Switzerland, X. v. Federal Office of Police

[**Source**: *Recueil officiel des arrêts du Tribunal Fédéral Suisse* (Judgements of the Swiss Federal Tribunal), Official Collection, Vol. 123, Part II, 1997, pp. 175-191; original in French, unofficial translation.]

Extract from the judgment of the First Court of Public Law
of April 28, 1997
in the case of X. v. the Federal Police Office (administrative-law appeal)

[...]

X. was arrested in Switzerland on February 11, 1995. A criminal investigation was instituted against him on the count of violation of the laws of war and placed in the hands of a military judge advocate. Essentially he was charged with having promoted, funded and organized massacres of civilians in the Bisesero region of the Kibuye prefecture during the ethnic war which took place in Rwanda from April to July 1994.

On March 12, 1996 the Trial Chamber of the International Criminal Tribunal for Rwanda in Arusha, Tanzania (hereinafter referred to as the “ICTR”) officially requested the deferment to its jurisdiction of all the proceedings brought against X.

By a decision of July 8, 1996 the Military Court of Cassation responded to that request. [...]

On August 26, 1996 the Registrar of the ICTR submitted to Switzerland a request for the transfer of the accused in support of which he produced the following documents:

- an indictment dated July 11, 1996 from the Prosecutor of the ICTR. In it X. is accused of bringing armed persons into the Bisesero region between April and June 1994 and ordering them to attack civilians who had come there to seek refuge; X. is claimed to have personally taken part in certain attacks. The charges are as follows: crimes of genocide for the killing or serious injury to the physical or mental health of members of a population, committed with intent to destroy, in whole or in part, an ethnic or racial group as such; (2) conspiracy to commit genocide; (3, 4, 5) crimes against humanity for killing and exterminating persons as part of a widespread and systematic attack and committing other inhuman acts against a civilian population on political, ethnic or racial grounds; (6) violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for committing or ordering to be committed acts of violence to life, health and the physical or mental well-being of persons;
- a decision confirming the indictment issued on July 15, 1996 by the Trial Chamber of the ICTR;
- an “arrest warrant with an order for transfer” issued the same day. In it the ICTR requests the surrender of X. so that he may answer for the crimes referred to in the indictment; the accused was to be informed of his procedural rights and take cognizance of the indictment.

[...]

By a decision of December 30, 1996 the Federal Police Office [Office Fédéral de la Police – the “OFP” –] ordered the transfer of X. to the ICTR on account of the acts referred to in the request of August 26, 1996. Those acts were also punishable in Swiss law and fell

within the jurisdiction of the ICTR. [...]

By means of an administrative-law appeal X. requests the following: that the decision to transfer him be declared void; that the OFP be asked to obtain from the ICTR exact figures on the sums allocated to the defence and the facilities granted to the latter; and that the OFP be questioned or asked to question the Federal Council on Switzerland's commitment to allow X. to serve a possible custodial sentence in its territory.

[...]

Extract from reasons:

[...]

2. (a) In its resolution 827 (1993), the United Nations Security Council decided to establish an *"ad hoc"* International Tribunal to try war crimes committed in the Former Yugoslavia; at the same time it adopted a Statute for that Tribunal, drawn up by the UN Secretary-General. Under the terms of the Statute, "all States" are under the obligation to cooperate fully with the Tribunal and to amend, where necessary, their domestic legislation. In its resolution 955 of November 8, 1994, the UN Security Council decided to set up a special Tribunal to try those presumed responsible for acts of genocide and other serious violations of international humanitarian law committed in Rwanda and in the neighbouring States by Rwandan citizens between 1 January and December 31, 1994, and adopted the Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as "ICTR") [**See** Case No. 230, UN, Statute of the ICTR [1]] That resolution lays down the same obligations on States as resolution 827 (1993). In accordance with Article 8, para. 2, of its Statute, the International Tribunal has "primacy" over national courts in the event of concurrent jurisdiction and may request that a case be deferred to its jurisdiction at any

time. [...]

