BRIEFING PAPER

Universal Jurisdiction
Law and Practice in Switzerland

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Table of Contents

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Introduction

This briefing paper was written by the Open Society Justice Initiative in partnership with TRIAL International. It provides an overview of the Swiss national legal framework on universal jurisdiction, including statutory and case law, and its application in practice.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.[1]

The content is based on desk research with the support of pro bono lawyers from the relevant jurisdiction. In addition, interviews with national practitioners were conducted on the practical application of the law. Respondents are not named in order to protect their identity and affiliation with certain institutions or organizations.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the investigating and prosecuting jurisdiction. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

The authors would like to thank Valérie Paulet and Jennifer Triscone for their contribution to the research and drafting as well as all experts and practitioners who agreed to be interviewed for their invaluable contribution to this briefing paper.

[1] All briefing papers are available at: https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness?utm_content=Netherlands%2CTrial%2CFrance%2CUniversalJurisdiction%2CGermany&utm_campaign=social&utm_source=twitter&utm_medium=TRIAL+International.

Crimes invoking universal jurisdiction

In 2001, a modern definition of international crimes was introduced into the Swiss Criminal Code[2] (SCC) in order to incorporate the Rome Statute of the International Criminal Court[3] (Rome Statute) into the current legislation.[4]

Today, Swiss authorities have universal jurisdiction to prosecute the following crimes: genocide, crimes against humanity, war crimes, and enforced disappearance (as stand-alone crime), when they are committed abroad by a foreigner against foreign nationals.[5] Furthermore, a special provision has been introduced that specifically provides for superior liability as a mode of liability (see below Modes of Liability).[6]

1. Genocide

The crime of genocide is defined in Article 264 of the SCC in accordance with Article 6 of the Rome Statute. The Swiss law provision is broader than the Rome Statute as it also protects groups characterized by their social or political affiliation.[7] However, it is narrower in that it does not explicitly protect national groups.

2. Crimes against humanity

Crimes against humanity were introduced into the SCC on 1 January 2011.[8] The definition of this crime is based on Article 7 of the Rome Statute.

In the SCC, the existence of a State or organizational policy is not required for the commission of a widespread or systematic attack; however, it can be used as contextual information to demonstrate its systematic nature.[9]

Article 264a of the SCC provides a list of prohibited acts, which are equivalent to the list of underlying crimes listed in Article 7 of the Rome Statute. However, the definitions of some crimes differ on certain elements:

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[2] Swiss Criminal Code of 21 December 1937 (RS 311.0) (hereinafter **SCC**).

[3] Rome Statute of the International Criminal Court (ICC) of 17 July 1998 (RS 0.312.1) (hereinafter **Rome Statute**).

[4] Swiss Federal Council, *Message du 23 avril 2008 relatif à la modification des lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale* (Note of 23 April 2008 concerning the modification of federal laws in view of the implementation of the Rome Statute of the International Criminal Court – hereinafter **FF 2008 3461**), FF 2008 3461, p. 3480.

[5] Articles 6(1), 7(1-2) and 264m(1) SCC.

[6] Article 264k SCC.

[7] Article 264 SCC.

[8] Article 264a SCC.

[9] TRIAL, *La lutte contre l'impunité en droit suisse - Compétence universelle et crimes internationaux, 2ème edition* (The fight against impunity under Swiss law – universal jurisdiction and international crimes, 2nd edition – hereinafter **TRIAL Report**), 2015, https://trialinternational.org/wp-content/uploads/2016/06/La-lutte-contre-limpunite-en-droit-suisse-publication.pdf, p. 95.

- **Enslavement:**[10] The SCC specifically identifies the three most common forms of slavery, namely trafficking in human beings, sexual exploitation and forced labor. These categories are not exhaustive.
- **Deportation or forcible transfer:**[11] Under Swiss law there is no exception for grounds permitted under international law.
- **Torture:**[12] Under Swiss law, there is no exception for lawful sanctions.
- **Sexual violence crimes**:[13]
  - **Rape**:[14] The definition of rape under Swiss law is more limited than the one under the Rome Statute. First, the victim of a rape can only be a female person and the perpetrator only a male person. Second, the prohibited sexual act only encompasses the penetration of the woman's vagina by the man's penis.[15]
  - **Forced prostitution**: In contrast to the Rome Statute, the perpetrator does not necessarily have to directly pursue to obtain an advantage.[16]
  - **Forced sterilization**: Swiss law does not mention the exception of consensual medical treatment.
- **Enforced disappearance:**[17] Swiss law requires the violation of a legal obligation to provide information on the disappeared person, a requirement not provided for in the Rome Statute.
- **Persecution:**[18] Swiss law provides for a shorter list of discriminatory grounds and does not include national, cultural and gender grounds, but instead includes social grounds.

3. War crimes

Before 2011, war crimes were only codified in the Military Criminal Code (MCC).[19] In 2011, however, a chapter on war crimes was introduced into the SCC, according to the relevant provisions of the Rome Statute and international humanitarian law. In the SCC, war crimes are divided into the following categories:

- grave breaches of the Geneva Conventions;[20]
- attacks on civilians and civilian objects;[21]

[10] Article 264a(1)(c) SCC.

[11] Article 264a(1)(h) SCC.

[12] Article 264a(1)(f) SCC.

[13] Article 264a(1)(g) SCC.

[14] Article 190(1) SCC.

[15] DUPUIS Michel *et al.* (édit.), *Petit Commentaire – Code penal* (A short commentary on the Criminal Code – hereinafter **Commentary on the SCC**), Helbing Lichtenhahn (2017), *ad* rt. 190 SCC, p. 1291ff.

[16] Commentary on the SCC, *ad* art. 264a SCC, p. 1702.

[17] Article 264a(1)(e) SCC.

[18] Article 264a(1)(i) SCC.

[19] Articles 110 to 114 *Code pénal militaire* (Military criminal code – hereinafter **MCC**) of 13 June 1927 (RS 321.0).

[20] Article 264c SCC.

[21] Article 264d SCC.

- unjustified medical treatment, violation of sexual rights and human dignity;[22]
- recruitment of child soldiers;[23]
- prohibited methods of warfare;[24]
- use of prohibited weapons;[25]
- violation of a ceasefire or peace agreement / offenses against a peace negotiator / delayed repatriation of prisoners of war;[26] and
- other violations of international humanitarian law.[27]

3.1. Application to international and non-international armed conflict

The Rome Statute distinguishes between an international armed conflict (IAC) and a non-international armed conflict (NIAC).[28] By contrast, Swiss law does not make that distinction, applying the law equally to both types of armed conflict, subject to two exceptions.[29]

First, the Swiss war crimes regime applies to NIACs only "if the nature of the offense does not exclude it."[30] This refers to war crimes that are based on legal notions specific to international humanitarian law in the context of IACs and that are therefore not applicable in the context of NIACs (e.g. crimes against prisoners of war, a category of protected persons that exists only for IACs, cannot be applied to acts committed in the context of a NIAC).[31]

Second, the special regime for grave breaches of the Geneva Conventions is only applicable to both IACs[32] as well as NIACs if the acts concerned are directed against a person or property protected by international humanitarian law as set out in Article 264c(2) of the SCC.

3.2. Underlying crimes

"Grave breaches of the Geneva Conventions" under Article 264c(1) of the SCC cover all breaches of international humanitarian law in the context of an IAC qualified as "grave breaches" under the four Geneva Conventions of 12 August 1949 and lists the same underlying crimes as Article 8(2)(a) Rome Statute.[33]

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[22] Article 264e SCC.

[23] Article 264f SCC.

[24] Article 264g SCC.

[25] Article 264h SCC.

[26] Article 264i SCC.

[27] Article 264j SCC.

[28] Articles 8(2)(a-b) and 8(2)(c,e) Rome Statute.

[29] TRIAL Report, p. 124.

[30] Article 264b SCC.

[31] FF 2008 3461, p. 3529 and 3530.

[32] Article 264c(1) SCC.

[33] See Article 50 of the C*onvention de Genève du 12 août 1949 pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne* (Geneva Convention of 12 August 1949 on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field – hereinafter **GCI**)), (RS 0.518.12); Article 51 of the *Convention de Genève du 12 août 1949 pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer* (Geneva Convention of 12 August 1949 on the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,– hereinafter **GCII**) (RS 0.518.23); Article 130 of the *Convention de Genève du 12 août 1949 relative au traitement des prisonniers de guerre* (Geneva Convention 12 August 1949 on the Treatment of

The other war crimes provided under Articles 264d to 264j of the SCC are based on The Hague Conventions and Declarations of 1899 and 1907,[34] the four Geneva Conventions, the two Additional Protocols of 8 June 1977,[35] as well as customary international law.[36]

Article 264g(1)(c) of the SCC punishes pillage or otherwise unlawful appropriation of property without any limitation as to the purpose of appropriation, unlike the Rome Statute which requires that it be done for private or personal use.[37] However, the Federal Council of Switzerland[38] states that this provision should apply only to the appropriation of property for private or personal use.[39] Therefore, in practice the Swiss provision would follow the Rome Statute.[40]

The Swiss legislation did not explicitly include the war crime of sexual slavery. However, such conduct will generally fall within the existing sexual violence crimes listed in Article 264e(1)(b) of the SCC.[41]

Swiss law punishes the use of toxic or asphyxiating gases, materials or liquids, and extends this provision to all biological and chemical weapons.[42] Article 264h of the SCC also punishes the use of bullets that explode in the human body.[43] In addition, the use of laser weapons whose main effect is to cause permanent blindness is punishable under Article 264h(1)(e).[44] All of these crimes have been included in the Rome Statute through amendments, but at the time of publication not all State Parties have ratified them.[45]

Prisoners of War - hereinafter **GCIII**) (RS 0.518.42); Article 147 of the *Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre* (Geneva Convention of 12 August 1949 on the Protection of Civilian Persons in Time of War– hereinafter **GCIV**) (RS 0.518.51); Commentary on the SCC, *ad* Art. 264c SCC, p. 1708.

[34] *Convention concernant les lois et coutumes de la guerre sur terre* (Convention concerning the Laws and Customs of War on Land), 29 July 1899 (RS 0.515.111); *Convention concernant les lois et coutumes de la guerre sur terre* (Convention concerning the Laws and Customs of War on Land), 18 October 1907 (RS 0.515.112).

[35] *Protocole additionnel du 8 juin 1977 aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux* (Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts - hereinafter **Protocol I**), (RS 0.518.521); *Protocole additionnel du 8 juin 1977 aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux* (Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts – hereinafter **Protocol II**), (RS 0.518.522).

