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Swiss Security Policy Hearings 2009 - Neutrality and its Discontents

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Hearings zum Sicherheitspolitischen Bericht 2009 [available at <http://www.sipol09.ethz.ch>]

Prof. Simon Chesterman, Director, New York University School of Law Singapore Program

Transkription der Stellungnahme vom 17. April 2009

Chesterman Simon: I'm conscious of the limited role that foreigners should have in the discussions you are undertaking. There are few things closer to the heart of sovereignty than security policy. For Switzerland in particular I know that this is a matter of lively debate, given its long history of independence, and the struggle to maintain that independence. Nevertheless, you have invited me here and I will endeavour to be as helpful as I can as you develop your new security policy.

I will speak today as an international lawyer but also as an internationalist. My biography has the unusual title of "Global Professor" representing New York University in Singapore. I justify this title by being an Australian educated in Europe working for an American organization in Asia. I think I'm about as "global" as you can get. In addition to my academic background, I have worked, briefly, for the United Nations in the former Yugoslavia and a decade ago served as an intern at the International Criminal Tribunal for Rwanda. I have written extensively on UN peace operations in particular, a subject that I know is under considerable scrutiny in your present deliberations. I have also written books on so-called "failed states" and am doing one now on the modern role of intelligence services.

I will also speak as an admirer of Switzerland. Prior to going to Rwanda, I completed the International Committee of the Red Cross summer school in Warsaw in 1998. While in New York, I worked periodically with Ambassador Jenö Staehelin in the period that saw Switzerland join the United Nations, as well as his successor Peter Maurer. I have also worked happily and closely with Swiss colleagues from government and the ICRC on the question of private military and security companies – a topic on which Switzerland has been one of the very few countries prepared to play a leading role.

Finally, I will speak as an academic. My views are my own and I am not responsible to any constituency. I know that sometimes that may encourage academics to be irresponsible. Nevertheless, I hope my remarks will be helpful.

There are five questions that I have been asked to address, which I will group into three sets of comments. First, as I am one of only a few international lawyers on your schedule, I will say something about neutrality. In particular, I will suggest that its legal content is important and worth preserving despite the changed security environment. Secondly, I will speak to the questions concerning past and future trends in security, its meaning, and threats to Switzerland. In that context, I will suggest that security policy must allocate resources by considering both the severity of threats and the probability of those threats materialising. Thirdly, I will address the role of armed forces in the context of modern peace operations. I will conclude with a few observations about the relationship between these security policy debates and the perception of Switzerland around the world.

1 Neutrality

Neutrality designates the legal status of a state that does not participate in a war being waged by other states. The traditional understanding of neutrality derives from custom, partly codified in Hague Conventions V and XIII of 1907. I am sure this is well known to most of you. The most elaborate rules

were therefore drafted a century ago and have never been updated. The basic rules are simple: First, a neutral should not fight. Secondly, belligerents should respect the territorial integrity of a neutral state.

On land, this is fairly straightforward, with reasonable exceptions for wounded personnel. With respect to warfare at sea – more of a theoretical consideration to Switzerland – there are more elaborate rules governing stops in neutral waters, phrased in language that today seems quaint – governing, for example, the time within which coal must be supplied to a belligerent ship.

A century ago, when these rules were being drafted, the Wright Brothers were still trying to sell their new flying machine to a sceptical world, so the Hague Conventions did not cover air warfare. Customary rules subsequently developed concerning equivalent rules of air transit, premised on air war being more like land war than sea warfare. Warring states were thus prohibited from flying over neutral airspace, and the air forces of neutrals were obliged to try to stop them if they did. Satellites were left out of the picture, but as space lies outside the territory of states, that is probably a moot point.

The point about air transit is important in the case of Switzerland because it has opened its airspace, as well as railways and roads, to peace operations such as IFOR in Bosnia beginning in 1995. This would suggest a belief on the part of Switzerland – a correct belief, I would submit – that such peace operations authorized by the Security Council are not "wars" triggering neutrality obligations. This underlines another important point about neutrality in international law: it applies only when triggered by the outbreak of war between two or more states, and is extinguished by the end of that war.

The exception to this is the notion of permanent neutrality, as adopted by Switzerland following the Vienna Congress of 1815 or asserted by Austria in 1955 and, more recently, by Moldova and Turkmenistan in the 1990s – though only the latter's permanent neutrality has been recognized. Permanent neutrality encompasses ongoing obligations. The academic literature includes some head-scratching over how an ongoing obligation can derive from a time-delimited one. The key question is whether there are obligations not merely to remain neutral when conflict breaks out, but to maintain the capacity to be neutral before conflict breaks out. This includes avoiding treaty obligations that would commit a state to conduct inconsistent with neutrality, for example the collective self-defence obligations attendant to joining NATO.

