

The execution of ICC arrest warrants and requests for surrender under Swiss law

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1. Introduction

At the time of the ratification of the Rome Statute of the International Criminal Court (ICC), consideration was given by Swiss authorities to the adaptation of the domestic legislation with a view to implement the provisions of the Statute requiring States Parties to cooperate with the ICC. Based on the duty of States Parties, under Article 88 of the Statute, to ‘ensure that there are procedures available under their national law for all of the forms of cooperation’ with the ICC, it was not conceivable for the Federal Council to ratify the Statute without, at the same time, adopting a specific piece of legislation for such purposes. It may be noted, in passing, that, faithful to the habit of the Swiss legislator to take note of legal developments in neighbouring States, the Swiss Federal Council, expressed its astonishment at the approach adopted by France and Italy, which had not yet addressed the issue even though they had ratified the Statute.¹ The Federal Act on Cooperation with the International Criminal Court (ICCA) was

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¹ See Conseil fédéral suisse, ‘Message relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale internationale ainsi qu’à une révision du droit pénal’ [2001] Feuille fédérale 359 <www.fedlex.admin.ch/eli/fga/2001/133/fr>, 419: ‘Quelques Etats, qui l’ont déjà ratifié, ont choisi une voie inusuelle pour eux aussi, en ce sens qu’ils ont déjà ratifié cet acte sans avoir achevé au plan national les travaux de mise en œuvre nécessaires. Certains n’ont même pas encore abordé le problème. C’est notamment le cas de l’Italie. La France a ratifié le Statut, elle aussi, sans adopter antérieurement de législation d’application. [...] Le Conseil fédéral considère qu’une telle façon de procéder n’est pas judicieuse pour la Suisse. Même si la ratification du Statut de Rome est soumise à une urgence extérieure, le Conseil fédéral



adopted by the Federal Assembly on 22 June 2001; the same day, the decision was taken to ratify the Rome Statute.²

After a brief presentation of the applicable legal framework applicable to the cooperation between Swiss authorities and the ICC (2), this contribution will turn to potential hurdles that may arise in practice, either in case of disagreements between Switzerland and the ICC as to the jurisdiction of the ICC or the admissibility of a case (3.1), or jurisdictional immunities (3.2). Moreover, it may be inquired if the powers of the Swiss Federal Council under Article 185 of the Federal Constitution of the Swiss Confederation entail a risk of politicization of the decision-making process (3.3).

2. *Applicable provisions of the Federal Act on Cooperation with the International Criminal Court for the execution of arrest warrants*

Instead of simply amending the legislation generally applicable for matters of judicial cooperation in criminal matters, and in light of the *sui generis* character of the cooperation between the ICC and Member States, the Federal Assembly followed the recommendation of the Federal Council³ and chose to adopt a comprehensive autonomous legislation rather than an amendment to the Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (Mutual Assistance Act). A decisive factor leading to this decision was the quasi-absolute duty to cooperate with the ICC as opposed to the regime applicable to mutual assistance with other States where various considerations may play a role in the decision to grant assistance or not.⁴ The Federal Council stressed, in particular, that ‘the Statute does not allow any grounds for refusing a surrender request’⁵.

estime que la Suisse doit pouvoir remplir les engagements issus directement, avec effet obligatoire de cet instrument international, au moment de sa ratification.’

² Loi fédérale sur la coopération avec la Cour pénale internationale (LCPI) of 22 June 2001 (*Fedlex*, 22 June 2001) <www.fedlex.admin.ch/eli/cc/2002/237/fr>.

³ See Conseil fédéral (n 1) 422.

⁴ *ibid* 397-399.

⁵ *ibid* 398: ‘En concordance avec le sens et le but de la coopération explicités ci-dessus, l’art. 86 [du Statut de Rome] impose aux Etats Parties de coopérer « pleinement » avec la Cour, conformément aux dispositions de l’ensemble du Statut. « Plement » signifie en particulier que le Statut n’admet aucun motif de refuser un transfèrement et



The cooperation of Switzerland with other international criminal tribunals or other assimilated institutions remains regulated by the relevant provisions of Mutual Assistance Act.⁶ With respect to proceedings instituted by a body established by a resolution of the United Nations that is binding on Switzerland or proceedings concerning the crime of genocide, crimes against humanity and war crimes, paragraph 3*bis* of Article 1 of Mutual Assistance Act thus provides that, '[u]nless other legislation or international agreements provide otherwise, this Act applies by analogy to proceedings for cooperation in criminal matters with international courts or other inter- or supra-national bodies with criminal justice functions'.⁷ This exclusion of cooperation with the ICC from the scope of the Mutual Legal Assistance Act means that the latter's role is at best subsidiary.⁸

