

Report on Switzerland

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Abstract The contribution of Prof. Günter Heine, in collaboration with Monika Zürcher-Rentsch, for the International Conference on “Transnational inquiries and the protection of fundamental rights in criminal matters” held in Syracuse on May 31 to June 1, 2011, gives an overview of the Swiss legal system on the topic. It starts with identifying the fundamental rights Switzerland committed to protect and then illustrates the different national and international legal sources regulating transnational cooperation between authorities and criminal courts. The continuously

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increasing cooperation with EU-member states is treated separately. With the help of various examples the contribution shows how fundamental rights are protected in the different proceedings. Differences exist mainly between proceedings of administrative assistance and of mutual assistance.

In its second part, the paper illustrates the Swiss regulations for the cooperation with international courts as well as domestic prosecution of international crimes and the few experiences in this field in connection with the protection of fundamental rights.

Abbreviations

BGE	Decisions of the Swiss Federal Court (<i>Entscheidungen des Schweizerischen Bundesgerichts</i>)
BGer	Swiss Federal Court (<i>Bundesgericht</i>)
BStGer	Bundestrafgericht (Swiss Federal Criminal Court)
CISA	Convention Implementing the Schengen Agreement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Erw.	Consideration (<i>Erwägung</i>)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IRSG	Swiss Federal Act on International Mutual Assistance (<i>Bundesgesetz über internationale Rechtshilfe in Strafsachen</i>)
Pr	Practice of the Swiss Federal Court (<i>Die Praxis</i>)
SIS	Schengen Information System
SR	Classified Compilation of Federal Legislation (<i>Systematische Sammlung des Bundesrechts</i>)
StGB	Swiss Criminal Code (<i>Schweizerisches Strafgesetzbuch</i>)
ZISG	Swiss Federal Law on Cooperation with the International Criminal Court (<i>Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof</i>)

1 Transnational Inquiries and the Protection of Fundamental Rights in Criminal Matters. Introductory Remarks

Today, we are confronted with an increasing number of crimes that have an international dimension. The need for unhindered and fast cooperation is obvious, but at the same time, we need to be aware that transnational criminal investigations can lead to a weakening of the protection of fundamental rights.

In Chapter 1 of its 2nd title, the Federal Constitution of the Swiss Confederation (henceforth: the Constitution) guarantees a number of fundamental rights. First and foremost, the core of each fundamental right is inviolable. However, Article 36 of the

Constitution allows the restriction of fundamental rights under certain conditions: the restriction has to be based on law, it needs to be justified by public interest or the fundamental rights of third persons and it has to be proportional.

Switzerland signed the ECHR (in effect for Switzerland since 1974) and the ICCPR (in effect for Switzerland since 1992). Both treaties guarantee the most fundamental human rights, which according to a Swiss understanding constitute the core of the constitutional fundamental rights. The ECHR and ICCPR thus prevail over any other international agreement or national law. According to the prevailing opinion, international procedural rights such as the right to a fair trial do not belong to the international *ordre public*. The Swiss Federal Court makes efforts to maintain all rights accorded by the ECHR and the ICCPR as binding standards. This position leads to a broader protection of these rights than the jurisdiction of the ECtHR, which only prohibits extradition to states where a flagrant violation of human rights awaits the defendant.¹

2 Cross-border Investigations and Fundamental Rights

2.1 *Tools of Investigative Cooperation Between Domestic and Foreign Authorities*

Switzerland has no general, all-embracing regulation of administrative assistance.² Administrative cooperation is regulated separately for each area of law in the respective legal provisions. There are provisions on administrative assistance in criminal investigations e.g. in the federal law on the prevention of money laundering and terrorism financing, for the combating of criminal organisations, as well as in customs or tax matters. Regarding police cooperation, Switzerland signed several bilateral police cooperation agreements with other states.³

2.1.1 Principles of Cooperation Between Authorities

In contrast to judicial assistance, administrative assistance does not allow the application of coercive measures, and the provisions regarding data protection apply. Measures of administrative assistance on the police level, for instance, regularly constitute an infringement of fundamental rights. The disclosure of information related to individuals in the course of exchange of information on police level constitutes an imminent threat to the fundamental right of privacy and data protection.⁴

¹ Donatsch et al. (2011), p. 54.