With the effective outlawing of war after the adoption of the UN Charter in 1945, some argued that neutrality had become obsolete. As all war would be illegal, with the exception of self-defence or action taken in the name of the UN Security Council, neutrality with respect to any particular conflict was irrelevant. A further challenge to the legal category was the determination by those creating the UN during the Second World War that only those participating in hostilities against the Axis powers could be counted among the "peace-loving" members of the UN – something of a contradiction within the UN Charter. Nevertheless, neutrality continues to be relevant and, occasionally, to be invoked at the international level. The Neutral Nations Supervisory and Repatriation Commissions, in which Switzerland played a significant role, set up after the Korean War, pointed to a role for neutral countries. Austria's declaration of permanent neutrality in 1955 was explicitly modelled on Switzerland and was universally recognized. During the Cold War, neutrals played a significant role. The end of the Cold War changed this political context significantly. The present legal questions surrounding neutrality depend on *from what* a state seeks to remain apart.

First and most obviously, despite the UN Charter, war continues. Thus, a neutral state can invoke its Hague privileges with respect to, say, the US invasion of Iraq in 2003 or the Russian military action in Georgia in 2008. I know that Switzerland did this with respect to the Kosovo intervention in 1999, prior to a Security Council-authorized mandate in which Switzerland now participates.

Secondly, it is sometimes argued that states might remain neutral with respect to UN-authorized enforcement or peacekeeping operations. Participation in such actions is predicated upon consent of the states concerned, thus no state could be forced to participate. They are all, if you like, "coalitions of the willing". But if a neutral state did participate, would that be a violation of its neutrality? The Second Hague Convention is silent on this. Austria, for example, has been participating in peace operations for four decades under what it calls its "active neutrality policy". Similarly, Sweden, Finland, and Ireland all participate in UN and non-UN peace operations despite their neutral status.

I know that Switzerland takes a slightly different view of this question. But the fact that Switzerland permits Security Council-authorized forces to fly over its territory acknowledges that neutrality – at least since 1995 – does not apply to such actions. The fact that Switzerland tends not to contribute militarily to such actions is a political choice. That is Switzerland's right, but it is not required by neutrality. An interesting marginal case is Afghanistan, from which Switzerland withdrew its two Kunduz-based officers in February 2008. The reason given by the former Defence Minister was that Afghanistan was becoming a peace enforcement operation rather than a peacekeeping operation. Without wanting to contradict the former Defence Minister, I have to say that Afghanistan was never a peacekeeping operation. However, if the suggestion was that the escalation in operations against the Taliban made the conflict more closely resemble an international armed conflict going beyond the Security Council mandate for ISAF, then the Swiss withdrawal might plausibly be based on its neutrality. Kosovo, where such concerns do not seem to apply and where Switzerland has a more robust deployment, would not appear to raise similar issues unless the conflict escalates significantly beyond the mandate under which those forces are present.

Both Afghanistan and Kosovo raise the third situation in which neutrality concerns might apply: internal armed conflict. Under traditional conceptions of neutrality, if an internal conflict does not rise to the level where other states recognize a belligerent, neutrality does not apply. This presents the somewhat odd situation that if confronted by, say, potential genocide in Darfur in 2003/2004, a neutral country could intervene – subject to other rules of international law – until such time as the conflict escalated to a level at which other nations became involved.

Fourthly, something much commented on in the literature and of considerable relevance to Switzerland is implementation of economic sanctions. Here the international legal situation is relatively simple. The Charter explicitly grants the Security Council power to impose economic sanctions. And under Article 103 of the UN Charter, Charter obligations trump other international obligations. This has posed some difficulties recently with respect to EU human rights considerations, in the Kadi case among others. But those cases held, at first, that Council resolutions could be reviewed only with respect to peremptory norms under international law. That initial finding was overruled by the European Court of Justice in September 2008, which held that it could not review Security Council resolutions but could review the European Community acts implementing them.

So what are the implications for Swiss security policy? I note that neutrality is important for Switzerland not only from an international legal perspective, but also under its domestic law. The Swiss constitution

twice states that the Federal Assembly has the duty and power to take measures to safeguard external security and the independence and neutrality of Switzerland. I gather that in Switzerland, terms such as "integral neutrality" and "active neutrality" have been adopted in political discourse. However, I am not sure this is helpful in clarifying the meaning of neutrality and, to an outsider at least, this appears to be hanging political policies on legal clothes hooks.

Everyone in Switzerland seems to agree that neutrality is important and vital, but everyone seems to understand the term differently. Speaking as a lawyer, I would therefore separate the legal concept of neutrality from political policies which we might term, for example, "isolationism" or "engagement". How those political policies are formulated is, of course, for the Swiss people and their political institutions to decide.

Neutrality would remain an important legal constraint on Swiss foreign policy, but be confined to its legal meaning of refraining from participation in unlawful international armed conflict – that is, conflict not authorized by the Security Council – or from entering into undertakings that would prejudice its ability to remain neutral in the event of such conflict.

2 Scope and Trends in "Security"

I will now turn more briefly to my second set of remarks on the changing understanding of security and the threats facing a country like Switzerland.