[36] Commentary on the SCC, *ad* Art. 264b to 264j SCC, p. 1705; FF 2008 3461, p. 3532.

[37] Rome Statute Elements of Crimes on Article 8(2)(b)(xvi).

[38] The Federal Council is the executive body of Switzerland. One of its functions is to transmit to Parliament proposals for the implementation of popular initiatives and draft laws. For more information, see: https://www.admin.ch/gov/fr/accueil/conseil-federal/attributions-conseil-federal.html.

[39] FF 2008 3461, p. 3536.

[40] Articles 8(2)(b)(xvi) and 8(2)(e)(v) Rome Statute.

[41] Trial report, p. 133.

[42] Article 264h(1)(b) SCC; Trial report, p. 140.

[43] Article 264h(1)(c) SCC ; Trial report, p. 140.

[44] Trial report, p. 141.

[45] Amendment to Article 8 (Weapons which Use Microbial or Other Biological Agents or Toxins), 14 December 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/CN.116.2018-Eng.pdf; Amendment to the Rome Statute of the International Criminal Court, Kampala, 10 June, 2010, https://treaties.un.org/doc/Publication/CN/2010/CN.533.2010-Eng.pdf; Amendment to Article 8 (Blinding

Article 264i of the SCC includes three offences that do not appear in the Rome Statute, namely the breach of an armistice or peace, the offence against a parliamentarian, and the delay in the repatriation of prisoners of war.[46]

Article 264j of the SCC broadens the notion of war crimes by criminalizing any violation of international humanitarian law that is not directly punishable under the crimes listed in Articles 264c to 264i of the SCC as long as the relevant act violates an international convention binding on Switzerland or a norm of customary international law.[47] Article 264j of the SCC covers all conventions that may be ratified in the future, as well as any development of customary international law, thus avoiding the need for the legislature to amend the law accordingly.[48]

The remaining war crimes under Swiss law correspond in substance to the war crimes in the Rome Statute.

4. Enforced disappearance

The crime of enforced disappearance was introduced into the SCC as an independent offense in January 2017.[49] Before the entry into force of this provision, the crime of enforced disappearance could only be prosecuted as a crime against humanity.[50] As of 2017, the Swiss authorities have universal jurisdiction to prosecute any person who has committed this offense abroad according to Article 185bis(2) of the SCC.

Article 185bis of the SCC reproduces the definition as formulated for enforced disappearance as a crime against humanity in Article 264a(1)(e) of the SCC, which follows Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.[51]

The provision requires four elements for the crime of enforced disappearance:

1) the deprivation of liberty of the person;
2) the authorization or acquiescence of the State or a political organization;
3) any refusal of information concerning the fate or whereabouts of the person; and
4) the perpetrator's intention to remove the person from the protection of the law.[52]

The provision punishes both the person who deprives the victim of her or his liberty and the person who refuses to provide information about the victim's whereabouts.[53]

Laser Weapons), 14 December 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/CN.126.2018-Eng.pdf.

[46] Trial report, p. 141.

[47] FF 2008 3461, p. 3541.

[48] *Ibidem*.

[49] Article 185bis SCC.

[50] Article 264a it. e SCC.

[51] C*onvention internationale pour la protection de toutes les personnes contre les disparitions forcées* (International Convention for the Protection of All Persons from Enforced Disappearance) of 20 December 2006 (RS 0.103.3).

[52] FF 2008 3461, p. 3469 et seq.

[53] Article 185bis SCC; Commentary on the SCC, *ad* Art. 185bis SCC, N 7ss.

An important difference between the Enforced Disappearance Convention and the SCC is that, under the SCC, a State does not necessarily have to be involved as the authorization or acquiescence of a political organization suffices.[54] Under the SCC, "political organization" refers to any non-state entity that exercises *de facto* power over or controls a portion of a given territory.[55]

Another difference is that the refusal to provide information on the fate of the disappeared person may only be punished if such conduct violates a legal obligation of the perpetrator to provide information.[56]

5. Torture

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[57] (CAT) was ratified by Switzerland on 2 December 1986 and entered into force on 26 June 1987. Protection against torture is a fundamental right under Article 10(3) of the Federal Constitution of the Swiss Confederation[58] and Article 3 of the European Convention on Human Rights (ECHR),[59] which is directly applicable in Switzerland. However, these two provisions require that States protect individuals against acts of the State; they do not address the criminal responsibility of perpetrators or accomplices in acts of torture.

In the SCC, there is no provision criminalizing torture as an independent offense. Since 1 January 2011, the SCC contains two provisions[60] that specifically punish individuals who commit torture, yet only in the context of crimes against humanity and war crimes (see above). Alternatively, torture can be prosecuted as certain ordinary crimes, such as assault[61], acts of aggression[62], endangering the life or health

[54] Article 185bis(1) SCC.

[55] Commentary on the SCC, *ad* Art. 185bis SCC, N 10.

[56] Article 185bis(1)(b) SCC.

[57] *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants* (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – hereinafter **CAT**) of 10 December 1984 (RS 0.105).

[58] Article 10(3) of the Federal Constitution of the Swiss Confederation of 18 April 1999 (RS 101) (hereinafter **Federal Constitution**).

[59] *Convention de sauvegarde des droits de l'homme et des libertés fondamentales* (European Convention on Human Rights) of 4 November 1950 (RS 0.101).

[60] Articles 264a(1)(f) and 264c(1) SCC.

[61] Articles 122 and 123 SCC.

[62] Article 126 SCC.

of another[63], insult[64], threatening behavior[65], coercion[66], false imprisonment and abduction[67], rape[68], or abuse of public office.[69]

Modes of liability

The different modes of liability are covered by the general rules of the Swiss Criminal Code. Swiss law makes a distinction between the categories of main participation and secondary participation, which incur different sentences.

1. Main participation

1.1. Direct perpetrator

The direct perpetrator is the person who carries out all the constituent elements of the offense herself or himself.[70] It also includes persons who order others to commit the crime.

For example, in the only universal jurisdiction case tried in Switzerland as of this writing,[71] Fulgence Niyonteze was sentenced to 14 years in prison for war crimes committed in Rwanda. During an assembly, Niyonteze called on the participants to kill the Tutsis. In addition, he gave, among other things, the explicit order to kill two brothers. He was convicted by the Military Court of war crimes as a perpetrator for giving the order to his soldiers to kill a witness.

1.2. Co-perpetrator

According to the Swiss Federal Court, a co-perpetrator is a person who intentionally collaborates in a significant manner with other persons in a decision to commit an offense, in its organization or execution, to the point of appearing to be one of the main participants; it is necessary that, depending on the circumstances of the specific case, the contribution of the co-perpetrator appears essential to the execution of the offense.[72] What is decisive is that each of the co-perpetrators was involved in the decision from which the offense arose or in its implementation, under conditions or to an extent that makes each of them appear to be a main, not a secondary, participant.[73]

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[63] Article 127 SCC.

[64] Article 177 SCC.

[65] Article 180 SCC.

[66] Article 181 SCC.

[67] Article 183 SCC.

[68] Article 190 SCC.

[69] Articles 190 and 312 SCC.

[70] Commentary on the SCC, *ad* Art. 24 to 27 SCC, N 6.

[71] Military Prosecutor v. Niyonteze, Military Court of Appeal 1A of 26 May 2000, in the case of N; Military Court of Cassation, 27 April 2001, in the case of N.

[72] Federal Court, Judgment of 22 December 2017, 6B_688/2014, para. 5.4.

[73] Federal Court, Judgment of 19 May 2009, ATF 135 IV 152, para. 2.3.1

No final judgment has been rendered in Switzerland on the basis of universal jurisdiction with respect to this mode of liability as of this writing.

1.3. Indirect perpetrator (*auteur médiat*)

According to the Federal Court, the indirect perpetrator is a person who uses another person as an instrument without will or at least acting without intent, in order to have the proposed offense executed.[74] The indirect perpetrator is punishable as if she or he had herself or himself performed the acts she or he caused the third party to perform as an instrument.

No final judgment has been rendered in Switzerland on the basis of universal jurisdiction with respect to this mode of liability as of this writing.

1.4. Command / superior liability

Criminal liability for commanders and superiors was introduced into the criminal code in 2011 to ensure the implementation of the Rome Statute.[75] Article 264k of the SCC applies in the context of genocide, crimes against humanity, and war crimes, but does not extend to acts of enforced disappearance as a separate offense.

Swiss criminal law essentially incorporates the objective and subjective elements of Article 28 Rome Statute, the main difference being that Swiss law does not distinguish between military and civilian superiors, but applies the same elements to both.

Command / superior responsibility aims to penalize superiors who fail to fulfill their obligation to enforce international humanitarian law.[76] The superior must have failed to exercise the necessary diligence in the performance of her or his duties when she or he would have had the opportunity to do so.[77] In assessing the objective duty of care, particular regard should be given to the nature of the subordinate relationship and the category of superior to which the accused person belongs.[78] It is also necessary to prove that the superior exercised effective control over the persons responsible for the underlying violations of international humanitarian law, i.e. that she or he had the power to prevent their commission of crimes or to punish them after the fact.[79]

A subordinate who commits a crime against humanity, war crimes or genocide by order of a superior or by obeying instructions binding her or him in a similar manner is punishable if she or he is aware, at the time of the facts, of the punishable nature of her or his act.[80]

No final judgment has been rendered in Switzerland on the basis of universal jurisdiction with respect to this mode of liability as of this writing.

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[74] Federal Court, Judgment of 2 February 1994, ATF 120 IV 17, para. 2d.

[75] See Article 28 Rome Statute.

[76] FF 2008 3461, p. 3544.

[77] *Ibidem*.

[78] FF 2008 3461, p. 3544.

[79] Commentary on the SCC, *ad* Art. 264k N 9.

[80] Article 264l SCC.

2. Secondary participation

2.1. Instigation (*instigateur*)[81]

Instigation is the act of intentionally causing others to commit an offense.[82] Unlike the co-perpetrator and indirect perpetrator, the instigator does not control the progress of the operations.[83]

In the *Niyonteze* case, as well as being convicted by the Military Criminal Court as a perpetrator for giving the order to his soldiers to kill targeted people, Niyonteze was also convicted as a secondary perpetrator (instigation) for having encouraged, in his capacity as Mayor, the murder and elimination of the Tutsi ethnic group.[84]

2.2. Complicity[85]

Swiss law punishes anyone who has intentionally assisted the perpetrator in committing a crime or a misdemeanor. [86]

One of the main differences between the SCC and the Rome Statute is that under Swiss law, complicity requires that the accomplice make a causal contribution to the commission of the offense by the main perpetrator – an element that is not required under the Rome Statute.[87]

No final judgment has been rendered in Switzerland on the basis of universal jurisdiction with respect to this mode of liability as of this writing.

