

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

SWITZERLAND¹

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Multilateral Initiatives — Foreign Policy Priorities

- ☛ Swiss Federal Council, *Foreign Policy Report* (2011)
<<http://www.eda.admin.ch/eda/en/home/doc/publi/ppol.html>>

Pursuant to the 2011 Foreign Policy Report, one of Switzerland's objectives at institutional level in 2011 was the improvement of the working methods of the UN Security Council (SC). As a member of the UN 'Small 5' group, on 28 March 2012, the Swiss delegation submitted a draft resolution to the UN General Assembly proposing to make the SC 'more open, transparent and efficient and to include the other UN member states more closely in its deliberations.'² A key point of the proposal is the 'democratisation' of the working methods of the SC, which could be effected by improving transparency and by ensuring that more meetings are held in public and are accessible to non-members, especially given that conflict-affected States and troop-contributing nations have an interest in being more closely involved in the decision-making process. Switzerland has also asked to limit the use of the P5's veto power, calling on these States to forgo veto in cases of genocide, war crimes and crimes against humanity.

At the thematic level, Switzerland stated that it prioritises human security (i.e. the protection of individuals from political violence, war and arbitrary State conduct). In order to ensure human security, Switzerland is willing to offer its good offices and to contribute to mediation in conflicts so as to promote human rights.³ Other Swiss priorities include arms control, disarmament and non-proliferation.⁴

Multilateral Initiatives — Human Security

In 2011, Switzerland invested CHF64.8 million in measures to prevent and regulate crises and to promote human security in international politics. In particular, it supported diplomatic

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² For a summary, see Federal Department of Foreign Affairs, 'Switzerland Wants to "Democratise" the UN Security Council' (Press Release, 28 March 2012) <<http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=43970>>. See also Federal Department of Foreign Affairs, *Foreign Policy Report* (2011) p. 2735 ('Foreign Policy Report') <<http://www.eda.admin.ch/eda/en/home/doc/publi/ppol.html>>.

³ *Ibid.*, p. 2680, Chapter 2.3.

⁴ *Ibid.*, p. 2681.

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initiatives aimed at abolishing the death penalty, ensuring the respect of human rights and international humanitarian law (IHL) by private military companies, and pursuing the fight against armed violence.

Human security also encompasses women's protection in armed conflict and post-conflict situations, the reinforcement of their human rights and their participation in peace-building. Therefore, in 2010, Switzerland decided to re-elaborate its National Plan of Action ('NPA') by focusing on an adapted version of the content of UNSC Resolution 1325 on gender issues to its national context. The NPA aims to establish efficient and coordinated collaboration among different partners within the Swiss Federal Administration dealing with peace and security. Switzerland's peace promotion strategy foresees for each State the adoption of measures taking into account the issue of equality between men and women, women's active participation in the peace process and the re-enforcement of women's rights and protection from sexual violence.⁵

Multilateral Initiatives — Disarmament and Non-Proliferation

On 4 April 2012, the Swiss government⁶ released its humanitarian demining strategy for 2012–2015, in which it stated its aim to invest approximately CHF16 million annually in demining projects and to provide to experts in the fight against landmines, cluster bombs and other explosive remnants of war, in particular via the Geneva International Centre for Humanitarian Demining (GICHD). Switzerland has been actively campaigning for the implementation of international instruments to prohibit these weapons since the 1990s. Thanks to these efforts, countries like Albania and Burundi have been cleared of landmines. A significant contribution has also been made to improve the living conditions of affected populations (e.g. in Colombia, Niger, Laos, Libya, the Horn of Africa, and South-East Europe). The Federal Department of Foreign Affairs ('FDFA') has also made commitments at the political level (e.g. in awareness raising projects on landmines, aid to victims and support to demining operations). Additionally, the Federal Department of Defence contributes to international organisations such as the UN with its demining experts. Switzerland is further actively involved in related multilateral bodies, and is committed to ensuring that the obligations of signatory States are implemented more efficiently and effectively.⁷

Several other activities have been undertaken in the field of disarmament and arms control.⁸ On 26–27 March 2012, Foreign Affairs Minister Didier Burkhalter attended the 2nd Nuclear Security Summit in Seoul, the aim of which was to strengthen nuclear security through measures aimed at preventing nuclear materials falling into the hands of terrorists. Switzerland's main objective was maintaining international stability through the lowest possible level of armament and the total disarmament of weapons of mass destruction. Switzerland also engages in the prevention of the illicit trafficking of conventional weapons and in the ban of weapons causing disproportionate traumatic effects or which have indiscriminate effects. In principle, Switzerland adheres to all the legally binding instruments

⁵ Ibid., p. 2756.

⁶ Through the Federal Department of Foreign Affairs (FDFA) and the Federal Department of Defence, Civil Protection and Sport (DDPS).

⁷ For a summary of the Federal Government strategy 2012–2015, see Federal Department of Foreign Affairs, 'Federal Government Demining Strategy, 2012 to 2015' (Press Release, 4 April 2012) <<http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=44040>>.

⁸ See Federal Department of Foreign Affairs, *Foreign Policy Report, supra* n. 2, p. 2789.

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available and favours the development of IHL in accordance with technological novelties. The following paragraphs provide an overview of Switzerland's engagement in specific areas of arms control and disarmament.

Three meetings were held in Geneva between 2008 and 2010 on the Iranian nuclear issue. Notwithstanding the welcoming of the ratification by the US and Russia in 2011 of the *Treaty for Nuclear Disarmament* (the 'new START'), the progress made in this field has been limited. Therefore, Switzerland's inter-departmental task force, established in 2008, intensified its work and sponsored, inter alia, a study on the optimization of the safeguards of the International Atomic Energy Agency (IAEA).

Switzerland also has the objective to start immediately negotiations for the ban on the production of fissile materials for the production of nuclear weapons within the Conference on Disarmament in Geneva.

