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The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes

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Introduction

While the interaction between the U.S. and Swiss Delegations concerning the International Criminal Court (ICC) during the Rome Conference, as well as during the second session of the Preparatory Commission (PrepCom), was not free from heated arguments,[1] overall it was characterized by fertile cooperation and mutual respect that led to broadly acceptable and soundly based results in the areas of list of crimes and Elements of Crimes. This is an example of the spirit of cooperation between all the delegations that dominated most of the negotiations. The polemic about a few particularly contentious parts of the Statute prevented full agreement at the end of the Rome Conference. Hopefully, it will be possible to draw from these positive experiences to reduce the remaining differences over the Statute to a level that allows for constructive cooperation between the United States and the like-minded countries, of which Switzerland is a founding member. After all, we do share a common goal, which is to fight impunity.

Switzerland is a small, wealthy, and internally stable country, which at least for the last fifty years has been surrounded by peaceful neighbors and

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* This text is essentially a transcript of a presentation given to participants at the Cornell International Law Journal Symposium on the ICC. The presentation introduced the audience to the point of view and role of a small European country that shares many values with the United States, yet differs in its perspective on the ICC.

** The author has been deputy head of the Swiss Delegation during the formation process of the ICC Statute and the PrepCom for the ICC that followed the Rome Conference. The present article reflects his personal views and does not represent the official position of the Swiss Government.

1. During negotiations on the list of War Crimes before and during the Rome discussions, Switzerland and the United States took largely antagonistic positions. While the United States took a rather restrictive position on the inclusion of some crimes or their formulation, Switzerland fought for a list as complete as possible that would reflect the "acquis" of International Humanitarian Law derived essentially from the Hague and Geneva Conventions (including the Additional Protocols) as comprehensively as possible. Several of the more delicate compromises in the list of crimes were negotiated between representatives of the two delegations, since Switzerland was also coordinating the like-minded countries on this subject. Similarly the negotiations on the Elements of Crimes are to a large extent based on papers presented by the U.S. and the Swiss Delegations, which were initially perceived as representing antagonistic approaches (see below).

32 CORNELL INT'L L.J. 499 (1999)

whose army[2] in the last 500 years has engaged in combat activity only once, when Napoleon attacked and occupied Switzerland some 200 years ago. As a result, Switzerland or Swiss soldiers are unlikely to be defendants before the ICC.[3]

Therefore, it might be asked why Switzerland is taking such an active part in the ICC in general and in the negotiations over war crimes in particular. Apart from general concern for the fate of humanity, Switzerland's involvement with the ICC is due to its disproportionate exposure to international atrocities. Switzerland has the highest number of refugees per capita of any country in Western Europe. For instance, Switzerland has the second largest number in absolute terms of Kosovo-Albanians outside of Kosovo.[4] Furthermore, Switzerland is intensively exposed to the horrible crimes being committed in various conflicts through its involvement with the International Committee of the Red Cross (ICRC), an originally Swiss institution in which Swiss citizens still make up the bulk of delegates.

As far as war crimes in particular are concerned, Switzerland has a special responsibility as the depository of the Geneva Conventions. It has been entrusted with organizing and presiding over periodical meetings "to consider general problems regarding the application of international humanitarian law."[5] For example, as part of this responsibility, the U.N. General Assembly recently called upon Switzerland to organize a Conference concerning the application of the Geneva Convention in the occupied Palestinian territories.[6] Although this task was politically delicate, Switzerland accepted its responsibility to the international community. Switzerland, therefore, has a special role in international humanitarian law, namely, maintaining the integrity of the Geneva Conventions and the Additional Protocols. Switzerland is concerned that a Statute establishing a restrictive definition of crimes can undermine the Geneva Conventions and the standard that they have established in the practice of international humanitarian law. This concern has motivated the Swiss Delegation to

2. Contrary to common belief, Switzerland has one of the largest armies in Europe; its militia army of about 400,000 members have their government-provided arms, uniforms and other personal equipment at home and can be mobilized on very short notice.

3. There are ongoing efforts to revise legislation in order to allow for armed peacekeepers. Current legislation only allows the government to send unarmed peacekeepers abroad.

4. Some 200,000 Kosovo-Albanians, i.e., about 10% of the former population of that province, currently live in Switzerland; over 60,000 of them have entered the country as refugees over the last two years. The remainder have come in earlier phases of the 10-year struggle over Kosovo for political and economic reasons. The Kosovars represent three percent of the total Swiss population. In addition, Switzerland harbours roughly another 200,000 people from other parts of former Yugoslavia, a majority of whom are Serbs.

