined while considering the twenty-seven year history of the United Nations, the conclusion will be reached that because of the antagonism between East and West, the Security Council is today a forum for political discussion, mediation, and conciliation rather than a decision-making organ of collective security. The Council arrives at a decision not by quasi-judicial investigation but by compromise, based on a complex process of negotiation and bargaining. The policy of the Council has, therefore, been termed not a policy of collective security but a policy of "collective neutrality."<sup>108</sup>

Under these circumstances, a permanently neutral country can fulfill its mission of *pacigérance* even within the Security Council. Nevertheless, it should not be overlooked that a concept of the United Nations which permits a permanently neutral state not only to become a member of the Organization, but also to obtain a seat in its leading organ no longer has very much in common with the concept upon which the Organization was originally framed. The entry of Austria into the Security Council signifies, with great clarity, the final breakdown of the system of San Francisco, a system that purported to guarantee peace through collective security.

The view that the deadlock within the Security Council was merely a transitory difficulty in the management of the United Nations must now finally be discarded; it has been for some time only a fiction. The United Nations, by making a permanently neutral state a member of the Council, has demonstrated that it does not believe in the possibility that it can, in the foreseeable future, return to the proper exercise of its original functions. State practice and doctrine will have to take into account, to a greater extent, this development.

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107. See Koeck, *supra* note 95, at 11.

108. This expression was used for the first time by D. FREI, DIMENSIONEN NEUTRALER POLITIK 24 (1969).