Temporal jurisdiction over crimes

1. Beginning of temporal jurisdiction

Since 1 January 2011, the prosecution of the crime of genocide, crimes against humanity, and war crimes is subject to ordinary criminal jurisdiction. On 1 January 2011, Article 23(1)(g) of the Swiss Criminal Procedure Code[88] (SCPC) came into force, according to which these crimes and Article 264k of the SCC (criminal liability of superiors) are subject to federal jurisdiction.[89]

[81] Article 24 SCC.

[82] Federal Court, Judgment of 31 January 1990, ATF 116 IV 1, para. 3c.

[83] Commentary on the SCC, *ad* Art. 24 N 1.

[84] Military Prosecutor v. Niyonteze, Military Court of Appeal 1A of 26 May 2000, in the case of N; Military Court of Cassation, 27 April 2001, in the case of N.

[85] Article 25 SCC.

[86] Article 25 SCC.

[87] Commentary on the SCC, *ad* Art. 25 N 5.

[88] Swiss Criminal Procedure Code of 5 October 2007 (RS 312.0) (hereinafter **SCPC**).

[89] Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140, para. 4.

1.1. War crimes

War crimes have been punishable under Swiss law since 1 March 1968. Until 31 December 2010, violations of international humanitarian law were sanctioned by Articles 108 and 109 of the former MCC and were therefore subject to military jurisdiction.[90]

1.2. Genocide

The crime of genocide was introduced into the SCC on 15 December 2000 and can be prosecuted only if committed on or after that date.

1.3. Crimes against humanity

Crimes against humanity were introduced into the Swiss Criminal Code on 1 January 2011. Prior to this date, no applicable law allowed prosecution for these crimes on the basis of universal jurisdiction in Switzerland.

The existence of Article 101(3) of the SCC suggests that conduct occurring before 1 January 2011 could be prosecuted as crimes against humanity. According to Article 101(3) of the SCC, crimes against humanity are not subject to statute of limitations, unless the statute of limitations had already expired on 18 June 2010, when the SCC was amended. Thus, this provision seems to suggest that crimes against humanity were punishable under Swiss law before 1 January 2011.

Two explanations for this provision on statute of limitations can be formulated: either the legislature considered that the principle of non-retroactivity did not apply in the case of international crimes and thus conduct occurring before 1 January 2011 can nevertheless be prosecuted as crimes against humanity;[91] or the legislature intended to make a delicate distinction between the statute of limitations and the temporal application of the offense.[92] Case law provides no definitive answer at this point.

1.4. Enforced disappearance

Enforced disappearance as a stand-alone crime can be prosecuted under the principle of universal jurisdiction if the act took place on or after 1 January 2017.[93]

2. Statute of limitations

According to Article 98 of the SCC, the starting point for the statute of limitations runs from the day on which the perpetrator committed the act,[94] from the day of the last act if this activity was carried out several times,[95] or from the day on which the punishable acts ceased if they had a certain duration.[96]

[90] Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140, para. 4.

[91] Interview with Swiss lawyers on 22 January 2019, 23 January 2019 and 29 January 2019.

[92] Interview with academics on 11 January 2019, 30 January 2019, 6 February 2019.

[93] Article 185bis SCC.

[94] Article 98(a) SCC.

[95] Article 98(b) SCC.

[96] Article 98(c) SCC.

As from 1 October 2002, the interruption and suspension of the statute of limitation has been abolished.[97] Article 97(3) of the SCC now specifies that where a first instance judgment is issued before the end of the statute of limitations period, the time limit no longer applies.[98] The date of the judgment is decisive, not the notification of the parties.

2.1. Genocide, crimes against humanity, and war crimes

Article 101(1) of the SCC provides that there is no statute of limitations to prosecute the offenses of genocide, crimes against humanity, and war crimes.

However, as an exception to this provision, cases of genocide and war crimes where the statute of limitations had already expired on 1 January 1983 (according to the law applicable up to that date) are not prosecutable. This same exception applies to crimes against humanity where the statute of limitations for the acts in question had already expired on 1 January 2011 (according to the applicable law up to that date).[99]

In the *Khaled Nezzar* case, the Swiss Federal Prosecutor dismissed a complaint on acts of torture as a crime against humanity allegedly committed between 1992 and 1994, because Swiss courts do not have jurisdiction over crimes against humanity if committed prior to 1 January 2011.[100]

2.2. Enforced disappearance

The statute of limitations for the offense of enforced disappearance is 15 years.[101] The crime of enforced disappearance being a continuous crime, the statute of limitations begins to run on the day on which the criminal conduct ceases (Article 98(c) of the SCC).[102] The criminal act can be prosecuted as soon as all its elements have been fulfilled, but is only completed when the act comes to an end.[103]

Universal jurisdiction requirements

1. Presence of the suspect

According to Articles 6(1), 7(1-2) and 264m(1) SCC, the jurisdiction of the Swiss authorities over crimes committed abroad is established the moment the perpetrator

[97] Commentary on the SCC, *ad* art. 97 SCC, p. 662.

[98] Federal Court, Extract from the Judgment 6B_771/2011 of 11 December 2012, ATF 139 IV 62, para. 1.5.2; Commentary on the SCC, *ad* art. 97 SCC, p. 662-663.

[99] Article 101(3) SCC; TRIAL Report, p. 32.

[100] Federal Criminal Court, Judgment of 30 May 2018, TPF BB.2017.10, para. 7.2.2 and 7.3.4; FF 2008 3461, p. 3509.

[101] Articles 185bis and 97(1)(b) SCC; Swiss Federal Council, *Message portant approbation et mise en oeuvre de la Convention internationale pour la protection de toutes les personnes contre les disparitions forcées* (Note on ratification and implementation of the International Convention on the Protection of All Persons against Enforced Disappearance), FF 2014 437, p. 450.

[102] Article 98(c) SCC; Swiss Federal Council, *Message portant approbation et mise en oeuvre de la Convention internationale pour la protection de toutes les personnes contre les disparitions forcées* (Note on ratification and implementation of the International Convention on the Protection of All Persons against Enforced Disappearance), FF 2014 437, p. 450.

[103] Commentary on the SCC, *ad* Art. 98 SCC, p. 666 to 667.

enters Switzerland. It is sufficient that the person be present in Switzerland when the prosecuting authorities commence the investigation; the accused can depart Swiss territory immediately after that, and jurisdiction would still remain with the Swiss authorities.[104] In the *Khaled Nezzar* case,[105] the Federal Criminal Court confirmed that the presence requirement must be fulfilled at the time of the opening of the investigation. The Tribunal indicated that if the investigation commences while the accused is in Switzerland, her or his subsequent departure does not put an end to Switzerland's jurisdiction.

On 14 November 2018, the Federal Criminal Court, in the *Rifaat Al-Assad* case,[106] explained that the condition of presence in Swiss territory must not be interpreted too restrictively. The Court held that prosecuting authorities can commence an investigation even in cases where the alleged perpetrator has never entered Swiss territory if there are grounds to believe the individual will enter Swiss territory in the near future.[107]

In 2015, following the filing of a criminal complaint by a victim, the Swiss authorities opened an investigation into acts allegedly committed by Bahrain's Attorney General Al-Buainain even though he was not present at the time of filing. The victim had provided information in the complaint regarding the possibility of a future visit to Switzerland.

2. Double criminality

Swiss law does not require double criminality for crimes against humanity, war crimes, genocide and enforced disappearance, i.e. the act does not need to be considered a crime in the state where it was committed to be prosecutable in Switzerland.[108]

3. Prosecutorial discretion

In principle, the prosecuting authorities have an obligation to "commence and conduct proceedings that fall within their jurisdiction, where they are aware or have grounds for suspecting that an offense has been committed".[109]

Article 264m(2) SCC, however, allows for prosecutorial discretion when the alleged crimes are committed abroad and neither the victim nor the perpetrator are Swiss nationals. In such cases, the Public Prosecutor may terminate or refrain from investigations and prosecution if

(a) the principle of subsidiary applies (see below on Subsidiarity) or

[104] Commentary on the SCC, *ad* Art. 264m SCC, p. 1730.

[105] Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140, para. 3.1.

[106] Federal Criminal Court, Judgment of 14 November 2018, TPF BB.2018.167, para. 2.3.

[107] *Ibidem.*

[108] Article 6(1)(a) and Article 7(1)(a) SCC which apply to offenses committed abroad require double criminality, but Art. 264m SCC which regulates crimes against humanity, war crimes, genocide, and enforced disappearance does not contain this requirement.

[109] Article 7(1) SCPC.

(b) the suspect is no longer present in Switzerland and not expected to return.

According to the same provision, the Public Prosecutor must, in any case, take measures to secure evidence. Despite the possibility given to her or him by Article 264m(2) SCC, the Public Prosecutor retains the freedom to initiate or continue the investigation.

As soon as the investigation is opened, the Public Prosecutor benefits from full discretion on its scope and may extend it to any person suspected of being involved as perpetrator, co-perpetrator or accomplice to the alleged act.[110] Similarly, the Public Prosecutor is not limited in the investigations by the factual scope of the preliminary decision to open an investigation or by the report of an offense (see below on Initiation of Investigations).[111] The Public Prosecutor has the power and duty to investigate the facts before her or him, but also automatically to extend the investigation to all offenses committed by the alleged perpetrator and which have come to her or his knowledge since the opening of the investigation.[112]

4. Political approval

There is no approval required by another authority to decide whether an investigation or prosecution can commence. The Federal Department of Foreign Affairs may nevertheless provide an opinion on a matter (usually on immunity questions, see below on Immunities),[113] but the Public Prosecutor is then free to make her or his own decision.

For example, in the *Khaled Nezzar* case, the Federal Department of Foreign Affairs recommended that immunity be granted to Former General Nezzar. Despite this opinion, the Public Prosecutor concluded that no immunity could prevent the proceedings from happening.[114]

5. Subsidiarity

Article 264m(2) of the SCC provides that for alleged crimes committed abroad by foreign nationals against foreign nationals the prosecution, with the exception of measures to secure evidence, may terminate or refrain from investigations and prosecution provided that a foreign authority or an international criminal court whose jurisdiction is recognized by Switzerland is prosecuting the offense and the suspected perpetrator is extradited or delivered to the corresponding judicial authorities. The Public Prosecutor has the discretion to decide whether to suspend or waive the prosecution or to continue or initiate it.