Article 3 of the ICCA designates the Federal Office of Justice as the central office entrusted with cooperation with the ICC. In particular, this central office is tasked with surrendering the persons prosecuted to the Court (Article 3(2)(e) ICCA). The fact that this function has been explicitly assigned to the Federal Office of Justice rather than to the higher level of the Federal Department of Justice and Police rules out the possibility of the Federal Councillor in charge of that Department intervening in the handling of this type of case.⁹ The underlying assumption is therefore

ne tolère, s'agissant des autres formes de coopération, que le motif de l'atteinte à la sécurité nationale.'

⁶ The relevant provisions of the Federal Act on International Mutual Assistance in Criminal Matters find their origins in a Federal Decree, subsequently turned into a Federal Act, on cooperation with international tribunals responsible for prosecuting serious violations of international humanitarian law adopted by the Federal Assembly in 1995. The provisions of this federal act were incorporated into the EIMP during a legislative reform in 2020. For more details, see R Zimmermann, *La coopération judiciaire internationale en matière pénale* (6th edn Éditions Stämpfli 2024) 169-170. See also A R Ziegler, 'Die Kooperation der Schweiz mit den internationalen Strafgerichten der UNO' (1997) 115 *Schweizerische Zeitschrift für Strafrecht* 382.

⁷ Paragraph 3*bis* of art 1 of the Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981 [Unofficial English Translation] (*Fedlex*, 20 March 1981) <www.fedlex.admin.ch/eli/cc/1982/846_846_846/en> (emphasis added).

⁸ For the view that the Mutual Assistance Act does not apply at all to cooperation with the ICC because this matter is regulated exclusively by the ICCA, see G Mieli, 'Art. 1 EIMP' in L Staffler, ML Glassey (eds), *Onlinekommentar zum Bundesgesetz über internationale Rechtshilfe in Strafsachen* (2023) <<https://onlinekommentar.ch/fr/kommentare/irsg1>> [24].

⁹ See art 38 of the Government and Administration Organisation Act (GOAO) of 21 March 1997 [Unofficial English Translation] (*Fedlex*, 21 March 1997)

that, as a rule, the surrendering of persons to the ICC is a purely legal-technical rather than a political matter. It must be noted that some authors have raised concerns, however, about the fact that all aspects of the cooperation with the ICC are entrusted with an administrative rather than a judicial organ.¹⁰

The arrest and surrender of a person sought by the ICC is regulated by Chapter 3 of the ICCA (Articles 16 to 28).¹¹ Article 16(1) affirms the basic principle that '[a] person is surrendered to the Court if it is clear from the request and supporting materials that the offence falls within the jurisdiction of the Court'.¹² Article 17(1) of the ICCA lists the documents requested from the ICC, including explanations as to the grounds for detention pending a decision on the request for surrender. The Federal Council commented that the materials submitted by the Court would permit the Federal Office of Justice to find answers to the two central questions relevant in the handling of such cases, namely whether we are dealing with the right person and whether the jurisdiction could or should be challenged.¹³

The Federal Council could rely in this context on a precedent decided by the Swiss Federal Court on the cooperation of Swiss authorities with the International Criminal Tribunal for Rwanda (ICTR).¹⁴ In the *Musema* case, the Federal Court established the distinction between cases of extradition and cases of surrender to an international criminal jurisdiction. It held, that grounds for the rejection of an extradition request or restrictions imposed on its execution (such as the principle of speciality or the allegedly political nature of the offence) were not applicable to the

<www.fedlex.admin.ch/eli/cc/1997/2022_2022_2022/en>: 'In principle, the head of department has the unrestricted right to issue instructions, to lead his or her department and intervene personally in a matter. Special provisions for individual administrative units and the attribution of certain powers under federal legislation are reserved.'

¹⁰ See, from the standpoint of the principle of the separation of powers, Richard Greiner, 'La Suisse et les juridictions pénales internationales' in Julie Meylan (ed), *La lutte contre l'impunité en droit suisse : compétence universelle et crimes internationaux* (2nd edn TRIAL 2015) 79 [45]. See also, for the view that the ICCA does not comply with the obligations flowing from Article 59(2) of the Rome Statute, Zimmermann (n 6) 386.

¹¹ See Zimmermann (n 6) 383-391.