² On the IRSG see below, § 3.1.

³ *Ibid.*, pp. 6–7.

⁴ Breitenmoser and Weyeneth (2010), p. 161.

Since measures of administrative assistance pose such risks, the principles of legality and proportionality need to be respected. The sources of these are Article 5 of the Constitution and Article 8 ECHR.⁵ Also, the principle of speciality and the reservation of norms belonging to the *ordre public* constitute additional limits on administrative assistance.⁶

2.2 *Investigative Cooperation at EU-Level*

On 12 December 2008, the Schengen *acquis* entered into force in Switzerland. Switzerland committed itself to adopt the entire Schengen *acquis*, including future Schengen legislation, according to Article 7 of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application, and development of the Schengen *acquis*.⁷

In the course of the implementation of the Schengen *acquis*, Switzerland introduced several new and more liberal measures on administrative assistance: The Schengen *acquis* contains provisions concerning cross-border police cooperation such as cross-border pursuit and surveillance as well as exchange of information between police authorities for the purpose of prevention and search. Switzerland also participates in the SIS, the central computer network containing, among other things, information on wanted persons, stolen objects and vehicles as well as on third country nationals to whom the entry into the Schengen area was refused.⁸

The data protection framework decision, regulating a new data protection concept, is also part of the Schengen *acquis* and must be implemented by Switzerland.⁹

3 **Obtaining and Admissibility of Evidence and the Respect for Human Rights Guarantees**

3.1 *The Transfer of Evidence from and to Foreign Criminal Proceedings*

The IRSG of 20 March 1981 and the corresponding ordinance regulate the conditions for mutual assistance based on a treaty as well as in the absence of such a treaty. Switzerland also signed several bilateral and multilateral conventions concerning mutual assistance in criminal matters, among them the European

⁵ *Ibid.*, p. 162.

⁶ *Ibid.*, p. 168.

⁷ SR 0.362.31; Link: http://www.admin.ch/ch/d/sr/c0_362_31.html.

⁸ Gless (2011), pp. 158–160.

⁹ *Ibid.*, p. 144.

Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters (both in effect for Switzerland since 1967) and the International Convention for the Suppression of the Financing of Terrorism (in effect for Switzerland since 2003).

The IRSG allows a number of ways of legal cooperation. Apart from extradition, the so called “small mutual assistance” provides for several other categories of assistance. They are: transfer of evidence which includes, in particular, the searching of persons and rooms, seizure, editing orders, expert opinions, hearing of witnesses and line-up of persons. It also covers the delivery of objects and assets for confiscation and restitution, service and delivery of documents and instruments. Spontaneous mutual assistance is possible, too. The IRSG also provides regulations for criminal prosecution and enforcement of sentences in place of a requesting state.¹⁰

Several principles regulated in international conventions, the Constitution, and the IRSG grant the compliance of measures of mutual assistance with fundamental rights:

- The principle of proportionality, although not mentioned explicitly in the conventions, is deemed to be a principle of international law.
- The principle of reciprocity.
- The principle of individual protection provides the person concerned, even in respect of measures of mutual assistance, the right to claim the same infringements of rights as if the procedure had taken place in the requested state.
- The IRSG as well as most of Switzerland’s conventions on mutual assistance and extradition contain the principle of dual criminality. It has recently been called into question in connection with the development of a European criminal procedure. The European Convention on Mutual Assistance in Criminal Matters, for example, does not demand this principle. It only allows the possibility of reservations regarding dual criminality, and Switzerland has made such a reservation. In the field of extradition, the principle of dual criminality is absolutely required in Switzerland and it is applied very strictly because of its severe effect on fundamental rights. The facts presented in the request for mutual assistance are examined carefully in order to ensure that any of the crimes charged are punishable according to Swiss law.
- Switzerland applies the principle of *ne bis in idem*. Some conventions on mutual assistance contain similar provisions: Concerning extradition under Articles 8 and 9 of the European Convention on Extradition or concerning “small mutual assistance” under Article 54 CISA. For the application of the European Convention on Mutual Assistance in Criminal Matters, which does not contain the principle, Switzerland has made the appropriate reservation.
- The principle of speciality.¹¹

¹⁰ *Ibid.*, pp. 79–80.