In addition to the provisions I quoted earlier, the Swiss Constitution states that the Confederation "shall ensure that the independence of Switzerland and its welfare is safeguarded; it shall in particular assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful coexistence of peoples as well as the conservation of natural resources." These provisions adopt a very broad and, I would suggest, enlightened approach to security. But there is a tendency – particularly, it sometimes seems, within Europe, although I don't really include Switzerland in this – to regard traditional inter-state conflict as something of the past. For a continent that has experienced so much conflict this appears to be a fairly short-sighted analysis. I would accept that such international armed conflict in Europe is unlikely, but to rule it out completely seems to be a mistake.

At the same time, there is a tendency to put "new" security threats under a security heading. This tendency is not limited to radical environmentalists who argue, quite plausibly, that climate change will reduce quality of life in a manner comparable to various forms of conflict. At his annual testimony to the Senate Select Committee on Intelligence in February 2009, the US Director of National Intelligence, Dennis Blair, began his statement by saying that the "primary near-term security concern of the United States is the global economic crisis and its geopolitical implications". He also outlined how the US intelligence community is increasingly devoting attention to climate and energy issues.

I do think it is important that such issues figure in Swiss policy-making, but would not suggest that they be explicitly embraced in a security policy.

Rather, put crudely, we might categorize security threats to a country like Switzerland under the following five headings, in order of diminishing severity:

1. Direct military confrontation with another country;
2. Military conflict between major powers, affecting Switzerland;
3. A major terrorist attack;
4. Conflict in Europe, leading to a significant influx of asylum seekers;
5. Conflict beyond Europe, leading to an influx of asylum seekers.

Clearly, the possibility of direct military confrontation requires a robust traditional defence capacity. But I would also put it to you that, as the headings listed decrease in severity – as we move from international armed conflict down to conflict outside Europe – they increase in likelihood. There are, for example, many conflicts beyond Europe currently underway or only recently stabilized. Within Europe, the Balkan region and the Caucasus are sources of ongoing instability. A major terrorist attack is a real possibility, not guarded against by Switzerland's neutrality. Conflict between the major powers seems unlikely, though six months ago Russia's Prime Minister Vladimir Putin announced a massive increase in defence spending and tensions are on the rise in the North Sea. And happily, for the time being, there is no real prospect of a direct military confrontation between Switzerland and another state.

I'm an Australian and we are inveterate gamblers, but from a security policy perspective I would want to hedge my bets by balancing the severity of a threat against the probability of it materialising. Again, put crudely, this means that maintaining stability in Kosovo is in the security interests of Switzerland. Merely declaring Kosovo "safe" – for refugee and asylum seeker purposes – as I gather Switzerland did recently, may be insufficient to ensure stability in a manner that will reduce the need for Switzerland to absorb refugees.

Given the prominence accorded to terrorist threats, I think it's important to say something more about how such threats might figure in a security policy, not least because we have military as well as police personnel here.

Many of the most controversial policies of the Bush Administration were grouped under the heading of the "global war on terror". Though President Obama has distanced himself from this rhetoric, it is worth noting the three problems with the term in the three main words. First, as has often been observed, "terror" is a tactic rather than a thing against which one might fight. Secondly, the term "global" is misleading and dangerous. It is misleading because it falsely suggests a degree of unity that doesn't exist between, say, al Qaeda and groups in my own region of South East Asia such as Jemaah Islamiyah in Indonesia or the Moro Island Liberation Front in the Philippines. The term "global" is dangerous because it runs the risk of creating the threat it seeks to remove. By telling every disgruntled young man that he is or could be part of a global movement, one increases the cohesion and attractiveness of what is really a ragtag bunch of extremists and murderers. Thirdly, and most relevantly for present purposes, this is not a "war". I was living in New York City in September 2001 and I know how people responded at a personal level. But framing the response at the national level as a "war" misdirects the various agencies that might be involved. There is an old expression that "if all you have is a hammer, everything looks like a nail". The language of war suggests a military response, when it has become quite clear that dealing with terrorism requires a suite of responses. In the United States, the non-military aspects of its power have for some time now been known as "soft power", but now that the Democrats are in office, they apparently worry that this might sound wimpish. So now they advocate what is termed "smart power" – which sounds more

robust than "soft power", while also offering an opportunistic swipe at the Bush Administration's use of what was, by implication, "dumb power". I don't say this because I think Switzerland is in danger of adopting a purely military response to terrorism but because I think it is interesting.

3 Armed Forces and International Peace Operations

I turn, now, to my third set of comments concerning the role and mission of modern armed forces. From what I've said thus far, the implications of neutrality as a legal concept are very limited outside of wars in violation of the UN Charter. Essentially, permanent neutrality requires states such as Switzerland not to put themselves in a position where they would be unable to fulfil the obligations of neutrality should a war break out.

Security considerations, I have suggested, require a state to prepare for threats according to the severity of their consequences and the probability of them materialising.

So what does this mean for the important question of whether a state like Switzerland should participate in peace operations? The first thing to emphasize is that this is a matter of choice. No state can be forced to contribute to a military action. This is not a matter of neutrality but of international law under the UN Charter. Article 43 of the Charter provides for agreements to put troops at the disposal of the Security Council, but no state has ever done so in the history of the UN. In the absence of such agreements, peace operations have taken place in the form of blue-helmet peacekeeping, said to be justified under Chapter VI½ of the Charter – because the term "peacekeeping" does not appear – and nominally led by the Secretary-General, or enforcement action authorized by the Council but led by a state or coalition of the willing. In each case, participation is voluntary.