Switzerland is a Party to the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* ('*Chemical Weapons Convention*'). By the end of April 2012, all Member States should have destroyed all their chemical weapons stocks. Switzerland follows the developments in this regard and encourages new technological advances in relation to chemical weapons to be integrated into the Convention. Switzerland further contributes to the strengthening of the Convention through its research activities of incapacitating chemical agents. In September 2011, the Laboratory of Spiez (Canton Bern, Switzerland) organised an international workshop on this subject.

In December 2011, Switzerland hosted an international conference in Geneva aimed at examining possible re-enforcement mechanisms of the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* ('*Biological Weapons Convention*' or '*BWC*'). With a group of like-minded States, Switzerland supports the strengthening of the applicable regime via new approaches aimed to promote transparency among State Parties and reduce further the risk of proliferation. Switzerland also plays a pioneering role in raising awareness among researchers on the problem of dual use in biotechnology research.

Switzerland supports the introduction of a new Protocol to the *1980 UN Convention on Conventional Weapons*, which should be complementary to the *Convention on Cluster Munitions* of 30 May 2008.⁹ On 6 June 2011, the Federal Council approved the ratification of the *Convention on Cluster Munitions*, along with the revision of the *War Material Act* of 13 December 1996. The Parliament approved the decision to ratify on 16 March 2012.¹⁰ The Swiss Army still possesses stocks of cluster munitions which are subject to the *Convention on Cluster Munitions* ban. With the ratification, Switzerland has undertaken to destroy these weapons within eight years from the Convention's entry into force.¹¹ The revision of the *War*

⁹ Ibid., p. 2791.

¹⁰ Curia Vista - Note de synthèse, 11.036, Convention sur les armes à sous-munitions. Loi sur le matériel de guerre <http://www.parlament.ch/f/suche/pages/legislaturueckblick.aspx?rb_id=20110036> (in French). See in particular the minutes of votes results at the Spring session of the National Council, 17th meeting, 16th March 2012, 8am, on the Cluster Munitions Convention (dossier 11.036) <http://www.parlament.ch/ab/frameset/f/n/4902/378422/f_n_4902_378422_378643.htm>. For the vote of the States Council, Spring Session 2012, 16th March 2012, 0820 am, 12th meeting, (dossier 11.036) <http://www.parlament.ch/ab/frameset/f/s/4902/378454/f_s_4902_378454_378489.htm>.

¹¹ Federal Department of Foreign Affairs, 'The Federal Council Decides to Ratify the Convention on Cluster Munitions' (Press Release, 6 June 2011) <<http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=39471>>. For more information on the discussions at Parliament on the Message to the Parliament for the Ratification of the Convention, see the

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Material Act also foresees a total ban of cluster munitions and the prohibition of the financing of prohibited weapons by the adoption of criminal law provisions.

Multilateral Initiatives — International Humanitarian Law

On 21 March 2011, the Federal Council announced a host State contribution of CHF70 million for the year 2012 to the International Committee of the Red Cross (ICRC). Switzerland, which is the depositary State of the *Geneva Conventions* of 1949, is the ICRC's third major donor.¹²

The Federal Department of Defence is also very active in the dissemination of IHL. The following training activities are organized within the framework of the Partnership for Peace: the ICMM Course on International Humanitarian Law (MILMED); the International Competition on the Law of Armed Conflict (LOAC) for middle rank officers (IHL Competition); the Training Course for Military Observers for UN and OSCE Missions (SUNMOC); the Peace Support Operations Basic Course (PSOBC); the Negotiation Training Seminar; the NCO Preliminary Leadership in International Environment Course (NCO Intermediate); the NCO Advanced Leadership in International Environment Course (NCO Advanced); the Annual Senior Officer's Security and Rule of Law Conference to Flag Officers and High level experts (Law Conference).¹³ Trainings are also offered by the Laws of Armed Conflict Section of the Swiss Defence Department at different levels of the Armed Forces. The section further coaches a team of the Military Academy to attend the LOAC Competition that is organized by the San Remo Institute for IHL. Specific sessions on international law, including LOAC and international criminal law, are also offered by the Swiss Military Academy at the Swiss Federal Institute of Technology¹⁴ in Zurich in different internal and external courses.¹⁵ Other important civilian partners of the Swiss Defence Department in this regard are the Geneva Centre for Security Policy (GCSP), the Geneva International Centre for Humanitarian Demining (GICHD), the Geneva Centre for the Democratic Control of the Armed Forces (DCAF), the International Relations and Security Network (ISN) in Zurich, the San Remo Institute for International and Humanitarian Law and the Harvard University Program on Humanitarian Policy and Conflict Research.¹⁶

In order to foster the dissemination of IHL and coordinate the activities at the Federal level, an Interdepartmental Committee for IHL has been tasked with the administration and the internal exchange of IHL expertise and its implementation, along with the development of

website Curia Vista, Note de synthèse, 11.036, Convention sur les armes à sous-munitions. Loi sur le matériel de guerre <http://www.parlament.ch/f/suche/pages/legislaturueckblick.aspx?rb_id=20110036> (in French). Message du 6 juin 2011 relatif à l'approbation de la Convention sur les armes à sous-munitions ainsi qu'à la modification de la loi sur le matériel de guerre (FF 2011 5495).

¹² Federal Department of Foreign Affairs, 'Contribution of Switzerland to the International Committee of the Red Cross ICRC' (Press Release, 21 March 2012) <<http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=43871>>.

¹³ Detailed information can be requested from the Laws of armed conflict section of the Swiss Army's Staff, which generously provided this information. See <www.loac.ch>.

¹⁴ See <www.milak.ch>.

¹⁵ In 2012, for instance, the MILAK will contribute to the ICRC's 2012 Annual course on IHL to be held from 2 – 11 July 2012 in Zäziwil with a presentation to be made by the author of the present report. For major details, see <<http://www.icrc.org/fre/resources/documents/event/ihl-course.htm>>.

