

Research summary PNR42+

Swiss foreign policy's flexibility for legal action against the South African Apartheid regime

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1. Study Goal and Content

Public condemnation of human-rights violations and especially the sanctioning of such behavior by third states are a relatively new phenomenon. Their beginning and further development are linked in many ways to the international community's stance against the South African Apartheid regime. Until long after World War II even the worst human-rights violations occurred beyond the scope of international judgment. In accord with prevailing viewpoints, third-state reactions at the time represented intrusions into broadly understood state sovereignty. As a result, other states had neither a justification nor even a responsibility to react to the relationship of states and individuals subject to their jurisdiction defined only by national law. This legal situation presented itself all the less satisfactorily, since international law scarcely had central legal entities entrusted with its implementation that could be summoned in such constellations. Compounding the problem was the fact that the UN system of collective security was hardly functional during the Cold War either.

All the more important when viewing this near vacuum of legal and practical tools to implement multilateral international law in such a legal system seems to be the authority and obligation to implement law bilaterally by third states as well. In the case of Apartheid – as one of the few examples of a policy characterized universally and uniformly as a violation of human rights during the Cold War period – an almost universally observed practice could meanwhile be observed for the first time. Even states not directly affected reacted to the worst international law violations of a third state to the extent that trade contacts with the Cape republic were restricted, even if to a greatly varying degree. Switzerland was one of the few states that remained largely passive, apart from its embargo on war material enacted on the basis of the war material law and a restriction on financial exports that was filled with loopholes.

Therefore, this study clarifies both the degree of Switzerland's justification in international and also national law by means of unilateral measures against South Africa to motivate observation of international law. In other words, it studies whether regulations under international, neutrality, and constitutional law restricted Switzerland's flexibility to act and can thus explain its lack of will to join the international sanctions against this state (Section 2). On the other hand, it examines – from an opposing viewpoint – if possibly normative and already contemporary obligations by now clearly tangible had even obligated Switzerland to conduct a more active South Africa policy, i.e., to react to the South African human-rights violations (Section 3). Nevertheless,

this work does not claim to be a comprehensive legal judgment of Switzerland's South Africa policy. Its approach is more modest: it seeks to present the status of relevant norms of international and national law for Swiss South Africa policy during the Apartheid period and clarify the compatibility of these two legal regimes. Only in individual areas does it also examine in exemplary manner if the Swiss practice could actually correspond to these fundamentals. Contemporary law serves as the basic gauge for such a judgment. However – as a consequence of our study period's first few years – differentiation between the law prevailing today and at that time is not always easily visible. Hence for this reason the current legal situation is also worked out in parallel.

2. The justification for reacting to South Africa's violations of international law: Switzerland's options

Though only affected indirectly by South Africa's legal violations, Switzerland was justified by international law to react with reasonable countermeasures to the Apartheid regime's violations of international law. Such measures would have represented no intrusion into South Africa's domestic affairs. They could have occurred in a manner always permitted under international law – perhaps in the form of diplomatic sanctions – but also disregarding bilateral legal relations, perhaps by unilateral failure to apply an international treaty norm. Hence Switzerland would have been authorized at the time to suspend the friendship treaty with South Africa or the bilateral dual taxation agreement. Moreover – in contrast to a viewpoint represented by the Federal Council – specific international law regulations set no further limitations on Switzerland's flexibility to act. In particular, Switzerland would even have been entitled to enact laws with extraterritorial range if a sufficient point of linkage existed. Doubtlessly legal regulation of foreign business deals in the realms of war material and nuclear policy concluded in Switzerland presented such a case.

Despite updating the neutrality case through the South Africa-Angola conflict, neutrality law obligations hardly narrowed Swiss foreign policy's room for maneuver in taking foreign trade measures against South Africa. Switzerland never summoned arguments based on neutrality law, as it assumed that neutrality law did not apply. Even neutrality policy precepts that were hardly cited as postscripts at the time to justify Swiss South Africa policy restricted this maximum reaction only to the extent that it had forbidden foreign policy to pursue such a unilateral maximum reaction in the sense of a go-it-alone measure. In view of the universal sanctions front against South Africa, Swiss participation in embargo measures would hardly have implied a prejudice of its position in a future conflict. It would much rather have presented a position favoring the lawbreaker, since neutrality policy considerations hardly opposed enactment of actual sanctions or a unilateral *courant normal* by Switzerland.

The universality pillar adopted an essentially more dominant role at the time in the conceptual foundation of South Africa policy: In exclusively following this guideline of foreign policy at the time, Switzerland's failure to take part in sanctions was elevated to a dogma of Swiss foreign policy. Yet an objective (i.e., comprehensive) consideration of all foreign policy guidelines of the time would hardly have narrowed Swiss room for maneuver against South Africa or only have limited it marginally. Even the goals of foreign policy that gradually congealed into constitutional common law during the 1980s – particularly engagement for on behalf of human rights and solidarity with the international community – suggested a change in behavior but found no expression in operational design of Swiss South Africa policy.