[110] Federal Criminal Court, Judgment of 14 November 2018, TPF BB.2018.167, para. 3.2.

[111] *Ibidem.*

[112] *Ibidem.*

[113] Interview with academics on 11 January 2019, 30 January 2019, 6 February 2019.

[114] Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140, para. E and F.

In universal jurisdiction cases, international criminal courts have priority over Swiss jurisdiction.[115] With regard to the determination of jurisdiction and the referral of a situation, reference should be made to the Federal Act on Cooperation with the International Criminal Court (ICC),[116] in particular Articles 7 and 9 thereof. In addition, all matters of cooperation with the ICC fall within the competence of the Federal Office of Justice.[117]

For a foreign perpetrator to be surrendered to an international criminal court, Switzerland must recognize the said court and the latter must have requested that the person concerned be surrendered to it.[118] The international criminal courts whose jurisdiction is currently recognized by Switzerland are:

- the ICC;[119]
- the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR);[120]
- the Special Court for Sierra Leone;[121] and
- the International Mechanism in charge of carrying out residual functions of international tribunals.[122]

6. Possibility of extradition

According to Article 264m(1) of the SCC, crimes against humanity, war crimes and genocide can be prosecuted only if the suspect is present in Switzerland (see above on Presence of Suspect) and is not extradited to another State or to an above-listed international criminal court recognized by Switzerland.

An extradition is not possible (which therefore makes prosecution in Switzerland possible) if there is concrete evidence that the requesting State is unwilling or unable

[115] FF 2008 3461, p. 3493.

[116] Federal Act on Cooperation with the International Criminal Court (RS 351.6).

[117] Interview with a Federal Prosecutor on 27 February 2019.

[118] FF 2008 3461, 3546.

[119] *Loi fédérale sur la coopération avec la Cour pénale internationale* (Federal Law on the Cooperation with the International Criminal Court – hereinafter **LCPI**) of 22 June 2001 (RS 351.6).

[120] *Loi fédérale relative à la coopération avec les tribunaux internationaux chargés de poursuivre les violations graves du droit international humanitaire* (Federal Law on the Cooperation with International Tribunals In Charge of the Prosecution of Grave Breaches of International Humanitarian Law) of 21 December 1995 (RS 351.20).

[121] *Ordonnance sur l'extension du champ d'application de l'arrêté fédéral relatif à la coopération avec les tribunaux internationaux chargés de poursuivre les violations graves du droit international humanitaire au Tribunal spécial pour la Sierra Leone* (Decree on the Extension of the Application of the Federal Decree on the Cooperation with International Tribunals In Charge of the Prosecution of Grave Breaches of International Humanitarian Law at the Special Tribunal for Sierra Leone) of 12 February 2003 (RS 351.201.11).

[122] *Ordonnance sur l'extension du champ d'application de la loi fédérale relative à la coopération avec les tribunaux internationaux chargés de poursuivre les violations graves du droit international humanitaire au Mécanisme international chargé d'exercer les fonctions résiduelles des Tribunaux pénaux* (Decree on the Extension of the Application of the Federal Decree on the Cooperation with International Tribunals In Charge of the Prosecution of Grave Breaches of International Humanitarian Law at the International Mechanism In Charge of Exercising the Residual Functions of the Criminal Tribunals) of 8 June 2012 (RS 351.201.12).

to prosecute the author of the crime seriously, or that in the event of extradition the author will not be sentenced to a just penalty.[123]

Key steps in criminal proceedings

1. Investigation stage (*Procédure préliminaire*)

1.1. Initiation of investigations

1.1.1. Competent authorities

In universal jurisdiction cases, acts that amount to genocide, crimes against humanity, and war crimes fall within the jurisdiction of the Federal Public Prosecutors at the Division for Mutual Legal Assistance and International Criminal Law based in Bern.[124] The division is part of the Federal Prosecutor's Office, which works under the direction of the Attorney General.[125] In contrast, acts that amount to enforced disappearance as a stand-alone crime fall within the jurisdiction of Cantonal Public Prosecutors in one of the 26 Cantons.[126]

Article 32 of the SCPC provides guidance to determine the competent cantonal jurisdiction:

- where an offense was committed abroad or if the place of commission cannot be established, the authorities of the place where the accused is domiciled or habitually resident has jurisdiction to prosecute and adjudicate the offense (para. 1);
- if the accused is neither domiciled nor habitually resident in Switzerland, the authorities at her or his place of origin have jurisdiction; in the absence of a place of origin, the authorities of the place where the accused was found have jurisdiction (para. 2);
- in the absence of a place of jurisdiction in accordance with paragraphs 1 and 2, authorities of the Canton requesting extradition have jurisdiction (para. 3).

Genocide, war crimes and crimes against humanity are investigated by the Federal Judicial Police and the Federal Prosecutor's Office[127] and tried in the Federal Criminal Courts.[128] The Federal Prosecutor's Office has authority over the Federal

[123] FF 2008 3461, p. 3492; Federal Court, Judgment of 8 June 1995, ATF 121 IV 145, para. 2cc; Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140, para. 3.4.

[124] Article 23(1)(g) SCPC; website of the Federal Prosecutor's Offices: https://www.bundesanwaltschaft.ch/mpc/fr/home.html.

[125] See website of the Federal Prosecutor's Offices, https://www.bundesanwaltschaft.ch/mpc/fr/home.html.

[126] Articles 22 to 24 SCPC.

[127] Articles 2 and 7 to 31 of the *Loi fédérale sur l'organisation des autorités pénales de la Confédération* (Federal Law on the Organisation of Criminal Justice Authorities of the Federation - hereinafter **LOAP**) of 19 March 2010 (RS 173.71).

[128] Article 23(1)(g) SCPC.

Judicial Police.[129] The Federal Prosecutor's Office's Mutual Legal Assistance and International Criminal Law Division is in charge of conducting investigations of international crimes under universal jurisdiction.[130]

1.1.2. Initiation by authorities

According to Article 300(1) of the SCPC, investigations start when the police begin enquiries or when an investigation is opened by the Public Prosecutor.

Investigation initiated by the police

The police conduct investigations in order to establish the facts constituting the offense concerned. Investigations by the police can be triggered by the report of an offense (by any person), prosecutorial directives, or their own findings.[131] Regardless of the reason for the investigation, the police must inform the Public Prosecutor without delay about serious offenses and any other serious events they become aware of.[132] In the case of such offenses, it will be the responsibility of the Public Prosecutor, to the extent possible, to conduct the first interviews.[133]

Investigation initiated by the Public Prosecutor

Public Prosecutors are in charge of the investigation as there is no investigating judge in the Swiss legal system.[134] They have the obligation to enforce the law according to the principle of impartiality.[135]

The Public Prosecutor is required to open and conduct investigations that fall within her or his jurisdiction where she or he becomes aware or has grounds for suspecting that an offense has been committed.[136] This can be based on information or reports by the police, the report of an offense (by any person) or their own findings.[137]

1.1.3. Initiation by victims and NGOs

According to Article 301(1) of the SCPC, any person is entitled to report an offense. The SCPC does not provide any particular conditions as to the content. It only specifies that the report must be made in writing or orally to a criminal justice authority.[138] A report of an offense can be made to a police station or directly to the

[129] Article 4 LOAP.

[130] See Office of the Attorney General of Switzerland, Organization, https://www.bundesanwaltschaft.ch/mpc/en/home/die-bundesanwaltschaft/organisation-template-breit.html.

[131] Article 306(1) SCPC.

[132] Article 307(1) SCPC.

[133] Article 307(2) SCPC.

[134] Article 308 SCPC.

[135] Article 6 SCPC.

[136] Article 7(1) SCPC.

[137] Article 309(1(a) SCPC.

[138] Article 301(1) SCPC.

relevant Public Prosecutor's Office.[139] It is recommended to file it in writing. Such a report can trigger investigations by the police[140] or by the Public Prosecutors.[141]

In the case of genocide, crimes against humanity, or war crimes, the report should be addressed to the Public Ministry of the Federation (*Ministère public de la Confédération*). In the case of enforced disappearance as a stand-alone crime, the report should be addressed to the Canton responsible for the matter (see above on Competent Authorities).

Regarding the content of such reports, federal case law has established the following, even though it is not specifically stated in the SCPC:

- where the name of the offender is known, it must be mentioned;
- the facts to which the act relates must be sufficiently described;
- the filing person is not required to know the nature or name of the crime filed against the alleged perpetrator.[142]

1.2. Time limits for investigation

Swiss law does not provide for a time limit within which authorities must complete the investigation and try crimes falling under universal jurisdiction. Nevertheless, authorities are bound by the principle of expeditiousness,[143] which requires the initiation of criminal proceedings and their completion without undue delay. Article 29(1) of the Constitution guarantees in particular the right of every person, in judicial or administrative proceedings, to have her or his case adjudicated within a reasonable amount of time.

According to the Federal Court,[144] in determining the duration of the reasonable period of time, objective elements must be taken into consideration, including the degree of complexity of the case, the stakes involved in the dispute for the person concerned, and the conduct of the person concerned and of the competent authorities. Further, a deficient judicial organization or a case overload cannot justify the excessive slowness of a proceeding, as the State has to organize its courts in such a way as to guarantee citizens an administration of justice in accordance with constitutional law.[145]

In practice, a lot of discretion is given to judicial authorities. For example, in the *Rifaat Al-Assad* case, a victim filed a complaint in 2017 based on denial of justice complaining of the lack of action since the investigation began in 2013. The Federal Criminal Court rejected the appeal, holding that due to the complexity and special

[139] Articles 301(1) and 304(1) SCPC.

[140] Article 306(1) SCPC.

[141] Article 309(1)(a) SCPC.

[142] Commentary on the SCC, *ad* Art. 30 SCC, p. 232.

[143] Article 29(1) of the Federal Constitution; Article 5 SCPC.

[144] JEANNERET/KUHN, *Précis de procédure pénale* (Review of the Criminal Procedure Code– hereinafter **Review Criminal Procedure Code**), Stämpfli (2013), p. 83; Federal Court. Judgment of 6 July 2011, 1B_219/2011, para. 2.1.

