

Translated from French

Criminal accountability of United Nations officials and experts on mission

Position taken by Switzerland pursuant to paragraphs 3 and 4 of General Assembly resolution 62/63 of 6 December 2007

A. Jurisdiction

In resolution 62/63, paragraph 3, the General Assembly strongly urges “all States to consider establishing to the extent they have not yet done so jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, at least where the conduct as defined in the law of the State establishing jurisdiction also constitutes a crime under the laws of the host State”.

Swiss legislation already contains the necessary legal provisions to meet this requirement fully. Reference is made in particular to articles 3 to 7 of the Swiss Criminal Code (Systematic Collection of Federal Law, 311.0, see annex below. The full text is available on the following site: http://www.admin.ch/ch/f/rs/c311_0.html). These articles provide that prosecutions are not limited to persons who commit crimes and offences in Switzerland. Also covered by Swiss criminal law are crimes committed by Swiss nationals abroad when those crimes are punishable in the territory in which they have been committed or when the place where the act was committed does not fall under any criminal jurisdiction (Criminal Code, art. 7, para. 1).

Swiss criminal law also establishes a limited universal jurisdiction that applies in the case of a series of specific crimes: in those instances, Swiss criminal courts are authorized to prosecute a foreign perpetrator who committed a crime abroad if that person is in Switzerland and has not been extradited (Criminal Code, art. 5 regarding crimes committed abroad against minors, and art. 6 regarding crimes or offences committed abroad and punishable by virtue of an international agreement).

Pursuant to the principle of the primacy of international law over national law, the immunities conferred on alleged perpetrators by international law are, however, not affected.

The Criminal Code provisions cited above are supplemented, in the case of certain categories of persons, by the provisions of the Military Criminal Code (Systematic Collection, 321.0, available on the following site: http://www.admin.ch/ch/f/rs/c321_0.html). Reference is made in particular to articles 3, 8 and 10 of the Military Criminal Code (see annex below).

In the light of the provisions of the Swiss Criminal Code and Military Criminal Code, Switzerland considers that its judicial authorities are fully competent to prosecute its nationals “while serving as United Nations officials or experts on mission”, in the words of paragraph 3 of General Assembly resolution 62/63.

B. Exchange of information with the United Nations

In resolution 62/63, paragraph 4, the General Assembly encourages “all States to cooperate with each other and with the United Nations in the exchange of information and in facilitating the conduct of investigations and, as appropriate, prosecution of United Nations officials and experts on mission who are alleged to have committed crimes of a serious nature, in accordance with the domestic laws and applicable United Nations rules and regulations, fully respecting due process rights, as well as to consider strengthening the capacities of their national authorities to investigate and prosecute such crimes”.

Judicial assistance and cooperation between Switzerland and other States are governed by a great many bilateral and multilateral agreements, while cooperation with the United Nations is covered especially by the Headquarters Agreement. Switzerland is not aware of any particular legal or practical problems in this connection.

C. Annexes

1. Pertinent provisions of the Swiss Criminal Code (Systematic Collection of Federal Law, 311.0)

Article 3. Conditions of place. Crimes or offences committed in Switzerland

1. This Code is applicable to any person who commits a crime or an offence in Switzerland.

2. If, by reason of such an act, the perpetrator has been condemned abroad and has served all or part of the sentence imposed, the judge shall set off the sentence served against the sentence to be imposed.

3. With the exception of a serious violation of the basic principles of constitutional law or of the European Convention on Human Rights of 4 November 1950, a perpetrator prosecuted abroad at the request of the Swiss authorities may no longer be prosecuted in Switzerland for the same act:

(a) If that person was acquitted abroad in a final judgement;

(b) If that person has served the sentence imposed abroad or if the sentence was remitted or time-barred.

4. If the perpetrator prosecuted abroad at the request of the Swiss authorities has not served the sentence imposed, that person shall serve it in Switzerland; if the perpetrator has served only part of the sentence abroad, the remainder shall be served in Switzerland. The judge shall decide if the perpetrator must serve or continue to serve in Switzerland the sentence which has not been served abroad or which has been served only in part.

Article 4. Crimes or offences against the State committed abroad

1. This Code is applicable to any person who commits abroad a crime or an offence against the State and national defence (arts. 265-278).

2. If, by reason of that act, the perpetrator has been sentenced abroad and has served all or part of the sentence imposed, the judge shall set off the sentence served against the sentence to be imposed.

Article 5. Crimes committed abroad against minors

1. This Code is applicable to any person who is in Switzerland and has not been extradited and has committed abroad one of the following acts:

(a) Human trafficking (art. 182), sexual coercion (art. 189), rape (art. 190), an act of a sexual nature committed against a person incapable of discernment or resistance (art. 191) or incitement to prostitution (art. 195), if the victim was less than 18 years old;

(b) An act of a sexual nature with a child (art. 187), if the victim was less than 14 years old;

(c) Aggravated pornography (art. 197, para. 3) if the contents of the objects or the representations were acts of a sexual nature with children.

2. With the exception of a serious violation of basic principles of constitutional law or of the European Convention on Human Rights, the perpetrator may no longer be prosecuted in Switzerland for the same act:

(a) If that person was acquitted abroad in a final judgement;

(b) If that person has served the sentence imposed abroad, if the sentence was remitted or if it was time-barred.

3. If, by reason of this act, the perpetrator has been condemned abroad and has served only part of the sentence imposed, the judge shall set that part off against the sentence to be imposed. The judge shall decide if the sanction ordered and partially executed abroad must be upheld or must be set off against the sentence imposed in Switzerland.