¹⁶ In particular, in relation to the Project 'IHL in Air and Missile Warfare'. For more details, see <<http://www.ihlresearch.org/amw/ihlri.php>>.

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relations with the academic community, civil society and other institutions dealing with IHL.¹⁷

Multilateral Initiatives — Peace Support Operations

Switzerland is active in peace support operations ('PSO') both with civilian and military personnel.

In 2011, Switzerland contributed 208 experts to promote peace and human rights in several bilateral and multilateral missions in a total of 43 countries. These activities included the monitoring of elections under the aegis of the Organisation for Security and Cooperation in Europe, the EU, the Organisation of American States and the Organisation International de la Francophonie (OIF).¹⁸

In 2011, almost 75 per cent of the resources designated to the civilian promotion of peace was dedicated to development programs in Switzerland's priority countries and regions. Efforts have been concentrated in South-East Europe, the Middle East, Western and Central Africa, Sudan, the Horn of Africa, the Great Lakes Region, Nepal and Colombia. Following the so-called Arab Spring in Northern Africa in 2011, Switzerland launched a program aimed at supporting democratic transition in most of this region's countries. Other investments have been made in Indonesia, Thailand, Kirghizstan and Northern Caucasus. Switzerland is further active in the Western Balkans, particularly in the decentralization process of Kosovo, which saw it engaged in a programme to improve the participation of the Serb populations in Kosovo's institutions.¹⁹ Switzerland supports the activities of the International Tribunal for the former Yugoslavia (ICTY), the Bosnian judiciary and NGOs which have a positive impact on reconciliation. Switzerland also contributes to NATO and EU civilian and military operations in Kosovo (EULEX, KFOR, ICO) and in Bosnia and Herzegovina (EUPM, EUFOR).

The Swiss Armed Forces have also been involved in PSO since 1953. Currently 297 men and women from the rank of first private to major general are serving in 17 countries on four continents.²⁰ The vast majority are non-professional military personnel (so-called militia).²¹ According to UN statistics, in 2011, Switzerland deployed 17 military and police members to UN PSO. In its Army Report dated 1 October 2010,²² the Federal Council expressed its intention to increase the number of Swiss military peacekeepers.

Swiss Armed Forces have been involved in Kosovo with the International Kosovo Force (KFOR) since 1 October 1999, by virtue of the contribution of the SWISSCOY [Swiss company]. The SWISSCOY is composed of up to 235 voluntary military persons armed for self-defence. Its deployment was decided on 23 June 1999 by the Federal Council on the basis of UN Resolution 1244. Since April 2010, new elements of the SWISSOCOY are

¹⁷ For more information, see <<http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/swieng/hvrk.html>>.

¹⁸ For more details see Federal Department of Foreign Affairs, *Foreign Policy Report*, *supra* n. 2, p. 2765.

¹⁹ *Ibid.*, p. 2757.

²⁰ Austria, Bosnia-Herzegovina, Western Sahara, Ghana, DR Congo, Middle East, Somaliland and Puntland, Southern Sudan, Burundi and Korea. For a map of the deployments, see <<http://www.vtg.admin.ch/internet/vtg/en/home/themen/einsaetze/peace>>.

²¹ More information on Switzerland's participation in Peace Support Operations can be found in the Review of the Swiss Contributions to International Operations 'Swiss Supporter' <http://www.vtg.admin.ch/internet/vtg/en/home/dokumentation/publik_zeitschr/magazin_swiss_peace.html>.

²² *Swiss Army Report* (2010) p. 8109. See Federal Department of Foreign Affairs, *Foreign Policy Report*, *supra* n. 2, p. 2736.

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explosive ordnance disposal teams and liaison and monitoring teams to facilitate the collection of information.²³

Multilateral Initiatives — International Criminal Law

Among Switzerland's foreign policy objectives is its strengthened engagement in the achievement of a strong and efficient international criminal justice system.²⁴ To this end, it supported the election of Mrs Fatou Bensouda (The Gambia), former Deputy Prosecutor, as Chief Prosecutor of the International Criminal Court ('ICC'). Switzerland believes that the ICC should work on a universal basis and thus it encourages the ratification of the *Rome Statute* by non-States Parties.

Legislation — Implementation of the Rome Statute

- 'Message du 23 avril 2008 relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale' (FF 2008 3461) <www.admin.ch/ch/f/ff/2001/359.pdf>
- Swiss Federal Department of Justice and Police, 'La Suisse se donne les moyens de poursuivre les crimes les plus graves : Le Conseil fédéral adopte un message' (Press Release, 23 April 2008) <www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2008/2008-04-23.html>
- Parliamentary Discussions and Votes²⁵ <www.parlament.ch/ab/frameset/f/s/4813/324564/f_s_4813_324564_324653.htm>

Following to the ratification of the *Rome Statute* on 12 October 2001 and the enactment of legislation by the Parliament allowing cooperation between Switzerland and the ICC on 22 June 2001, which entered into force on 1 July 2002,²⁶ on 17 August 2005, the Swiss Federal Council opened the internal consultations for the adoption of complementary criminal law measures to implement the *Rome Statute*.²⁷ On 28 February 2007, the outcome was delivered to the Federal Council. The Federal Council supported the view that crimes against humanity, war crimes and genocide should not go unpunished and thus supported the amendment of the existing *Criminal Code* in order to better safeguard the prosecution of such offences. The 'close nexus' requirement for the establishment of Switzerland's jurisdiction over offences committed abroad was highly criticized. Therefore, in its mandate to the Federal Department of Justice and Police for the drafting of a Message to the Parliament, the Federal Council substituted it with a narrower definition of universal jurisdiction.²⁸

²³ For more information, see the Factsheet on Kosovo published on the website of SWISSINT <<http://www.vtg.admin.ch/internet/vtg/en/home/themen/einsaetze/peace/swisscoy/factsheet.html>>.