¹¹ Donatsch et al. (2011), pp. 61–87.

3.1.1 Protection of Fundamental Rights

The relevant standards of binding international law applying in connection with mutual assistance are the right to life, prohibition of collective punishment, ban of arbitrary sentencing, and the ban on torture and other inhuman treatment.¹²

In the state providing mutual assistance, fundamental rights can be affected when coercive measures are carried out. Generally, the guarantees of Article 6 ECHR do not apply to mutual assistance procedures because they are not criminal procedures. It is recognised, however, that if irreparable damages occur, seizure in mutual assistance procedures amounts to civil issues in the sense of Article 6(1) ECHR and/or Article 14(1) ICCPR.¹³

In the case of a forthcoming extradition, the requested state has to examine if the requesting state will guarantee fundamental human rights. Unlike the ECtHR, the Swiss Federal Court has stated that Switzerland must ensure human rights protection in the requesting state not just in cases of potential extradition, but also before granting other mutual assistance.¹⁴ The risk of violation of fundamental rights must be individual and concrete. Furthermore, the Swiss Federal Court held that a close examination needs to be undertaken especially regarding states showing democratic deficits.¹⁵ It also takes the view that member states of the ECHR are entitled to a general assumption that they will guarantee the rights enshrined in the Convention.¹⁶

Switzerland demands of the requesting state particularly that it respect the following human rights: prohibition of torture and inhuman punishment, prohibition of punishment because of race or religion, the material principle of legality as well as guarantees concerning a legally competent judge and fair trial (Art. 6 ECHR, Art. 14 ICCPR) consisting, inter alia, of the presumption of innocence, the accused's right to silence, prohibition of constraint to self-incrimination, right to presence, protection of family life and protection of freedom of expression.¹⁷

Consequences for the decision on mutual assistance when human rights are at risk of being disregarded are the following:

- Refusal of mutual assistance: According to Article 2 IRSG, Switzerland denies mutual assistance where no treaty has been concluded with the requesting state if there are reasons to assume that the procedure in the requesting state is not compliant with the fundamental rights or procedural standards of the ECHR and the ICCPR. For this reason, mutual assistance was denied to Iran in a case in 1989.¹⁸ Iran requested mutual assistance from Switzerland in a case of fraud and asked for documentation on bank accounts of the accused person in Switzerland

¹² *Ibid.*, p. 53.

¹³ *Ibid.*, p. 55.

¹⁴ BGE 123 II 616 f.

¹⁵ BGE 123 II 167, 112 Ib 223, 108 Ib 412.

¹⁶ Pr 85 (1996) Nr. 99, BGer of 26 March 2002, 1 A.182/2001, Erw. 5.1.

¹⁷ Donatsch et al. (2011), pp. 56–57.

¹⁸ BStGer, Decision of 23 February 2010, RR.2009.26.

as well as that the assets in these bank accounts be frozen. To find out if there was a risk of human rights violations in the concrete case if the request were granted, the Swiss Federal Court first considered the general situation of human rights in Iran and then examined whether the accused would be exposed to danger in the concrete circumstances. It came to the conclusion that Iran was not to be considered a constitutional state because it did not respect nor did it ensure minimal procedural safeguards according to international standards. Mutual assistance was therefore denied, as the subjects of the criminal procedure were not guaranteed sufficient protection.