[145] Federal Court, Judgment of 6 July 2011, 1B_219/2011, para. 2.1.

circumstances of the case, the investigation had indeed slowed down, but was never interrupted, therefore the duration of the procedure was considered proportionate.[146]

However, this discretion is not absolute since on 3 September 2013 the European Court of Human Rights found that Switzerland had contravened Article 6(1) of the ECHR (right to a fair trial) for allowing a civil proceeding to take 13 years to be completed.[147]

1.3. Completion of investigations

1.3.1. Possible outcomes

If the Public Prosecutor regards the investigation as completed, she or he shall

(i) bring charges (an indictment) or
(ii) abandon the proceedings (closing of the case without further action).[148]

She or he shall provide the parties with a period within which to submit requests for further evidence to be collected.

Indictment[149] (mise en accusation)

The Public Prosecutor shall bring charges before the competent court if, based on the results of the investigation, she or he considers the grounds for suspicion as sufficient (*les soupçons établis sur la base de l'instruction sont suffisants*).[150] The indictment issued by the Public Prosecutor's Office refers the case directly to the court,[151] the receipt of the indictment by the court creating *lis pendens*, meaning that the jurisdiction passes to the court.[152]

Dismissal[153] (classement de la procédure)

According to Article 319(1) of the SCPC, the Public Prosecutor can order the complete or partial closing of the proceedings when

- no suspicions are substantiated that justify bringing charges;
- the conduct in question does not fulfill the elements of an offense;
- defenses to an offense exclude prosecution;
- it is impossible to fulfill the procedural requirements or procedural challenges that have arisen; or
- a statutory regulation applies that permits the Public Prosecutor to refrain from bringing charges or imposing a penalty.

For alleged crimes committed abroad where neither the perpetrator nor the victim is a Swiss national, Article 264m(2) of the SCC provides that the prosecution, with the

[146] Federal Criminal Court, Judgment of 30 May 2018, TPF BB.2017.173, para. 2.3.

[147] European Court of Human Rights, Roduit v. Switzerland, Judgement of 3 September 2013, Application No. 6586/06.

[148] Article 318(1) SCPC.

[149] Articles 324 to 327 SCPC.

[150] Article 324(1) SCPC.

[151] Article 324ff SCPC.

[152] Article 328 SCPC.

[153] Articles 319 to 323 SCPC.

exception of measures to secure evidence, may terminate or refrain from investigations and prosecution under certain circumstances (see above Prosecutorial Discretion).

1.3.2. Possible challenges by victims

The parties to the proceedings may challenge the Public Prosecutor's decision to dismiss the case before the Court of Appeal within 10 days of the decision.[154] Injured persons, including victims, can become parties to the proceedings in the form of Private Plaintiffs (see below on Victim Participation at Investigation Stage) and in that role appeal the dismissal decision. According to Article 393(1)(a) SCPC, such a challenge is also possible if the prosecutor exercises her or his discretion to dismiss the case under Article 264m(2) SCC (see above Prosecutorial Discretion).

Victims who do not become parties to the proceedings in form of Private Plaintiffs may also appeal the dismissal. Since Article 321(1) of the SCPC provides for notification of the dismissal to the victim who has not become a party, Article 322(2) of the SCPC is interpreted broadly and the victim must also be granted standing to appeal against the decision not to indict.[155] The Federal Criminal Court has taken the view that, because of the right to be heard, victims who have not yet had the opportunity to constitute themselves as a party are also entitled to appeal against a dismissal order.[156]

1.4. Victim[157] rights and participation at the investigation stage

1.1.4. Injured persons and victims

Swiss law distinguishes between two types of individuals affected by the crime:

(1) a person who suffers any type of direct harm (*lésé* – **injured person**)[158] and
(2) a person who suffers direct physical, sexual, or mental harm (*victime* – **victim**).[159]

A victim is considered a sub-category of injured persons who suffers specific forms of harm.[160] Due to the particular injury suffered, the victim benefits from special rights (see below Rights of Victims and Injured Persons).

Spouses, children, parents of victims and other persons who have a similarly close relation to the victim are considered relatives of the victim. Third parties who are not directly affected in their rights do not have any rights in the proceedings.[161] NGO are

[154] Articles 322(2) and 393 to 397 SCPC. According to Article 324(2) SCPC, the indictment is not subject to appeal by the accused.

[155] MOREILLON /PAREIN-REYMOND (édit.), *Petit Commentaire – Code de procédure pénale*, (A short commentary on the criminal procedure code – hereinafter **Commentary on the SCPC**), Helbing Lichtenhahn (2016), *ad* Art. 322 SCPC, p. 1070.

[156] *Ibidem*, Art. 322 SCPC, p. 1070; Federal Criminal Court, Judgment of 4 July 2011, TPF BB.2011.34, para. 1.

[157] The term "victim" used in the headings is used as short-hand for all categories under Swiss law, including private plaintiffs, injured persons and victims in the narrow sense of the SCPC.

[158] Article 115(1) SCPC.

[159] Article 116(1) SCPC.

[160] Article 116(1) SCPC.

[161] Article 105(2) SCPC.

not considered injured persons or victims and thus have no rights in criminal proceedings.

1.1.5. Private Plaintiffs

All injured persons, including victims, may file a declaration to become party to the proceedings in the form of Private Plaintiffs.[162] Being parties to the proceedings, Private Plaintiffs enjoy extensive procedural rights (see below Rights of Private Plaintiffs). Should injured persons, including victims, decide not to file such a request, they remain mere participants of the proceedings with a limited set of procedural rights (see below Rights of Victims and Injured Persons).[163]

To become a party to the proceedings in the form of Private Plaintiffs, it is sufficient for the injured person / victim to file a declaration orally or in writing to the Public Prosecutor's Office that she or he intends to be a Private Plaintiff.[164] Such a declaration has to be filed before the conclusion of the investigations (see above on Completion of Investigations).[165]

The declaration needs to indicate whether the injured person intends to become party to the criminal proceedings and/or make a civil claim for damages in connection to the criminal proceedings (see below on Reparation for Victims in Criminal Proceedings).[166] The injured person can chose between the two options or assert both. Either way, the injured persons becomes a party to the proceedings in the form of a Private Plaintiff. Relatives of victims can only make a civil claim for damages.[167]

1.1.6. Rights of victims and injured persons

Article 117 of the SCPC sets out in a non-exhaustive manner the rights enjoyed by a victim, which are listed in different parts of the SCPC, such as the:

- Right to the protection of personal privacy,[168] including restrictions and exclusion of public access, restriction on the information given to the public, and other general measures aiming to protect victims.
- Right to be accompanied by a trusted person during the steps of the proceeding.[169]
- Right to protective measures: The law provides for a non-exhaustive list of protective measures from which the victim may benefit.[170]
- Right to refuse to testify: A victim of a sexual offense may in every case refuse to answer questions that relate to her or his private domain.[171]

[162] Article 118(1) SCPC.

[163] Article 105(1) SCPC.

[164] Article 118(1) SCPC.

[165] Article 118(3) SCPC.

[166] Article 119(2) SCPC.

[167] Article 122(2) SCPC.

[168] Articles 70(1)(a), 74(4), and 152(1) SCPC.

[169] Article 117(1) SCPC.

[170] Article 117(1)(c), 152 to 154 SCPC.

[171] Article 169(4) SCPC.

- Right to a particular composition of the court: If the case involves sexual offenses, there must be at least one judge of the same gender as the victim, if she or he so requests.[172]
- Right to information:[173] The police and the Public Prosecutor's Office must inform the victim of all the rights she or he has during criminal proceedings.[174] In addition, the decisions rendered by the Public Prosecutor's Office will also be notified to the victim.[175]
- The possibility of claiming victim support benefits,[176] such as psychological support, for crimes committed abroad. The law requires that the victim be a resident of Switzerland when the offense was committed or when she or he filed a complaint in order for the victim to be eligible for these benefits. Aid shall be granted only where the State on whose territory the offense was committed does not provide any benefits or provides insufficient benefits.[177]

The wider category of injured persons, which includes victims, have the following rights:

- Right to make a civil claim (see below Reparation for Victims in Criminal Proceedings): The injured person must expressly declare her or his will to do so to the Police or the Public Prosecutor's Office before the end of the investigations.[178]
- Right to be assisted by a lawyer: The injured person has a limited right to legal advice.[179]

1.1.7. Rights of Private Plaintiffs

As party to the proceedings, Private Plaintiffs have the following additional rights:

- Right to make a civil claim (see below Reparation for Victims in Criminal Proceedings)
- Right to be assisted by a lawyer[180]
- Right to benefit from free legal aid[181] provided that the private plaintiff is indigent and asserts civil claims that are not doomed to fail.
- Right to access the case files[182]

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[172] Articles 117(1)(f) and 335(4) SCPC.

[173] Articles 305 and 330(3) SCPC.

[174] Articles 117(1)(e), 305, and 330(3) SCPC; KUHN/JEANNERET (édit.), *Commentaire romand – Code de procedure pénale Suisse* (Commentary of the Criminal Procedure Code – hereinafter **Commentary Criminal Procedure**) Helbing Lichtenhahn (2011), HEMMER, *ad* art. 305 N 6.

[175] Articles 321(1)(b), 327(1)(c), and 354(1)(b) SCPC.

[176] Article 305(2)(b) SCPC.

[177] *Loi fédérale sur l'aide aux victimes d'infractions* (Federal Law on the Assistance to Victims of Crimes) of 23 March 2007 (RS 312.5) (LAVI), Arts. 2, 3(2) and 17.

[178] Articles 118(1) and 118(3) SCPC.

[179] Article 127(1) SCPC.

[180] Article 127(1) SCPC.

[181] Articles 136 to 138 SCPC.

[182] Article 107(1)a) SCPC.

- Right to participate in the taking of evidence: when the Public Prosecutor, judges or other agents of the Courts take evidence, Private Plaintiffs can be present and put questions to persons who are questioned.[183]
- Right to request that further evidence be obtained:[184] It should be noted that a rejection by the Public Prosecutor of a request for further evidence cannot be challenged, given that it may be requested again during the trial.[185]
- Right to make submissions:[186] Submissions may be made in writing or orally on record.[187] Written submissions must be dated and signed.[188]
- Right to challenge decisions of investigating and prosecuting authorities:[189] Parties to the proceedings, including Private Plaintiffs, can challenge the rulings and the procedural acts of the police and the Public Prosecutor's Office, including the dismissal decision, provided that the Private Plaintiff has a legally protected interest in the annulment or modification of a decision (limitation to the right of challenge).
- Right to be informed: the prosecuting authorities must inform the injured person of her or his rights.[190]

1.5. Arrest warrant[191]

An arrest warrant may be issued by the prosecution or courts for a suspect to be arrested and brought before the authorities if there is a strong suspicion (*fortement soupçonné*) that she or he has committed a crime and in addition there are serious reasons to believe that there is a

- flight risk;
- risk of influencing evidence or people to inhibit the seeking of the truth; or
- danger for others after the suspect has previously committed similar crimes.[192]

The police will be required to detain the person subject to the arrest warrant.[193] Following an arrest, pre-trial detention can be ordered by a court upon request by the prosecution.[194]

[183] Articles 147(1) SCPC.