²⁴ Federal Department of Foreign Affairs, *Foreign Policy Report, supra* n. 2, pp. 2735, 2737–2738 of the French version.

²⁵ See also Jurius, 'Guerres et genocides: le Conseil des Etats prône un arsenal pénal encore plus sévère', *Jusletter* (22 March 2010); Trial Watch, *Genocide, Crimes against Humanity and War Crimes: Switzerland to Have a New Law — But with Limited Application* (19 March 2010) <[www.trial-ch.org/en/activities/details/article/genocide-crimes-against-humanity-and-war-crimes-switzerland-to-have-a-new-law-but-with-limited-a.html?tx_ttnews\[backPid\]=50&cHash=dc1d25f5d5](http://www.trial-ch.org/en/activities/details/article/genocide-crimes-against-humanity-and-war-crimes-switzerland-to-have-a-new-law-but-with-limited-a.html?tx_ttnews[backPid]=50&cHash=dc1d25f5d5)>.

²⁶ *Loi fédérale du 22 juin 2001 sur la coopération avec la Cour pénale internationale (LCPI)*, SR 351.6 <www.admin.ch/ch/f/rs/c351_6.html>.

²⁷ Amendments to the *Loi fédérale du 20 mars 1981 sur l'entraide internationale en matière pénale (loi sur l'entraide pénale internationale, EIMP)*, SR 351.1 <www.admin.ch/ch/f/rs/c351_1.html>.

²⁸ Federal Department of Justice and Police, 'Droit pénal: vers une définition plus précise des crimes les plus graves' (2007) <<http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2007/2007-03-010.html>>.

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The Message was released on 23 April 2008, following which a draft²⁹ Federal Law concerning the revision of the *Criminal Code* ('CC') and the *Military Criminal Code* ('MCC') was elaborated and its final version released on 18 June 2010.³⁰ No referendum was required and therefore the proposed amendments entered into force on 18 June 2010. The revised CC and MCC entered into force on 1 January 2011.

Jurisdiction over civilian offenders was delegated from the military justice system to the civilian justice system. From 1 January 2011 onwards, the military justice system shall only retain jurisdiction over crimes committed by or against a Swiss national, or/and crimes committed within the framework of an armed conflict to which Switzerland is a Party (MCC, arts. 3, 5).³¹ Civilians who participated in these offences along with persons who are subjected to the MCC shall be tried pursuant to the civilian CC (MCC, art. 7). In complex cases where more than one person is involved and the perpetrators are partly subject to the ordinary and the military jurisdiction, the Judge Advocate General or the Federal Attorney General may decide to delegate the whole case to either the military justice system or the competent civilian authorities. In this event, all those involved shall be tried pursuant to the same law (MCC, art. 221a).

In all other cases, jurisdiction shall lie with the civilian justice system. The Federal Attorney General's office has the prosecutorial competence over these cases³² and thus they shall not be delegated to the Cantons.³³ Cases pending on 1 January 2011 were handed over to the Federal Attorney General's Office.³⁴

Since crimes against humanity were introduced for the first time on 1 January 2011, in application of a rigid interpretation of the principle of non-retroactivity, crimes committed prior to this date cannot be prosecuted under this heading, notwithstanding recognition as customary law. The alternative is to prosecute them under other 'ordinary crimes' headings (e.g. murder), in which case the competent judicial authorities are the cantonal ones.³⁵

The principle of non-retroactivity, however, does not affect international judicial assistance requests in criminal matters.³⁶ What matters is that the conduct which is the object of a foreign criminal prosecution constitutes a crime both in the country requesting assistance as well as in the requested country, at the time that the assistance request was placed (so-called principle of double criminality).

All the cases, including those that were pending on 1 January 2011 will have to be prosecuted by the Federal Attorney General's Office pursuant to the new *Federal Code of Criminal Procedure* (arts. 25 and 448/449). The first competent judicial instance is the Federal Criminal Court, whose judgments may be appealed to the Swiss Federal Supreme Court.

²⁹ Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale, Projet, (FF 2008 3565) <<http://www.admin.ch/ch/f/ff/2008/3565.pdf>>.

³⁰ Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale, 18th June 2010, FF 2010 3889 <<http://www.admin.ch/ch/f/ff/2010/3889.pdf>>.

³¹ See also Message to the Parliament: Botschaft über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs vom 23. April 2008, BBl 2008 3863, p. 3971.

³² See *Federal Code of Criminal Procedure*, art. 23(1)(g) which entered into force on 1 January 2011 by replacing the 26 existing Cantonal Codes of Criminal Procedure and the former *Federal Code of Criminal Procedure*.

³³ *Code of Criminal Procedure*, arts. 25(1), 23(1)(g).

³⁴ *Ibid.*, arts. 448/449.

³⁵ CC, art. 264; MCC, art. 109.

³⁶ See *Federal Law on International Judicial Assistance in Criminal Law*, art. 35(2).

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The perpetrator of offences committed abroad may be punished in Switzerland as long as he finds himself in Switzerland and is not extradited to another State or is not surrendered to an international tribunal, the competence of which has been recognized by Switzerland (CC, art. 264k). If neither the perpetrator nor the victim is a Swiss national, the Judge can decide either not to enter into the matter or to abandon the case, on condition that:

- a) he/she has taken adequate measure to safeguard the evidence, in the event that a foreign authority or an international criminal tribunal recognized by Switzerland is leading a case and the perpetrator is extradited or surrendered to such tribunal, or
- b) if the perpetrator no longer finds him-herself in Switzerland and it seems unlikely that he/she will return to Switzerland.

