

## EDITORIAL COMMENT

### SWITZERLAND, INTERNATIONAL LAW AND WORLD WAR II

The recent sudden upsurge of interest in Swiss behavior during and after World War II seems to call for a brief review of the international law issues that were relevant to that country's decisions. Many of them, in particular the law of neutrals, have become obsolete and are obviously not understood by many commentators. Of course, to reach a judgment that the behavior of Switzerland was compatible with the rules of international law then in effect does not dispose of issues of humanity and morality. But it does contribute to explaining Swiss behavior, particularly since the Government in Bern was quite legalistic in its approach to the questions of the time.

It has been remarked that, over time, the moral standing of neutrals has declined.<sup>1</sup> To have been neutral as between Germany and France in 1870–1871 or Russia and Japan in 1904–1905 was to stand aside from a quarrel that affected only those two parties and arguably should never have caused resort to arms. To remain neutral in 1914–1918 or 1939–1945 was to shrink from taking part in what the participants—amounting to a high proportion of the inhabitants of the globe—regarded as a crusade. Let it be remembered, however, that from 1914 to 1917 the United States was a neutral and tried, more or less, to conform to the rules of neutrality, as understood at the time. In 1917 we then went to war, believing that our neutral rights had been intolerably abused by the kaiser.<sup>2</sup> From 1939 to 1941, the United States was again neutral, although such steps as the destroyer bases deal and lend-lease took us further and further away from the traditional rules of neutrality. In 1941 we were precipitated out of neutrality and into war, not through our own deliberate decision but by the Japanese attack on Pearl Harbor and the concomitant declarations of war by Japan and Germany.<sup>3</sup>

As a culmination of the decline of neutrality came the advent of the United Nations. In that Organization it could be argued that such states as Eire and Portugal were not eligible for membership because they had not fought in World War II and hence did not meet the “peace-loving” standard.<sup>4</sup> Particularly devastating to neutrality was the grant of power to the Security Council to declare binding boycotts of offending nations, which means that there are hostilities in which nobody can be neutral. Nobody, that is, except Switzerland, which has never joined the United Nations. In effect, on such occasions as the Persian Gulf war, countries can be drafted into the service of the United Nations and compelled to interrupt communications and trade with the party designated as the offender, even though their armed forces cannot be conscripted to participate in the fighting. To be sure, there have been some episodes of serious fighting in which the Security Council has not acted—the struggle over the Malvinas/Falklands between Argentina and Britain and the long Iran/Iraq war come to mind—but the neutrality issues they generated were not highlighted.<sup>5</sup> Thus, it takes an act of historical reconstruc-

<sup>1</sup> Josef L. Kunz, *The Laws of War*, 50 AJIL 313, 326 (1956) (stating that “neutrality was looked upon as something immoral, if not criminal”).

<sup>2</sup> CHARLES CALLAN TANSILL, *AMERICA GOES TO WAR* (1938).

<sup>3</sup> For a review of neutrality practice in the period before Pearl Harbor, see HANS L. TREFOUSSE, *GERMANY AND AMERICAN NEUTRALITY, 1939–1941* (1951); the same events are seen in German perspective in FRIEDRICH BERBER, *DIE AMERIKANISCHE NEUTRALITÄT IM KRIEGE, 1939–1941* (1943).

<sup>4</sup> Admission of a State to the United Nations (Charter, Art. 4), 1948 ICJ REP. 57, 112 (Advisory Opinion of May 28) (Krylov, J., dissenting).

<sup>5</sup> See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (no jurisdiction under the Foreign Sovereign Immunities Act to hear a claim Argentina violated neutral rights by attacking neutral vessel on high seas). On the present status of neutrality in general, see Dietrich Schindler, *Transformations in the Law*

tion to understand the concepts of neutrality that were part of the framework within which states made decisions from 1939 to 1945.

First, the neutrality of Switzerland had a rather special basis in international law. It was not merely that the country chose to remain neutral but, rather, that there was an international understanding that it should remain so. Once Switzerland was a warlike country involved in repeated combat with its neighbors. Its soldiers were valued on the military labor market throughout Europe. It last experienced foreign occupation during the period of French hegemony, when it was known as the Helvetic Republic. The settlement at the Congress of Vienna produced an international declaration of November 20, 1815, that Switzerland should be "permanently neutral."<sup>6</sup> This status implied obligations for both Switzerland and other states. Switzerland was supposed to refrain from unneutral activities and other states were not to invade the country or interfere with its sovereignty. A rather similar status was imposed on Belgium somewhat later.

