

SWITZERLAND, NEUTRALITY AND THE UNITED NATIONS

I. INTRODUCTION

Apart from some mini-states (such as Andorra, Liechtenstein, Monaco, Nauru, San Marino and Western Samoa), no state, with the exception of Switzerland, has voluntarily remained outside of the Organisation of the United Nations. Outsiders may well be justified in wondering whether this is not a peculiar state of affairs. Indeed, even Swiss insiders have recently begun to question the wisdom of continuing this policy. In 1967, five National Councillors asked the Federal Council to draft a report analyzing the prospects and possibilities of Switzerland's joining the Organization of the United Nations without causing prejudice to its status of neutrality.¹ On June 16, 1969, the Federal Council submitted an extensive report to the Federal Assembly which involves a fundamental reappraisal of the whole Swiss relationship with the United Nations.²

In the main, two factors have thus far kept Switzerland outside of the United Nations: a) its *neutrality*; and b) the fact that the decision of adhering to the United Nations would have to be submitted to a *compulsory referendum* by the people and the cantons. It will be the purpose of this article to elaborate both these factors and to explain in some detail Switzerland's co-operation with, and attitude with regard to, the United Nations, as well as Switzerland's auto-interpretation of its neutral status. The interest of such a discussion goes beyond the geographical range of Switzerland alone. For it necessitates both an evaluation of the present role of the Organisation of the United Nations and of the rules of international law governing the status of neutrality.

In the following paragraphs we shall, therefore, discuss first, Switzerland's relations with the United Nations (with the Organization itself, its various organs and the specialized agencies); secondly, the evolution, present situation, and future development of the United Nations as viewed from Switzerland; and thirdly, the Swiss status of neutrality (its origin, sociological foundations, and compatibility with the U.N. Charter).

1. Messrs. Bretscher, Conzett, Dürrenmatt, Eggenberger, and Furgler. The National Council is one of the two chambers of the legislature (the Federal Assembly). It is composed of 200 members chosen according to population. The Council of States, the other legislative chamber, is composed of two representatives of each of the 22 cantons. The Swiss Government is the Federal Council, composed of seven members. Each Federal Councillor is simultaneously member of the Government and Head of one of the seven Departments (Ministries). The seven Federal Councillors are collectively responsible for decisions of the Government.
2. Feuille fédérale de la Confédération Suisse (hereinafter: Ff) 1969 I 1457-1617.

II. SWITZERLAND'S RELATIONS WITH THE UNITED NATIONS

The Questions of Adherence

In 1945, the Swiss Federal Council set up a committee of experts to examine the possibilities of admission to the United Nations. The commission came to the unanimous conclusion "that Switzerland could not stand aloof from a world organization such as the United Nations, which aims at instituting a durable system of peace, but that the special situation resulting from the Confederation's permanent neutrality ought to be safeguarded".³ The Federal Council did not, however, submit any request for admission, nor did it initiate talks designed to secure recognition of the Swiss neutrality status. This attitude was probably the result of the initial cool indifference in regard to neutrality on the part of the United Nations. Some Switzerland was simply not prepared to relinquish its neutrality for the sake of joining the United Nations, the view prevailed that neutrality was incompatible with the U.N. Charter (cf. *infra* page 154).

Actually, Switzerland's aim would have been the attainment of a special status, analogous to the one it had enjoyed in the League of Nations. The Covenant of the League, in article 16, provided that, if a member state were to resort to war, the other members undertook to apply sanctions, including the severance of all trade and financial relations, and to afford free passage through their territory to the armed forces of member states. This requirement being incompatible with the obligations of a permanently neutral state, the Council of the League of Nations decided, on February 13, 1920, that Switzerland would be obliged to participate only in economic and financial sanctions against a Covenant-breaking state, but would not be bound to participate in any military action.⁴ Thereupon, Switzerland joined the League; its neutrality was referred to as a "differential" or "qualified" one. When the League's system of collective security began to crumble in the 1930s, Switzerland's request for release from the obligation to participate in economic and financial sanctions was granted on May 14, 1938. Switzerland thus reverted to its traditional concept of an "integral" or "unqualified" neutrality.⁵

The grant of a special status in form of a compromise arrangement seemed impossible, however, after the Second World War. In 1946, therefore, the Federal Council summarized the attitude which it intended to adopt towards the United Nations in three main principles: it intended to follow closely the work being done in the United Nations; to request the admission of Switzerland to the International Court of Justice and to specialized agencies; and to help the United Nations to install itself on Swiss territory.⁶ These directives have proved decisive ever since.

3. Rapport de gestion du Conseil fédéral 1945, p. 110; Ff 1969 I 1500-05.

4. Text in Ff 1938 I 849, 1969 I 1483-84.

5. Cf. Ff 1938 I 855, 1969 I 1484-88.

6. Rapport de gestion du Conseil fédéral 1946, p. 35; Ff 1969 I 1504.

During the tenure of Federal Councillors Petitpierre (1945-59) and Wahlen (1960-65) as heads of the Federal Political Department,⁷ the Swiss Government stated repeatedly that the time was not ripe to undertake negotiations for admission to the United Nations, and that Switzerland could render greater services to mankind as a non-member of the Organization than as a member. This latter point disappeared in the 1969 report of the Federal Council, which was drafted during the tenure of Federal Councillor Spühler (1966-69). However, the Swiss Government still *refrained, for the time being, from recommending entry* into the United Nations. It explained its reserve by invoking the scepticism or indifference towards the United Nations of a large part of the Swiss people. The Government was contented, therefore, with a *rapprochement*. It announced that it envisaged, among other measures, an increase of financial contributions to the United Nations, its organs and specialized agencies; that it intended to further develop and make available Geneva as headquarters of the United Nations and as a center of international conferences; that it planned to augment its aid to victims of disasters occurring in foreign countries; that it proposed to increase its development aid within the framework of the United Nations; and that it envisaged to take fresh initiatives in the fostering of humanitarian law.⁸ Both chambers of the Federal Assembly assented to the proposals of the Federal Council with an overwhelming majority.