[184] Articles 107(1)(e) SCPC.

[185] Article 318(2) and (3) SCPC.

[186] Article 109(1) SCPC.

[187] Article 110(1) of the SCPC.

[188] *Ibidem*.

[189] Article 382(1) and (2), Article 393(1)(a) SCPC.

[190] Article 107(2) SCPC.

[191] Articles 220 to 221SCPC.

[192] Article 221(1) SCPC.

[193] Article 217(1)(b) SCPC.

[194] Article 224(2) SCPC.

2. Trial stage

2.1. Competent authorities

Federal authorities have jurisdiction over the crimes of genocide, crimes against humanity, and war crimes while Cantonal authorities have jurisdiction to prosecute enforced disappearance as a stand-alone crime. War crimes were subject to military jurisdiction (and Military Courts) until 1 January 2011.[195] Since then, the prosecution of genocide, crimes against humanity, and war crimes is subject to ordinary criminal law (federal criminal jurisdiction).

The competent court at first instance for crimes against humanity, genocide, and war crimes is the Federal Criminal Court (*Cours des affaires pénales*).[196] The first instance judgment may be challenged before the Court of Appeal of the Federal Criminal Court, in accordance with the procedural rules of the SCPC.[197] The judgments rendered by the Court of Appeal may in turn be appealed to the Federal Court.[198]

2.2. Possible outcomes

If it appears, during the examination of the charges or at the latest during the proceedings, that a judgment on the merits cannot yet be rendered, the court suspends the proceedings.[199] If necessary, the judge refers the charges back to the Public Prosecutor's Office for completion or correction.[200] When a judgment can definitively not be rendered, the court closes the proceedings.[201]

When the court is in a position to rule materially on the charge, it renders a judgment on the guilt of the accused, the sentence and other consequences.[202] If there are civil claims, the court will also rule on them (see below Reparation for Victims in Criminal Proceedings).[203] In some cases, it will refer the Private Plaintiff making the civil claim to civil courts, particularly where the full assessment of the civil claims would require disproportionate work.[204]

2.3. Possible challenges by victims

Any party to the proceedings (including Private Plaintiffs) has the right to appeal against a decision of the court.[205] The Private Plaintiff's grounds for appeal are

[195] Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140, para. 4.

[196] Article 35(1) LOAP; Article 23(1)(g) SCPC.

[197] Articles 38a and 39(1) LOAP; Article 398 ff SCPC.

[198] Articles 80(1) and 100(1) of the *Loi sur le Tribunal fédéral* (Law on the Federal Court) of 17 June 2005 (RS 173.110).

[199] Article 329(2) SCPC.

[200] *Ibidem*.

[201] Article 329(4) SCPC.

[202] Article 351(1) SCPC.

[203] Article 126(1) SCPC.

[204] Article 126(2-3) SCPC.

[205] Articles 382(1) SCPC.

limited in that she or he cannot appeal on the question of the sentence or measure imposed.[206]

In addition to Private Plaintiffs, injured persons who do not have the status of a Private Plaintiff have the right to appeal, provided that they have taken part in the first instance's proceedings and have a legally protected interest.[207] However, the grounds for appeal will be limited to "the extent of their intervention in the proceedings", e.g. a victim who took part as a witness in the proceedings may appeal, a decision requiring her or him to testify in violation of her or his right of refusal.[208]

2.4. Victim rights and participation at the trial stage

Once the trial starts, neither an injured person nor a victim can become a Private Plaintiff, the deadline for such a declaration being the end of the investigations,[209] i.e. before a decision at the end of investigations is made.[210]

Injured persons, victims and Private Plaintiffs enjoy to a large extent the same rights as listed above (see Victim Rights and Participation at Investigation Stage).

Rules of evidence

1. At investigation stage

1.1. Necessary information for the report of an offense

The report of an offense should mention the name of the perpetrator (if known) as well as the facts to which it relates. However, it can also be filed against an unknown person.[211]

Under Swiss law, the principle of freedom of evidence prevails.[212] Therefore, any type of evidence can be brought to the Public Prosecutors. The only requirements are that it is admissible under the law and is able to establish the truth.[213]

[206] Article 382(2) SCPC.

[207] Articles 105(2) and 382(1) SCPC; Commentary Criminal Procedure - CALAME, *ad* art. 382 SCPC N 4ss; FF 2006 1292.

[208] Commentary Criminal Procedure - CALAME, *ad* art. 382 SCPC; Federal Court, Judgment of 4 April 2013, 6B_80/2013, para. 1.2.

[209] Article 118(3) SCPC.

[210] Article 318(1) SCPC; Commentary Criminal Procedure - JEANDIN/MATZ, *ad* Art. 118 N16.

[211] Commentary on the SCC, *ad* Art. 30 SCC, p. 232; Federal Court, Judgment of 24 January 2002, ATF 128 IV 81, para. 2a.

[212] Article 139 SCPC; Commentary Criminal Procedure - BENEDICT/TRECCANI, *ad* art. 139-141 N 1.

[213] Article 139 SCPC.

1.2. Necessary evidence and threshold to open an investigation

As a general rule, the Public Prosecutor will initiate an investigation when it appears from the police report, the report of an offense, or her or his own findings that there is sufficient suspicion (*soupçons suffisants*) that an offense has been committed.[214]

It is not necessary that there be a strong likelihood that a conviction will be handed down at the end of the proceedings; it is sufficient that there are concrete indications of an offense.[215] The concept is sufficiently flexible so that, in practice, the Public Prosecutor's Office may initiate an investigation whenever it considers it justified, on the sole condition that there are certain concrete elements relating to an offense.[216] The law only excludes the opening of an investigation where the file contains no concrete elements and where the investigation is similar to a "fishing expedition."[217]

1.3. Necessary evidence and threshold for an indictment

Where the Public Prosecutor considers that the suspicions based on the investigation are sufficient (*les soupçons établis sur la base de l'instruction sont suffisants*), she or he must prepare an indictment that she or he will forward to the court for trial.[218]

In practice, an indictment is required when a conviction appears more likely than an acquittal. [219] In this context, the Public Prosecutor has broad discretionary powers. This issue is particularly sensitive when the probabilities of acquittal and of conviction appear to be similar. In such cases, the Public Prosecutor's Office is in principle required to charge the suspect pursuant to Article 324 of the SCPC, especially when the offenses are serious. When there is notably no suspicion justifying an indictment[220] or when the elements constituting an offense are clearly not present,[221] the Public Prosecutor will dismiss the case.

1.4. Admissibility of evidence

The criminal justice authorities can use all legally admissible evidence that, according to the state of scientific knowledge and experience, can establish the truth.[222] Therefore, the means must be of sufficient probative value, so that it is possible to determine the truth with an acceptable degree of certainty.[223] Methods that are not based on reason are thus excluded (e.g. fortune telling).[224]

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[214] Article 309(1)(a) SCPC.

[215] Commentary Criminal Procedure - CORNU, *ad* art. 309 N 8.

[216] *Ibidem*.

[217] *Ibidem*.

[218] Article 324(1) SCPC.

[219] Federal Court, Judgement of 27 March 2012, 1B_687/2011, para. 4.1.1 to 4.3.

[220] Article 319(1)(a) SCPC.

[221] Article 319(1)(b) SCPC.

[222] Article 139(1) SCPC.

[223] Commentary Criminal Procedure - BENEDICT/TRECCANI, *ad* art. 139 N 9.

[224] *Ibidem*, N 10.

In principle, nothing prevents the parties from invoking evidence arising from the use of social media. It is often used, for example, to support reports of an offense (e.g. YouTube videos). In addition, federal police reports also use open source evidence.

2. At trial stage

2.1. General rules

Articles 139 to 141 of the SCPC stipulate the rules of admissibility of evidence. As a general rule, the authorities must use all legally admissible evidence that, according to scientific knowledge and experience, can prove the truth.[225] There is no need for the authorities to introduce evidence on irrelevant facts known to the criminal authorities or already sufficiently proven.[226]

2.2. Unlawfully obtained materials

2.2.1. Obtained by authorities

Evidence may be unlawful by its nature or by the way it was obtained.[227] Articles 140 and 141 of the SCPC define the legal framework within which State authorities must obtain and consider evidence. According to these provisions, the use of unlawful evidence can be divided into the following three different categories.

Strictly inadmissible evidence

Some methods of obtaining evidence are contrary to the accused's fundamental rights, such as human dignity, and the right to remain silent. Article 140 SCPC aims to prohibit torture and similar practices (e.g. deprivation of meals or sleep) but also other methods likely to reduce or even destroy the will of the persons involved in the procedure, such as the use of narco-analysis, hypnosis, lie detectors or the accused's drunkenness, even if the persons concerned have consented to the use of such methods.[228] Thus, when evidence is collected in violation of Article 140 of the SCPC, it is strictly inadmissible.[229]

In addition, Article 141(1) of the SCPC provides for a second category of strictly inadmissible evidence covering all the situations in which the law expressly prohibits it, such as evidence collected in violation of the right to contest allegations during investigation, or the interrogation of the accused not informed of the charges and of her or his rights.[230]

Relatively inadmissible evidence

According to Article 141(2) SCPC, this category includes unlawful evidence that is not covered by Article 141(1) of the SCPC and which was obtained either through

[225] Article 139(1) SCPC.

[226] Article 139(2) SCPC.

[227] Article 139 et seq. SCPC.

[228] JEANNERET/KUHN, Review Criminal Procedure Code, Stämpfli (2013), p. 181 to 183.

[229] Article 141(1) SCPC.

[230] JEANNERET/KUHN, Review Criminal Procedure Code, p. 181 to 183.

the commission of a criminal offense by the authorities (e.g. a home invasion) or in violation of a rule on the validity of evidence. A rule on the validity of evidence is one that aims to guarantee the reliability of evidence or to protect the person subject to a measure (e.g. provisions regulating the material conditions of a search or seizure).[231]

Unlawful evidence within the meaning of Article 141(2) of the SCPC is in principle inadmissible, unless it is essential to the elucidation of a serious offense. The evidence is admissible when on assessing the balance between the public interest of justice, on the one hand, and the private interest protected by the infringed norm, on the other hand, the former outweighs the latter.[232]

Strictly admissible evidence

Article 141(3) of the SCPC refers to evidence that has been submitted in violation of an administrative rule, i.e. a procedural standard that is not ultimately intended to guarantee the reliability of evidence or to protect the person subject to a measure, but to regulate the proper order of the procedure (e.g. rules on the form and time of notification of the summons of appearance or the duty of a notary, coercive measures, etc.).[233] In such a situation, the evidence collected is admissible without further conditions.