Thus the Apartheid era's foreign-policy pillar of the time would in no way have prevented the Federal Council from stabilizing trade with South Africa by decreeing a binding unilateral court normal or taking part in sanctions against South Africa to an extent comparable to Switzerland's most important trading partner. Still the Federal Council sometimes based its policies on these pillars and on constitutional standards in order to give a legal underpinning to its policy of rejecting any sanctions against South Africa on principle and thus protecting it against attack.

In order to achieve this goal, it did not shrink from interpreting constitutional provisions in a way deviating from its normal practice while basing its decisions unilaterally or on the foreign-policy pillars in a completely result-oriented manner. This resulted in the latter losing their function and their meaning being left open to voluntary interpretation.

National restrictions on private trade with South Africa already represented an infringement on basic rights at the time. Therefore, the maximum reaction allowed to Switzerland in the foreign trade sphere was largely determined by assumptions of intervention into free trade and commerce at the time and specifically of the presence and structure of legal principles.

While the motivation for intervention in foreign trade freedom was not to protect domestic business but to carry out interests of the international community, the law on foreign trade – and particularly the laws on war material and nuclear policy – indicated conscious loopholes justified by some legally unacceptable arguments. Therefore, the federal government often lacked the formal legal tools needed to take part in a manner compatible with basic rights regarding measures against South Africa in the sectors mentioned. This classification can be demonstrated by the lack of state regulation of technology transfer and of foreign agent businesses as well as of dual-use goods export. Thus the Federal Council pursued a one-sided policy in the trade sector supported by a majority of Parliament. Its marker was the universality pillar. Despite potential danger for other foreign-policy interests, it aimed to affect the commercial interests of Swiss firms as little as possible. By constantly reaffirming the alleged legal and practical impossibility of the state regulating agency deals and later technology transfers as well as export of military and nuclear dual-use goods in general, the Federal Council kept Parliament from even discussing the necessity of a legal change. Yet the Federal Council not only engaged in pointedly and successfully preventing Parliament from closing possible loopholes; it was also reluctant as the issuer of decrees – with one exception in the final phase of the Apartheid regime and under pressure from the international community – to subject export of dual-use goods to any effective controls.

Meanwhile, the Federal Council could largely have countered the shortage of formal legal principles for foreign trade based on its direct powers under the constitution to issue decrees or assume authority. This has been illustrated for some time by Swiss participation in sanctions agreed upon within and outside the UN's institutional framework since 1990 that – given the same legal situation – were based on such a principle of national law. Thus national law at the time hardly confined the room for maneuver of foreign-policy actors in any notable way. Without doubt it would have enabled Switzerland to join measures directed against South Africa to the same degree as its most important trading partners.

These examples as well as others also within the scope of this study (capital export, gold and diamond trade, bilateral air traffic, and the export risk guarantee) prove that neither international nor national law at the time would have constrained foreign-policy options to any notable degree from reacting to South Africa's human-rights violations and joining the international sanctions movement. Hence Switzerland's consistent refusal to take effective foreign-policy measures against South Africa can in no way be explained as a result of the legal situation at the time. Rather it hinged exclusively on a basic decision motivated by business policy to avoid con-

straining foreign trade with the Apartheid state as much as possible. On the contrary, it actually aimed to promote it.

3. The obligation to react to South Africa's violations of international law: Switzerland's responsibility to act or refrain from action

Switzerland at the time stood under no direct obligation of international law to react to South Africa's violations of international law. Thus there was no determination then that would have forbidden support services by third states beside the incriminating conduct of South Africa. Nor was it demonstrable that conduct by Switzerland or its administrative bodies would have violated existing standards of international law directly.

Meanwhile, a Swiss obligation to refrain could easily have been deducted at the time by assuming a general ban on abetting international-rights violations. However, a normatively clear binding effect of this legal form cannot be proved with enough certainty for the relevant period studied here. Therefore, a Swiss obligation to modify its South Africa policy cannot be supported by this legal form. Yet international law provided an exception, i.e., in case of verified violations, precisely in common law during the period relevant here and thus applying universally to the solidarity obligations of third states. Specifically international law of the time determined the following minimum obligations of third states in case of systematic violations of international law's qualified norms:

- to ban situations recognized as creating verified violations of international law,
- to ban obstruction, i.e., to ban obstruction of other states' efforts that strive to end verified violation of human law through preventive measures,
- to ban moves to thwart a fundamental demand of international law by circumventing supporters of this law, and
- to ban abetting maintenance of a verified offense that violates international law.

On the other hand, actual obligations to act in preventing or ending violations of international law by third states could not be deduced from international law valid at the time. South Africa systematically violated regulations under international law qualified this way and particularly the ban on systematic racial discrimination and violence, the people's right to self-determination, as well as crucial regulations of international humanitarian law and fundamental guarantees of human rights. As a result, Switzerland had to observe its obligations of solidarity toward the international community and organizations responsible for defending the norms violated by South Africa.

