

## Switzerland, Criminal Code

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**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

### Swiss Criminal Code of 21 December 1937 (Status as of 1 January 2015)

(...)

#### Title Six

##### Limitation

##### Art. 101

1. There is no limitation of the right to prosecute the offences of:

c. war crimes (Art. 264c para. 1-3, 264d para. 1 and 2, 264e para. 1 and 2, 264f, 264g para. 1 and 2 and 264h)

(...)

3. Paragraphs 1 letters a, c and d and paragraph 2 apply if the right to prosecute or execute the sentence had not been time barred by 1 January 1983 in accordance with the law applicable until that point in time.

(...)

#### Title Twelve: Felonies and Misdemeanours against Public Order

(...)

## **Title Twelve<sup>ter</sup>**

### **War Crimes**

#### **Art. 264b**

Articles 264d-264j apply in connection with international armed conflicts including occupations as well as, unless the nature the offences requires otherwise, in connection with non-international armed conflicts.

#### **Art. 264c**

1. The penalty is a custodial sentence of not less than five years for any person who commits a serious violation of the Geneva Conventions of 12 August 1949<sup>1</sup> in connection with an international armed conflict by carrying out any of the following acts against persons or property protected under the Conventions:

- a. intentional homicide;
- b. hostage taking;
- c. causing severe pain or suffering or serious injury, whether physical or mental, in particular by torture, inhuman treatment or biological experiments;
- d. extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
- e. compelling a person to serve in the forces of a hostile power;
- f. unlawful deportation or transfer or unlawful confinement;
- g. denying the right to a fair and regular trial before the imposition or execution of a severe penalty.

2. Acts in terms of paragraph 1 committed in connection with a non-international armed conflict are equivalent to serious violations of international humanitarian law if they are directed against a person or property protected by international humanitarian law.

3. In especially serious cases, and in particular where the offence affects a number of persons or the offender acts in a cruel manner, a custodial sentence of life may be imposed.

4. In less serious cases under paragraph 1 letters c-g, a custodial sentence of not less than one year may be imposed.

#### **Art. 264d**

1. The penalty is a custodial sentence of not less than three years for any person who in connection with an armed conflict directs an attack:

- a. against the civilian population as such or against individual civilians not taking direct part in hostilities;
- b. against personnel, installations, material or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations of 26 June 1945, as long as they are entitled to the protection of international humanitarian law;
- c. against civilian objects, undefended settlements or buildings or demilitarised zones that are not military objectives;
- d. against medical units, material or vehicles using a distinctive emblem under international humanitarian law

or whose protected character is recognisable even without a distinctive emblem, hospitals and places where the sick and wounded are collected;

e. against cultural property or persons entrusted with its protection or vehicles for its transport, against buildings dedicated to religion, education, art, science or charitable purposes, provided they are protected by international humanitarian law.

2. In especially serious cases of attacks on persons, a custodial sentence of life may be imposed.

3. In less serious cases, a custodial sentence of not less than one year may be imposed.

#### **Art. 264e**

1. The penalty is a custodial sentence of not less than three years for any person who, in connection with an armed conflict:

a. causes severe pain or suffering or serious injury or danger, whether physical or mental, to a person protected by international humanitarian law by subjecting that person to a medical procedure that is not justified by the state of his or her health and which does not comply with generally recognised medical principles;

b. rapes a person of the female gender protected by international humanitarian law or, after she has been forcibly made pregnant, confines her unlawfully with the intent of affecting the ethnic composition of a population, forces a person to tolerate a sexual act of comparable severity or forces a person protected by international humanitarian law into prostitution or to be sterilised;

c. subjects a person protected by international humanitarian law to especially humiliating and degrading treatment.

2. In especially serious cases, and in particular where the offence affects a number of persons or the offender acts in a cruel manner, a custodial sentence of life may be imposed.

3. In less serious cases, a custodial sentence of not less than one year may be imposed.

#### **Art. 264f**

1. The penalty is a custodial sentence of not less than three years for any person who enlists a child under the age of fifteen into armed forces or groups or recruiting them for this purpose or using them to participate in armed conflicts.

2. In especially serious cases, and in particular where the offence affects a number of children or the offender acts in a cruel manner, a custodial sentence of life may be imposed

3. In less serious cases, a custodial sentence of not less than one year may be imposed.

#### **Art. 264g**

1. The penalty is a custodial sentence of not less than three years for any person who, in connection with an armed conflict:

a. launches an attack although he knows or must assume that such an attack will cause loss of life or injury

to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

- b. uses a person protected by international humanitarian law as a human shield in order to influence military operations;
- c. as a method of warfare, pillages or otherwise unlawfully appropriates property or destroys or seizes enemy property in a way not imperatively demanded by the necessities of war, deprives civilians of objects indispensable to their survival or impedes relief supplies;
- d. kills or wounds an enemy combatant treacherously or after he or she has laid down his or her arms or no longer has a means of defence;
- e. mutilates a dead enemy combatant;
- f. as the commander orders that no quarter be given or threatens the enemy that no quarter will be given;
- g. makes improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, or the distinctive emblems under international humanitarian law;
- h. as a member of an occupying power, transfers parts of its own civilian population into the territory it is occupying or deports all or parts of the population of the occupied territory within or outside that territory.