Relations with the Organization and its Organs

As early as 1946, the Federal Council set up a liaison office with the United Nations. On November 5, 1948, the liaison office was converted into an autonomous mission headed by a *permanent observer* accredited to the U.N. Secretariat. The legal status of the permanent observer and his mission are not clearly defined.⁹ In practice, the observer's mission consists in keeping the Federal Council informed of the U.N. activities; in transmitting any communications between the United Nations and Switzerland; in representing Switzerland in all organs and specialized agencies of which it is a member and which have their seat in New York; and generally in acting as a liaison with the Secretary-General.¹⁰

Switzerland is a *mere observer* in five out of the six main *organs* of the United Nations: in the General Assembly, as well as its main commissions, standing committees and other organs (e.g., the International Law Commission), the Security Council, the Trusteeship Council, the Economic and Social Council (ECOSOC), and the Secretariat. It enjoys a consultative status in the four regional commissions subordinated to the ECOSOC, and in particular in the Economic Commission for Europe (ECE). Unlike the Federal Republic of Germany—likewise not a

7. Ministry of External Affairs.

8. Ff 1969 I 1584-87.

9. See U.N. Doc. ST/LEG/8 (1962), p. 236, for the view of the Secretary-General; and see U.N. Doc. A/CN.4/L. 118 (1967), pp. 98 et seq.; El-Erian, Third Report on Relations between States and Intergovernmental Organizations, U.N. Doc. A/CN.4/203/Add. 5 (1968), pp. 14 et seq.

10. Ff 1969 I 1512-14.

member of the United Nations — Switzerland is not a full member of the ECE. Again without being a regular member, Switzerland pays voluntary contributions to the U.N. Institute for Training and Research (UNITAR) and the U.N. Research Institute for Social Development (UNRISD).

Switzerland *participates as a full member* in the work of one main organ of the United Nations (viz., the International Court of Justice) and of several *auxiliary organs* of the U.N. General Assembly. It takes an active part in the U.N. Development Program (UNDP), U.N. Children's Fund (UNICEF), U.N. Conference on Trade and Development (UNCTAD), Trade and Development Board, U.N. Industrial Development Organization (UNIDO), World Food Program (WFP), U.N. High Commission for Refugees (UNHCR), U.N. Relief and Works Agency for Palestine Refugees (UNRWA), and International Narcotics Control Board.¹¹

In the realm of *peacekeeping*, Switzerland served in both U.N. Neutral Commissions for Korea (supervising the enforcement of the armistice, and the exchange of prisoners of war). In 1956, it transported 3800 U.N. troops from Naples to Egypt on Swiss aircrafts at its own expense. During the Congo operation (1960/61), Swiss aircrafts transported foodstuffs and other products to the Congo, and a team of civilian doctors as well as various experts and technicians were dispatched there, at Swiss expense. In 1961, Switzerland subscribed to the U.N. bond issue. It has also contributed, since 1964, to the financing of the U.N. peacekeeping forces in Cyprus (UNFICYP). After the Middle East 6-day war of 1967, Secretary-General U Thant nominated Ambassador Thalmann for an observation mission to the city of Jerusalem. Furthermore, the Federal Council placed a military aircraft and two crews at the disposal of the U.N. observer group in the Near East (UNTSO), at its expense. In addition, Switzerland contributes to the cost of UNTSO.¹²

Geneva is the *seat of the United Nations* in Europe. It is also the headquarters of more than 150 international organizations, more than a dozen of which are intergovernmental. Among them are the following U.N. organs and specialized agencies: International Labour Organization (ILO), World Health Organization (WHO), International Telecommunication Union (ITU), World Meteorological Organization (WMO), General Agreement on Tariffs and Trade (GATT), International Bureau of Education (IBE), recently linked with UNESCO, U.N. Conference for Trade and Development (UNCTAD), Economic Commission for Europe (ECE), International Narcotics Control Board, and Office of the High Commissioner for Refugees (UNHCR). The Geneva Office of the United Nations comes second in importance after New York, to be sure, but it has the fullest concentration of specialized agencies and organs of the General assembly.¹³

11. Cf. Ff 1969 I 1529-37.

12. Ff 1969 I 1515-23.

13. Ff 1969 I 1505-12.

Relations with Specialized Agencies

Switzerland exemplifies the fact that membership in specialized agencies is not necessarily dependent upon membership in the United Nations. For Switzerland, while being a non-member of the political organization of the United Nations, is a *full member* of all *specialized agencies* except those dealing with financial and monetary questions. In the first place, it is a member of those organizations which, having been set up before World War II, have since, through agreement with the ECOSOC, become specialized agencies in accordance with article 63 of the U.N. Charter. These are the International Labour Organization (ILO), the International Telecommunication Union (ITU), and the Universal Postal Union (UPU). In the second place, Switzerland is also a member of most specialized agencies set up after the establishment of the United Nations: the International Civil Aviation Organization (ICAO), the Food and Agriculture Organization (FAO), the U.N. Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the World Meteorological Organization (WMO), the Intergovernmental Maritime Consultative Organization (IMCO), the International Development Association (IDA), and the International Atomic Energy Agency (IAEA, which is not, however, strictly a specialized agency). Switzerland is not a member of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), nor of the International Finance Corporation (IFC).¹⁴

In summary, it would seem superficial to discern in Switzerland's non-membership in the United Nations but an aloofness or a lack of solidarity or interest with the burning multilateral international problems of our time. Rather, Switzerland participates in all predominantly *technical* activities of the United Nations. But why not in the *political* activities, too? The 1969 report of the Federal Council ponders the pros and cons of a Swiss membership in the political organs of the United Nations at some depth. Our next paragraph will describe how the Federal Council evaluates the evolution of the United Nations since 1945, and the present role of the world organization. The compatibility of neutrality law and neutrality policy with membership in the United Nations will then be examined in the last paragraph.

III. THE CHANGING ROLE OF THE UNITED NATIONS, AS VIEWED FROM SWITZERLAND

Evolution of the United Nations since 1945

The 1969 report of the Swiss Federal Council emphasizes six main factors which have, in its opinion, decisively altered the actual structure of the United Nations.¹⁵ These are:-

- a) First, the *failure* of the Charter's system of *collective security*. In most cases, the Security Council has failed to accomplish its mission to decide on enforcement action in the event of threats to the peace,

14. Ff 1969 I 1537-49.

15. Ff 1969 I 1560-67.

breaks of the peace or acts of aggression. The Federal Council's report places the blame for this state of affairs squarely on the permanent members of the Security Council. The viability either of replacing the Security Council by the General Assembly, or of supplanting the collective security system by peacekeeping actions is doubted.