Therefore, based on these common law obligations of solidarity – not on the UN Charter – Switzerland was bound to observe, for example, the binding UN weapons embargo. Various administration in-house studies prove that the Swiss government was aware of this obligation despite public protestations to the contrary. Yet the Swiss law on war material and nuclear arms was incompatible with the UN embargo in various aspects. This assessment applies particularly to export of know-how and licenses or machine tools in the sphere of war material and nuclear arms. The fact that such legal loopholes remained open intentionally and both Parliament and the Federal Council actively opposed closing them along with the indications of such specific deals available suggests that export business actually occurred in violation of the embargo and hence circumvented the UN sanctions in key sectors.

Solidarity obligations under international law also forbade Switzerland from recognizing South Africa's occupation of Namibia. The Swiss stance was ambivalent on this issue. It indeed basically recognized the Namibian people's right of self-determination in connection with defining UN agencies but could not, as far as we can see, manage to condemn South Africa explicitly. Rather – deeply interwoven in Cold War outlooks – it showed great understanding for the South African position and thus put this state's violations of international law in perspective. Given this background, it is hardly astounding that the legal description of South Africa's occupation as illegal hardly found expression in the operational formulation of Swiss Namibia policy. Hence the administration did not take the opportunity to modify bilateral treaty relations based on South African conduct in violating international law. Nor did it refrain from taking official trips to Namibia with South African military officials, limit the responsibilities of Swiss diplomatic and consular representatives, or stop the import of Namibian mineral resources. This Swiss conduct also violated international law's ban against recognition to some degree.

International law also forbade Switzerland from recognizing the independence of the Bantustans. Like all other states, Switzerland also considered the professed independence of these homelands as a product to perpetuate the Apartheid policy and thus refused to grant them official recognition. Meanwhile, Switzerland became the only European country to recognize travel documents of these structures and granted export risk guarantees for large infrastructure facilities in these territories. Hence it contravened the ban against indirect recognition of statehood for these territories and offered forbidden aid in maintaining a recognized offense against international law. Other Swiss foreign-policy activities violated obligations to refrain that belonged in a normative gray area of norms and could not be considered a necessarily clear violation of international law. These activities included approval of homeland missions in Switzerland, maintenance of contacts with representatives of these territories, and approval of financial exports. However, they stretched the room for maneuver within international law to the extreme.

On the other hand, disregarding the exceptional case of strategically sensitive goods, there are no indications to be found that international law at the time would have obligated states to restrict bilateral trade unilaterally or build up a monitoring mechanism with a state violating international law. Indeed, Switzerland's wide-ranging bilateral economic relations with Apartheid put it into an internationally exposed position; however, it represented no violation of international law. International law at the time offered no sufficient basis to justify a general international ban on supporting exports to South Africa by means of state guarantee agreements. This derives from state practice in use at the time: Hence only a few states ruled out exports to South Africa as an integral part of their state export insurance policy. Furthermore, the general connection between such a nationally supported export business and South Africa's possibility of maintaining its Apartheid system may also be difficult to prove in a legally persuasive manner. But this assessment in no way rules out the role that state export promotion-measures in specific constellations could play in triggering the export state's responsibility under international law. If product exports to South Africa, for example, were supported in this way and presumably used for internal repression there, the supporting state would indeed have been found complicit through its support in maintaining a situation violating international law.

A disregard for Switzerland's legal obligations regarding neutrality can only be proved in relatively unimportant individual cases. On the other hand, Switzerland contradicted the precepts of a credible neutrality policy through its contacts with the Apartheid regime and its constant refusal to take foreign-economy measures. Thus it prejudiced its position in case of a future dispute.

On the other hand, the Swiss constitution then validly stipulated no clear obligation to implement the minimum responsibilities under the precepts of international law. Constitutional law at the

time contained foreign-policy guidelines, though they were only fairly specific and thus rather programmatic relating to the pillars of neutrality and solidarity as well as the material goals of foreign policy taking form. Meanwhile, these guidelines would have demanded a reaction at least in the scope of minimum obligations under international law. Even Swiss parliamentary rules at the time largely lacked clearly binding minimum obligations in its standards for foreign-policy decision-makers. This applied especially in the foreign trade sector which had nearly no regulations then that stipulated a reaction to violations of international law or human rights by third states.

To clarify the question if Swiss foreign policy had the necessary tools available to at least implement the minimum reaction demanded by international law, one must differentiate whether the conduct required by international law did or did not affect the freedom of foreign trade protected by constitutional law:

- In decision-making spheres that did not affect positions protected by constitutional law, (e.g., the issue of recognizing a state or suspending a bilateral state treaty), the Federal Council could implement the minimum obligation without any problem, based on its general authority to conduct foreign policy.
- If a required measure affected protected positions of constitutional law, the administration was only authorized to implement it if there was a legal basis for it in national law. As a result of loopholes in the foreign trade law, on the other hand, such a basis was often lacking. However, the Federal Council was still authorized, if not obligated, to offset these shortcomings by means of independent decrees and orders unless a regulation with the force of law explicitly forbade it.

Therefore, even Switzerland's faulty observation of minimum obligations under international law was not the inevitable result of insufficient tools of national law at the time. Rather it must be ascribed to the unwillingness of Parliament and the Federal Council to observe these obligations under international law in an integral manner.