### I. TERRITORIAL INTEGRITY OF A NEUTRAL

The first obligation of a neutral state is to preserve its territorial integrity, that is, not to allow other states to impinge upon its soil or the airspace above it to conduct their warlike activities. Switzerland was not invaded during World War II by either side. However, there were incursions into its airspace by both sides.<sup>7</sup>

For their part, the Germans, during the French campaign in the spring of 1940, sent Luftwaffe units across western Switzerland as a convenient short cut to targets in the area encompassing Dijon and Lyons. Following their neutral duties, Swiss pilots scrambled to meet the challenge. Aerial combat resulted and aircraft were shot down by each side, with the advantage falling to the Swiss. Reportedly, Hitler was extremely angered by this action, all the more because the Swiss air force was flying Messerschmitt fighters sold to it by Germany and because Swiss pilots were hotly pursuing German aircraft into French airspace. He was also annoyed because German troops had found documents in France relating to discussions between the Swiss and French general staffs about the joint operations they would have pursued if the Germans had attacked neutral Switzerland rather than neutral Belgium and Holland. At the same time, the Swiss were interning units of the French army that had retreated to the border rather than surrender to the Wehrmacht.

During the period between the fall of France and the start of the war against the Soviet Union in the summer of 1941, Switzerland felt, and had good reason to feel, apprehension that it might be next on Hitler's list of targets.<sup>8</sup> Public choice theory would have concluded that Hitler would not attain a net benefit from invading Switzerland, but any theory that depended on Hitler's acting rationally was a dangerous guide to action. Retrospectively, we know what the Swiss did not know then, that the German general staff had been ordered to prepare a contingency plan for "Operation Tannenbaum."<sup>9</sup> The plan envisaged a swift invasion of Switzerland spearheaded by armor and air units; it recognized the dangers that would be presented if the Swiss adopted the tactic of retreating to the mountains and destroying tunnels and other choke points of communications. In June 1941, however,

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of *Neutrality since 1945*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 367 (Astrid Delissen & Gerard Tanja eds., 1991). For a rare expression of interest in neutrality, see *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Parts I & II)*, 82 ASIL PROC. 146, 594 (1988).

<sup>6</sup> 1 EDGAR BONJOUR, *GESCHICHTE DER SCHWEIZERISCHEN NEUTRALITÄT*, ch. 9 (2d ed. 1965). Bonjour discusses the difficult problems of establishing an authentic text of the declaration.

<sup>7</sup> See Kurt Bolliger, *Die Neutralitätswahrung im Luftraum*, in SCHWEDISCHE UND SCHWEIZERISCHE NEUTRALITÄT IM ZWEITEN WELTKRIEG 236 (Rudolf Bindschedler et al. eds., 1985) [hereinafter NEUTRALITÄT].

<sup>8</sup> See, e.g., Hans Senn, *Schweizerische Dissuasionsstrategie im Zweiten Weltkrieg*, in *id.* at 197.

<sup>9</sup> For a collection of German war plans envisaging an invasion of Switzerland, see WERNER ROESCH, *BEDROHTE SCHWEIZ: DIE DEUTSCHE OPERATIONSPLANUNGEN GEGEN DIE SCHWEIZ IM SOMMER/HERBST 1940 UND DIE ABWEHREBEREITSCHAFT DER ARMEE IN OKTOBER 1940* (1986).

Hitler's focus shifted east and there was no indication that he again seriously contemplated an attack on Switzerland. During March 1943, a time when Switzerland was becoming more aggressive in its trade negotiations with Germany, the Swiss were somewhat apprehensive about an attack, but there seems to have been no real cause for such concern and the alarm soon subsided.<sup>10</sup>

During the war, Switzerland was never compelled to allow German armed forces transit rights across the country. In this respect it fared better than Sweden.<sup>11</sup> That country's neutrality came into conflict with the German interest in circulating units to and from garrisons in Norway without exposing them to the Royal Navy's attacks on transport ships. While trying to impose limitations on that traffic, Sweden felt compelled to make concessions to Germany. The same applied to movements by German units across Swedish territory from Norway to Finland. The Germans felt less urgency about traversing Swiss territory since they could reach Italy via the Brenner Pass and other routes even further east. Thus, the only German soldiers who were ever transported across Switzerland were some three thousand troops so severely wounded that Swiss army doctors concluded that they would be unfit for service for a long time.<sup>12</sup>