The major change in the CC³⁷ has been the introduction of a war crimes catalogue (CC, arts. 264c–264h) and a new crimes against humanity provision (CC, art. 264a). War crimes are punishable regardless of the nature of the armed conflict.

Along with genocide (CC, art. 264), instigation to commit genocide is now also foreseen as a specific offence (CC, art. 259 (1bis)), independently of whether the instigation has been committed abroad, as long as the genocide was supposed to take place in part or in whole in Switzerland.

Preparatory acts (e.g. the taking of technical or organizational arrangements on the basis of a plan) may also be punished with a maximum sentence of five years detention or a pecuniary sentence (CC, art. 260 bis (1)).

The principle of command responsibility for military and civilian superiors, which was already foreseen in different forms in the old MCC, is now addressed in Article 264k of the CC. The provision is contained in the chapter on common provisions applicable to war crimes, crimes against humanity and genocide. Its status (*sui generis* crime or a (special) form of participation) will have to be defined by jurisprudence.³⁸ The maximum penalty for all these offences is life-long detention (CC, art. 64).

From a procedural point of view, prescription does not apply (CC, art. 101). With regard to war crimes and genocide, this holds true as long as on 1 January 1983 the criminal prosecution or the sentence were not prescribed on the basis of the law applicable at that time. With regard to crimes against humanity, the same holds true if on 18 June 2010 (the date of the amendment of the law), the criminal action or sentence were not prescribed on the basis of the law applicable at the time.

Finally, relative immunity is excluded (CC, art. 264n).

The possibility to prosecute breaches of the laws of armed conflict ('LOAC') was provided by Article 109 of the former MCC of 13 June 1927.³⁹

Art. 109 Violation des lois de la guerre

1. Celui qui aura contrevenu aux prescriptions de conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens, celui qui aura violé d'autres lois et coutumes de la guerre reconnues,

³⁷ *Code pénal Suisse*, du 21 décembre 1937 (Etat le 1er janvier 2012), RS 311.0 <http://www.admin.ch/ch/f/rs/311_0/index.html>.

³⁸ R. Arnold, 'Book Review Essay of M. Nybondas' book "Command Responsibility and Its Applicability to Civilian Superiors"', *Journal of International Criminal Justice* (forthcoming 2012).

³⁹ This version is still available on the website of the Swiss Military Attorney General. See <<http://www.vbs.admin.ch/internet/vbs/fr/home/documentation/oa010.html>>. For a history, see R. Arnold, 'Commentary to the STGB', *supra* n. 38 (forthcoming), BBl 1950 II 267, S. 269.

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sera, sauf si des dispositions plus sévères sont applicables, puni de l'emprisonnement. Dans les cas graves, la peine sera la réclusion.

2. L'infraction sera punie disciplinairement si elle est de peu de gravité

This general provision, along with Articles 110–114a of the former MCC,⁴⁰ provided the only legal basis for the indictment and punishment of perpetrators for breaches of the LOAC.⁴¹ Following the ratification of the *Rome Statute*, the legislature concluded, however, that this provision was too generic under the perspective of the principles of legality and certainty. It therefore decided to introduce a new detailed war crimes catalogue. The new MCC, which entered into force on 1 January 2011, now contains several new provisions which correspond to the provisions contained in the ordinary CC in defining war crimes, crimes against humanity and genocide. Genocide is defined in Article 108 of the MCC, whereas crimes against humanity are enlisted in Article 109. Both offences are contained in Chapter 6. War crimes are listed in Chapter 6bis, under Articles 110–114 and are divided into grave breaches (art. 111), war crimes (arts. 112–113) and other violations of IHL (art. 114).

Analogously to Article 264k of the CC, the principle of command responsibility is now addressed separately (MCC, art. 114a) as it is contained in Chapter 6(ter) on 'common provisions' to Chapters 6 and 6bis. The issue of whether this is a sui generis offence, or a (special) form of participation to other crimes is left to the jurisprudence.

Plundering is now banned under Article 139 of the MCC (as a 'common provision'), along with the instigation to commit genocide in whole or in part in Switzerland (MCC, art. 171a (1bis)). Preparatory acts are punishable by a maximum of 5 years' detention or a pecuniary sanction (MCC, art. 171b(1)). Relative immunity does not apply (MCC, art. 114b).

Following the delegation of the competence to prosecute war crimes, crimes against humanity and genocide to the Federal Attorney General's Office, on 1 January 2011, a new

⁴⁰ Art. 110 — Abus d'un emblème international

Celui qui aura abusé de l'emblème ou de la protection de la CroixRouge, du Croissant-Rouge, du Lion et du Soleil-Rouges ou de l'écusson des biens culturels, pour préparer ou commettre des actes d'hostilité, sera puni de l'emprisonnement. Dans les cas graves, la peine sera la réclusion.

Art. 111— Actes d'hostilité contre des personnes et des choses protégées par une organisation internationale

1 Celui qui se sera livré à des actes d'hostilité contre des personnes placées sous la protection de la Croix-Rouge, du Croissant-Rouge, du Lion et du Soleil-Rouges ou de l'écusson des biens culturels, ou les aura empêchées d'exercer leurs fonctions, celui qui aura détruit ou endommagé du matériel placé sous la protection de la Croix-Rouge, du Croissant-Rouge ou du Lion et du SoleilRouges, celui qui, sans droit, aura détruit ou endommagé des biens culturels ou du matériel placés sous la protection de l'écusson des biens culturels, sera puni de l'emprisonnement. Dans les cas graves, la peine sera la réclusion.

2 L'infraction sera punie disciplinairement si elle est de peu de gravité.

Art. 112 — Violation des devoirs envers des ennemis

Celui qui aura tué ou blessé un ennemi qui se rendait ou qui, d'une autre manière, avait cessé de se défendre, celui qui aura mutilé un ennemi mort, sera puni de l'emprisonnement. Dans les cas graves, la peine sera la réclusion.