¹² 'Une personne est remise à la Cour s'il ressort de la demande et des pièces justificatives que l'infraction relève de la compétence de la Cour.'

¹³ Conseil fédéral (n 1) 431.

¹⁴ To avoid any risk of confusion, it should be pointed out that the Swiss legal system does not recognise the doctrine of the binding nature of judicial precedents (*stare decisis*).



surrender of suspects to the ICTR.¹⁵ It stressed that when seised with a request for surrender, Swiss authorities do ‘not have to verify the merits of the charge against the person concerned’,¹⁶ adding that only a ‘manifestly inaccurate or incomplete request, making the requesting authority’s action appear to be an obvious abuse’ could be rejected.¹⁷ In contrast with the unfortunate expulsion of the Rwandan suspected *génocidaire* Félicien Kabuga, in August 1994,¹⁸ the handling of the *Musema* case by Swiss authorities represented a successful case of international cooperation; the ICTR being then able to rely on evidence gathered in the context of the investigation conducted by Swiss authorities.¹⁹

Section 2 of Chapter 3 of the ICCA (Articles 18-21) regulates matters of detention of the person being prosecuted pending a decision on surrender. According to Article 19 the central service issues an arrest warrant for the purpose of surrender. Article 20(1) provides that, as a rule, the person is maintained in detention throughout the whole proceedings. Article 20(2) allows the person to apply for release with the right to appeal the decision to the Federal Court. According to Article 21(1), if the request for surrender and supporting documents are not received by the central office, the person is released no later than 60 days after the arrest. Section 3 of Chapter 3 of the ICCA (Article 22-28) relates to the surrender proceedings. Article 22 guarantees the right to be heard of the person subject to surrender proceedings. In particular, it provides that the authority tasked with the execution of the request must inform the prosecuted person of its right to challenge the jurisdiction of the ICC. In case

¹⁵ *X c Office fédéral de la police (recours de droit administratif)*, Federal Court Judgment of the first Court of Public Law of 28 April 1997 ATF 123 II 175 <http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F123-II-175%3Afr&lang=fr&type=show_document> 181 [4]. With respect to the principle of speciality, art 27 of the ICCA provides that ‘[l]a Cour peut poursuivre, punir ou détenir une personne qui lui est remise à raison de l’ensemble des comportements qui relèvent de sa compétence’.

¹⁶ *ibid* 181-182 [4(a)]: ‘saisie d’une demande de transfèrement, l’autorité suisse requise n’a pas à vérifier le bien-fondé de l’accusation portée contre l’intéressé. L’autorité requérante n’a pas à prouver les faits qu’elle allègue, ni même à les rendre vraisemblables’.

¹⁷ *ibid*: ‘Seule sera rejetée une demande manifestement inexacte ou lacunaire, faisant apparaître la démarche de l’autorité requérante comme un abus évident.’

¹⁸ See AR Ziegler, ‘La mise en œuvre du droit international humanitaire par la Suisse’ (1997) 36 *Military L and L of War Rev* 245, 258-259.

¹⁹ See *Prosecutor v Musema* (Judgment) ICTR-96-13-T, T Ch I (27 January 2000) 14-15 [17]-[18].

of a challenge to the jurisdiction of the ICC, the central office refrains from granting the authorization to proceed to the surrender until the ICC has issued a decision on its jurisdiction (Article 24(2) of the ICCA), unless a number of conditions are fulfilled (Article 26 of the ICCA). The person sought by the ICC may also consent to the surrender, in which case the execution of the decision is simplified (Article 23 of the ICCA). Because of the possibility of challenging the jurisdiction of the ICC, the decision on the request for surrender is not susceptible of appeal.

3. *Potential hurdles*

This is not the place to expound in further detail the provisions applicable in cases of requests for surrender under the ICCA. It suffices, for our purposes, to note that difficulties may arise in relation to two sets of international legal issues: jurisdiction and admissibility (3.1), or jurisdictional immunities (3.2). In addition, it may be inquired whether the Federal Constitution of the Swiss Confederation leaves further room for politically motivated interventions by the Federal Council in the handling of ICC arrest warrants and request for surrender (3.3).