5. 26th International Conference of the Red Cross and Red Crescent, Dec. 3-7, 1995, Res. 1, para 10.

6. *See* "Requests Sec-General to monitor situation Under-Secretary General for political affairs" consulted with Israel, U.N. Res. ES-10/3 to ES-10/6, 16th emergency special sess. (1997), in particular ES-10/4 Agenda Item 5 and ES-10/6 at 3.

take a more active role in the negotiations over some parts of the ICC Statute, specifically, the current debate over the Elements of Crime component.

I. The Rome Conference

Switzerland is aware that penal law is different from international humanitarian law. The distinctions might justify narrower Elements of Crimes definitions in a criminal statute such as the ICC Statute. During negotiations, the Swiss Delegation has accepted narrow definitions where clearly justified and even helped to convince others of the necessity of establishing a realistic Statute that is compatible with modern warfare. However, the Swiss Delegation resisted narrow definitions whenever they threatened to undermine violations of the Geneva Conventions that would remain below the threshold of the narrower definitions. In trying to balance these concerns, the Swiss Delegation has always striven to act responsibly. Specifically, the Swiss Delegation has been sensitive to the concerns of countries whose citizens risk being exposed to the jurisdiction of the ICC. It resisted pressure from non-governmental organizations and radical delegations who proposed a broader jurisdiction for the ICC or a wider definition of certain crimes.

A government that respects and applies the rule of law, trains its troops to uphold international humanitarian law, and holds its troops responsible for violating it, does not have to fear the jurisdiction of the ICC. If this meant that the ICC would have no cases to judge, its promoters would have reached the highest of their goals. The reality, unfortunately, is that a number of governments and armed groups systematically violate these standards. It is for them that the world needs the ICC. The Court is not intended to deal with petty crimes and marginal issues that could easily be resolved through the traditional legal system. Bringing such cases before the ICC could undermine its credibility enough as to render it meaningless. The ICC exists solely to address the most outrageous crimes of concern to all mankind, and only if the States concerned do not effectively exercise jurisdiction over their subjects.[7]

The need to establish a universally credible court that would be respected for its application of international humanitarian law also requires that the ICC be sheltered from political interference and imposed double standards. Ideally, the Court would be competent to judge a crime regardless of where it was committed or the identity of the perpetrator. While the Swiss Delegation considered this concept of a universal jurisdiction desirable, it recognized that it might be somewhat premature under present-day standards of international jurisdiction. Together with a large majority of States, it thus supported jurisdiction for the ICC based on crite-

7. This is the principle of complementarity: the ICC will only exercise jurisdiction when states do not effectively do so. *See Rome Statute of the International Court*, U.N. Diplomatic Conference of Plenipotentiaries of on the Establishment of an International Criminal Court, Preamble, at 4, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

ria traditionally used by States to claim criminal jurisdiction, i.e., jurisdiction over their territory, their citizens, and those who committed crimes against them. By becoming parties to the Statute, States transfer this criminal jurisdiction, which they undeniably have, to the ICC, under the condition of complementarity.

Together with a majority of delegations, the Swiss Delegation would have expanded the ICC's jurisdiction to include suspects who stay in the territory of a State Party. This link, which would have brought the jurisdiction of the ICC very close to universal jurisdiction, was sacrificed in favor of broader support for the compromise package. In the absence of universal jurisdiction, the Swiss Delegation is pleased that under the ICC Statute the Security Council can refer situations to the ICC, based on its sweeping powers under Chapter VII of the U.N. Charter.

II. The Negotiations Over the Elements of Crimes

The U.S. Delegation made a proposal for an Elements of Crimes component to the ICC at an advanced stage of the negotiations. The proposal drew little support from other delegations, many reservations, and much open opposition. There were two main reasons for this reaction. First, the very concept of Elements of Crimes is alien to most legal systems. Second, many delegations viewed it as an attempt by the United States, which already seemed to have fundamental reservations about the concept of a truly independent and universal ICC, to weaken the substance of the Statute. Therefore, the proposal was kept in brackets in the various working documents that led to the Statute. However, the proposal was finally integrated in the package proposed by the Bureau of the Rome Conference for the final form of the Statute, even though at that point it was certain that the United States would not support the Statute.[8] The overriding argument to convince the majority to agree to an Elements of Crimes article was that there was a genuine concern by a country important to the success of the ICC and that the integration of the Elements of Crimes into the Statute would not necessarily weaken the ICC. Nonetheless, many apprehensions remained and many States were weary in the wake of the first session of the PrepCom.