Some treaties entered into by Switzerland include clauses to limit mutual assistance when human rights are disregarded, for example Article 3 of the European Convention on Extradition. When provisions of a bilateral treaty conflict with the ECHR or the ICCPR, these Conventions prevail according to Swiss opinion.¹⁹

- Granting mutual assistance under certain conditions: mutual assistance can be provided in these cases but it is made dependent on a confirmation of the requesting state guaranteeing the respect of fundamental rights or the possibility to monitor the procedure. In its decision BGE 131 II 228, the Swiss Federal Court considered the confirmation of Taiwan concerning the non-enforcement of the death penalty as insufficient. Such demands are constitutionally delicate insofar as they, by requiring the court of the requesting state to forego a certain punishment, can be so diplomatic in nature as to risk violating the separation of powers.²⁰ As an example for conditions set out for granting mutual assistance see BGE 129 II 274 where the Swiss Federal Court demanded of Nigeria the observance of Articles 7, 10 and 17 ICCPR.²¹

Mutual assistance is furthermore denied where the requesting state prosecutes or punishes the accused based on political opinion or the belonging to a certain social group, race, religion or ethnicity. This barrier is guaranteed by the IRSG, in the Swiss Criminal Code (StGB, Articles 261bis and 264), the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters. Switzerland denies mutual assistance where substantial indications show that a criminal procedure is motivated mainly by one of the reasons listed above. Accordingly, the Swiss Federal Court denied mutual assistance to the Russian attorney-general in the “Yukos” case. It considered the criminal procedure against Mr. Chodorkowski politically motivated and discriminatory. The Swiss Federal Court based its decision on reports of Amnesty International, Human Rights Watch, and the International Helsinki Federation for Human Rights of the year 2006. Those reports considered that minimal procedural guarantees according to the ECHR and the ICCPR were not present in the procedure in question.²²

¹⁹ Donatsch et al. (2011), pp. 57–58.

²⁰ See also BGE 131 II 228.

²¹ Donatsch et al. (2011), pp. 58–59.

²² BGer, Decision of 13 August 2007, 1A.29/2007, Erw. 3. See Donatsch et al. (2011), pp. 59–60.

3.2 *The Transfer of Evidence at EU-Level*

The association to the Schengen *acquis*, which is part of the Bilateral Agreements II between Switzerland and the European Union signed in the year 2004, changed mutual assistance in several respects. Numerous simplifications entered into force for Switzerland concerning the extradition, transfer of evidence, and the enforcement of penalties. The principle of request is weakened by the regulations of Article 52 f. CISA, providing for the possibility of direct communication between prosecuting authorities and direct service of process. An important change for Switzerland is furthermore the commitment to extensive mutual assistance in the area of consumption tax, value added tax and tollage, and the expansion of mutual assistance into cases of evasion of these types of taxes. Another novelty is the softening of the requirement of dual criminality by the broadening of the accessory mutual assistance and the expansion of mutual assistance on administrative offences sanctioned by administrative authorities.

Also part of the Bilateral Agreements II between the EU and Switzerland is the regulatory framework fraud prevention agreement.²³ The defining of indirect taxes as subject to mutual assistance and in particular the possibility of spontaneous mutual assistance constitute the principal novelties for Switzerland within this agreement.²⁴

3.3 *Special Regulations in the Field of Transnational Organized Crime*

Membership in and supporting a criminal organisation became a crime in Switzerland on 1 August 1994.²⁵ Article 72 StGB allows the confiscation of assets under the de facto control of criminal organisations. If these assets belong to a person participating in a criminal organisation or supporting such an organisation, the power of disposition of the criminal organisation is presumed until proven otherwise (reversal of the burden of proof).

Switzerland ratified the UN Convention against Transnational Organised Crime in the year 2000. As a consequence of this ratification, Switzerland implemented various measures against organised crime amongst which are the commitment to several measures of mutual assistance, including extradition of possible offenders and the exchange of information on organised crime among the authorities of the member states.

²³ SR 0.351.926.81.

²⁴ Donatsch et al. (2011), pp. 130–133.

²⁵ Art. 260ter StGB.

Article 7(1) of the Treaty between Switzerland and the USA on mutual assistance in criminal matters of 25 May 1973 prescribes that there is no prerequisite of dual criminality for measures in connection with the prevention of organised crime.