- b) Secondly, the transformation of the United Nations from an alliance of the victorious states of the Second World War into a *virtually universal organization*. The Swiss Government's report points out that entry of newly independent states into the United Nations is equivalent to world-wide recognition of their sovereignty.
- c) Thirdly, the *influence of the cold war* between the United States of America and the Soviet Union is considered *declining*. It is alleged that the East-West opposition has ceased to be a predominant factor within the world organization.
- d) Fourthly, to a large extent, *decolonization and problems of the Third World* have replaced earlier East-West antagonisms. The Federal Council's report praises the United Nations for having steered the decolonization movement on a relatively smooth course and having served as both a catalyst and a buffer between the great powers. Nevertheless, the Swiss Government considers that the composition of the majority in the General Assembly and the "one state — one vote" rule manifestly do not reflect the real distribution of political forces.
- e) Fifthly, and in the same context, the Swiss Government points out that the *problem of the mini-states* is *still unsolved* and requires attention. The Secretary-General's proposals for some form of association for the micro-states with the United Nations are mentioned.¹⁶ The Federal Council insists that Switzerland would certainly not wish the same associated status as a mini-state.¹⁷
- f) Sixthly, the Federal Council stresses the *increasing multi-lateralization of international politics*, not only in the technical, economic and legal fields, but quite generally in the realm of politics.

The Present Situation in the United Nations

The Swiss Federal Council's 1969 report qualifies the work of the *technical organization* of the United Nations as *constructive*. This includes the whole network of specialized agencies, the bodies concerned with development aid directly linked with the General Assembly, as

16. ONU, Chronique mensuelle, vol IV, no. 9 (Oct. 1967), pp. 147-49.

17. On the notion of a "mini-state" see UNITAR Series No. 3 (1969), Status and Problems of Very Small States and Territories. The UNITAR study concludes that there are many ways to define a mini-state but they are all more or less arbitrary; the use of a single variable is too narrow a conception; the three most important variables are area, population and gross national product. The study enumerates 96 mini-states with a population of less than a million (48 with 1-100'000, 30 with 100'001- 500'000, 18 with 500'001 - 1'000'000). Of these 96 mini-states 44 have an area of 1 - 1'000 square kilometres, 19 of 1'001 - 10'000 sq. km, 21 of 10'001 - 100'000 sq. km, 12 of 100'000 - 825'000 sq. km.

well as the International Court of Justice. By contrast, it considers the situation of the *political* organization of the United Nations as *precarious*.¹⁸ To buttress this charge of precariousness, the report refers to the heavy financial indebtedness of the Organization and its powerlessness in the face of the Soviet military occupation of Czechoslovakia and in the wars in Viet-nam, in the Middle East, in Yemen and in Nigeria.

The Swiss Government refuses, however, to blame the United Nations for the development of the international relations. It applies the old adage that every people gets the government it deserves to the United Nations. An organization can be neither different nor better than its members wish it to be. The present world organization merely mirrors the political structure of humanity in its racial, religious, ideological and doctrinal complexity and in its historical evolution.

Where, then, lies the *actual utility of the United Nations* ? The Federal Council answers as follows: "It is inevitable that the United Nations, as at present organized, should be unable to claim spectacular successes. Its scope of action lies in its ability to exert moral pressure and to isolate an aggressor, even one who is not a member of the Organization. Its general role is essentially a preventive one; it is to prevent situations from deteriorating, to contain and neutralize nationalistic passions, and patiently to seek new channels for international co-operation. Viewed from this realistic angle, it represents the sole world-wide organization capable of reflecting the aspirations of the civilized world in the concrete form of a peaceful community of peoples. Its most important asset is that it provides a forum in which international disputes, if rarely settled conclusively, can be discussed, and, with the element of acrimony mitigated, at times be rendered harmless. It also provides a meeting place where the representatives of every nation and every race may forget protocol."¹⁹

"The United Nations, like the League of Nations, is not a perfect institution; it is rather a compromise between the ideal of a peace organization and the political adaptability of a world still torn by rival nationalisms and ideologies. The precarious peace we have today is only marginally due to the efforts of the United Nations, which can never be the guardian of peace, however much it may be consolidated and expanded. At best, it can only be an instrument in its service — at least until we obtain world-wide disarmament. And we are a long way from achieving that. As long as nations can impose their national ambitions by force of arms, the concept of collective security will remain a distant utopia. The path the United Nations has chosen is nonetheless the right one. The United Nations is the only attempt to achieve world-wide order to which we can bear witness. It is also the greatest achievement in the cause of peace, with the highest degree of universality ever attained, that the international community has ever undertaken."²⁰

18. Ff 1969 I 1567-70

19. Ff 1969 I 1569.

20. Ff 1969 I 1570.

Neutral Switzerland and the Political United Nations

Detractors of neutrality might wonder whether Switzerland is not leaning back in a snug armchair in a secure geographical spot and philosophizing about the evils of the world around it. Indeed, permanent neutrality has often been blamed for its alleged egoism, isolationism and indifference. That is too facile a view, however, though there is an element of truth in the reproach. It is true in the sense that there is something paradoxical in Switzerland's attitude towards the United Nations. On the one hand, the Organization's collective security system is considered inimical to the institution of permanent neutrality. Superficially it would seem, therefore, that the less effective the collective security system is, the less endangered is the status of neutrality. Yet on the other hand, some Swiss blame the United Nations for being inefficient, and its collective security system for being a failure. Undoubtedly, there is some inconsistency in these two arguments.

On the whole, nonetheless, the whole tenor of the Federal Council's report is favourable to the United Nations. Those who should think that it is not favourable enough must be reminded of two factors. First, the report is addressed to an internal rather than an external audience. And for those knowing Swiss internal policy, it is unmistakable that the 1969 report constitutes a major turnabout in the history of Swiss relations with the world organization. Rarely has an official governmental statement been so full of understanding and sympathy to the United Nations. The other point which must be made is this: Switzerland is a small and neutral state which lays great emphasis on local self-government and semi-direct democratic institutions, such as referendum and initiative votes on the federal, cantonal and communal levels. An occasionally atavistic fear of being manipulated by less democratic superpowers operating in the name of a pretended common interest — which in truth is but their own — makes most Swiss recoil from a collective security system, ineffective though it may be (cf. *infra* page 151).