(b) On February 2, 1994, and then on March 20, 1995, the Federal Council decided unilaterally to apply those two resolutions in view of the fact that they fall within the scope of Chapter VII of the Charter of the United Nations (maintenance of peace), they seek to ensure the actual application of international humanitarian law, in particular the Geneva Conventions, and Switzerland took an active part in the preparation of the two Statutes, the character and, to a large extent, the contents of which are identical. The obligations imposed on States include cooperation in the search for persons, the arrest and surrender of remanded prisoners and accused persons, and other acts of judicial cooperation (Article 28 of the Statute of the ICTR). A national law appeared necessary in order to ensure effective cooperation with the two International Tribunals. [...]

(c) On December 21, 1995 the Federal Assembly adopted the Emergency Federal Decree [“arrêt fédéral urgent”, a form of urgent legislation adopted by parliament and subject to the possibility of a popular referendum only after its entry into force] Relating to Cooperation with International Tribunals Responsible for the Prosecution of Grave Breaches of International Humanitarian Law. The provisions contained in the Decree, which deal with the particular problems posed by that specific type of cooperation and are intended to simplify procedures by avoiding delays [...], are in part completely new and in part inspired by the Federal Law on Mutual International Assistance in Criminal Matters (EIMP) with the necessary amendments. Subject to provisions to the contrary, the rules contained in the Decree and the implementing regulations thereof are applicable by analogy to cooperation with those international tribunals (Article 2 of the Decree).

The Decree governs cooperation with the International Tribunals for the Former Yugoslavia and for Rwanda and the Federal Council may extend the scope thereof to cooperation with other tribunals of the same type set up by the Security Council (Article 1).

[...]

4. In accordance with Article 10 of the Decree, any person may be transferred to the international tribunal concerned for the purpose of criminal prosecution where it is apparent from the request and the attached documents that the breach (a) falls within the jurisdiction of that tribunal and (b) is punishable in Switzerland. [...] In order to guarantee effective cooperation with the international tribunals, Switzerland decided to reduce as much as possible the grounds likely to stand in the way of surrender. Therefore, the expression "transfer" was chosen deliberately by the legislature to make it clear that "classic" extradition within the meaning of the EIMP is not involved, having regard to the nature of the requesting authority and the terms governing the grant thereof. [...]

[...] [W]hen a transfer request is pending before it, the Swiss authority to which it is made does not have to verify the substance of the charge brought against the person concerned. The requesting authority does not have to provide evidence of the acts which it alleges or even show that they are likely to have happened. Only a request which is clearly incorrect or incomplete, and thus makes the representation from the requesting authority look like an obvious abuse, will be rejected. [...] Those principles, which were developed with respect to extradition, apply all the more with respect to the procedure for transfer. The legislature intended that procedure be simpler and quicker so as to preclude both verification of the alibi and a defence alleging that the breach was political in nature (first paragraph of Article 13 of the Decree). [...]

(b) The appellant does not deny, with good reason, that the two conditions laid down in Article 10 of the Decree are met in this case. The acts with which he is charged in accordance with the indictment of 11 July 1996 are considered to constitute genocide and conspiracy to commit genocide, a crime against humanity and a grave breach of Article 3 common to the Geneva Conventions and Additional Protocol II thereto and they fall within

the jurisdiction of the ICTR in accordance with Articles 2, 3, and 4 of the Statute. In respect of acts committed on Rwandan territory in 1994, the territorial and temporal jurisdiction of the ICTR is not in doubt (Article 7 of the Statute). Moreover, as has already been pointed out by the Courts-Martial Appeal Court, civilians who, during an armed conflict, commit a breach of public international law, render themselves liable to prosecution for breaches of the laws of war within the meaning of Article 109 of the Military Penal Code [*Code pénal militaire* – the "CPM" – **See Switzerland, Military Penal Code** [2]] Therefore, the acts with which X. is charged are also punishable in Swiss law. [...]

7. Essentially, the appellant contends that the proceedings before the ICTR do not meet the requirements of a fair trial. He claims that since it was established the tribunal has had management and funding problems and has not functioned satisfactorily. He submits that the substantial expenses necessary for the defence of the appellant will not be reimbursed. Furthermore, the information requested from the ICTR on that matter has not been forthcoming and there are concerns that Article 6 (1) of the European Convention on Human Rights [the "ECHR"] (equality of arms) and 6 (3) (c) and (d) of the ECHR (rights of the defence) may be contravened. In any event the requesting authority should be asked to specify which sums will be allocated to the assigned defence counsel to cover his fees.