Peace operations, however, have been changing. After various experiments with peacekeeping during the Cold War, the end of the global standoff between the Soviet Bloc and the West saw great expectations of the UN. The rhetoric after the 1991 Gulf War was euphoric, utopian, and brief. Somalia and Rwanda demonstrated the limited political will for resolving distant conflicts. Bosnia demonstrated the limited operational capacity of complicated force structures operating even when there was political will.

By the end of the 1990s, the Kosovo intervention appeared to prove to NATO on its 50th birthday that it could undertake out of area operations. For some countries it also proved that vetoes by Russia or China on the UN Security Council need not be a barrier to humanitarian operations with a military component. The United States, by contrast, took a very different lesson from Kosovo: that it would, at least in a war fighting capacity, never again fight under coalition auspices. After September 11, NATO issued its first article V declaration that an attack on one member was to be treated as an attack on all. The United States responded basically by saying "thanks, but no thanks". Subsequently, NATO did become involved, although that has been problematic in its own right.

Now that NATO has celebrated its 60th birthday, the period of enthusiasm for NATO operations appears to be passing, with Kosovo being passed to the EU and Afghanistan becoming more and more a US operation again. Peacekeeping, meanwhile, under the auspices of the UN, is on the rise with over 90,000 peacekeepers around the world in 16 missions.

Switzerland has participated in peacekeeping missions since its deployment in 1953 of 93 personnel to Korea to support the Neutral Nations Supervisory Commission I mentioned earlier. I gather there are still five officers stationed in Panmunjom. Deployments of military observers began in 1990. It presently has, as you all know, a small number of officers deployed in the Middle East, in Georgia, in the Democratic Republic of Congo, in Nepal, and in Burundi. By far its largest deployment is the 220 personnel in Kosovo as part of KFOR, not under UN auspices. It has also provided some leading figures in peacekeeping, including the head of the UN peacekeeping operation in Georgia, Heidi Tagliavini, who served from 2002 to 2006.

As I said, participation in these operations is a choice. No state can be forced into participating in peace operations. But let me offer four reasons for considering it. I'm conscious that this goes beyond my legal remit; these are policy considerations you might wish to keep in mind.

The first is national security in a narrow and broader sense. In the narrow sense, Switzerland is clearly threatened by instability in Europe, and to a lesser extent by instability beyond Europe. A return to hostilities in the Balkans, for example, would adversely affect Switzerland. In the broader sense, Switzerland profits from a stable international order. As a financial centre, Switzerland profits in particular from globalization and suffers when barriers to trade arise. That is of course evident in the current financial crisis; it is also true with respect to the openness that a relatively stable world offers.

The second reason to consider participation in peace operations is efficiency. Switzerland is more generous than most in its humanitarian assistance, and more active than most in its efforts at mediation. Yet one of the findings from conflict studies is that the greatest factor in the outbreak of conflict is – a history of conflict. More than half of all countries emerging from civil war fall back into it within five years of a peace agreement being signed. The question of resolving one conflict has therefore become linked with the question of preventing another. An important part of conflict resolution and peacebuilding is a military component. Given the extensive involvement of Switzerland in mediation and humanitarian assistance, these efforts would be best supported by robust military support. From an efficiency perspective, it would therefore seem to make sense for Switzerland to play a role in that, so that its efforts are not wasted.

The third reason is equity. Of the about 90,000 military and police serving in UN peace operations around the world, the top nine contributors – constituting well over half of all personnel – are developing countries. Overall, the proportion of troops contributed by OECD countries amounts to just 12 percent of the total. This situation has been described as "peacekeeping apartheid", with developing countries shouldering a disproportionate amount of the human cost of peace operations. Even within this group, Switzerland's eighteen military observers and six civilian police is towards the bottom of the OECD contributors. In absolute terms, the Department of Peacekeeping Operations' listings for March 2009 put Switzerland 85th, just below the Central African Republic – though ahead of the country I live in at the moment, Singapore.

Now Switzerland contributes in many other ways. Its humanitarian work and mediation efforts are rightly regarded as a source of pride within Switzerland, and as a source of hope and comfort to many around the world. The ICRC in particular is rightly recognized as one of the most important organizations in the world, joined by many other Swiss government agencies and non-government organizations that play a role in ameliorating conflict. But a recurrent complaint within the peacekeeping world – that Jean-Marie

Guéhenno may have spoken about this morning – is that the most dangerous roles are left for those from the global south.

A fourth reason to consider participation in peace operations is self-interest. Effective peace operations save aid money; effective preventive deployments and peacebuilding avoid future conflicts that Switzerland – even if it doesn't participate militarily – may have to pay for either through absorbing refugees or through paying its share of the peacekeeping budget within the United Nations.