Art. 113 — Rupture d'un armistice ou de la paix

Celui qui aura continué les hostilités, après avoir eu officiellement connaissance de la conclusion d'un armistice ou de la paix, celui qui aura, de n'importe quelle autre manière, violé les conditions d'un armistice qui avaient été officiellement portées à sa connaissance, sera puni de l'emprisonnement. Dans les cas graves, la peine sera la réclusion.

Art. 114 — Infractions contre un parlementaire

Celui qui aura maltraité, injurié ou retenu indûment un parlementaire ennemi ou une personne qui l'accompagne, sera puni de l'emprisonnement.'

⁴¹ Botschaft über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs vom 23. April 2008, BBl 2008 3863, p. 3882 (German version).

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Competence Centre for so-called 'humanity crimes' was created.⁴² On 23 December 2011, the Parliament representative Carlo Sommaruga (Socialist Party) asked the National Council why there was no record of any sentencing of war criminals in Switzerland during the last ten years, when States like the Netherlands, Great Britain, Norway, the USA or Germany had obtained great success in the prosecution of this kind of offender, particularly following the establishment of special war crimes units. The Federal Attorney General's Office was thus asked the following questions:⁴³

- 1) What means are/have been made available to/by the Attorney General's Office to adapt to the new legislation and ensure the efficient prosecution of war criminals who may find themselves in Switzerland?
- 2) What measures have been effectively adopted within the Attorney General's Office in order to track down suspects and facilitate the prosecution of such crimes in Switzerland?
- 3) Is there any coordination mechanism in place between all the different authorities (Office of Migration, Federal Department of Foreign Affairs, tribunals, police, Prosecutor's office, etc...) that may discover or detain information concerning war criminals possibly located in Switzerland, particularly in application of art. 98 of the Federal Law on Asylum seekers?
- 4) How many investigations have been conducted and how many cases have been transmitted to the criminal prosecutorial authorities since the adoption of the above mentioned provision and which was the crime concerned in such case?
- 5) Has not the time come to provide for concrete and efficient means in this field and to create a specialized international crimes unit?⁴⁴

⁴² See <<http://www.bundesanwaltschaft.ch/aufgaben/00029/index.html?lang=en>>.

⁴³ Unofficial English translation. The official version in French of the Parliamentary question, deposited on 23 December 2011, Parliamentary Question no. 11.4168 <http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20114168>. The deposited text is the following: « Selon différentes sources, les Etats occidentaux abritent de nombreux génocidaires et autres criminels de guerre. Le 1er janvier 2011, les dispositions pénales de mise en oeuvre du Statut de Rome sont entrées en vigueur dans le Code pénal suisse et notre pays dispose désormais d'une loi moderne pour lutter contre l'impunité des auteurs de crimes internationaux. La justice civile est compétente et nos autorités ont l'obligation de chercher activement les personnes suspectées d'avoir commis de tels crimes et qui se trouveraient sur notre territoire. La dernière décennie n'a pourtant vu aucune condamnation en Suisse. Beaucoup d'Etats occidentaux parmi lesquels les Pays-Bas, le Royaume-Uni, la Norvège, les Etats-Unis ou l'Allemagne, ont mis sur pied une unité spécialisée chargée de poursuivre les criminels de guerre, avec des résultats probants à la clé. Je charge le Ministère public de la Confédération de répondre aux questions suivantes:

1. Quels ont été les moyens mis à disposition du et par le Ministère public de la Confédération (MPC) pour s'adapter aux nouvelles dispositions législatives et permettre la poursuite efficace des criminels internationaux présents en Suisse?
2. Quelles sont les mesures effectivement prises au sein du MPC pour dénicher activement les suspects et favoriser la poursuite de tels crimes en Suisse?
3. Existe-t-il une coordination entre les différentes autorités qui pourraient être en contact ou détenir des informations sur les criminels de guerre susceptibles de fouler le territoire helvétique (Offices des migrations, DFAE, tribunaux, polices, parquets, etc.), notamment au regard de l'article 98a LAsi?
4. Combien d'enquêtes ont-elles été conduites et combien d'affaires ont-elles été transmises aux autorités de poursuites pénales depuis l'adoption de ladite disposition, et quel était le crime concerné dans chacune de ces affaires?
5. Le temps n'est-il pas enfin venu de mettre à disposition des moyens concrets et effectifs en la matière et de créer une unité spécialisée dans la poursuite des crimes internationaux en Suisse? »

⁴⁴ Loi du 26 juin 1998 sur l'asile (LAsi), RS 142.31 <http://www.admin.ch/ch/f/rs/c142_31.html>.

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In its reply dated 20 February 2012, the Federal Council stated that⁴⁵ among others, the Federal Attorney General's office had not been granted additional resources in order to adapt

⁴⁵ Official Version in French of the Parliamentary Question, Deposited on 23 December 2011, Parliamentary Question no. 11.4168 <http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20114168>. Réponse du Conseil fédéral, Réponse de l'Autorité de surveillance du Ministère public de la Confédération du 20 février 2012:

« 1. Le Ministère public de la Confédération (MPC) n'a pas reçu de ressources supplémentaires pour s'adapter aux nouvelles dispositions législatives. En utilisant l'expérience et les connaissances spéciales acquises antérieurement dans ce domaine et dans d'autres fonctions par certains de ses collaborateurs, il a constitué un Centre de compétence Crimes contre l'humanité et crimes de guerre. Ce Centre est actuellement formé du procureur en chef de la Division Entraide judiciaire, d'une procureure de la Division Protection de l'Etat et de deux collaboratrices juridiques. Ces personnes y traitent les cas en sus de leurs affaires courantes et poursuivent leur spécialisation. Une équipe d'enquêteurs fédéraux de la Division Enquêtes Protection de l'Etat de fedpol, Commissariat Protection de l'Etat et Commissariat Exécution de l'entraide judiciaire, appuie par ailleurs le MPC dans ce domaine.