Despite these fears, the Federal Council supports the purposes and principles of the U.N. Charter, which are those of Switzerland, too. "Peace and the world as a whole have, in certain ways, become indivisible. The interdependence of modern states and the multilateral evolution of international relations oblige Switzerland also to promote and strengthen world-wide peace, respect for human rights, cooperation among peoples, and economic, social and technological progress, all of which are purposes of the United Nations."²¹ In this sense, the Federal Council acknowledges that it is of vital interest to Switzerland that the United Nations should not just continue to exist but act with increasing political effectiveness.

The main stumbling-block on Switzerland's way into the United Nations is the indifference or recalcitrance of many of its citizens, a majority of whom will have to vote authorization of an adherence to the U.N. Charter. This attitude can in turn be traced back to Switzerland's status as a neutral country. Would this status be affected by entry into the United Nations, and if so, how and to what extent? In

21. *Ibid.*

our last paragraph, we shall endeavour to answer this question by briefly reviewing the history, content, and sociological conditions of Swiss neutrality and its compatibility with the U.N. Charter.

IV. NEUTRALITY AND MEMBERSHIP IN THE UNITED NATIONS

Origin of the Swiss Neutrality

The origins of Swiss neutrality go back to the 16th and 17th centuries, more particularly to the defeat which the Swiss cantons sustained at Marignano (Italy) in 1515 and to the policy of abstention adopted by the cantons during the religious wars following the Reformation.²² What was first a purely *occasional* neutrality progressively took on the character of a *permanent* neutrality, both in terms of legal status and a consistent neutrality policy. Permanent neutrality as an international status was bestowed upon Switzerland by the Act of November 20, 1815, signed in Paris by Austria, France, Great Britain, Prussia and Russia. The Paris Act contained a recognition²³ of Swiss neutrality, the essential passage of which reads as follows:-

The powers signatories hereby "formally and authentically recognize the permanent neutrality of Switzerland and guarantee the integrity and inviolability of its territory within its new boundaries. ."

The powers hereby "recognize authentically that the neutrality and inviolability of Switzerland and its independence from any foreign influence are in the true interest of the policy of the whole of Europe."²⁴

Other countries, such as Portugal, Sweden and Spain, subsequently acceded to the Act of Paris. Similarly, the Kingdom of Sardinia recognized Swiss neutrality. The United States of America and the Soviet Union, however, have never formally recognized the permanent neutrality of Switzerland. According to article 435 of the Treaty of Versailles of June 28, 1919, the contracting parties "recognize the guarantees stipulated by the treaties of 1815, and especially by the Act of November 20, 1815, in favour of Switzerland, and said guarantees constituting international obligations for the maintenance of peace. . ." Though article 435 does not expressly mention Swiss neutrality, the Federal

22. For an authoritative history of Swiss neutrality, see E. Bonjour, *Geschichte der schweizerischen Neutralität* (4 vols. to date, ed. of 1970).

23. The Permanent Court of International Justice, in its Order of August 19, 1929, in the *Case of the Free Zones of Upper Savoy and the District of Gex* (Ser. A, No. 22, p. 20), discussed the Act of Paris as well as the Vienna Declaration of March 20, 1815. It said ". . . these instruments, taken together, as also the circumstances in which they were executed, establish, in the Court's opinion, that the intention of the Powers was, besides "rounding out" the territory of Geneva, and assuring direct communication between the Canton of Geneva and the rest of Switzerland, to create in favour of Switzerland a right, on which she could rely, to the withdrawal of the French customs barrier from the political frontier of the District of Gex, that is to say, a right to the free zone of Gex." The report of the Federal Council assumes that the Court's statement, which refers only to the establishment of the free zones, may readily be extended so as to imply a general, legally binding recognition of Swiss neutrality. *Ef* 1969 I 1479.

24. Cf. Bonjour, *loc. cit.*, vol. I, pp. 215-16.

Council nevertheless considered that it entailed an explicit confirmation of neutrality by all states signatories of the Treaty of Versailles.²⁵

In summarizing which states may at present be considered bound by the status of Swiss permanent neutrality, the Federal Council's report comes to the following conclusions :-

- a) Recognition remains valid for all states which signed the Act of November 20, 1815, or which adhered thereto.
- b) Additionally, it is valid for all states which are bound by article 435 of the Treaty of Versailles or by corresponding provisions in the other peace treaties of 1919 and 1920.
- c) Lastly, it is valid also for the powers which are bound by the declarations of the Council of the League of Nations of February 13, 1920, and May 14, 1938 (cf. *supra* page 141).
- d) Given the fact that, in the course of the Moscow Negotiations of 1955, Swiss neutrality was expressly cited as a model for the neutrality of Austria, the Federal Council assumes that those states which referred to Swiss neutrality directly or indirectly when recognizing the neutrality of Austria are equally pledged to recognition of Swiss neutrality.²⁶

Of course, this enumeration would become superfluous if it could be admitted that the Swiss status of neutrality has become a customary, instead of a merely conventional, rule of international law. We shall have to come back to this problem later on (*infra* page 150).

Between the 1st and the 2nd World Wars, Switzerland was a member of the League of Nations. On the basis of the London Declaration by the Council of the League of February 13, 1920, which has already been mentioned (cf. *supra* page 141), Switzerland pledged itself to participate in economic and financial, but not in military sanctions against Covenant-breaking states. In 1938, Switzerland reverted from this status of "qualified" neutrality to its traditional concept of "integral" neutrality.

Before studying the compatibility of Swiss neutrality with the U.N. Charter, we shall further investigate how Switzerland itself interprets its neutrality status, and whether changing sociological conditions necessitate a re-evaluation of the concept of neutrality.

Swiss Auto-Interpretation of Neutrality

The principles governing the Swiss status of neutrality have been defined in a report of the Federal Political Department of November 26, 1954.²⁷ This report distinguishes between occasional and permanent neutrality. *Occasional* neutrality, it is said, is the legal status of a state which refrains from taking part in acts of war between other

25. Ff 1969 I 1481-82.

26. *Ibid.*

27. 24 Jurisprudence des autorités administratives de la Confédération (1954), pp. 9-13.

states. *Permanent* neutrality, on the other hand, is marked by a basic determination on the part of the neutral state to renounce participation in any future warlike confrontation. Permanent neutrality may be either unilateral or conventional or both. The report regards the case of Switzerland as a combination of unilaterally declared permanent neutrality, subsequent conventional guarantees in the Act of Paris and later recognitions of Swiss neutrality.