2.2.2. Obtained by Private Plaintiffs

The admissibility of evidence obtained by other parties, including Private Plaintiffs and the accused, must be decided by the Courts on a case-by-case basis, unless the law prohibits its admissibility independent of the statute of the party who obtained the evidence in question. For strictly inadmissible evidence, the prohibitions set out in Article 140 of the SCPC should also be applicable, in principle, to evidence unlawfully obtained by Private Plaintiffs who intend to present it through a submission.[234] For relatively inadmissible evidence, in principle, the same test applies as for authorities, i.e. it is subject to a balance of interests test similar to the one prescribed in the context of Article 141(2) of the SCPC.[235]

2.3. Open source materials

Open source evidence is admissible,[236] with no specific conditions governing its admissibility.[237] Nevertheless, the question will arise as to how the weight of this evidence will be assessed at trial, in particular with regard to its authenticity.[238]

Swiss courts are therefore amenable to all kinds of evidence, including open source material, photographs, and videos, as long as it complies with the above-mentioned

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[231] JEANNERET/KUHN, Review Criminal Procedure Code, p. 183 to 184.

[232] JEANNERET/KUHN, Review Criminal Procedure Code, p. 183 to 184.

[233] JEANNERET/KUHN, Review Criminal Procedure Code, p. 185.

[234] Commentary Criminal Procedure - BENEDICT/TRECCANI, *ad* art. 139 to 141, N 7.

[235] JEANNERET/KUHN, Review Criminal Procedure Code, p. 187 to 188.

[236] Some information on the Internet can be considered as a well-known fact, see Federal Court, Judgment of 20 September 2017, ATF 143 IV 380.

[237] Interview with Swiss lawyers on 22 January 2019, 23 January 2019 and 29 January 2019.

[238] *Ibidem*.

admissibility rules. Photographs in particular are frequently introduced in proceedings, subject to proper authentication.

In several judgments (not in relation to international crimes), the cantonal courts have used social media to obtain various information about the accused without this being challenged by the Federal Court. For instance, the cantonal judges[239] assessed the accused's personal situation and his evolution since the beginning of his detention on the basis of social media where the appellant boasted of continuing to use drugs. In another judgment, a cantonal court relied on various elements to establish the behavior alleged against the accused, including texts published on Facebook.[240] In practice, procedural files very often contain Facebook correspondence.[241]

2.4. Introduction of new evidence

At the beginning of the trial, the judge(s) examines the request to introduce new evidence that has not been introduced during the investigation.[242] At this stage, the judge(s) may decide to dismiss evidence introduced if she or he does not consider it relevant, or if the evidence tends to prove elements that are already clearly established or cannot provide the necessary clarification.[243] The court may also supplement evidence where it considers the facts to have been insufficiently established.[244]

According to Article 104(1) of the SCPC, all parties to the proceedings, including Private Plaintiffs, can submit evidence at trial.[245]

Witness and victim protection

According to Article 149(1) of the SCPC, the following persons may benefit from protective measures: witnesses, persons called upon to provide information, accused persons, experts, translators or interpreters, as well as persons having a relationship with these persons that would grant them the right to refuse to testify on the grounds of personal relations.[246] The injured person who has become a Private Plaintiff is treated as a person called upon to provide information and benefit in that capacity from the protection conferred by Article 149 of the SCPC.[247]

In order to benefit from protective measures, there must be reasons to fear that the person involved in the procedure may, by reason of her or his participation, be exposed either to a serious danger threatening her or his life or physical integrity or

[239] Federal Court, Judgment of 7 July2016, 6B_1249/2015.

[240] Federal Court, Judgment of 25 July 2018, 6B_618/2018.

[241] Federal Court, Judgment of 11 June 2018, 6B_69/2018.

[242] Articles 343(1)SCPC; Commentary Criminal Procedure - DE PREUX, *ad* art. 343 N 11.

[243] Federal Court, Judgment of 10 July 2008, TF 6B_314/2008, para. 2.1.

[244] Commentary Criminal Procedure - DE PREUX, *ad* art. 343 N 13.

[245] Articles 61(a), 104(1), and 331(2) SCPC.

[246] See Article 168(1) to (3) SCPC.

[247] Commentary on the SCPC, *ad* art. 149 p. 504 ; Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 6.

to another serious disadvantage.[248] There must be concrete evidence to justify the protective measure (a general reference to hazards to which the person may be exposed is not sufficient).[249] In addition to the person's subjective feeling, there must be objective elements showing a danger.[250]

The existence of a serious danger to life or body within the meaning of Article 149 of the SCPC must, for example, be recognized when death threats have been made against a person who is herself or himself a party to the proceedings or a person with whom she or he has a relationship as set out above, when such attacks have already taken place, or when there is a seriously risk thereof, having regard to the context in which the person concerned is operating.[251]

The protective measures that can be put in place include:

- Ensuring the anonymity of the person to be protected;
- Conducting confidential pre-trial hearings (without allowing parties or members of the general public);
- Modifying the appearance or voice of the person requiring protection or screening the person from the court;
- Limiting the parties' right to access the file with regard to the identity of the protected person and information that could allow her or his identification.[252]

Despite these protective measures, it should be recalled that a conviction cannot be based exclusively or to a decisive extent on anonymous statements and must therefore be based on other evidence.[253] The protection of a person's identity does not prevail over the right to a fair trial.[254]

Anonymity is intended to ensure that a person's identity is not revealed during the proceedings and not included in the case files.[255] Since the guarantee of anonymity is a particularly intrusive measure of protection for the procedural rights of the parties, in particular those of the defense, it can only be resorted to in extreme circumstances (*ultima ratio).*[256] It is necessary to balance the divergent interests of the person to be protected, the accused, and the proceedings (the public interest in seeking the truth), and to compensate as far as possible for any limitations on the rights of the parties.[257]

In the *Rifaat Al-Assad* case, the Court upheld a decision of the Attorney General's Office to refuse to grant anonymity to the claimant, the son of a murdered victim, on

[248] Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 7 to 9.

[249] Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 7 to 9.

[250] Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 7 to 9.

[251] Federal Criminal Court, Judgment of 2 August 2018, TPF BB.2018.37, para. 2.1.

[252] Articles 149 and 178(a) SCPC; Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 31.

[253] Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 47.

[254] JEANNERET/KUHN, Review Criminal Procedure Code, p. 200.

[255] Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 19 ; Federal Criminal Court, Judgment of 2 August 2018, TPF BB.2018.37, para. 2.1.

[256] Federal Criminal Court, Judgment of 2 August 2018, TPF BB.2018.37, para. 2.1.

[257] *Ibidem.*

the grounds that he had not provided any concrete evidence or sufficient information as to which members of his family might be exposed to serious danger threatening their physical integrity or their lives (e.g. region where they reside, description of the context in which they live, etc.).[258]

In addition, the Court stated that the refusal to grant anonymity was justified by the mere fact that the claimant was a Private Plaintiff with regard to both criminal and civil claim matters and that, consequently, civil claims would probably be made.[259] The Court recalled that, as a person called upon to provide information, the Private Plaintiff may, subject to the fulfillment of the strict requirements laid down for the protection measure, be granted the guarantee of anonymity only if he is called upon to intervene in the proceedings for the purpose of being heard, thereby approaching the status of a witness, and that he does not, therefore, make any civil claims in criminal proceedings.[260] Furthermore, the Court considered that the death of one of the victims, in this case the claimant's father, could not be established without identifying him, which would result in the identification of the latter, or even other members of his family.[261]

Victims should therefore be informed by their legal representative that, in the event of a refusal to grant anonymity, their identity will most likely be included in the case file.

In addition, individuals at risk can be included in the witness protection program. The Federal Police Office on the Protection of Witnesses (*Service national de protection des témoins*) can decide under strict conditions to take measures for a witness or a victim and place her or him under a protection program in Switzerland.[262]

The protection program may include, in particular, the following extra-procedural measures: housing the individual concerned in a safe place; changing their workplace and home; blocking and/or securing the communication of the individual; providing the individual with a new identity; supporting them financially; etc.[263]

Any measure that restricts the rights of the defense must be absolutely necessary, subsidiary to other less restrictive measures, and the most appropriate (principle of proportionality).[264] Thus, the interests of the defense must be weighed against those of the witness in each case.[265]

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[258] Federal Criminal Court, Judgment of 2 August 2018, TPF BB.2018.37, para. 2.2.

[259] *Ibidem*.

[260] *Ibidem*.

[261] *Ibidem*.

[262] Articles 8 and 28 of the *Loi fédérale sur la protection extraprocédurale des témoins* (Federal Law on the Extra-procedural Protection of Witnesses – hereinafter **Witness Protection Law**) of 23 December 2011 (RS 312.2).

[263] Art. 5 Witness Protection Law.

[264] Commentary Criminal Procedure - PERRIN, *ad* art. 149 N 40; ECHR, Van Mechelen and others v. Netherlands, Judgment of the Court (Chamber) of 23 April 1997, Application No. 21363/93, 21364/93, 21427/93 and 22056/93.

[265] *Ibidem*.

Reparation for victims in criminal proceedings

A person who has suffered harm as a consequence of a crime, i.e. injured person, including victims (see above on Injured Persons and Victims), may bring civil claims in the criminal proceedings as a Private Plaintiff (see above Private Plaintiff).[266] The victims' relatives, i.e. spouses, children, parents and others in a similarly close relationship, have the same right to the extent that they would be able to make their own civil claims against the accused.[267]

To do so, the injured person, including victims, must expressly declare that she or he wishes to make a civil claim in the criminal proceedings as a Private Plaintiff.[268] The declaration must be made to a criminal justice authority no later than the end of the investigation.[269] The civil claim must if possible be quantified in the declaration and a brief statement of the grounds must be provided, detailing the relevant evidence.[270] It should be noted that if the conclusions are not quantified or justified in a sufficiently precise manner, the judge will refer the private claimant to act through civil proceedings.[271]

A Private Plaintiff who makes a civil claim has the right to legal aid for the pursuit of this civil claim under certain conditions.[272] To be entitled to legal aid, she or he must show that she or he does not have the required financial resources, and that she or he asks for a civil claim that does not appear to be without any prospect of success.[273] According to the case law of the Federal Court,[274] the procedure is not devoid of any chance of success if, at the time of filing the application for legal aid, the chances of winning and the risk of losing are approximately equivalent, or if the former are only slightly lower than the latter. Account must also be taken of the importance of the outcome of the procedure for the applicant.