(a) Where it grants extradition or assistance in legal matters, Switzerland must assure itself that the proceedings for which it is providing cooperation guarantee those being prosecuted a minimum standard which corresponds to that provided by the law of democratic States as laid down in particular in the European Convention on Human Rights and the UN Covenant on Civil and Political Rights (UN Covenant II [...]). [...] Switzerland would be contravening its own commitments if it deliberately granted assistance or the extradition of a person to a State in which there were serious grounds to believe that the person concerned might be subject to treatment which violated the ECHR or UN Covenant II. [...]

(b) Those principles, which were developed in connection with international assistance involving third States, should not be applied automatically in the specific case of assistance to be granted to international criminal courts whose jurisdiction Switzerland has expressly and unreservedly recognized. When they decided unilaterally to apply resolutions 827 (1993) and 955 (1994) the Federal Council, and then the Swiss legislature, assumed that those international tribunals, which are products of the community of States, would provide sufficient guarantees with respect to the proper course of proceedings. [...] Contrary to the assertions of the appellant, it is not possible to see a gap in the law which could to be filled by the Tribunal [...]. Therefore, there is no need to examine, as the appellant would like, whether the proceedings before the ICTR conform to the minimum standards laid down in the ECHR and UN Covenant II, as such conformity must be presumed. In any case, such an examination would not make it possible to reject a request for cooperation, as is demonstrated below.

(aa) The presumption which the requesting tribunal enjoys on the basis of its very nature is borne out by the wording of its Statute. That is because Article 20 cited above grants the accused all the procedural rights afforded by the ECHR and UN Covenant II. Furthermore, Rule 44 [sic] of the ICTR's rules of procedure and evidence, which were adopted on July 5, 1996, provide for the assignment of counsel to indigent accused persons. The criteria governing indigence, the list of counsel willing to be appointed and the scale of fees are determined by the Registrar of the Tribunal. Exercising that power, the Registrar of the ICTR drew up a directive, approved by the Tribunal on January 9, 1996, concerning the assignment of counsel which lays down the terms and procedure governing their appointment and remuneration.

Moreover, the counsel for the appellant was herself assigned by the ICTR on December 12, 1996 to defend the appellant. On that occasion, the Registrar sent her the three instruments already attached to the request for transfer, the Statute of the Tribunal and an

interlocutory law for pre-trial detention.

(bb) In its resolution 50/213 C of June 7, 1996 the General Assembly of the United Nations asked the Office of Internal Oversight Services to carry out an inspection at the ICTR. That inspection took place from September 30, to November 1996. The report by that Office, which was submitted to the General Assembly on February 6, 1996, referred to the deficient management of the ICTR, several failures within the system and internal differences between its bodies (the President of the Tribunal, the Registry, and the Office of the Prosecutor) which resulted in the replacement of a number of officials. It stated that the Tribunal was not achieving its objectives and would not do so without the necessary support. Certain changes were under way but many more appeared to be necessary. The Office drew up several recommendations, in particular with respect to the role of the Registrar and his organization. A further, limited, examination was to take place during the second quarter of 1997. In his note of February 6, 1997, which accompanied the report, the Secretary-General accepted those conclusions as his own. He committed himself to fill the gaps which had been exposed and take all the measures necessary to rationalize and increase the support which the Secretariat gives to the Tribunal. As “immediate follow up” to the above-mentioned recommendations additional assistance is now being given on the spot to the Tribunal and more systematic support procedures have been developed to meet its needs.

(cc) It should be pointed out that the above-mentioned criticisms regarding the effectiveness of the Tribunal [...] relate only to its management and organizational problems. By contrast, no fears have been voiced specifically with regard to respect for the rights of the accused. Moreover, the failures referred to have been taken seriously by the competent international authorities and specific measures have been taken to remedy them effectively. The stringent checks to which the ICTR has been submitted constitute the best guarantee that the Tribunal will have sufficient means to function satisfactorily and that the

right of the appellant to a fair trial will be safeguarded there.

Therefore, the appellant's allegations regarding the ICTR's poor organization and lack of funds do not preclude the assumption that the criminal proceedings as a whole will, in accordance with its Statute, meet the minimum requirements imposed by the instruments relating to human rights. In accordance with a request for assistance granted on the basis of the confidence which is legitimately inspired by the requesting tribunal, there is no reason to impose conditions on the transfer or to question that Tribunal on the procedures governing the defence assigned to the accused.