While the principles of neutrality are basically the same for both occasional and permanent neutrality, a *permanently neutral state* alone is subject to legal obligations in *times of peace* as well as in *times of war*. The 1954 report cites three principal obligations in times of peace: The permanently neutral state must abstain from starting a war; it must defend its neutrality and independence; and it must conduct a policy of neutrality, or, in other words, it must avoid policies and actions that might involve it in hostilities on any future occasion.

The 1954 report stresses that the *conduct of neutrality policy* is a matter of free discretion for the permanently neutral state. Such a policy is likely to have repercussions on three levels: on a *military* level, a permanently neutral state must not conclude any treaty implying an obligation to wage war; it must not enter into military agreements, reciprocal offensive alliances, treaties of guarantee, or collective security arrangements. A permanently neutral state may, however, freely adhere to any humanitarian or otherwise non-political treaty. The report emphasizes that the obligations of permanent neutrality do not entail moral neutrality, do not apply to individuals or call for any limitations on the freedom of the press.

On a *political* level, participation of a permanently neutral state in international conferences and international organizations with a predominantly economic, cultural or technical purpose is considered unproblematic. Participation in political international conferences or organizations is regarded admissible only if a certain universality is achieved, and especially if all parties to a conflict participate. Despite these strictures, neutrals may offer their good offices and mediation even during hostilities. The first Hague Convention on the peaceful settlement of international disputes of 1907 provides in article 3 that the belligerents may not regard a neutral's offer of good offices or mediation as an unfriendly act.

On an *economic* level, a permanently neutral state must not, in time of peace, enter into a customs or economic union which might jeopardize its independence of political action or its capacity to live up to those obligations of neutrals which become applicable in time of war.

On the whole, the *1969 report* of the Federal Council reiterates faithfully the principles spelled out in the 1954 report of the Federal Political Department.²⁸ It demonstrates a somewhat greater flexibility and awareness of changing patterns. It explicitly rejects, for instance, the allegation that Switzerland's neutrality policy asks for a non-participation in any political organisation. The 1969 report rightly

28. Ff 1969 I 1474-80.

insists that such a principle in no way forms a classic element of the Swiss policy of neutrality, witness Switzerland's membership in the League of Nations and the Council of Europe. Nor has Switzerland always refrained from taking position on political matters, even in controversial affairs.²⁹

By and large, however, the Swiss understanding of neutrality has remained unchanged. This is so because in part Swiss neutrality is firmly anchored in long historical experience, and because in part most customary rules of neutrality law have grown in the 19th century, while most conventional rules have been adopted at the 1899 and 1907 Hague Conferences. It may be useful, at this point, to try to analyze what have been the sociological conditions at the time of the growth of these customary and conventional rules, and in what respect conditions have changed in the 20th century. This analysis is the author's own and is not based on any governmental document.³⁰

Sociological and Functional Conditions of Neutrality

Among the conditions for the formation, in the 19th century, of neutrality law in general and the Swiss neutrality status in particular the following nine factors may be mentioned :-

- a) The system of a *European balance of power*, of the so-called European concert, which was founded on the idea of polycentrism. Neutrality could hardly have grown in a power system dominated by one super-power.
- b) The *European-Christian background*. Swiss neutrality was embedded among bigger powers, but all of them had approximately the same culture, mentality, ideology, technology and race.
- c) The international law doctrine of *unlimited lawfulness of wars*. Since war was simply a "continuation of policy with different means", no fault could be found with an attitude of abstention vis-à-vis any belligerent settlement of international disputes.
- d) The strict *separation*, in theory and practice, *between peace and war* facilitated perception of the right moment for a proclamation of neutrality.
- e) *The relative importance of neutral powers*. In most conflicts of the 19th century the neutrals taken together were equally or more powerful than the belligerent states.
- f) *The various limitations upon wars* in that time. The number of belligerent states was usually small. What was at stake were

29. Ff 1969 I 1572-74.

30. See generally R. L. Bindschedler, *Die Neutralität im modernen Völkerrecht*, 17 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (hereafter: *ZaöRV*) (1956-57), pp. 1-37; C.E. Black/R.A. Falk/K. Knorr/O.R. Young, *Neutralization and World Politics* (1968); D. Frei, *Dimensionen neutraler Politik* (1969); D. Schindler, Jr., *Aspects contemporains de la neutralité*, 121 *Recueil des Cours de l'Académie de Droit International* (hereafter: *RC*) (1967 II), pp. 225-319, at 225-42.

purely military and not total, ideological conflicts. Neutrality referred only to inter-state relations, not to ideologies, class antagonisms, colonialism or development level. The possibility of an absolute indifference to warfare in terms of both space and content still existed.

- g) *Economic liberalism* which exempted private commerce from the laws of war. Only the state as such and no private individuals were required to be neutral.
- h) *Pacifistic and humanitarian endeavours*, which then amounted to a support of a neutral attitude.
- i) The necessity of *internal cohesion of Switzerland*. Swiss neutrality resulted, *inter alia*, from the need of preventing a splintering of the nation into divergent linguistic or religious groups or alliances of allegedly sovereign cantons.

Various of these factors have disappeared in the course of the 20th century. First and foremost has become the longer the more total and comprehensive, in military, ideological, economic and other regards. As a result, the U.N. Charter obliges all states to refrain from war or the threat or use of force. While in the 19th and earlier centuries unlimited recourse to warfare could be considered lawful because of the many other, complementary limitations upon warfare, the total character of modern war asks for a total prohibition. However, the previously strict line of separation between a state of war and a state of peace has become fluid. Furthermore, the relative power of neutral states is insignificant today.

Other factors have retained their justification. Neutrality may still be capable of counterbalancing the breaking up of a country into antagonistic and extremist groups. Similarly the fact that an increased polycentrism has supplanted the bi-polarity of the cold war might enhance the chances of neutrality. Of course, the context today is that of a universal interdependence between states of widely differing value systems, and no longer that of a European-Christian power balance. Nonetheless and in spite of the *changed sociological conditions*, the *functional use* and availability of neutrality is in many respects still essentially *the same*.