Usually, the Court will rule at the same time on the accused's guilt and on the civil claims. The court may firstly decide solely on guilt and sentence; thereafter the Presiding Judge may, following a further hearing of the parties, rule as a judge sitting alone on the civil claim.[275]

Nevertheless, in some cases, the criminal judge will refer the Private Plaintiff to file her or his civil claim before a civil court, notably when the criminal proceedings are abandoned or the accused acquitted because the court was not in a position to make a decision.[276] Furthermore, if a full assessment of the civil claim would cause

[266] Article 122(1) SCPC.

[267] Articles 116(2) and 122(2) SCPC.

[268] Article 118(1) SCPC.

[269] Article 118(3) SCPC.

[270] Article 123(1) SCPC.

[271] Article 126(2)(b) SCPC.

[272] Articles 136 to 138 SCPC.

[273] Articles 119(2) and 136(1)(a) and (b) SCPC.

[274] Commentary Criminal Procedure - HARARI/CORMINBOEUF, *ad* art. 136 N 33.

[275] Article 126(4) SCPC.

[276] Article 126(2)(a) and 126(2)(d) SCPC.

unreasonable expense and inconvenience, the court may make a decision in principle on the civil claim and refer it to civil proceedings.[277]

Immunities

1. General rules

Federal law does not provide for any specific regulations relating to immunities. A framework law is used to determine to whom Switzerland could grant immunities or privileges.[278] The granting of diplomatic privileges and immunities fall under the responsibility of the Federal Department of Foreign Affairs.[279]

In the *Khaled Nezzar* case,[280] the Federal Criminal Court stated clearly that the question of immunity has to be analyzed at the initial stage of the proceedings (as soon as the jurisdiction of Swiss authorities is confirmed). Under Swiss criminal procedure, the prosecuting authority may not undertake any investigative measures before the opening of the investigation, since the legislator has waived the possibility of "prior investigations."[281] Accordingly, in practice, it is inevitable that the Public Prosecutor open an investigation before the issue of immunity is addressed. However, this issue should be examined as soon as possible as the existence of immunity is an obstacle to prosecution.[282]

The Federal Department of Foreign Affairs will often take a position on whether immunity exists.[283] However, this opinion is mainly indicative since it has no legal value, the judicial authorities being under no obligation to follow this opinion.[284]

2. Personal immunity

Swiss authorities recognize personal immunities for Heads of State, Heads of Government, as well as for Ministers of Foreign Affairs (also referred to as the *troika*) during the performance of their duties, covering all their acts, including private ones.[285]

Immunity takes effect when the person in charge takes up her or his duties and applies until the day on which her or his duties end.[286] However, members of the *troika*

[277] Article 126(3) SCPC.

[278] *Loi fédérale sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu'Etat hôte* (Federal law on Privileges, Immunities and Facilities as well as on the Financial Support Granted by Switzerland as Host State) of 22 June 2007 (RS 192.12).

[279] Interview with a Federal Prosecutor on 27 February 2019.

[280] Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140.

[281] Federal Criminal Court, Judgment of 25 July 2012, TPF BB.2011.140, para. 1.2.2.

[282] Interview with Swiss lawyers on 22 January 2019, 23 January 2019 and 29 January 2019.

[283] Interview with academics on 11 January 2019, 30 January 2019, 6 February 2019.

[284] *Ibidem*.

[285] Federal Criminal Court, Judgment of 25 July 2012, TPF BB. 2011.140, para. 5.3.1.

[286] *Ibidem*, para. 5.3.1.

continue to enjoy residual immunity after their term in office for official acts performed during their term of office. Thus, after their term ends, a former member of the *troika* may be tried for acts committed before or after the period during which she or he held those functions, as well as in respect of acts which, although committed during that period, were committed in a private capacity.[287]

In the *Khaled Nezzar case,*[288] the former Algerian General was accused in Switzerland of war crimes. He claimed that he enjoyed immunity between 14 January 1992 and 30 January 1994, since he had exercised official functions during that time. In its judgment, the Federal Criminal Court concluded that Khaled Nezzar enjoyed personal immunity (*ratione personae*) during the period in which he was acting as Minister of Defense.[289]

The question that remained was whether, after the termination of his official functions, Khaled Nezzar continued to enjoy immunity; that is, whether residual functional immunity covered acts committed outside his term as Minister.[290] The Federal Criminal Court held that Khaled Nezzar could not claim any functional immunity (*ratione materiae).* The Court stated that it would be both contradictory and futile if, on the one hand, one were to claim to combat serious violations of the fundamental values of humanity (which are genocide, crimes against humanity, and war crimes), and, on the other hand, one were to accept a broad interpretation of the rules of functional immunity (*ratione materiae*) that could benefit former officials whose concrete result would prevent, *ab initio*, any or all investigation.[291] Moreover, the Court specified that for acts committed before Khaled Nezzar took office as Minister of Defense of Algeria and for acts committed after the end of his time in office, no immunity applied.[292]

3. Functional immunity

Representatives of foreign States, other than members of the *troika*, and officials who do not enjoy other immunities as members of the diplomatic team or as officials of an international organization covered by the agreement of the headquarters of that international organization or under national law, in principle enjoy immunity from jurisdiction and enforcement in other States.[293] Such immunity arises from acts performed in the exercise of official duties.[294]

This immunity continues for official acts performed during the term of office even after the end of that term.[295] Yet, it cannot protect the former official from criminal prosecution for criminal acts committed before or after the end of her or his official

[287] *Ibidem*, para. 5.3.3.

[288] Federal Criminal Court, Judgment of 25 July 2012, TPF BB. 2011.140.

[289] *Ibidem*, para. 5.4.2.

[290] *Ibidem*, para. 5.4.3.

[291] *Ibidem*, para. 5.4.3.

[292] *Ibidem*, para. 5.5.

[293] Federal Criminal Court, Judgment of 25 July 2012, TPF BB. 2011.140, para. 5.3.2.

[294] *Ibidem*, para. 5.3.2.

[295] *Ibidem*, para. 5.3.2.

function or for criminal offenses committed during the period of her or his official function but outside the duties of her or his function.[296]

4. United Nations and permanent missions

Switzerland is host to a number of agencies and permanent missions to the United Nations (UN). A specific regime is applicable to the UN. The UN Charter[297] provides that the UN shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.[298] Furthermore, it states that the UN and its agencies, as well as its representatives shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillments of its purposes. [299]

The Convention on the Privileges and Immunities of the United Nations[300] derives from the application of the above principles. According to this Convention three categories of persons are eligible for immunity: representatives of members of the UN (Article IV), UN officials (Article V), and experts on mission for the UN (Article VI).

The immunity from prosecution enjoyed by members of the staff of permanent missions derives from the Vienna Convention of 18 April 1961 on Diplomatic Relations,[301] applicable by analogy.[302]

5. Headquarters Agreement

Switzerland is also host to a number of international organizations other than the UN. The immunity from prosecution enjoyed by international officers derives from the Headquarters Agreements (*Accords de siège*) which the Swiss Federal Council has concluded with intergovernmental organizations and international institutions.[303] A Headquarters Agreement entered into force with such organizations established in Switzerland (such as the World Intellectual Property Organization, World Trade

[296] *Ibidem*, para. 5.3.2.

[297] *Charte des Nations Unies* (Charter of the United Nations- hereinafter **UN Charter**) of 26 June 1945 (RS 0.120).

[298] Article 104 UN Charter.

[299] Article 105 UN Charter.

[300] *Convention sur les privilèges et immunités des Nations Unies* (Convention on the Privileges and Immunities of the United Nations) of 13 February 1946 (RS 0.192.110.02).

[301] *Convention de Vienne sur les relations diplomatiques* (Vienna Convention on Diplomatic Relations) of 18 April 1961 (RS 0.191.01).

[302] Perez, *Le système des privilèges et immunités applicable aux organisations internationales en Suisse et aux délégations permanentes étrangères à Genève* (The System of Privileges and Immunities Applicable to International Organisations in Switzerland and to Foreign Permanent Delegations in Geneva), 1997, p.30, https://www.eda.admin.ch/dam/mission-onu-omc-aele-geneve/fr/documents/Publication-Privileges-immunites-PZ_FR.pdf.

[303] *Ibidem*, p. 28.

Organization, and World Health Organization) determines the status of the organization and the scope of the immunity granted to it by the host State.[304]

6. Special mission immunity

Switzerland has ratified the Convention on Special Missions of 8 December 1969,[305] which was introduced into Swiss legislation on 21 June 1985. A special mission is composed of one or more representatives of a State, who are sent by the State to another State in order to carry out a specific task.[306]

In general, people participating in such a mission may be granted immunities that may vary according to the category of person concerned. It is provided in particular in this Convention that the Head of the sending State, when she or he is at the head of a special mission, shall enjoy, in the receiving State or in a third State, the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.[307] Similarly, the Head of Government, the Minister for Foreign Affairs and other senior officials, when taking part in a special mission of the sending State, shall enjoy, in the receiving State or in a third State, in addition to what is granted by this Convention, the facilities, privileges, and immunities recognized by international law.[308]

Amnesties

An amnesty granted by one State has no international effect in another State.[309] It is up to the legislator of one State to determine whether it wishes to recognize such a national law of another State.

Swiss law does not contain any provision regarding the recognition of amnesties of other States. Arguably, Swiss authorities are bound by several international conventions with strict requirements regarding the duty to prosecute international crimes,[310] and therefore should not recognize a foreign amnesty that would exempt a perpetrator of international crimes from prosecution.

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[304] *Ibidem*, p. 15.

[305] *Convention sur les missions spéciales* (Convention on Special Mission Immunity – hereinafter **Special Missions Convention)** of 8 December 1969 (RS 0.191.2).

[306] Articles 1(a) and 9 Special Missions Convention.

[307] Article 21(1) Special Missions Convention.

[308] Article 21(2) Special Missions Convention.

[309] Interview with academics on 11 January 2019, 30 January 2019, 6 February 2019.

[310] Articles IV, V and VI of the *Convention pour la prevention et la repression du crime de genocide* (Convention on the Prevention and Punishment of the Crime of Genocide) of 9 December 1948 (RS 0.311.11); Article 49 GCI; Article 50 GCII; Article 129 GCIII; Article 146 GCIV; Articles 5 to 7 CAT.

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