As for the Allies, they also never invaded Switzerland. But they overflowed the country on many occasions.<sup>13</sup> The Swiss were rarely able to intercept these flights, often because they lacked radar and night fighters. Swiss cities were blacked out for a time so as to avoid guiding the raiders. The Allied flights often crossed Switzerland en route from England to targets in northern Italy. In about ten cases, bombs were dropped on Swiss territory. Most seriously, on April 1, 1944, U.S. fliers attacked Schaffhausen, a Swiss city with the bad luck to be located on the north bank of the Rhine, which, in general, forms the Swiss/German border as it flows west from Lake Constance. The United States apologized for the action and paid Switzerland compensation for the civilian dead and wounded and for property damage caused by this "violation of neutral rights."<sup>14</sup> In addition, Basel was bombed twice by the Royal Air Force. Once bombs fell ominously close to a ball-bearing factory. Many Allied entries into Swiss airspace were by bombers damaged in action over targets in Germany and unable to return home. They usually did not resist the orders of Swiss fighter pilots to land and be interned, though there were occasional misunderstandings due in large part to the fact that the Swiss were still flying Messerschmitts. In one episode, after a raid on Friedrichshafen on the north shore of Lake Constance, sixteen U.S. bombers crash-landed on Swiss soil.<sup>15</sup>

In the closing months of the war, the Swiss Government, after considerable soul-searching, decided to permit a substantial deviation from neutral behavior in the matter of troop transports. While the war with Japan was still in progress, some seven hundred thousand British troops without weapons were moved from Italy to Britain for redeployment. It was hardly likely that they would be employed in operations against Japan and the Japanese had too many other problems on their hands to file a protest.<sup>16</sup>

<sup>10</sup> WERNER RINGS, *RAUBGOLD AUS DEUTSCHLAND: DIE "GOLDDREHSCHLEIBE" SCHWEIZ IM ZWEITEN WELTKRIEG* 146–52 (1985).

<sup>11</sup> Ulf Brandell, *Die Transitfrage in der schwedischen Aussenpolitik während des Zweiten Weltkrieges*, in *NEUTRALITÄT*, *supra* note 7, at 82. For Allied protests, see 11 *Whiteman DIGEST* §33, at 405–07.

<sup>12</sup> Richard Ochsner, *Transit von Truppen, Einzelpersonen, Kriegsmaterial und zivilen Gebrauchsgütern zugunsten einer Kriegspartei durch das neutrale Land*, in *NEUTRALITÄT*, *supra* note 7, at 216. Such humanitarian transit is recognized in Article 14 of the Hague Convention on neutrality, *see* note 17 *infra*.

<sup>13</sup> Swiss sources meticulously counted 6,501 violations of Swiss airspace. DENIS J. FODOR ET AL., *THE NEUTRALS* 58 (1982).

<sup>14</sup> 11 *Whiteman DIGEST* §9, at 207–09. *See* Settlement of Certain War Claims, Oct. 21, 1949, U.S.-Switz., *TIAS* No. 2112, 132 *UNTS* 163.

<sup>15</sup> GEOFFREY PERRET, *WINGED VICTORY: THE ARMY AIR FORCES IN WORLD WAR II* at 292 (1993).

<sup>16</sup> Ochsner, *supra* note 12, at 219.

In conclusion, one should appreciate that Switzerland's policy of maintaining a substantial portion of its armed forces on a ready status imposed significant costs on the Swiss taxpayer who footed the bill, and on the citizen soldiers who for long periods of service were separated from their families and careers. These sacrifices pale into insignificance alongside those made by Allied soldiers who actually fought, but they can be fairly compared with those made by Americans who stood long, boring watches during the Cold War. It is understandable that the self-image of Switzerland in this period still centers on its citizens' belief that a German invasion was prevented by the firm stance of the Swiss armed forces.