The fact that the concept of Elements of Crimes in this form is unknown to most legal systems has confused and complicated matters. Furthermore, the scope of this exercise probably transcends anything that

8. The fact that we are now negotiating the Elements of Crimes is proof of a general and broad willingness to accommodate the United States where this is considered feasible at a tolerable price. A tolerable price in the mind of most like-minded countries means that there would be no major collateral damage with respect to the independence of the ICC or its ability to have a reasonable chance to indict the true criminals. The problem is that, thus far, no concrete proposals have been made that would accommodate the remaining U.S. concerns over the ICC Statute, without also protecting those for whom the Statute was created from jurisdiction of the court.

has ever been done in a multilateral forum of 187 States.[9] Reaching an agreement over such a detailed definition of crimes is particularly difficult since many of the delegates are not criminal law specialists nor are they experts in the application of international humanitarian law. Under these conditions, we have indeed embarked on a very difficult exercise.

The somewhat unclear references to Elements of Crimes in the Statute add to the confusion. Article 9, the key provision that introduces the concept of Elements of Crimes into the Statute, states that the Elements should assist the ICC in the application and interpretation of articles 6 through 8, which list the crimes under the jurisdiction of the ICC.[10] However, article 21, which was negotiated before it was decided that there would be an Elements of Crimes component, stipulates that the Elements of Crimes are part of applicable law under the Article's conditions.[11]

The uncertainty over the exact status of the Elements has led to broad concern that they could indirectly amend the Statute. There were heated arguments about the form of the Elements during the PrepCom Session of February 1999. Some delegations categorically opposed comments or footnotes to the Elements because they feared that their inclusion could enhance the Elements' status.[12] Any uncertainty as to the status of the Elements also constitutes a very practical problem: the ratification process has already started.

Some countries have ratified the Statute and many more intend to do so soon. It would be impossible to present a treaty to a parliament and seek authorization for ratification if the list of crimes, a core part of the Statute, is only of a preliminary nature and its final form is still being negotiated through the Elements of Crimes. No parliament would ratify a treaty which is presented in such a way. It is, therefore, important for States who are willing to ratify the Statute to be able to tell their parliaments that the Elements of Crimes, which are being negotiated in parallel to the ratification process, will be of an indicative and not of a normative nature.[13]

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9. The negotiations for the ICC Statute are open to 187 States, i.e., the 185 U.N. members, the Holy See, and Switzerland. Some 160 States took part in the Rome Conference and only about 120 are participating in the PrepCom for the ICC. This is a very high number of participants for as complicated an endeavour as codifying the Elements of Crimes.

10. *See* Rome Treaty, *supra* note 7, art. 9, at 13.

11. Besides the fact that article 9 is clearly the basic provision with respect to the Elements, it also has the favourable position of the *lex posterior* in terms of the drafting history. It therefore reflects more accurately the final will of the drafters of the Statute than the older article 21. *See id.*

12. The fruitful and constructive cooperation between the U.S. Delegation and delegations of countries supporting the ICC in the PrepCom Sessions in February, July, and August 1999, together with a more conciliatory approach by the U.S. administration to the Statute in general, have diminished some of the delegates' initial fears and have led to a more relaxed and constructive atmosphere during the elaboration of the Elements of Crimes.

13. As the negotiations have progressed in a very constructive atmosphere and produced broadly acceptable results, many apprehensions on all sides have subsided and

In terms of substance there was also the fear that, at worst, these Elements will be a step backwards from the current standards of international humanitarian law.[14] At best, there was concern that the Elements would risk limiting the creative development of that law. Depending on how we would formulate the Elements, we could make it more difficult, if not impossible, for the ICC to develop international humanitarian law as was done by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[15] The development of international humanitarian law must not stand still.

Furthermore, due to the sometimes hostile declarations of some U.S. officials with respect to the ICC, many delegations were apprehensive of changes to the Statute. The declarations have created a profound distrust about any proposal coming from the United States.