4 Conclusions: Switzerland in the World

The last thing I would like to say in my prepared remarks is that as I prepared for this morning, I was conscious to limit my focus to security considerations. Though I think our environmental challenges are enormous, and the global financial situation is precarious, these are not helpfully viewed through a security lens, at least from the perspective of developing a security policy. Yet at the same time, it became clear to me that this is not just a discussion about Swiss security policy but partly also about Swiss identity. Until now, Switzerland's foreign policy appears to me – an outsider – to have been defined by neutrality and by what is sometimes called "Swissness". "Swissness" has included the strong commitment to humanitarianism epitomized by the Red Cross, but also the stability and discretion of other Swiss institutions – notably its banks and their secrecy.

The world, however, has changed. The types of conflicts that we experience today still cry out for the humanitarian work of the ICRC and others, but conflicts tend to be internal rather than international, with the result that traditional humanitarian work becomes more complicated and more bound up in security considerations. At the same time, Switzerland's desire to insulate itself from foreign scrutiny – most obviously with respect to the secrecy of its banks – has been called into question.

The Swiss are famously multilingual. My only foreign language is Chinese. In Chinese, the term for a crisis – wēijī – is made up of two characters. The first, "wēi", means danger or peril; the second, "jī", means opportunity. I certainly don't think Switzerland faces perilous times, but I do think that these discussions about your security policy – and the admirable openness with which you are conducting them – offer an opportunity. It is an opportunity for Switzerland – its people, its political institutions – to consider the role they wish to play in the world. As I stressed at the beginning, these questions are clearly for the Swiss to address. I hope, however, that I've fulfilled my mandate in offering you some thoughts on neutrality, the scope and trends of "security", and the role of armed forces in the early 21st century.

I look forward to hearing your thoughts and answering any questions that you might have.

Discussion

Thalmann Anton: In Switzerland, there is a consensus that we don't want to give up neutrality. Therefore, we are trying to figure out what, as a neutral country, we have to do and what we may do. Many of the fears Swiss citizens suffer from with regard to maintaining neutrality are self-inflicted in the sense that they don't know enough about what a neutral country is allowed to do. This has been illustrated in these hearings by people questioning whether a neutral country could become a member of the Security Council – not to speak of participation in peace enforcement operations, although participating in such operations is, in a way, a political choice.

What would you say to people who still fear for our neutrality, although we accepted the UN Charter in a referendum? What would you say to those who argue that in order to maintain neutrality we have to abstain from being a candidate for the Security Council?

Chesterman Simon: From a legal perspective – the virtues of law and the dangers of law are its clarity – I think this is quite simple: whether neutrality applies or not depends on whether there is an international armed conflict not authorized by the UN Security Council. I say this although I imagine it would be an unpopular way of saying it: if in Switzerland you believe that operations authorized by the Security Council trigger neutrality, then they trigger all of neutrality, which means: no airspace and no ground transportation. However, the fact that since 1995, Switzerland has opened its airspace to operations like IFOR makes it hard to argue that you can't also participate in such operations. The limitation on that would be the example of Afghanistan: Swiss participation would be a violation of neutrality if Switzerland reasonably believed that an operation had gone beyond the mandate and that there was an international armed conflict not authorized by the Security Council.

What does that mean for membership on the Security Council? Again, the legal question seems to be quite simple: if Security Council-authorized operations do not trigger neutrality, neither would participation in the decision-making process. That is clearly only the legal answer, but that's why I emphasized in my prepared remarks that I think there is a certain virtue in keeping neutrality as a legal concept rather than as a political one. I say this because clearly in Switzerland neutrality has become something that is used by people with very different interpretations of what it means – the Australian term for that would be a "political football". So, language can be very important.

I will give you just one illustration at the international level of how important language can be. That illustration is "Responsibility to Protect" – or indeed human security. The doctrine of humanitarian intervention – that is the idea that it is possible to use military means outside of Security Council authorization and outside of self-defence to protect people at risk of some sort of severe humanitarian consequence – has long been a very controversial issue in international law. I did my doctoral thesis on this; basically, I was convinced that there was no prospect of any international agreement on humanitarian intervention. Subsequently, I became involved in a very marginal way in the drafting of the report that ended up being called "Responsibility to Protect". This largely linguistic shift has not changed the law at all, but shifting the focus from the rights of states to intervene militarily on to the responsibility of states to protect civilians within their territory has radically changed the political discourse.

Therefore, one thing you might consider in these discussions and in your security policy is to separate out these issues to preserve what is agreed neutrality covers, which I would submit is the legal content that Switzerland has upheld for a long time. Presumably you'll have big celebrations in 2015 with two centuries of permanent neutrality after the 1815 document – although neutrality goes beyond that for Switzerland – and have a real political debate about the issues that you wish to discuss, such as whether to participate in peace operations, but not premising that on what I would submit is an unhelpful twist on the legal rules that neutrality requires.

That was the long answer. The short one is: no, I don't see any bar to participating in the UN Security Council. If you can implement, and pay for, the Security Council's decisions, you can also participate in the making of those decisions.

Catrina Christian: What you just said reflects to a certain extent the debate that is going on in this country. The decision to withdraw the two officers from ISAF was not explicitly – and, I think, not even implicitly – based on our neutrality. Rather it was based on the fact that the operation did not look very promising and that there was not enough domestic support.