2. In especially serious cases, and in particular where the offence affects a number of persons or the offender acts in a cruel manner, a custodial sentence of life may be imposed.

3. In less serious cases, a custodial sentence of not less than one year may be imposed.

#### **Art. 264h**

1. The penalty is a custodial sentence of not less than three years for any person who, in connection with an armed conflict:

- a. employs poison or poisoned weapons;
- b. employs biological or chemical weapons, including poisonous or asphyxiating gases, substances and liquids;
- c. employs bullets which expand or flatten easily or explode in the human body;
- d. employs weapons primarily designed to cause injury through splinters that cannot be detected by x-ray equipment;
- e. employs laser weapons primarily designed to cause permanent blindness.

2. In especially serious cases, a custodial sentence of life may be imposed

#### **Art. 264i**

The penalty is a custodial sentence not exceeding three years or a monetary penalty for any person who:

- a. continues military operations after receiving official notification of an agreement on a ceasefire or a peace agreement, or violates the conditions of the ceasefire in some other way;
- b. abuses, insults or without reason obstructs an opposing peace negotiator or any of his party;
- c. without justification delays the repatriation of prisoners of war after conclusion of military operations.

#### **Art. 264j**

The penalty is a custodial sentence not exceeding three years or a monetary penalty for any person who in connection with an armed conflict violates a provision of international humanitarian law other than those mentioned in Articles 264c-264i, where such a violation is declared to be an offence under customary international law or an international treaty recognised as binding by Switzerland.

#### **Title Twelve<sup>quater</sup>**

#### **Common Provisions for Title Twelve<sup>bis</sup> and Title Twelve<sup>ter</sup>**

#### **Art. 264k**

1. A superior who is aware that a subordinate is carrying out or will carry out an act under the Title Twelve<sup>bis</sup> or Title Twelve<sup>ter</sup> and who fails to take appropriate measures to prevent the act is liable to the same penalty as the perpetrator of the act. If the superior fails to prevent the act through negligence, the penalty is a custodial sentence not exceeding three years or a monetary penalty.

2. A superior who is aware that a subordinate has carried out an act under Title Twelve<sup>bis</sup> or Title Twelve<sup>ter</sup> and who fails to take appropriate measures to ensure the prosecution of the perpetrator of the act is liable to a custodial sentence not exceeding three years or a monetary penalty.

#### **Art. 264l**

A subordinate who, on orders from a superior or on orders of equivalent binding effect, carries out an act under Title Twelve<sup>bis</sup> or Title Twelve<sup>ter</sup> is guilty of an offence if he was aware at the time that the act is an offence.

#### **Art. 264m**

1. A person who carries out an act under Title Twelve<sup>bis</sup>, Title Twelve<sup>ter</sup> or Article 264k while abroad is guilty of an offence if he is in Switzerland and is not extradited to another State or delivered to an international criminal court whose jurisdiction is recognised by Switzerland.

2. Where the victim of the act carried out abroad is not Swiss and the perpetrator is not Swiss, the prosecution, with the exception of measures to secure evidence, may be abandoned or may be dispensed with provided:

- a. a foreign authority or an international criminal court whose jurisdiction is recognised by Switzerland is prosecuting the offence and the suspected perpetrator is extradited or delivered to the court; or
- b. the suspected perpetrator is no longer in Switzerland and is not expected to return there.

3. Article 7 paragraphs 4 and 5 applies unless the acquittal, or the remission or application of time limits to execution of the sentence abroad has the aim of protecting the offender from punishment without justification.

#### **Art. 264n**

The prosecution of offences under Title Twelve<sup>bis</sup>, Title Twelve<sup>ter</sup> and under Article 264k does not require

authorisation in accordance with any of the following provisions:

- a. Article 7 paragraph 2 letter b of the Criminal Procedure Code;
- b. Article 14 and 15 of the Government Liability Act of 14 March 1958;
- c. Article 17 of the Parliament Act of 13 December 2002;
- d. Article 61a of the Government and Administration Organisation Act of 21 March 1997;
- e. Article 11 of the Federal Supreme Court Act of 17 June 2005;
- f. Article 12 of the Federal Administrative Court Act of 17 June 2005;
- g. Article 16 of the Patent Court Act of 20. March 2009;
- h. Article 50 of the Criminal Justice Authorities Act of 19 March 2010.

## Discussion

1.

As the international treaties to which Switzerland is party and customary international law are automatically incorporated into Swiss law (monist system), why does Switzerland need laws of this kind?

2.

Does Swiss law fulfil the requirements of the Geneva Conventions? Of Additional Protocol I? Of international criminal law? Does it go further? Can a State criminalize violations that are not classified as crimes under international law? Can it invoke its universal competence, as provided for in Art. 264m? (GC I-IV, Arts 50/51/130/147 respectively; AP I, Arts 11 and 85; ICC Statute, Art. 8 [See *also* The International Criminal Court])

3.