3.1. *Challenges to the jurisdiction of the Court or the admissibility of the case*

Under Article 7(1) of the ICCA the central office is tasked with asserting the jurisdiction of Swiss criminal authorities in the framework of Article 18 of the Rome Statute and, whenever necessary, with challenging the jurisdiction of the Court or the admissibility of the case based on Article 19 of the Rome Statute. Moreover, according to the latter provision, persons being the object of the request for surrender may also challenge the jurisdiction of the Court or the admissibility of the case. In such cases, the central office is expressly bound to accept the decision of the ICC (Article 7(2) of the ICCA). It would, therefore, not be open to the central office to reject a request for surrender by the ICC on the ground of a disagreement about the jurisdiction of the ICC over the conduct of the person being prosecuted. In terms of jurisdiction *ratione materiae*, difficulties are unlikely to occur in practice: the central office is only required to verify that the arrest warrant is based on offenses encompassed in the



relevant provisions of the Rome Statute. A potential difficulty could arise in case of an arrest warrant issued by the ICC for a ‘new’ crime to which Switzerland would not have consented under Article 121(5) of the Rome Statute.²⁰ Again, there is no reason to believe that a decision by a Pre-Trial Chamber of the ICC would not be able to clarify the precise scope of the duty of States Parties to cooperate with the Court in such cases.

3.2. *Jurisdictional immunities*

A more delicate issue is the case of jurisdictional immunities. This is the only point on which the ICCA expressly allows the involvement of political authorities in the surrender proceedings. According to Article 6(1) of the ICCA, on request of the Federal Department of Justice and Police, the Swiss Federal Council rules on matter of immunities in the sense of Articles 98 and 27 of the Rome Statute that may arise in the context of the execution of a request for surrender. In its explanatory report, the Swiss Federal Council affirmed that issues of immunities are among those that are most likely to give rise to divergences between Switzerland and the ICC.²¹ It considered that in case consultations between the central office and the ICC have failed to settle such differences, the issue acquires a political connotation in the sense of the term used in Article 1a of the Mutual Assistance Act.²²

According to the latter provision, ‘[i]n the application of this Act, Swiss sovereignty, security, public order or similar essential interests must be taken into account’. This is a very broad clause allowing Swiss

²⁰ It must be stressed that this case is highly theoretical because to this date Switzerland has ratified all the amendments to art 5 to 8bis of the Rome Statute.

²¹ Conseil fédéral (n 1) 425.

²² *ibid* 426 : ‘Si, dans un cas concret, le point de vue de la Cour diverge de celui des autorités suisses compétentes en matière de poursuites pénales et si les consultations n’ont pas permis d’aplanir ces divergences, soit parce que la Cour a accepté de modifier sa demande soit encore parce qu’elle a obtenu le consentement de l’Etat concerné, la décision que devra prendre la Suisse sur le plan interne, à savoir celle de lever ou non l’immunité, prendra une connotation politique au sens où l’entend, par exemple, l’art. 1a EIMP. En pareille occurrence, la décision ne doit plus appartenir au service central. Après l’échec des consultations (art. 44, al. 1, applicable par analogie), il transmet la demande de la Cour au Département fédéral de justice et police qui peut demander au Conseil fédéral de lever l’immunité en question (al. 1).’

authorities to refuse international cooperation in criminal matters for political reasons, on grounds not otherwise foreseen in the legislation.²³ A decision of the Federal Council not to waive an immunity is not subject to appeal. This is, of course, quite problematic from the standpoint of the rule of law because such notions – tantamount to an ill-defined *raison d'Etat* – are in no way reflected in the Rome Statute itself when it comes to the execution of arrest warrants or requests for surrender. There is, therefore, a substantial risk that a decision to execute or not a request for surrender of the ICC in cases where the person being prosecuted is entitled to jurisdictional immunities may eventually depend on political rather than legal considerations. Irrespective of what future decisions may be taken in this respect, one may only express the hope that the Federal Council will adopt a principled approach to such issues and will refrain from applying double standards.

3.3. *Assessing further risks of politicization in light of Article 185 of the Federal Constitution of the Swiss Confederation*

Finally, one may wonder whether a further risk of politicization does exist in connection with Article 185 of the Federal Constitution of the Swiss Confederation. According to this provision the Federal Council is entrusted with the task to safeguard the internal and external security, the independence and neutrality of Switzerland. It ‘may in direct application of this Article issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security’.²⁴ According to a recent report of the Federal Council, the prerogatives based on this provision find their limits (among others) in the absolute duty to respect imperative norms of international law (*jus cogens*) rather than the more general duty to comply with international law enshrined in Article 5(4) of the Constitution.²⁵

²³ B Kammermann, ‘Art. 1a EIMP’ in L Staffler, ML Glassey (eds), *Onlinekommentar zum Bundesgesetz über internationale Rechtshilfe in Strafsachen* (2023) [2] <<https://onlinekommentar.ch/fr/kommentare/irsg1a>>.