## II. TRADE BY NEUTRALS

Trade by neutrals with warring parties was permitted under the traditional rules. This extended even to sales of weapons. The only restrictions under the Hague Convention were, first, that any limitations on sales be impartially applied so as not to discriminate<sup>17</sup> between the sides and, second, that the government itself not sell to belligerents.<sup>18</sup> The rule of evenhandedness may in fact produce differential consequences if the geographic/military situation favors one belligerent. The Swiss decision in the fall of 1939 to sell arms for a time favored France and Britain, which had put in large orders for Oerlikon anti-aircraft guns.<sup>19</sup> The fall of France gave Germany the advantage in weapons purchases thereafter, since it was only possible to smuggle small quantities of specialized components to the West from then until the summer of 1944. By way of comparison, during World War I Secretary of State Lansing told the Austro-Hungarian ambassador that the United States intended to continue its policy of selling arms to all belligerents and that, if not many sales were made to Germany or Austria, they could take the matter up with the Royal Navy.<sup>20</sup>

One sees expressions of indignation in the current writings about Switzerland during the war at the fact that the Swiss traded with the Nazis. This was not only legal, but also inevitable. From the summer of 1940 to the fall of 1944, Switzerland was surrounded on all sides by Germany and its allies. As a country of some 4.2 million inhabitants, it was hardly self-sufficient. Before the war, it had produced only about half of its food supply; for much of the war period, its citizens lived on short rations comparable to those prevailing in the belligerent states.<sup>21</sup> It also needed coal, petroleum products and raw materials to keep its factories going and to provide employment. There are statements from the Nazi camp that Switzerland was indispensable to the German economic war effort, in particular its financing assistance.<sup>22</sup> That dependency was reciprocal, for the Swiss could not have survived without German supplies.

Two things may be noted about that commerce: First, the trade was, after all, bilateral. While Switzerland was supplying Germany with weapons, electricity and machinery, Germany was constantly shipping goods to Switzerland that would have been useful to its war

<sup>17</sup> Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, Art. 7, 36 Stat. 2310, 1 Bevans 654. "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet." Article 9 reads in part: "Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents."

<sup>18</sup> This rule is, curiously, to be found in the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723, to which landlocked Switzerland was a party. Article 6 says: "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."

<sup>19</sup> Klaus Urner, *Neutralität und Wirtschaftskrieg: Zur schweizerischen Aussenhandelspolitik*, in NEUTRALITÄT, *supra* note 7, at 256, 266–73.

<sup>20</sup> 7 Hackworth DIGEST §684, at 618–20.

<sup>21</sup> JERROLD M. PACKARD, NEITHER FRIEND NOR FOE: THE EUROPEAN NEUTRALS IN WORLD WAR II at 249–52 (1992).

<sup>22</sup> Walter Funk, Reich Minister of Economics, is cited to that effect. RINGS, *supra* note 10, at 7.

effort. A fraction of German exports paid for invisible items on the Swiss side, such as interest on loans and insurance premiums, of no use to the war effort. It is therefore misleading to think of Swiss exports as simply a net gain to the Nazi war effort. Second, the Allies were fully informed about Swiss trade with the Germans, just as the Germans were kept apprised of Swiss trade with the Allies. Because there was a series of agreements, renewed about twice a year, between the Swiss and the Germans and the Swiss and the Allies,<sup>23</sup> each could be said to have consented to the trade with the adversary. That consent was necessary because the Germans could bar all traffic across their territory in a form of counterblockade. The Allies, while the territory they controlled was not contiguous to Switzerland, could prevent it from trading with neutrals, as well as themselves, through the British "navicert" system and the blacklisting of Swiss firms doing business with Germany without tacit leave.

Predictably, the terms of the trade agreements shifted with the tides of war. Except for fanatic Nazis, Europeans recognized in the summer of 1943 that, with the great Nazi defeat at Kursk and the Allied landing in Sicily, which precipitated the fall of the Fascist Government, Hitler's days were numbered. Therefore, the renewals of the trade agreement with Germany were on different terms. For one thing, the Germans were experiencing increasing difficulties in living up to their commitments to furnish coal, owing to the disruptions in the rail system, shortages of labor and heavy bombing of the Ruhr mining district. Allied pressures to disengage from Germany increased. At the same time, Swiss exports of armaments and components for arms for the third quarter of 1944 amounted to only 10 percent of the quantity shipped in 1942. Arms exports stopped completely in September 1944, as Western troops reached the border.<sup>24</sup>