2. Avant même l'entrée en vigueur des nouvelles dispositions pénales de mise en oeuvre du Statut de Rome, le MPC avait noué des contacts avec des partenaires susceptibles de dénoncer des cas touchant le territoire suisse. Ainsi, il a rappelé à l'Office fédéral des migrations (ODM) et au Tribunal administratif fédéral (TAF) les obligations de coopération découlant de l'article 98a LAsi; il en est résulté un cas signalé en 2011 par l'ODM mais il ne remplissait pas les conditions d'ouverture d'une procédure pénale. Le Centre de compétence a également rencontré des organisations non gouvernementales (ONG) ayant leur siège en Suisse ou à l'étranger. Le MPC participe également depuis trois ans, en tant qu'observateur, aux réunions semestrielles d'un groupe de travail de l'Union européenne (European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes) regroupant des praticiens de l'entraide judiciaire et de la poursuite pénale en matière de crimes internationaux; les discussions menées au sein de ce groupe ont permis au Centre de compétence de tirer profit de l'expérience de pays tels que les Pays-Bas, le Royaume-Uni, la Norvège, les Etats-Unis ou l'Allemagne pour mettre en place au MPC des méthodes de travail favorisant la poursuite des crimes internationaux en Suisse.

3. En dépit d'une obligation de dénonciation des crimes ou délits poursuivis d'office incombant aux employés de la Confédération et des cantons et de l'entrée en vigueur au 1er janvier 2008 de l'article 98a LAsi qui met en oeuvre l'article 1, Section F, lettre a de la Convention relative au statut des réfugiés, le MPC n'a jusqu'ici reçu, en application de cette disposition, aucun cas ayant conduit à l'ouverture d'une procédure pénale. La coordination existant depuis plusieurs années entre le MPC et les différentes autorités partenaires a fait l'objet de discussions spécifiques au domaine des crimes internationaux durant l'année 2011. Un des objectifs 2012 du Centre de compétence est de renforcer les contacts, en particulier avec l'ODM et les polices cantonales, afin de les sensibiliser aux nouvelles infractions, d'améliorer l'échange d'informations et de mener des procédures sur initiative des autorités de poursuite pénale.

4. Depuis le 1er janvier 2011, le MPC a traité sept demandes d'entraide judiciaire portant essentiellement sur les événements du Rwanda et de l'Ex-Yougoslavie. Il a par ailleurs traité, d'office ou sur dénonciation d'ONG ou de particuliers, sept affaires au niveau national: dans quatre cas, il a rendu des ordonnances de non-entrée en matière; dans trois autres cas, il a ouvert des instructions qui sont toujours pendantes. Parmi les affaires traitées au niveau national, cinq portaient sur l'infraction de crime de guerre, une sur l'infraction de crime contre l'humanité et une sur les infractions de crimes de guerre et de génocide.

5. La mise en place du Centre de compétence dans son organisation actuelle au sein du MPC est issue d'une analyse des cas de crimes internationaux traités jusqu'au 31 décembre 2010, qui aboutissait au constat que les autorités précédemment compétentes pour ce genre d'infractions - MPC pour le génocide, Office de l'auditeur en chef pour les crimes de guerre et parquets cantonaux pour les infractions correspondant à la notion de crimes contre l'humanité - avaient mené peu de procédures pénales. Par ailleurs, un seul cas de crime de guerre a fait l'objet d'un transfert de la justice militaire au MPC en début d'année 2011. Le peu de cas traités sur territoire suisse s'expliquait en outre par la volonté constante du législateur fédéral d'appliquer strictement le principe de non-rétroactivité de la poursuite pénale pour les crimes commis avant le 1er mars 1968 (crimes de guerre), le 15 décembre 2000 (génocide) et le 1er janvier 2011 (crimes contre l'humanité). Durant l'année 2011, le Centre de compétence a ainsi pu gérer tous les cas qui lui ont été dénoncés et initier les premières démarches en vue de découvrir de nouveaux cas par lui-même. Il a également mis l'accent - et continuera de le faire selon ses objectifs 2012 - sur la formation de son personnel, notamment par des cours menés conjointement avec la PJF, des participations à des conférences ou par un engagement dans une mission internationale. Le Centre de

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to the new legislation, but that a new competence centre for crimes against humanity and war crimes had been created, which resorts to the experience and the specialized knowledge acquired previously in this and other fields by some of its collaborators. At the same time, there is also a special team of investigators in the Federal Police. With regard to collaboration with other authorities, contacts have already been established prior to the entry into force of Article 98 of the *Federal Law on Asylum Seekers*, in particular with the Administrative Federal Court and the Federal Office of Migration. The latter notified one case in 2011, which however, did not meet the criteria for the opening of a criminal case. One of the competence centre's objectives for 2012 will be the re-enforcement of these contacts, in particular with the Federal Office of Migration and the Cantonal Police forces, in order to inform them about these new crimes and to improve the exchange of information and the conduct of new cases opened thanks to the self-initiative of the prosecutorial authorities.

The competence centre's creation was the outcome of an analysis of the international crime cases dealt with until 31 December 2010, which led to the conclusion that the authorities previously entrusted therewith (the Military Justice and the different Cantonal Attorney general's offices) had undertaken relatively few cases. For instance, only one case was transferred from the Military Justice to the Federal Attorney General's Office in early 2011. The limited number of cases dealt with on Swiss soil could be explained by the federal legislator's intention to apply the principle of non-retroactivity rigidly for the prosecution of crimes committed prior to 1 March 1968 (war crimes), 15 December 2000 (genocide) and 1 January 2011 (crimes against humanity). Thus, in 2011, the competence centre was able to deal with all the cases that had been submitted to it and to take its first steps toward the discovery of new cases. The competence centre had also emphasised the training of its personnel, for instance through courses held jointly with the Federal Judiciary Police, as well as the participation in conferences and international missions. This will remain one of the objectives in 2012. In 2012, the competence centre will be more active in identifying new cases in Switzerland. Taking into consideration the developments that have taken place in other States and relying on specialized units in this field, the centre will evaluate the situation and, if necessary, undertake an internal reorganization in order to better address these offences.