In Switzerland, all kinds of statements are – erroneously – based on the principle of neutrality, for example statements on the decision not to participate in peace enforcement combat operations, although that decision was not based on neutrality. The reasons that led to that decision have in fact nothing to do with neutrality and international law; we just don't want to see ourselves being involved in that kind of operations. In other words, there is a risk to overestimate the importance of neutrality with regard to certain decisions.

As Anton Thalmann, I hope that we will be able to continue along the official line we have now had for ten years.

I certainly agree with you if you say that apples and oranges should not be compared. The legal aspects of neutrality are, as you said, more or less clear. If we want to pinpoint the risks, we have to focus on another drawer of the chest of drawers we are dealing with: we have to focus on what in Switzerland is called neutrality policy. Neutrality policy (as opposed to neutrality law) is subjective: there is nothing solid to keep hold of, to guide you. At present, the legal aspects of neutrality have not a great impact on our foreign policy because it is not often that we find ourselves in a situation in which those legal aspects come into play. Accordingly, it is other aspects than legal ones we have to contend with. For example, it is being said that Switzerland's wealthiest politician once remarked – I do not know whether this is real or apocryphal – that only the people deep in their heart know what neutrality really is. It is in things like that that there is a risk, the risk that the very popular of neutrality can be filled with whatsoever, with things very remote from the legal aspects of neutrality. Some people argue - explicitly or implicitly, that Switzerland should seek protection by not being visible; there is the idea that in certain situations equidistance – morally speaking – should be an acceptable political stance.

Chesterman Simon: In response to that extremely interesting set of remarks I would say – and as an Australian I will be blunt – that for your security you should have a security policy and not a neutrality policy. If the purpose of your neutrality policy is Swiss security, then what you are talking about is a security policy. Clearly, neutrality policy is, as you said, subjective with nothing solid to keep hold of. From the legal perspective, you never ask a question you don't know the answer to, and you shouldn't have a policy if you don't know what it means. Human security is a broad church under which everyone can gather, but that is clearly not what is happening with neutrality policy in Switzerland. One possibility – but, of course, this is your decision, not mine – would be to abandon neutrality policy, emphasize neutrality as a legal concept, be clear about what that means and then have a real debate about security policy and about particular operations. However, I imagine there would be resistance if everyone “in their heart” knows what neutrality means.

Schmidt Tartagli Dagmar: Let me ask you a question referring to security threats and international law: today, states are confronted with the fact that there are increasing areas on the world's map in which there is no state to guarantee that justice and order are pursued by a global organization of well-ordered

states. What is, in your view, the most appropriate way for the international community to meet this challenge?

Chesterman Simon: You're alluding to what are sometimes described as "failed states" and, in the literature, called "bad neighbourhoods". This gets a little bit away from traditional security policy. However, much of my work has been on what I call state building and, sometimes, peace building, although peace building is a very broad term. There was an interesting shift through the 1990s, where there was an upsurge in conflict, peaking at around 1994, driven primarily by internal armed conflict. Things have become much safer in the last dozen or so years, so that today, despite terrorist threats and everything else, the world is a much safer place. The only place in the world where conflict has been on the rise is Africa. In particular, there has been a number of coups d'états.

What this reflects is partly a changing attitude towards the state. During the 1990s, there was a widely held assumption in the international relations literature that the state was dead and that we are all really part of a globalized community. This was profoundly wrong because by the end of the 1990s, two things happened: first, there was the realization, driven by these internal armed conflicts, that much as states might be the primary violator of human rights around the world – effective, functioning, legitimate states are the only way to protect human rights. The second thing that happened was September 11 and the realization by the United States that weak, non-functional or failed states presented, even to the most powerful country on the planet, a security threat. So, this has led to a whole range of attempts to resolve this question. The most extreme attempt has been a kind of modern trusteeship, where international organisations take over territory for limited or more extensive periods of time, the extreme cases being Kosovo and East Timor, but also situations like Afghanistan and Iraq.

What is – to answer your question – the best way of resolving this? You need to do at least three things: The first thing that needs to be done is prevention. Prevention is notoriously hard because it is hard to justify expenses when something is not on the front page of the newspaper. However, prevention is also notoriously cheaper than cure. The difficulty is that it is hard to know when prevention has worked. One of the easier cases is Macedonia: until 1999, a deployment served a very useful purpose in preventing conflict, until it was vetoed by China for extraneous reasons connected with Taiwan. So, prevention is the first thing that needs to be done – sometimes in a military sense, but primarily in non-military ways by supporting the formation of legitimate and sustainable national institutions. Legitimate and sustainable means: being embraced by the people and able to run themselves. The Democratic Republic of Congo for example presents a difficult case because the UN-administered election there, which was widely held to be a free and fair election, was only possible because 0.5 billion \$ were spent on security and other provisions in the election. That's clearly not sustainable. Development assistance is a long-term structural form of prevention. All of these things fall into the first basket of prevention.