Two aspects of Swiss trade practice seem vulnerable to criticism as departures from the legal rules on neutrality. First, the Swiss Government in effect advanced funds to Germany so that it could import Swiss goods; the matter became interwoven with the issues regarding the gold that flowed into Switzerland from Germany (discussed in part V below). Second, in 1941 under German pressure, Switzerland forbade the export of goods through the mails; this ban had the effect of virtually terminating the practice of sending small, but valuable, arms components to the Allies. At that time, Germany had not fully taken the matter into its own hands by controlling traffic through unoccupied France.<sup>25</sup>

### III. NEUTRALS AS INTERMEDIARIES

One of the classic activities of a neutral is the furnishing of good offices to the warring parties. Sometimes this activity has been spectacularly successful, as when Russia and Japan ended their war on President Theodore Roosevelt's yacht in the harbor of Portsmouth, New Hampshire. Antagonism between the sides in World War II reached such a level of intensity that Switzerland could not effectively perform this function. There was no room for negotiation in the face of the demand for unconditional surrender. Negotiations did take place in Switzerland for the separate surrender of the German armed forces in Italy. Acute concerns of the negotiators on both sides that Stalin and Hitler might hear about this settlement delayed it to the point that the separate surrender only narrowly preceded the final surrender celebrated as V-E Day.<sup>26</sup> The Swiss communi-

<sup>23</sup> For a description of these by a negotiator, see HEINRICH HOMBERGER, *SCHWEIZERISCHE HANDELSPOLITIK IM ZWEITEN WELTKRIEG* (1970).

<sup>24</sup> *Id.* at 109–12.

<sup>25</sup> Urner, *supra* note 19, at 281.

<sup>26</sup> RICHARD LAMB, *WAR IN ITALY: A BRUTAL STORY, 1943–1945*, at 284–95 (1993).

cations system proved technically useful in passing the messages back and forth between Japan and the Allies that led to the ceremonies of surrender celebrated as V-J Day.<sup>27</sup>

One chapter of Swiss intermediation deserves special mention. Switzerland was designated by both Germany and the Western Allies as the protecting power under the Geneva Convention of 1929 with respect to prisoners of war.<sup>28</sup> That conditions for British and American prisoners of war never descended to the levels that prevailed in other camps run by the German Government is in no small measure due to the presence of Swiss inspectors. The contrast is particularly sharp when one looks at the appalling mortality rates in camps where captives from the Red Army were confined without coverage under the Convention.<sup>29</sup> Although Japan was a signatory to the 1929 Convention, its authorities refused to take it seriously and Swiss emissaries accomplished little, one of them being executed by the Japanese in the process.<sup>30</sup> Delegates from the International Committee of the Red Cross (ICRC) accepted the growing risks connected with travel through wartime Germany in order to ensure observance of the Convention. Their presence, inter alia, reminded German camp administrators that delinquencies on their part would be communicated to the Western powers, which were increasingly in a position to retaliate as their inventory of German POWs grew. In one episode the Swiss were able to persuade the British and the Germans to cease putting their prisoners in handcuffs, a practice that had developed into a cycle of retaliation.<sup>31</sup> At the same time, the Red Cross was able to bring to the camps under its supervision both mail from home and packages of food and other necessities and amenities of life that the Germans were unwilling or unable to provide.

The ICRC has come under criticism of late from Swiss sources on the grounds that it drew its mandate too narrowly and, in the interest of preserving the smooth functioning of its prisoner-of-war operations, suppressed the information it possessed about the fate of civilian inmates of the death camps. Resolution of that question implicates such issues as whether a protest to Germany about the Final Solution would have mitigated the horrors of the Holocaust or seriously harmed the POW work by terminating German cooperation.<sup>32</sup> Similar questions are raised about the reactions of the Western Allies and the papacy to learning—at about the same time—the essential facts about the Holocaust. Toward the end of the war, the ICRC did begin to pay more attention to civilian detainees and other nonmilitary captives of the Nazis. The ICRC and other Swiss functionaries helped make arrangements with Nazi leaders that brought 1,368 Jews from Bergen-Belsen to Switzerland and another 1,200 from Theresienstadt, although other negotiations broke down.<sup>33</sup> Swiss agents in Hungary distributed documents to Jews that placed them under Swiss protection and spared them from the worst. This activity closely paralleled the better-known work of the Swedish delegate Raoul Wallenberg, who disappeared into Russian hands. As soon as the fighting stopped, the Swiss Red Cross was well positioned to bring relief supplies to the concentration camps swiftly and efficiently.