- a. In the context of an international armed conflict, which of the criminalized acts referred to in Arts 264c to 264i go beyond the Geneva Conventions and Additional Protocol I? Beyond the ICC Statute? Which acts criminalized in the ICC Statute are not taken up in Swiss law? (GC I-IV, Arts 50/51/130/147 respectively; AP I, Arts 11 and 85; ICC Statute, Art. 8(2)(a) and (b))
- b. What differences in wording do you note between the acts criminalized in Arts 264c to 264i and those in the ICC Statute? Are they significant? What is the effect of such differences? On the possible competence of the ICC in a case which falls within the jurisdiction of the Swiss courts? What are the advantages and disadvantages of such discrepancies? (ICC Statute, Arts 1, 8 and 17 [See *also* The International Criminal Court])
- c. In your opinion, is the most faithful reflection of customary and treaty-based international law as it is today found in the ICC Statute or in Swiss law?
- d. In the context of an international armed conflict, is Art. 264h, in particular, in line with the ICC Statute? With general international law? If not, is it acceptable for Switzerland to invoke it on the basis of the principle of universality? (ICC Statute, Art. 8(2)(b)(xviii)-(xx) [See *also* The International Criminal Court])

4.

- a. Does international law require criminalized acts to be extended to non-international armed conflicts, as

provided for in Art. 264b? Is that acceptable under international law? Does an exception need to be made for cases in which the nature of the offence does not permit that extension to be made?

b. With regard to the offences referred to in Arts 264d to 264j, can you find examples in which the nature of the offence precludes punishment in non-international armed conflict? Is it necessarily acceptable for Switzerland to punish offences which are by nature not applicable to non-international armed conflicts? Regardless of criminalization under international criminal law?

c. In the context of a non-international armed conflict, which of the criminalized acts referred to in Arts 264d to 264j go beyond the ICC Statute? Which acts criminalized in the ICC Statute are not taken up in Swiss law? What is the effect of such differences? On the possible competence of the ICC in a case which falls within the jurisdiction of the Swiss courts? (ICC Statute, Art. 8(2)(c) and (e) [See also The International Criminal Court])

d. In the context of an international armed conflict, is Art. 264h, in particular, in line with the ICC Statute? With general international law? If not, is it acceptable for Switzerland to invoke it on the basis of the principle of universality? (ICC Statute, Art. 8(2)(e)(xiii)-(xv) [See also The International Criminal Court])

e. Is Art. 264b, read in conjunction with Arts 264d to 264j, sufficiently precise for criminal legislation given the principle of "*nullum crimen sine lege*"?

5.

a. Do the Geneva Conventions require the acts listed in Art. 264c(1) to be prosecuted if they are committed during a non-international armed conflict? Do they allow prosecution? (GC I-IV, Arts 3 and 50/51/130/147 respectively; AP I, Arts 11 and 85)

b. Which persons and property are protected by IHL in non-international armed conflicts? Is the definition of those persons and that property the same in each of the letters in paragraph 1? (GC I-IV, Art. 3; AP II)

c. Do Art. 264b and Art. 264c(2) have the same effects? If yes, would it have been sufficient to include a reference to Art. 264c in Art. 264b?

6.

a. Are attacks intentionally directed against the persons or objects referred to in Art. 264d but unsuccessful (for example, because no civilian deaths or damage to civilian property occurred as a result) a crime under Art. 264d or merely an attempt to commit that crime?

b. Of Art. 264d(1)(d) and Art. 8(2)(b)(xiv) of the ICC Statute, which is most clearly in line with IHL?

7. Is the age limit of 15 years in Art 264f acceptable despite the fact that Switzerland is party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which prohibits the recruitment of children under 18 years of age?

8. Does Art. 264g(1)(g) go beyond IHL? (GC I, Art. 53; AP I, Art. 85(3)(f))

9. Does Art. 264j permit all violations of IHL to be prosecuted? Does it fulfil the principle of *nullum crimen sine lege*? Does it permit acts criminalized by customary law or by international customary law to be prosecuted following the entry into effect of the Swiss law? Can it be applied to an act which was already prohibited under international law in 2011 but which is not included in Arts 264c to 264i?

10. What is the difference between Art. 264l and Art. 33 of the ICC Statute?

11. Is universal competence, as provided for in Art. 264m, required by IHL? Is the restriction to perpetrators in Switzerland compatible with IHL? Can Switzerland nonetheless conduct an inquiry with a view to arresting a person who is not in its territory but who is likely to go there? (GC I-IV, Arts 49/50/129/146 respectively; AP I, Art. 85)

12. Is the relationship between national prosecution and prosecution before the ICC as provided for in Art. 264m in keeping with the ICC Statute? (ICC Statute, Arts 1, 8 and 17 [See *also* The International Criminal Court])

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