²⁴ Federal Constitution of the Swiss Confederation of 18 April 1999 [Unofficial English Translation] (*Fedlex*, 18 April 1999) <www.fedlex.admin.ch/eli/cc/1999/404/fr>.

²⁵ See Conseil fédéral, Conseil fédéral, ‘Recours au droit de nécessité. Rapport du Conseil fédéral donnant suite aux postulats 23.3438 de la Commission des affaires

Thus, it cannot be excluded altogether that if the political stakes are very high, even in a case that does not involve jurisdictional immunities, the Federal could be tempted to rely on this prerogative as a basis for a decision not to cooperate with the ICC in the execution of an arrest warrant. One may think, for instance, to a case where a credible threat of force in breach of Article 2(4) of the UN Charter is made against Switzerland in case it decides to comply with a request for surrender – a scenario that could potentially qualify as a case of necessity under the rule of customary international law reflected in Article 25 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.²⁶ The vaguer purpose of maintaining friendly relations with another State or, obviously, attempts to shield Swiss authorities from scrutiny of the ICC would, however, not suffice. In any case, such a decision, would be unprecedented and would likely trigger controversies in political circles and in the public opinion, especially if it were not motivated by particularly compelling reasons.

It must be stressed, however, that Switzerland's record in this field does not point toward international lawlessness but rather to the opposite direction: in the past the prerogatives of the Federal Council was used once to combat impunity rather than to create an exception to a pre-existing duty of cooperation. In 1976, the Federal Council relied on of the earlier Federal Constitution of 1874 (Articles 70 and 102) as a basis for its decision to surrender Nazi war criminal Pieter Nicolaas Menten to the Netherlands at a time when the relevant legislation did not permit the execution of an extradition due to the fact that the crimes imputed to Menten were time-barred under Swiss criminal law.²⁷

juridiques du Conseil national du 24 mars 2023 et 20.3440 Schwander du 6 mai 2020' [2024] Feuille fédérale 1784, 1855-1858 <www.fedlex.admin.ch/eli/fga/2024/1784/fr>.

²⁶ ILC, *Report of the International Law Commission on the work of its fifty-third session* (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10 in (2001) II(2) YB Intl L Commission 1, 80.

²⁷ P.-A. S., 'Le Conseil fédéral expulse le Néerlandais Menten' *Journal de Genève* (23 December 1976) 9 <www.letempsarchives.ch/page/JDG_1976_12_23/9/article/8285454/>; Ziegler (n 18) 258. See also the discussion by the Supreme Court of the Netherlands in 'Public Prosecutor v Menten' (1987) 75 Intl L Rep 331, 343.



4. *Concluding remarks*

The legal framework applicable to Switzerland's cooperation with the ICC leaves a very little, if any, margin of appreciation for the central office tasked with such matters. It may, therefore, be expected that the execution of arrest warrants in Switzerland will not raise major legal difficulties and that Switzerland is in a position to cooperate efficiently and diligently with the ICC. Concerns exist, however, as to possibilities of political interferences in cases that involve jurisdictional immunities and, possibly, in cases where the political stakes are very high and in which the Federal Council would decide to rely on Article 185(3) of the Federal Constitution to justify the failure to execute an arrest warrant or to reject a request for surrender.

Abstract: This article explores the execution of arrest warrants and requests for surrender under Swiss law, focusing on the Federal Act on Cooperation with the International Criminal Court (ICCA). It examines Switzerland's legal framework for cooperating with the ICC, highlighting the distinct legislative approach taken in adapting Swiss law to comply with the Rome Statute. The article outlines procedural aspects, including the central role conferred upon the Federal Office of Justice, the handling of requests for surrender, and challenges to the jurisdiction of the ICC or the admissibility of a case. It addresses potential legal hurdles, particularly the risk of politicization in decisions involving jurisdictional immunities and the Swiss Federal Council's powers under Article 185 of the Federal Constitution. Despite a legal framework that considerably limits the discretion of Swiss authorities in this context, concerns remain about the potential influence of political considerations, particularly in cases involving high political stakes. The article concludes that while Switzerland is generally well equipped to cooperate with the ICC, the possibility of political interference—especially in cases involving jurisdictional immunities or the invocation of concerns for national security—could pose risks to the integrity of the process.

Keywords: International Criminal Court; Judicial cooperation; Arrest warrants; Domestic implementation; Switzerland.