Today as in the 19th century, the permanent neutrality of a state is a *calculable*, stable, reliable and trustworthy *element* in any given conflict or power parallelogram. — It permits the *localisation* of conflicts. It enables the neutral state to wriggle itself out of war-like confrontations between two more powerful groups. — There is always a need for neutral third states which offer their *good offices and mediation* in international disputes. Insofar as neutrals contribute to the pacific settlement of disputes, their role is essentially the same as that of the United Nations under Chapter VI of the Charter. One is tempted to say that under Chapter VI the United Nations aims at achieving not only collective security, but also “*collective neutrality*”. — There is, furthermore, an equally clear want of neutral *humanitarian efforts* and neutral *support of international law*. — Finally, article 1 (4) of the U.N. Charter states that it is the purpose of the United Nations “to be a center for harmonising the actions of nations in the attainment of . . . common ends.”

To the extent that the United Nations serves as a “lightning conductor”, as a “clearing house of world policy” and as an international *forum* of crisis management and *conflict prevention and discussion*, neutrality again pursues the same basic aims.

The continued functional usefulness of permanent neutrality even in modern political international organizations is a point of crucial importance on the internal Swiss scene. Those who *oppose a Swiss entry* into the United Nations argue that any collective security system is fundamentally incompatible with traditional permanent neutrality. They say that it is more important to preserve the full independence and sovereignty, the time-honoured neutrality status and the “special position” of Switzerland, rather than to engage in an idle act of international solidarity by joining the United Nations, which would only endanger the credibility of Swiss neutrality policy. Other more irrational or more peculiarly Swiss characteristics may also help to explain the antipathy to the United Nations of a vocal fraction of the Swiss people. Among them are a substantial dose of isolationism; the uneasiness and distrust of a small state vis-à-vis giant international structures; scepticism about power politics and a certain double standard in the treatment of violations of human rights in the United Nations; concentration on internal policy; a strong desire to see tangible, concrete results; a somewhat perfectionist desire for quality and an urge to achieve accomplishments with one’s proper might.³¹

More and more Swiss citizens and the 1969 report of the Federal Council, too, have lately begun to take issue with those arguments against Swiss entry into the United Nations. The *supporters of Swiss membership* in the United Nations point out the continuing functional usefulness of neutrality, which I have discussed above. In their view, an activation and creative shaping of neutrality is necessary to lend credence to the realization that modern Swiss neutrality must be universal and must support international co-operation, world-wide peace and international law. The increasing multilateralisation of world politics and the simultaneously increasing concentration of all international activities in the United Nations, its organs and specialized agencies make it more and more difficult to comprehend Switzerland’s aloofness from the United Nations. The Federal Council makes it quite clear that membership in the United Nations would enhance rather than decrease a neutral’s possibility to offer mediation and good offices and to discreetly settle disputes behind the scenes.³² In addition, the United Nations has become a most useful place of international contacts and encounters. In the eyes of the supporters, Switzerland’s adherence to the United Nations would permit substantial realizations and achievements on the international scene, gains which would easily outweigh whatever risks such adherence might bring for Swiss neutrality policy.³³

31. See the arguments of National Councillors Ballmoos, Dürrenmatt, Fischer, Gianella, Hofer and Sauser, in Bulletin Sténographique du Conseil national (1969), pp. 709-48.

32. Ff 1969 I 1575-84, at 1579-80.

33. In that sense among others, National Councillors Binder, Suter, Tschäppät, Masoni, Ziegler, Schaffer, Renschler, Franzoni, Baechtold, Gerwig, Bringolf, Weber and Federal Councillor Spühler, *loc. cit. supra n. 31*.

On balance, the *Federal Council's report* of 1969 would seem to side with the viewpoint of the supporters of U.N. membership. To be sure, the Government frowns upon any go-go-activity, even in Switzerland became a member of the United Nations. Discreet reserve and caution would surely characterise Swiss external policy even after entry into the United Nations. On the other hand, the Swiss Government would hardly hesitate to speak out in favour of international law, human rights, humanitarian endeavours, or the peaceful settlement of international disputes, to mention but a few points where an eloquent and impartial third-party observer might be of considerable use. In so speaking out, Switzerland would of course continue to conduct a neutrality policy aiming at a high degree of credibility and impartiality.

Both opponents and supporters of Swiss entry into the United Nations do not agree, by and large, that neutrality be given up. They agree that neutrality has served Switzerland well. They also agree that Swiss neutrality is not destined to only serve a small country's desire for self-preservation by means of abstention. A sometimes missionary and ideological trait characterizes the common belief that Swiss neutrality does and must serve peace, justice, impartiality, human rights, and international law.³⁴

The Question of the Compatibility of Membership in the United Nations with Permanent Neutrality

The U.N. Charter speaks nowhere explicitly of neutrality. The French delegation suggested at the San Francisco Conference in a memorandum dated March 21, 1945, that one of the Charter's provisions should specifically stipulate that the status of neutrality was incompatible with U.N. membership. The French delegate explained that what he meant by "status of neutrality" was permanent neutrality. From the discussion that ensued on the French proposal, "it was understood that the status of permanent neutrality is incompatible with the principles declared (in what are today article 2 (5) and (6)) in that no state can avail itself of the status of permanent neutrality to be freed from the obligations of the Charter."³⁵ The sub-committee, on that understanding, tacitly accepted that its vote covered the French amendment.

It may be useful from the beginning to break down the broad question of the compatibility of United Nations' membership with neutrality into more specific groupings of problems :-

- a) Is the *legal position of members and non-members* of the United Nations the same, or does the U.N. Charter oblige members to certain actions to which non-members are not obliged ?
- b) Assuming the *Security Council has determined* who is the aggressor in a given conflict, does the Charter *still admit neutrality* (on the part of members and of non-members) ?

34. Cf. D. Frei, *Neutralität — Ideal oder Kalkül ?* (1967).

35. U.N. Conference on International Organization (San Francisco 1945), vol. VI, pp. 418-19, 459, 722; see also *id.* at 312; vol. III, p. 383.

- c) Assuming the *Security Council has been unable to determine* who is the aggressor state, does the Charter then *admit neutrality* (on the part of members and of non-members) ?
- d) In all these cases (a-c), does the Charter distinguish between *occasional and permanent neutrality* ?
- e) Again in all these cases (a-d), does the Charter distinguish between *military and economic neutrality* ?
- f) Does the Charter admit the existence of a *customary neutrality status* which would prevail as against the obligations of the U.N. Charter, even in the face of the supremacy clause of article 103 ?