The second thing one can do is to react. Reaction sometimes will include military means, but usually it includes non-military means, things like putting pressure on governments that are at risk of falling under a coup, on governments that turn against their own populations. In my own region, I would pick in particular on Myanmar, which is a pretty obvious case of the need for reaction, although not necessarily for a military reaction.

The third set of things that need to be done is rebuilding. That means putting in resources – not merely to ameliorate the cost of the conflict, although that is important, but also in preventing the return of the

conflict. As I said earlier, within five years half of all internal armed conflicts restart. So, rebuilding is really a link back to conflict prevention. Sometimes this includes a military component; that is pretty obvious in the Balkan region. That's one of the reasons why KFOR continues to operate in Kosovo and why Bosnia continues to have a limited military presence. My understanding from people in both regions is that if the international military presence were to leave immediately, conflict would probably restart within a few weeks or a few months.

That was the long answer. The short answer is that a whole range of activities is required, ranging from development assistance to humanitarian relief. Civilian police play an extraordinarily important role, although frequently countries don't have deployable police capacities, so that their role is left up to the military, although that's not necessarily what they have been trained for. It does also require a military component.

Catrina Christian: From the legal point of view, what happened in Georgia last August is an interesting case. Here in Switzerland, we had a slightly different view on these events than the rest of Europe and probably the US, in the sense that the media – and generally those interested in foreign policy – put the blame less squarely on the Russians. Since the events in Georgia have been used to back assertions which are conflicting and even opposing one another, I would like to hear your opinion on that.

Chesterman Simon: I read a range of perspectives on that issue. I would certainly agree that Georgian President Mikheil Saakashvili acted imprudently and dangerously, but I think it would be a hard stretch to say that he acted in a way that would, in a legal sense, justify what Russia did. From a legal perspective, I think it was an unlawful use of force against a sovereign state – but that is not the end of the matter. I also think that the Kosovo intervention was an unlawful use of force – but that is not the end of the matter with respect to Kosovo. It is similar with respect to Iraq.

There are two interesting things that come out of the Georgia debate. The first is the invocation by Russia, in particular by Foreign Minister Sergei Lavrov, of Responsibility to Protect, which points to the danger of norms being abused. This is one of the reasons why I argued in my first major book that a legal right of humanitarian intervention was a terrible idea because no country had ever refrained from protecting civilians at risk because of international law, and because it would almost certainly open the possibility for abuse of a doctrine. Hitler notoriously abused it with respect to Czechoslovakia.

The second interesting legal point is Russia's recognition of the independence of South Ossetia, which also points to the danger of exceptions in legal terms. When the United States and indeed Switzerland recognized Kosovo, that recognition offered dangers that other states would do similar things. Switzerland was one of the early movers with regard to Kosovo, although I think it was politically impossible that Kosovo would ever go back under Belgrade's control and that it was inevitable that at some point Kosovo would assume some form of independence. Such active recognition – others would mention Germany's recognition of Croatia back in 1991 – points to the difficulties of trying to keep an exceptional situation exceptional. So, Russia's assertion was – just as the United States and others said Kosovo is *sui generis* – South Ossetia is *sui generis*.

The German philosopher Carl Schmitt – he is unpopular these days – once said that "The rule proves nothing; the exception proves everything". From an international legal point of view, the interesting thing about the Georgia situation was the limited ability of countries, of Western countries in particular, to

maintain exceptions for circumstances that suit them politically. We could apply a similar rationale to South East Asia, the region I now live in, where countries are extremely jealous of their sovereignty. I think they would share some similar reservations to Switzerland in what in other contexts have been called “foreign entanglements”. There has also been – ill-founded, I think – a great deal of concern about doctrines like Responsibility to Protect. But it is also a region where states have watched the situation in Europe and in the Caucuses with great interest and some concern.

That, again, was the long answer. The short answer is: the Russian action was unlawful, and the recognition by Russia is a political statement. The question of whether South Ossetia becomes independent raises the question of secession in international law, a bit like Kosovo. The act of recognition might be seen as intemperate. However, whether a country can separate into two is not really a legal, but a political question. It's only once that has happened that international law comes into play. So, eventually, Kosovo will become recognized, I assume, by enough countries that it assumes international legal personality. At the moment, it looks like South Ossetia will remain, like the Turkish Republic of Northern Cyprus, recognized only by a very small number of countries, probably only one or two.

Zwahlen Pedro: To bring the discussion back to the core of the purpose of this hearing, I would like to come back for a moment to the issue of neutrality. You said that the understanding of neutrality was not necessarily linked to security policy and that our understanding of neutrality could partly be dislinked from security policy. Do you see neutrality as a useful tool to maintain Switzerland's security in today's context? If you do so, in what way: as a legal framework or rather as a political conception?

Chesterman Simon: I meant to say that I would abandon "neutrality policy" as a term. However, it is clear that neutrality has, as a legal doctrine, historically safeguarded Switzerland and Swiss interests. There have been almost two centuries with no major conflict, although there are of course controversies, particularly about the Second World War.