(c) The appellant would also like the Federal Council to be questioned and to commit itself to permitting him to serve any custodial sentence imposed upon him in Switzerland and to expressing that intention to the ICTR. In accordance with Rule 103 of the ICTR's rules, "Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons..." [first paragraph]. "Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed" [second paragraph]. Invoking his status as an asylum-seeker in Switzerland, the appellant states that he fears imprisonment in Rwanda in view of the deplorable prison conditions which prevail there and other violations of human rights which are being committed in that State at present.

That request likewise has no place within the context of those proceedings. That is because the surrender of the appellant to the ICTR is in no way comparable with straightforward extradition to Rwanda. Prior to the trial the appellant will be detained in Tanzania. Furthermore, there is no indication that in the event that he were found guilty the sentence would be served in Rwanda if there were any grounds to believe, in particular, that he would be exposed to treatment which violated Article 3 of the ECHR or Article 7 of UN Covenant II. Article 26 of the Statute and Rule 104 of the rules [of procedure and evidence]

stipulate that all sentences of imprisonment shall be supervised by the Tribunal or a body designated by it and that should dispel the fears of the appellant.

Article 29, para. 1, of the Decree permits enforceable decisions of an international tribunal to be implemented in Switzerland where the convicted person is habitually resident in Switzerland and where the sentence relates to offences punishable in Switzerland. However, that presupposes a request by the ICTR. Other than where the convicted person is a Swiss national, [...] no right exists to serve a sentence imposed by the International Tribunal in Switzerland and the Decree does not permit the Federal Court to draw up, under the present procedure, any proviso or condition concerning the place or conditions of imprisonment. [...]

Discussion

1. Is X. accused of grave breaches of IHL? Taking into account Art. 109 of the Swiss Military Penal Code [**See** Switzerland, Military Penal Code [2]], can Switzerland punish X. for the alleged acts? From the point of view of IHL, can it prosecute such acts? Must it prosecute such acts?
2. Why was Switzerland bound by the ICTR Statute, even though it was not a UN member State?
3. a. Is the transfer of an accused to the ICTR an extradition? Under IHL, can a State transfer an accused charged with grave breaches of IHL to the ICTR? (GC I-IV, Arts 49(2) [3]/50(2) [4] /129(2) [5] /146(2) [6] respectively)
   b. Under the ICTR Statute [**See** UN, Statute of the ICTR [1]], can a State consider a transfer to the ICTR an extradition and subject it to the usual procedures of its extradition laws? Which conditions of such procedures might run counter to the ICTR Statute?
   c. On what grounds could Switzerland refuse to transfer an accused to the ICTR? Under the ICTR Statute? Under Swiss law?
4. a. Does IHL prescribe judicial guarantees and guarantees of treatment for the benefit of suspected perpetrators of grave breaches? Are such guarantees

applicable in States not party to the conflict? (GC I-IV, Arts 49(4) [3]/50(4) [4]/ 129(4) [5]/146(4) [6] respectively)

b. Must Switzerland ensure that the aforementioned guarantees will be respected before it extradites a suspected perpetrator of a grave breach to a third State? Under IHL? Under international human rights law? Would your answer be the same with respect to transfers to the ICTR? If not, how would it be different?

c. Is there a risk that the aforementioned guarantees for the accused will be violated in Arusha?

5. a. Can the ICTR transfer the accused to Rwanda to serve a possible sentence?

b. Could Switzerland insist that the accused serve his possible sentence in Switzerland? If he were a Swiss citizen? Under the ICTR Statute? Under Swiss Law?

c. Could Switzerland refuse to transfer an accused to the ICTR if he were a Swiss citizen? If he were prosecuted for his crimes in Switzerland?

Links

[1] https://casebook.icrc.org/case-study/un-statute-ictr

[2] https://casebook.icrc.org/case-study/switzerland-criminal-code

[3] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=3F6C2B8B20272F58C12563CD005

[4] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=58854E245CB34B82C12563CD005

[5] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=C083F579BD003884C12563CD005

[6] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F96EE4C7D1E72CAC12563CD00