#### IV. REFUGEE POLICY

The real blot on Switzerland's honor lies in its treatment of refugees from the Nazi horrors. Neutrals have a right and at least a moral obligation to provide shelter for those

<sup>27</sup> Konrad Stamm, *Die Vertretung fremder Interessen durch die Schweiz im Zweiten Weltkrieg*, in NEUTRALITÄT, *supra* note 7, at 307, 312–14.

<sup>28</sup> Convention Relative to the Treatment of Prisoners of War, July 27, 1929, Art. 86, 47 Stat. 2021, 2 Bevans 932.

<sup>29</sup> CHRISTIAN STREIT, KEINE KAMERADEN, DIE WEHRMACHT UND DIE SOWJETISCHEN KRIEGSGEFANGENEN, 1941–1945, at 10 (1978).

<sup>30</sup> Stamm, *supra* note 27, at 314–15.

<sup>31</sup> ERWIN BUCHER, ZWISCHEN BUNDES RAT UND GENERAL 588 (1993).

<sup>32</sup> JEAN-CLAUDE FAVEZ, UNE MISSION IMPOSSIBLE? LE CICR, LES DÉPORTATIONS ET LES CAMPS DE CONCENTRATION NAZIS 367–75 (1988).

<sup>33</sup> JACQUES PICARD, DIE SCHWEIZ UND DIE JUDEN 1933–1945, at 455–61 (1994).

attempting to flee war, persecution and their attendant cruelties. However, at that time, each country, including the United States, regarded how many refugees of what types it would admit as a matter within its domestic jurisdiction. Objectionable Swiss practices began with persuading the Germans to adopt the practice of stamping the passports of German Jews with a “J.”<sup>34</sup> This episode is difficult to understand, partly because the German Government had already issued rules that would shortly force upon its Jewish population the adoption of Sara or Israel as first names. The fact that the “J” stamp was instituted at the behest of the Swiss Government was carefully concealed from the public.

Most dreadful is the turning away of some twenty thousand Jews who were attempting to escape from Nazism in 1942 after the nature of the threat to them from the Holocaust had become apparent, at least to policy-making members of the Swiss Government. The latter instituted a policy of rejecting claims for refugee status based on race, as differentiated from politics. The persons most affected were refugees from France, since reaching the Swiss border through Germany was already impossible. There was considerable protest within Switzerland as the reality became known and eventually the policy was relaxed, but much too late to avoid the destruction of these unfortunate would-be émigrés. Belatedly, the Swiss President apologized for this action during the proceedings commemorating the fiftieth anniversary of the end of World War II. The enormity of this cruel action quite overshadows the fact that it did not violate international law as it was understood in 1942. The matter became subject to international law only with the adoption of the Protocol Relating to the Status of Refugees.<sup>35</sup> The Swiss delegation at the drafting conference in Geneva argued vigorously for the proposition that a state should retain the right to turn back people who had not yet been admitted to its territory. It said: “According to that interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross its [*sic*] frontiers.” It thus justified the past behavior of Switzerland during World War II and reserved its right to act in the same way in the future. One is disturbed to find that the United States Supreme Court quoted extensively from that Swiss argumentation when it upheld the administration’s practice of intercepting refugees on the way from Haiti to the United States.<sup>36</sup>

The Swiss rejection of these terribly endangered persons took place in the context of the country’s acceptance of a very substantial number—apparently nearly three hundred thousand—of refugees of various categories from 1933 onward.<sup>37</sup> That figure includes escaped prisoners of war, soldiers seeking internment, Italians and French fleeing the oncoming fighting, and others. In relation to a population of 4.2 million, the figure compares favorably with the number admitted during that time by the United States and Great Britain. It also compares favorably with reactions by the United States with regard to Haiti, and by European countries, including Germany, with respect to the former Yugoslavia. The Swiss argument that the “boat is full” was not without some measure of validity. Among the persons who did succeed in attaining asylum in Switzerland were those who entered unlawfully with the assistance of officials and other Swiss sympathizers, Jewish and gentile. It is a symptom of Swiss hyper-legalism that the most famous official to assist Jewish refugees by irregular means, Paul Grüninger, was not “rehabilitated” until 1993.<sup>38</sup>

## V. FINANCIAL MATTERS

The original focus of the revived interest in Swiss behavior in the 1940s was the issue of numbered bank accounts maintained in Swiss institutions by persons who had perished

<sup>34</sup> *Id.* at 157–62.