The conclusion of the answer to the parliamentary request was that one year after the entry into force of the new international criminal law provisions, it was premature to draw conclusions on the efficiency of prosecution of alleged war criminals in Switzerland and whether the allocated resources have been sufficient.

During a media conference on 30 March 2012, the newly elected Attorney General Michael Lauber⁴⁶ announced plans to professionalize the competence centre.⁴⁷

Cases — International Crimes Trials (War Crimes, Crimes against Humanity, Genocide)

compétence développera en 2012 une démarche plus active pour découvrir de nouveaux cas en Suisse; c'est ainsi, à l'image de ce qui s'est fait progressivement dans d'autres pays disposant d'une unité spécialisée, que le MPC sera à même d'évaluer en toute connaissance de cause la situation et de décider, cas échéant, d'une réorganisation dans le domaine de la poursuite pénale des crimes internationaux. Après une année seulement d'existence, il serait donc prématuré de tirer des conclusions. »

⁴⁶ Michael Lauber took office on 1 January 2012, following his election to Parliament on 28 September 2011.

⁴⁷ See Swiss Federal Attorney General's Office '100 premiers jours en fonction : Informations du Procureur général' (Press Release, 30 March 2012)

<http://www.bundesanwaltschaft.ch/medien/00084/00085/index.html?lang=fr>.

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In 2010–2011, there were no trials concerning war crimes, crimes against humanity or genocide in Switzerland.

However, several criminal complaints have been brought by Swiss NGOs such as TRIAL⁴⁸ and the *Gesellschaft für bedrohte Völker*.⁴⁹ In its official reply to the Sommaruga request, the Federal Council confirmed that since 1 January 2011, the Federal Attorney General's Office had received seven international judicial assistance requests in criminal matters, concerning primarily situations that had taken place in Rwanda and the former Yugoslavia. The Office has further dealt with seven national cases, either ex officio or on the basis of criminal complaints by NGOs. In four cases an investigation was opened and these investigations are still ongoing. Among the national cases, five concerned war crimes, one concerned crimes against humanity and one concerned war crimes and genocide.⁵⁰

At the same time, since 2009, the Swiss military justice system has conducted investigations against a Rwandan citizen residing in Switzerland with a temporary permit who is alleged of having participated in the genocide in 1994.⁵¹ Finally, a landmark decision was taken by the Federal Criminal Court on 25 July 2012 in the case of a former Algerian defence minister denounced by the NGO TRIAL (Swiss Association against Impunity) for war crimes. The FCC found that the former Algerian defence minister could not claim immunity for acts committed during his tenure, thus paving the way for a trial in Switzerland.⁵²

Cases — Extradition of Alleged War Criminal

On 21 March 2012, a Serbian citizen who claims to be Kosovar and who is accused of participating in war crimes, was extradited by Switzerland to Serbia. He had been in custody pending extradition since 14 April 2011. The Serbian authorities suspect him of participating in war crimes committed by the Kosovo Liberation Army against Serbian and Albanian civilians in the Gnjilane area of Eastern Kosovo in 1999. Among the alleged crimes listed in the extradition request are several cases of murder, torture, rape and arson. Upon request of the Federal Office of Justice, on 10 and 14 June 2011, Serbian authorities submitted guarantees to conduct the trial in accordance with human rights treaties and to allow Swiss representatives to visit the man freely in custody at any time and to attend the trial as observers. The extradition follows the Federal Criminal Court's dismissal on 29 November 2011 of the appellant's political offence claim and the Federal Supreme Court's decision of 7

⁴⁸ Track Impunity Always – Swiss Association against Impunity.

⁴⁹ For the details, see the NGOs' websites, in particular TRIAL's website <<http://www.trial-ch.org/en/activities/litigation/trials-cases-in-switzerland.html>>.

⁵⁰ Interpellation No. 11.4168 – Sommaruga, *Moyens mis à disposition pour la poursuite des criminels de guerre et création d'une unité spécialisée* (23 December 2011) <http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20114168>.

⁵¹ See S. Taylor, 'Kriegsverbrecher in Luzern?', *Neue Luzerner Zeitung*, 26 March 2012, <<http://www.luzernerzeitung.ch/zentralschweiz/kantone/luzern/Kriegsverbrecher-in-Luzern;art92,167004>>.

⁵² Federal Criminal Court's decision of 25 July 2012, Case nr. BB.2011.140, <http://www.trial-ch.org/fileadmin/user_upload/documents/affaires/algeria/BB.2011.140.pdf>. For a summary of the facts in English, see Trial, 'Landmark decision: no immunity for an Algerian former defence minister accused of war crimes' (Geneva, 31 July 2012) <http://www.trial-ch.org/en/about-trial/trial-acts/details/article/decision-historique-pas-dimmunité-pour-un-ancien-ministre-de-la-defense-algerien-poursuivi-pour-cr.html?tx_ttnews%5BbackPid%5D=1188&cHash=b9ecaefded32ceacd4c9906b824f877>.

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March 2012 to uphold the lower court's decision.⁵³ A subsequent request to the European Court of Human Rights to defer the extradition was also unsuccessful.⁵⁴

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⁵³ Federal Court's decision no. (1C_559/2011).

⁵⁴ For a summary see the Press release of the Federal Office of Justice of 21 March 2012 'Extradition to Serbia', <www.ejpd.admin.ch/content/ejpd/en/home/dokumentation/mi/2012/ref_2012-03-21.html>.