Is neutrality useful today? That depends on what one thinks the threats are. If one thinks the threats are the first two I pointed to, then the answer is yes. I think permanent neutrality makes a direct military confrontation with another country less likely because a state is less likely to see Switzerland as a threat if Switzerland is neutral. With respect to major conflicts within the region I also think neutrality would protect Swiss interests. But that's neutrality in the narrow legal sense.

Does neutrality policy help Switzerland? I'll be a bit provocative and say that it hurts Switzerland because countries don't know what Swiss policy is. Neutrality is sometimes invoked in the policy sense, in particular with respect to peace operations, but the fact that around the table we would probably not be able to agree on what neutrality policy entails means that it complicates Switzerland's foreign relations and the perception of Switzerland around the world. So, I would separate out the legal conception of neutrality – that Switzerland commits not to be a party to a conflict – from how Switzerland engages in a foreign policy to try and avoid states adopting positions that are inconsistent with Swiss interests and to promote Swiss interests around the world – which is the same foreign policy that every other country engages in. I would call that security policy in terms of defending Swiss interests and foreign policy in terms of promoting Swiss interests. I don't see the need for a separate neutrality policy, as neutrality law is implemented through both security policy and foreign policy.

Thalman Anton: I think what Pedro Zwahlen was aiming at was this: how much security does neutrality bring us today in a pacified and rather united Europe? I am not sure whether the distinction you make between law and policy will answer that question.

Catrina Christian: When we talk of neutrality policy we refer to things that we do, beyond the legal dimensions of neutrality, to ensure that we can legally remain neutral in the future. You said that being neutral means, first, not to take part in armed conflicts and, secondly, not to take on any obligations that would make it impossible to remain neutral in the future. According to our conception, the term "neutrality policy" basically covers the second of these two points. It is of course highly subjective because it directly deals with the question of what impression some action or non-action might have on somebody else and with the question of how credible our neutrality is in somebody else's eyes. That is why I said the whole thing is subjective, that there are no fixed things in neutrality policy; what you are dealing with are assumptions rather than anything else.

Chesterman Simon: Permanent neutrality embraces a prohibition on activities that would make it legally impossible for Switzerland to remain neutral. That would embrace joining NATO. Beyond that, I don't see much that it would cover. So, in terms of the role that permanent neutrality plays in security policy, it is extremely important in the first two types of threats: in the direct challenge by another country and in a major conflict. However, I think such conflicts are highly unlikely. Thus I think neutrality will play a very, very small role in Swiss security policy – and that is entirely appropriate.

That Switzerland would abandon neutrality completely is highly unlikely. I would – and that again is the lawyer in me speaking – not fight a battle that I don't think is necessary. Neutrality seems to be so bound up in Swiss culture that it seems unlikely that the Swiss would want to give it up. Rather, I would try and adapt it to the very small set of circumstances where neutrality law would actually apply, however unlikely those things are. That means that neutrality should be a very, very small part of any security policy. It certainly wouldn't prohibit participation in UN-authorized peace operations – or, indeed, membership in the Security Council, even if that includes voting to authorize the use of military force. It is understood that Switzerland could at all times make a political determination whether it participated in any of these actions.

Catrina Christian: Foreigners are sometimes surprised at the fact that Switzerland has armed forces at all because, at least from a faraway point of view, our armed forces may seem to be completely unnecessary, given Switzerland's setting in one of the best neighbourhoods the globe has to offer and given the improbability of a conventional military attack on Switzerland. Yet the same could be said – at least from a faraway point of view – with regard to Australia. However, Australia has quite a strong army. So, what would you, as an Australian, respond to a foreigner who wonders what Australia needs armed forces for – beyond the fact that Australia has a huge territory to control?

Chesterman Simon: The security threats facing Australia are considerable, even if they are not traditional security threats in the sense of a military overthrow. One of our nearest neighbours is Indonesia, a 200 million strong country that has had a history of instability. There has been, a little bit like in Switzerland, a significant influx of asylum seekers or refugees. There are also the problems with the ways in which Australia has handled that question.

Australia is not living in as comfortable a neighbourhood as Switzerland, and it has an enormous sea border. Although conflict in South East Asia has reduced considerably in recent years, it was only in 1999 that Australia deployed troops to East Timor. There is also a danger of confrontation with Indonesia. More recently, Australia has deployed some troops – though mostly police – to the Solomon Islands. Australia has, briefly, also deployed police to Papua New Guinea. In brief, Australia lives near what has been termed by scholars an "arc of instability". It should probably be added that Australia has more to fear from failing states than from conquering ones. The involvement in East Timor – the East Timor operation was very popular in Australia – demonstrates that a military component can play an important role in that.

The other reason – which is not applicable to Switzerland – Australia maintains a military is to fulfil its alliance commitments. Australia has gone to war every time the United States has asked it to – sometimes very controversially. That alliance is seen as a safeguard to keep the United States as Australia's strongest ally in the event of a very bad conflagration in the region. Similar views are maintained in Singapore: Singapore is a very close ally of the United States; that alliance is partly seen as a hedge against instability. Given its small size, Singapore has a very considerable military force which it maintains for fairly obvious reasons.

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