<sup>35</sup> Jan. 31, 1967, 19 UST 6223, 606 UNTS 267.

<sup>36</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 184–87 (1993).

<sup>37</sup> RAUL HILBERG, *PERPETRATORS, VICTIMS, BYSTANDERS: THE JEWISH CATASTROPHE 1933–1945*, at 258 (1992).

<sup>38</sup> PICARD, *supra* note 33, at 301–02.

in the Holocaust. This Editorial Comment will not consider that subject since it is not a matter of public international law but of actions by private institutions and, incidentally, because the facts are at this point so unclear that it is hard to comment meaningfully on the complex of issues. However, that complex of issues is related to the financial activities of the Swiss Government, in particular to claims that have been or might be raised by other governments. During the war, the Swiss Government, the Swiss national bank and private institutions entered into dealings with the German Government and German individuals. There was nothing inconsistent with the status of neutrality in those activities *per se*. However, the origins of the German assets transferred to Switzerland were in some cases of such a shadowy character as to raise questions. For one thing, there were movements to Switzerland of the monetary gold reserves of the governments and central banks of states that had come under Nazi control in 1940. This practice has evoked many expressions of shock in recent discussions of "looted gold" and Switzerland's behavior. Its illegality under the rules then in place, however, is not that clear. Those rules were stated in the Regulations annexed to the 1907 Hague Convention respecting the Laws and Customs of War on Land.<sup>39</sup> Switzerland could rely on Article 53, which says that "[a]n army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State." To that extent, the Convention carried forward the old "to the victor belong the spoils" tradition. Article 46 of the Regulations provides that "[p]rivate property cannot be confiscated." There is room for argument as to whether the holdings of central banks, sometimes incorporated under commercial laws, were "strictly the property of the State" or were private. There is also a possible argument that such seizures violated Article 55, which limits occupying states in their utilization of the wealth of defeated countries to that of a usufructuary, that is, a life tenant. Taking the wealth of an occupied country in such a way as to deprive it permanently of these resources might violate that provision. Swiss state responsibility would be derivative of the German. Although the law of involvement in international wrongs by states that in municipal legal systems might be categorized as co-conspirators, joint tortfeasors, aiders and abettors, or receivers of stolen property was not well developed in the 1940s (and is not far advanced today), it could be argued that Switzerland did incur such responsibility. That reasoning would require dealing with such possible defenses by Switzerland as that it had acted in good faith, ignorant of the precise origins of the gold, that it had passed the gold on to other states, and that it was entitled to a setoff for funds advanced to Germany. Swiss bankers in 1944 obtained an opinion about the legal questions from an eminent Swiss international lawyer, Dietrich Schindler, and in 1946, in preparation for negotiations with the Allies, obtained another opinion from the equally distinguished Georges Sauser-Hall.<sup>40</sup> Different questions would arise to the extent that it were shown that the gold had been private, both under the Hague Convention and under general human rights law.

As a matter of strict international law, the questions were laid to rest by the so-called Washington Accord of 1946 in which a lump sum settlement was agreed upon by the parties involved.<sup>41</sup> The negotiations were arduous. Stubbornly, the Swiss Government clung to the position that it was "unable to recognize the legal basis for these claims" but asserted that it "desired to contribute its share to the pacification and reconstruction of Europe." It argued that Allied economic warfare measures against Switzerland, such as the blacklisting of Swiss firms and the freezing of Swiss assets, had been of doubtful legality during the war, and in peacetime were clear violations of its rights. The agreement

<sup>39</sup> Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

<sup>40</sup> RINGS, *supra* note 10, at 79, 110–13.

<sup>41</sup> Liquidation of German Property in Switzerland, May 25, 1946, 13 UST 1118.

called for a settlement of gold claims for 250 million Swiss francs. It also required Switzerland to round up assets in Switzerland held by Germans resident in Germany and turn part of them over to the Allied occupation authorities in Germany, who assumed responsibility for compensating the German owners. That obligation was assumed by the Federal Republic and compensation was eventually paid by it.<sup>42</sup> We have recently learned that there was a postwar agreement between Switzerland and Poland transferring Polish assets in Switzerland to the Swiss Government, which used them to compensate Swiss citizens whose assets in Poland had been expropriated. Poland assumed responsibility for reimbursing its nationals.<sup>43</sup> Unlike the Washington Accord, this agreement was secret and acknowledgment of its existence had to be wrung out of the Bern Government inch by inch.