The 1969 report of the Swiss Federal Council does not answer all these questions, but it is quite specific in most regards. Let us look in succession at most of the problems mentioned above :-

a) *Neutrality of non-members:*

Under article 2 (6) of the Charter, the United Nations shall ensure that states which are not members act in accordance with the principles of the Charter, so far as may be necessary for the maintenance of international peace and security. This contradicts the general rule of the law of treaties regarding third states, according to which a treaty does not create either obligations or rights for third states without their consent.³⁶

Some authors (such as Kelsen and Taubenfeld)³⁷ believe that non-members of the United Nations are obliged to participate in its collective security system as if they were members. The vast majority of modern authors reject, however, this viewpoint.³⁸ The Federal Council makes it quite clear that it does not regard article 2 (6) as legally binding upon Switzerland. It acknowledges that it might be difficult for Switzerland to disregard decisions of the world organization, in view of the political circumstances and pressures, the relative weight of forces involved and the predominant climate of world opinion.³⁹

In the case of the *sanctions against Rhodesia*, Switzerland considered itself not being bound by the decisions of the Security Council. Recognising that it could not ignore the policy of the world organization, it autonomously initiated measures. In particular, it subjected imports from Rhodesia to a system of permits which are issued only for imports

36. This rule was reasserted in the 1969 Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), art. 34, p. 18.

37. M. Kelsen, *The Law of the United Nations* (1950) 107-08; H. J. Taubenfeld, *International Actions and Neutrality*, 47 *American J. Int. Law* 377, 385-90, 394-96 (1953); also the Belgian delegation in U.N. Conference on International Organization (1945), vol. VI, p. 348.

38. R. L. Bindschedler, *Das Problem der Beteiligung der Schweiz an Sanktionen der Vereinigten Nationen, besonders im Falle Rhodesiens*, 28 *ZaöRV* 1, 5-7 (1968); E. Castrén, *Neutralität*, 5 *Archiv des Völkerrechts* 21, 28 (1955-56); Ch. Chaumont, *Nations Unies et neutralité*, 89 *RC* 1, 44 (1956 I); 2 L. Oppenheim/H. Lauterpacht, *International Law* 652 (7th ed. 1952); Schindler, *supra* n. 30, 245.

39. *Ff* 1969 I, 1467, 1555-56.

not exceeding annually, for each category of merchandise, the average for the period 1964 -1966. Imports are thus held at the level of the normal amount ("courant normal"). The Federal Council argues that this measure, though not constituting full participation in sanctions, ensures that their effectiveness is not compromised by the attitude of Switzerland.⁴⁰

b) *Has the U.N. Charter done away with neutrality ?*

The United Nations' initial hostility to neutrality, which is obvious in the *travaux préparatoires* (cf. *supra* n. 35), has largely vanished in the meantime. The continued existence of neutrality is presupposed in the four 1949 Geneva Conventions, the 1954 Hague Convention for the protection of cultural property in the event of armed conflict, the 1953 Korean armistice convention and the 1955 Moscow Memorandum between Austria and the Soviet Union, coupled with Austria's subsequent admission to the United Nations. Sweden, Austria and Laos joined the United Nations with no objection from any member to their admission or to the maintenance of their neutrality policy. Most modern writers reject the argument that adoption of the U.N. Charter has eliminated neutrality as an institution of international law.⁴¹

The Federal Council is of the opinion that *permanent neutrality is not inconsistent in principle with U.N. membership*, but in practice is limited by the Charter. The 1969 report says: "The concept of collective security, which is the very foundation of the Charter, is no doubt theoretically at variance with that of neutrality, which implies abstention from interference and hostilities. Collective security, on the other hand, demands that members should make common cause against the aggressor. The essential point, however, is that the intent of either concept is the maintenance of peace. In this sense neutrality in no way runs counter to the provision of the Charter: on the contrary, it marches with it, in quest of the supreme objective of the Charter. It should also be pointed out that neutrality is a status which has often

40. Ff 1969 I, 1526-29. Cf. Bindschedler, *supra* n. 38; B. A. Boczek, Permanent Neutrality and Collective Security: The Case of Switzerland and the United Nations Sanctions Against Southern Rhodesia, 1 Case Western Reserve J. Int. Law 75-104 (1969).
41. For this view see C. G. Fenwick, Is Neutrality Still a Term of Present Law ?, 63 American J. Int. Law 100-02 (1969). But see H. Accioly, Guerre et Neutralité en face du droit des gens contemporain, en Hommage d'une génération de juristes au Président Basdevant (1960), I, 4-7; Bindschedler, *supra* n. 30, 29-33; D. W. Bowett, Self-Defence in International Law (1958) 174-81; I. Brownlie, International Law and the Use of Force by States (1963) 404; Castrén, *supra* n. 38, 28-30; Chaumont, *supra* n. 38, 7-8, 30-56; A. Greber, Die dauernde Neutralität und das kollektive Sicherheitssystem der Vereinten Nationen (1967) 85-127; P. Guggenheim, La sécurité collective et le problème de la neutralité, 2 Annuaire suisse de droit international I, 29-40 (1945); H. Haug, Neutralität und Völkergemeinschaft (1962) 90-95; J. F. Lalive, International Organization and Neutrality, 24 British YB. Int. Law 72-89 (1947); U. Scheuner, Neutralität, in 2 Strupp-Schlochauer, Wörterbuch des Völkerrechts 593 (1961); Schindler, *supra* n. 30, 243-60; G. Schwarzenberger, A Manual of International Law (5th ed. 1967) 218; J. Stone, Legal Controls of International Conflict (1959) 382; A. Verdross, Die immerwährende Neutralität der Republik Oesterreich (3rd ed. 1967) 22-29.

proved its value in the practical application of international law, whereas the principle of collective security will, for a long time to come, remain utopian."⁴²

c) *Wording of the Charter :*

Under article 2 (5) of the Charter, all members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. Pursuant to article 25, U.N. members undertake to accept and carry out the decisions of the Security Council. The Security Council has the right and the duty to have recourse to measures of compulsion if it decides that there exists a threat to the peace, a breach of the peace, or an act of aggression (article 39).

