

## Prosecution of suspected war criminals in Switzerland

### *Legal bases*

By ratifying the Geneva Conventions of 1949, Switzerland undertook to supplement its national legislation accordingly. Its subsequent revision of the Swiss military penal code<sup>1</sup> in 1950, though certainly prompt, was half-hearted. It was not until 1 March 1968, when a broader revision came into force, that national legislation was fully adapted to meet the requirements laid down in those Conventions:

- the scope of application of Swiss criminal law was extended to cover all armed conflicts within the meaning of international conventions;
- civilians who commit offences against international law in the event of armed conflict were explicitly made liable to military jurisdiction; it is thereby clearly established that Switzerland, or more specifically the military justice authorities, must prosecute violations of international humanitarian law even if the offence is committed outside Switzerland by nationals (civilians or members of the armed forces) of another country.

Although surrender to an international tribunal or extradition to another State takes precedence over prosecution at the national level, extradition is not admissible or possible in all cases. Moreover, in certain circumstances a State interested in prosecution may, for political reasons or because it does not have a functioning legal system, decide not to present an extradition request.

### *Procedure*

The preliminary investigation and criminal proceedings are governed by the procedural provisions of military penal law. We thus have a modern judicial procedure that corresponds to the requirements of a constitutional State and is uniform throughout Switzerland.

---

Original: German

<sup>1</sup> See appended extracts.

The elucidation of presumed war crimes is entrusted to specially trained and documented examining magistrates; if necessary, teams consisting of several such magistrates are set up.

For the preliminary investigation two courses may be taken: the *provisional gathering of evidence* and the *preliminary hearing*. The provisional gathering of evidence serves to establish the facts discreetly and without the knowledge of the person concerned, and is warranted, for instance, when the evidence is as yet inconclusive or the suspicion itself is largely unsubstantiated. The preliminary hearing is ordered when the suspicion is or has become firm enough for the suspect to be confronted outright with the evidence against him.

In all cases of presumed war crimes it must be assumed that the suspect will attempt to flee. Every effort is therefore made to carry out the preliminary investigation without publicity so as to avoid making arrests which might subsequently prove unjustified. If, however, a suspicion becomes common knowledge prematurely, the arrest must be made even if the evidence is still inadequate, so that the investigating authority cannot be reproached for having simply let a presumed war criminal go free.

#### *Particular problems in practice*

Criminal prosecutions as we know them in Switzerland normally begin with the recording of facts by the police. Clues are secured, photographs taken, diagrams drawn, witnesses heard and all other appropriate measures adopted. The crime is known, and the hunt for the person who committed it begins.

In the prosecution of presumed war crimes the starting point is completely different: in a nutshell, the perpetrator is known or believed to be known, and the attempt is made to prove that he did commit a crime.

In such cases, most of the usual methods of investigation are not available. Instead the presentation of evidence must be confined almost entirely to the *examination of witnesses*. Even in normal circumstances testimony by witnesses is a problematic means of evidence. With regard to presumed war crimes dating back several years or more, it is all the more problematic, particularly since wartime events will have widely dispersed, or led to the death of, possible witnesses.

The investigation of presumed war crimes is thus extremely difficult and time-consuming.

For such investigations *international cooperation* is indispensable. Fortunately, it generally works smoothly. To avoid indirectly endangering

relatives of witnesses or suspects, however, special care must be taken when requesting assistance in legal matters from warring States.

Past experience has shown that the protection of witnesses is particularly important. Witnesses of war crimes are understandably afraid of exposing themselves or members of their families to reprisals if their willingness to testify becomes known. Legislation for the protection of witnesses is therefore being prepared, but for the time being recourse must be had to the means developed by the Swiss Federal Court of Justice and the European Court of Human Rights to protect police officers engaged in covert criminal investigations.

### *Cooperation with the UN tribunals*

The legal basis for close cooperation by the Swiss justice authorities with the UN Tribunals for the former Yugoslavia and Rwanda was created in December 1995 by an urgent federal decree on cooperation with international courts of law to prosecute serious violations of international humanitarian law.<sup>2</sup> In particular, information and evidence can spontaneously be passed on to them. The tribunals, furthermore, now have the possibility of demanding that proceedings pending in Switzerland for violations of international humanitarian law be transferred to their jurisdiction.

No difficulties whatsoever have arisen to date in the course of cooperation between the Swiss criminal prosecution authorities and the two UN tribunals.

*Jürg van Wijnkoop*<sup>3</sup>  
Head of Military Justice  
of the Swiss Armed Forces

---

<sup>2</sup> Arrêté fédéral relatif à la coopération avec les tribunaux internationaux chargés de poursuivre les violations graves du droit international humanitaire, du 21 décembre 1995, Recueil officiel des lois fédérales, n° 1, 9 janvier 1996, p. 2.

<sup>3</sup> Brigadier General Jürg van Wijnkoop, LL.D., is Head of Military Justice of the Swiss Armed Forces.

## Annex

### Swiss Military Penal Code (of 13 June 1927)

#### *Article 2*

Those subject to military law are:

...

9. Civilians who, in the event of armed conflict, commit violations of international law (Articles 108-114).<sup>4</sup>

#### **Section six:**

#### **Violations of international law in the event of armed conflict**

##### *Article 108 — Scope of application*

<sup>1</sup> The provisions in this section shall be applied in the event of declared wars and other armed conflicts between two or more States; violations of neutrality and resistance to them by force are equated with such events.

<sup>2</sup> The violation of international agreements is furthermore punishable if provision is made in those agreements for a broader scope of application.

##### *Article 109 — Violation of the laws of war*

<sup>1</sup> Whosoever acts contrary to the provisions of international agreements on the conduct of hostilities and the protection of persons and property,

whosoever violates other recognized laws and customs of war, shall, unless more severe penalties apply, be punished by imprisonment and, in serious cases, by imprisonment with hard labour.

<sup>2</sup> Petty offences shall incur disciplinary penalties.<sup>5</sup>

---

<sup>4</sup> "Civilians" must be understood as meaning all persons who are not members of the Swiss armed forces, thus also members of foreign armed forces.

<sup>5</sup> Translation by the *Review*.