Is there any reason to suppose that the Washington Accord might be regarded as invalid under international law? The Vienna Convention on the Law of Treaties sets up several reasons for invalidating treaties, including counterparts to the standard municipal law grounds for setting aside contracts.<sup>44</sup> These include coercion, fraud and mistake. It seems a bit implausible to think that Switzerland could exert coercion on states whose armed forces had just crushed the Third Reich. Additionally, large amounts of Swiss funds in the United States were frozen under the Trading with the Enemy Act and only released after the Washington Accord. There is little authority on “fraud” or “mistake” under international law. The accounts standing between Switzerland and Germany and the occupied states were complex and subject to argument. The Allied Governments were represented by a distinguished delegation—the United States mission chief was the noted tax lawyer Randolph Paul—and had information both from the states whose gold was taken and from captured German documents and witnesses. Everybody in 1946 was anxious to get on with the business of rebuilding Europe and to set the past aside. There was general gratitude toward Switzerland for the past work of the ICRC and other Swiss agencies and an expectation that Swiss relief work would continue into the postwar reconstruction period. There was perhaps some embarrassment over the as yet unsettled claims from bomb damage to Switzerland. And there was anxiety about communism. The negotiators accepted the accord, lest “an agreement with the Swiss, which would secure whole-hearted support by the Swiss of the Allied economic security objective, should be jeopardized for the sake of a few more dollars.”<sup>45</sup> Shortly before that point, Winston Churchill had written Anthony Eden words the Swiss are prone to quote:

Of all the neutrals Switzerland has the greatest right to distinction. She has been the sole international force linking the hideously sundered nations and ourselves. What does it matter whether she has been able to give us the commercial advantages we desire or has given too many to the Germans, to keep herself alive?<sup>46</sup>

For the states involved to take a crude stab at a total figure seems an entirely natural thing to have done. It has been standard practice to settle international claims by quite gross lump sum settlements. Any claim for the invalidity of the Washington Accord seems

<sup>42</sup> There was a later agreement of Aug. 28, 1952, Liquidation of German Property in Switzerland, 13 UST 1131, which involved transfers among Germany, Switzerland and the Allied powers to settle the German property claims. The Swiss Government asserted that there were no assets of “heirless Nazi victims” but stated that it would give sympathetic consideration to their dedication to a charitable cause if any were found thereafter. See the letter related to the agreement, Aug. 28, 1952, *id.* at 1143.

<sup>43</sup> FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 14, 1997, at 58–59.

<sup>44</sup> *Opened for signature* May 23, 1969, 1155 UNTS 331.

<sup>45</sup> [1946] 5 FOREIGN RELATIONS OF THE UNITED STATES 216.

<sup>46</sup> 6 WINSTON CHURCHILL, THE SECOND WORLD WAR: TRIUMPH AND TRAGEDY 712 (1953), *quoted in* HOMBERGER, *supra* note 23, at 131, and BUCHER, *supra* note 31, at 589. The context of the quotation was advice to Anthony Eden about the position the Allies should take regarding Switzerland vis-à-vis Stalin.

farfetched. As this Comment went to press, the U.S. Government issued a report sharply critical of the accord, but no move to set it aside seems to be in prospect.<sup>47</sup>

#### VI. CONCLUSION

On the whole, the behavior of the Swiss Government during World War II was in compliance with the rules of international law, including the rules of neutrality, as they were then understood. There were lapses in connection with trade and transit, though some of them leaned in favor of the Allies. With respect to the gold transactions, it does appear that there were violations of international law, but that fifty years ago a reasonable and binding settlement of those claims was achieved. A case can be made for the proposition that the trespasses on Switzerland's rights as a neutral that were committed by the warring parties were substantially more serious than the Swiss lapses. When one passes from legal to moral questions, the issues become much more subjective and this Comment cannot deal confidently with them. It is, however, worthwhile to think about Winston Churchill's contemporaneous judgment, that of a statesman who knew how difficult it was to navigate the ship of state in such turbulent waters.

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<sup>47</sup> N.Y. TIMES, May 8, 1997, at A1.