The cumulative effect of these provisions is that in principle no U.N. member state is entitled, at its discretion, to remain neutral in a war in which the Security Council has decided to apply sanctions, whether non-military (article 41) or military (article 42). The Federal Council's report recognizes that equality in dealing with belligerents on both the military and the economic planes is hardly compatible with the obligation to give assistance under article 2 (5). This does not mean that the Charter rules out any possibility of neutrality. The obligation to take part in military actions becomes effective only when the neutral state has concluded an agreement with the Security Council governing the nature and extent of the military assistance to be provided (article 43). The Security Council may, moreover, in accordance with article 48, entrust the carrying out of enforcement actions to all or some of the member states. In the interpretation of the Federal Council, article 48 makes it possible for a permanently neutral state to be absolved from taking part in military or non-military sanctions.⁴³

If the Security Council is unable to determine who is the aggressor in a given war-like international conflict, member states have the right, but not the duty, to assist in collective self-defence according to article 51. Since they may abstain from participation in the conflict, they may remain neutral. Other possibilities for a U.N. member state to preserve its neutrality arise when the Security Council makes recommendations only ; when the General Assembly makes (non-binding) recommendations ; under article 106 of the Charter ; under articles 53 and 107 of the Charter ; in cases of internal conflicts between two or more groups within a member state.

Several authors have argued that the U.N. Charter has modified the classical notion of neutrality insofar as modern neutrality is restricted to the military plane. In ratifying the U.N. Charter, so the argument runs, member states have declared their willingness to subordinate themselves to the United Nations' collective security system and specifically

42. Ff 1969 I, 1552.

43. Ff 1969 I 1555. Same view: 2 P. Guggenheim, *Traité de droit international public* (1954) 274; Haug, *supra* n. 41, 93; Lalive, *supra* n. 41, 83, 88; Verdross, *supra* n. 41, 26-27; Schindler, *supra* n. 30, 249 n. 9.

to Chapter VII of the Charter. Any member guilty of a war of aggression in violation of the principles of the Charter has, therefore, declared in advance that it will not consider the participation of neutral member states in economic sanctions according to article 41 as a violation of neutrality.⁴⁴

In essence, there are two ways of tackling the problem. According to one viewpoint, U.N. member states have a right, but no duty, to discriminate against aggressor states; they may choose (in the absence or even in the presence of an authoritative determination by the Security Council) whether they wish to remain "integrally neutral" in the traditional sense of the term, or whether they will discriminate against the aggressor, thus opting for the status of "qualified neutrality", "non-belligerency" or "non-participation". According to another viewpoint, U.N. members can no longer be integrally neutral, but are differentially neutral. They *must* discriminate under the new law of the Charter, at least if the Security Council has identified the aggressor.

If one carries the latter argument one step further, then sanctions against wars in violation of the U.N. Charter are no longer "wars" in the sense of classical international law. Military measures under the Charter no longer being wars, neutrality too has changed its meaning, in this view. Participation in military sanctions would, therefore, violate the duties of a neutral no more than participation in economic sanctions.⁴⁵

Without being very specific about these points, the 1969 report of the Federal Council takes a quite clear position. Its basic assumption is that the Charter has not modified traditional neutrality nor the neutral's duties. Its basic preoccupation is how to preserve Switzerland's neutrality even after entry into the United Nations.

Subsequent speeches of the head of the Federal Political Department, Federal Councillor Spühler, before the Federal Assembly have left no doubt that Switzerland wishes to join the United Nations only if it can preserve its integral military and economic-political neutrality. In view of articles 43 and 48 of the Charter and the writing of qualified publicists this attitude is certainly tenable; the measure of its realization will depend on the future development of the international community and particularly on the degree of effectiveness of the present or any future collective security system.

d) Is Swiss neutrality a customary or conventional status ?

Article 103 of the Charter stipulates that in the event of a Conflict between the obligations of the members under the Charter and any other international obligations, even if the latter preceded the Charter's

44. 2 Oppenheim/Lauterpacht, *supra* n. 38, 648-49; F. Seyersted, United Nations Forces (1966) 260-62; Q. Wright in 50 *Annuaire de l'Institut de droit international* (1963 I) 125; J. Zourek, 50 *ibid.* (1963 II) 318-19, 350. *Contra*: Schindler, *supra* n. 30, 256-60.

45. In that sense A. Galina, *Das Problem der Neutralität im gegenwärtigen Völkerrecht*, in: *Gegenwartsprobleme des Völkerrechts* (1962) 152, 179; P. Georgieff, *Aspects juridiques de la neutralité*, VIIe Congrès de l'Association Internationale des juristes démocrates (1960) 103-04. Their view is criticized by Schindler, *supra* n. 30, 253-56.

entry into force, the members' obligation under the Charter shall prevail. There is no doubt, of course, that the status of Switzerland's permanent neutrality has been firmly anchored in *conventional* law since 1815 (cf. *supra* page 148). The United Nations' International Law Commission has twice adopted the view that Switzerland's neutral status may be deemed to be well established in *customary* international law.⁴⁶ This is a highly interesting standpoint. If Swiss neutrality is held to have acquired the characteristics of customary law over the last 150 years, and not merely since 1945, and if it was still customary law as of 1965, then there is every reason to assume that the U.N. Charter could not and did not invalidate Switzerland's neutrality status.

The Federal Council adduces this argument in further support of the proposition that permanent neutrality is compatible with membership. It adds a cautionary note, however, to the effect that it realizes that article 103 might also be interpreted so as to obliterate any customary status of permanent neutrality.⁴⁷

e) Realization of Swiss Neutrality under the U.N. Charter

Finally, it may be useful to inquire how the Federal Council imagines that Switzerland's integral neutrality can be inserted into the framework of the United Nations. *Five different possibilities* are envisaged: entry subject to specific reservations in respect of neutrality, admission combined with an agreement in accordance with article 43 of the Charter, association or consultative status, admission with no express reservation of neutrality, admission with no express reservation but a unilateral declaration prior to admission. The first three variants do not seem probable to the Federal Council; at the present moment, the latter two seem more likely to the Swiss Government.⁴⁸ The point is left open, however, since this delicate question may have to be answered anew when the time for Switzerland's entry into the United Nations is at long last considered ripe.

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46. Yearbook of the Int'l Law Comm'n 1964 II 184, 1966 II 231.

47. Ff 1969 I 1553-54.

48. Ff 1969 I 1556-60.

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