Article 6. Crimes or offences committed abroad and prosecuted by virtue of an international agreement

1. This Code is applicable to any person who commits abroad a crime or an offence which Switzerland has undertaken to prosecute by virtue of an international agreement:

(a) If the act is also punishable in the State where it was committed or if the place where the act was committed does not fall under any criminal jurisdiction and

(b) If the perpetrator is in Switzerland and has not been extradited.

2. The judge shall determine the penalties so as not to treat the perpetrator more severely than would have been the case under the law applicable in the place where the act was committed.

3. With the exception of a serious violation of basic principles of constitutional law or of the European Convention on Human Rights, the perpetrator may no longer be prosecuted in Switzerland for the same act:

(a) If that person has been acquitted abroad in a final judgement;

(b) If that person has served the sentence imposed abroad, if the sentence has been remitted or if it is time-barred.

4. If, by reason of this act, the perpetrator has been condemned abroad and has served only part of the sentence imposed, the judge shall set that part off against the sentence to be imposed. The judge shall decide if the sanction ordered and partially executed abroad must be upheld or must be set off against the sentence imposed in Switzerland.

Article 7. Other crimes or offences committed abroad

1. This Code is applicable to any person who commits a crime or offence abroad which does not meet the conditions provided for in articles 4, 5, or 6:

(a) If the act is punishable also in the State in which it was committed or if the place where the act was committed does not fall under any criminal jurisdiction;

(b) If the perpetrator is in Switzerland or has been handed over to Switzerland by reason of this act and

(c) If, according to Swiss law, the act can be cause for extradition but the perpetrator has not been extradited.

2. Where the perpetrator does not have Swiss nationality and the crime or offence has not been committed against a Swiss national, paragraph 1 shall apply only if:

(a) The request for extradition has been rejected for a reason other than the nature of the act or

(b) The perpetrator has committed a particularly serious crime proscribed by the international community.

3. The judge shall determine the penalties so as not to treat the perpetrator more severely than would have been the case under the law applicable in the place where the act was committed.

4. With the exception of a serious violation of basic principles of constitutional law or of the European Convention on Human Rights, the perpetrator may no longer be prosecuted in Switzerland for the same act:

(a) If that person has been acquitted abroad in a final judgement;

(b) If that person has served the sentence imposed abroad, if the sentence has been remitted or if it is time-barred.

5. If, by reason of this act, the perpetrator has been condemned abroad and has served only part of the sentence imposed, the judge shall set that part off against the sentence to be imposed. The judge shall decide if the sanction ordered and partially executed abroad must be upheld or set off against the sentence imposed in Switzerland.

II. Pertinent provisions of the Military Criminal Code (Systematic Collection of Federal Law, 321.0)

Article 3. Personal conditions

1. Military criminal law shall apply to:

1. Persons called to military service when they are on active duty, with the exception of soldiers on leave who, with no connection to their troop service, commit crimes referred to in articles 115 to 137 and 145 to 179;

2. Officials, employees and workers in the military administration of the Confederation and the cantons, when they commit acts affecting national defence and are in uniform;

3. Persons called to military service, when they are in uniform while off duty and commit crimes referred to in articles 61 to 114 and 138 to 144;

4. Persons called to military service, even if they are not on active duty, insofar as their military status and their tour of duty are concerned, as well as persons who have been called to military service and have not yet completed their tour of duty;

5. Persons called to report for recruitment, while they are under the obligation to report as well as during the day of orientation and for the duration of the recruitment days;

6. Professional military personnel, contractual military personnel, persons belonging to border-protection corps and persons who, in accordance with article 66 of the Federal Act of 3 February 1995 on the army and the military administration, are assigned to peace-promotion service, when they commit crimes while on duty, crimes while off duty but affecting their military obligations or military status, and crimes while in uniform;

7. Foreign civilians or military personnel who are guilty of treason for violation of secrets having to do with national defence (art. 86), sabotage (art. 86a), assault on the defensive power of the nation (arts. 94-97), violation of military secrets (art. 106) or failure to obey measures taken by military or civilian authorities to prepare or carry out army mobilization or to safeguard military secrecy (art. 107);

8. Foreign civilians or military personnel who commit acts referred to in articles 115 to 179 (a) while working with the troops as persons employed or appointed by the army or the military administration;

9. Foreign civilians or military personnel who, during an armed conflict, are guilty of violations of the law of nations (arts. 108-114).

2. The persons referred to in paragraph 1, subparagraphs 1, 2, 6 and 8, are, throughout the period of their active service abroad, subject to military criminal law if they commit an act punishable under this Act while they are abroad.

Article 8. Application of ordinary criminal law

Persons subject to military criminal law remain subject to the ordinary Criminal Code in the case of violations not referred to in this Code.

Article 10. Conditions of place

1. Where the personal conditions are met, this Code is applicable both to crimes committed in Switzerland and to those committed abroad.

1 bis. This Code applies to the persons referred to in article 3, subparagraph 9, who are foreigners and commit, on the occasion of an armed conflict abroad, crimes violating the law of nations (arts. 108-114), when:

(a) They are in Switzerland;

(b) They have a close link to Switzerland;

(c) They can neither be extradited nor handed over to an international criminal tribunal.

2. If, by reason of such an act, the perpetrator has been condemned abroad and has served there all or part of the sentence imposed, the judge shall set off the sentence served against the sentence to be imposed.

3. With the exception of a serious violation of basic principles of constitutional law or of the European Convention on Human Rights of 4 November 1950, a perpetrator prosecuted abroad at the request of the Swiss authorities may no longer be prosecuted in Switzerland for the same act:

(a) If that person has been acquitted in a final judgement;

(b) If that person has served the sentence imposed abroad, if the sentence has been remitted or if it is time-barred.

4. The judge shall decide if the sentence which has not been served abroad or which has been served only in part must be executed or upheld in Switzerland.