Reciprocity is not a requirement for mutual assistance, according to Article 8(2) (a) IRSG, where the nature or seriousness of the offence make a response necessary, which is in particular the case of organised crime. Also, the requirements of the principle of dual criminality are lowered in respect of organised crime.²⁶

4 Cooperation with International Criminal Tribunals and the Protection of Fundamental Rights

4.1 The Protection of Fundamental Rights in the Judicial Cooperation with Ad Hoc Tribunals

The Federal Resolution of 21 December 1995 on Cooperation with the International Tribunals Prosecuting Serious Violations of International Humanitarian Law regulates the judicial cooperation.²⁷ In general, the rules of the IRSG are applicable to the cooperation with international courts, insofar as there are no special regulations *e.g.* in a Convention.²⁸

The Swiss Federal Office of Justice rejected in 2009 a request for mutual assistance from the Rwandan government for the extradition of an alleged “*génocidaire*” because the level of human rights protection in Rwanda was not satisfying to the degree that would permit an extradition. One reason for this was the fact that the accused would not be permitted to call witnesses for his defence in the same manner and under the same conditions as witnesses for the prosecution.²⁹

4.2 The Protection of Fundamental Rights in the Judicial Cooperation with the Permanent International Criminal Court

Switzerland’s cooperation with the permanent International Criminal Court is regulated by a federal law.³⁰ Transfer of persons prosecuted or sentenced by the

²⁶ Donatsch et al. (2011), pp. 63 and 71.

²⁷ SR 351.20; Link: http://www.admin.ch/ch/d/sr/c351_20.html.

²⁸ Gless (2011), p. 284.

²⁹ Duttwiler (2009), p. 2.

³⁰ Federal Law of 22 June 2001 on Cooperation with the International Criminal Court, ZISG. SR 351.6; Link: http://www.admin.ch/ch/d/sr/c351_6.html.

court is the main form of cooperation. Other measures such as the recording of evidence including hearings of witnesses and suspects, searches and seizures, service of documents and protection of victims and witnesses are regulated.

The ZISG grants the fundamental rights concerning a fair trial, offering for example possibilities to lodge a complaint against a transfer to the ICC and provides guarantees such as fair hearing. Each final decision of the competent authority for any cooperation is subject to appeal, so that the relevant fundamental rights can be guaranteed. When the ICC requests the transfer of a Swiss resident, Switzerland grants special legal protection. The affected person has the possibility to lodge a complaint to the Federal Criminal Court within ten days. The court decides on the jurisdiction of the ICC. In case concurrent Swiss jurisdiction is questioned, it is the ICC that decides on the jurisdiction.³¹

The principle of speciality is also anchored in Article 27 ZISG. Dual criminality, however, is not required.

Switzerland has so far had only limited experience in the cooperation with the ICC.³²

4.3 Domestic Prosecution of International Crimes and the Protection of Fundamental Rights

Since 1968, the Swiss Military Courts have been competent to judge violations of the Geneva Conventions and other Conventions of international humanitarian law. Due to an amendment entered into force on 1 January 2011, the competency to judge cases of genocide, crimes against humanity and war crimes belongs now to the ordinary courts. Military courts are now only competent to judge war crimes in the event of war.

According to statistics, to date the Swiss Military courts have adjudicated a total of 27 cases (Ex-Yugoslavia: 14; Rwanda: 3; Sierra Leone: 3; other countries: 4) of people presumed to have committed serious violations or grave breaches of the Geneva Convention. One trial lead to a conviction. It was the case of F. Niyontese in April 1999, a former mayor of Mushubati, Rwanda. He was convicted and sentenced to life imprisonment for murder, attempted murder, and incitement to murder as well as grave breaches of the Geneva Conventions.³³ Two cases were transferred to the International Criminal Tribunal for Rwanda for judgement and in one case mutual assistance was granted to Sierra Leone.

³¹ Gless (2011), p. 287.

³² *Ibid.*, p. 285.

³³ Sentence of the Swiss Military Justice of 27 April 2001, commented in Ziegler et al. (2009), pp. 389–396.

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