Under these conditions, and keeping in mind its responsibilities as depository of the Geneva Conventions, the Swiss Delegation considered it its duty to contribute to the discussion with an Elements proposal of its own, limited, however, to the list of war crimes (Article 8 of the Statute), which is a reflection of the Hague and Geneva Conventions and the Additional Protocols.[16] The Swiss Delegation was grateful that the ICRC, in accordance with its mandate, took it upon itself to write a comprehensive reference paper on the practice of international humanitarian law in general, and in particular its own experience with international humanitarian law, and the jurisprudence of the International War Crimes Tribunals. The endeavor of the ICRC proved an enormous undertaking and it rightly received much praise from all quarters. The Comment to the first section of Article 8 on Grave Breaches of the Geneva Conventions, which covers only about one-sixth of the number of Crimes under this Article, amounted to over sixty pages. This indicates the scope of the enterprise on which we have embarked.

In order to facilitate the negotiations, in particular for delegations who might not be able to go into the depth of the ICRC paper,[17] the Swiss Delegation presented a paper transforming the conclusions of the ICRC paper

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the prospect of achieving a broadly acceptable agreement on the legal nature of the Elements should improve.

14. This could be the case if the Elements do not carefully incorporate the practice of international humanitarian law.

15. For example, the ICTY recently considered rape to be an independent war crime, i.e., a grave breach of the Geneva Conventions, through interpretation of international humanitarian law, a concept which had not before been common understanding. *See* Prosecutor v. Furundzija, 1999 I.L.M. 317 (ICTY, 1998).

16. Articles 6 and 7 on Genocide and Crimes against Humanity are not based on the Geneva Conventions. Switzerland, therefore, does not feel a particular responsibility for the respective Elements. This does not preclude Switzerland from making proposals on these issues.

17. One has to bear in mind that many delegations consisted of a single member who covered both the negotiations on Elements of Crimes and those on the Rules of Procedure. Often, the delegate was also heavily engaged in the efforts to find a definition for the Crime of Aggression. If this delegate also served as a representative to the United Nations, various tasks would have been added to this individual's list of duties.

into the shape of the U.S. paper. The Swiss Delegation hoped to create a constructive discussion through a comparative basis. The Swiss Delegation conceived this proposal to reflect the current state of the practice of international humanitarian law, based upon the Geneva Conventions. In no way did it try to facilitate developments in the law or to solve intended ambiguities in the Statute.

The U.S. Delegation was apprehensive about the appearance of the ICRC and Swiss papers, which were probably perceived as attempts at pushing aside the U.S. proposal. The Swiss Delegation was equally apprehensive about being perceived as an adversary to the United States. The Swiss Delegation was therefore greatly heartened by the way in which the PrepCom evolved. The discussions were constructive. All participants, without any exception, were genuinely striving to reflect the state of international humanitarian law to the best of their knowledge.

In hindsight, the Swiss paper proved not only useful for the whole exercise of the PrepCom meeting on Elements of Crimes but also enhanced the credibility of the U.S. paper. Switzerland conceded to the United States by adopting the same form for its proposal that the United States had adopted for its paper. As it turned out, many countries actually had different forms in mind. If the two main papers[18] during negotiations had not adopted the same form, we might have endlessly debated over the appropriate form of these Elements. Furthermore, delegates were confused about the nature of the Elements of Crimes both in general and in the context of the ICC Statute. Many were unaware of the substance and details of the practice of international humanitarian law and the jurisprudence of various tribunals, namely the Nuremberg, Tokyo, Yugoslav and Rwanda Tribunals. Consequently, had the negotiations only been based upon a single paper, they could have lead to a very polemic discussion. Having two papers from seemingly opposite perspectives set the outer parameters of this discussion and provided it with a rational basis.

In elaborating its paper and in the ensuing negotiations, the Swiss Delegation realized the difficulty of transforming norms regulating States' behavior into norms defining individual crimes. That task is further complicated by the interaction that is to be expected between these definitions, the practice of international humanitarian law in general, and the Geneva Conventions in particular. The Swiss Delegation is keenly aware of the danger that any behavior that would not be considered to amount to a crime under the Statute and the Elements of Crimes would simply be regarded as admissible under international humanitarian law during an armed conflict.

We have to prevent the ICC from adjudicating over petty crimes, marginally criminal behavior or other borderline cases while avoiding the

18. Only the United States and Switzerland presented proposals on all the crimes of Article 8 and the discussion consequently focused for the most part on these two proposals. Spain and Japan made proposals which covered only certain parts of Article 8. In the case of Spain, the proposal was formulated as commentary. There were also proposals by various other countries on specific crimes.

impression that such behavior is licit and permissible. The solution for this dilemma could only be to trust the various and important thresholds and safeguards incorporated in the Statute,[19] as well as the common sense of judges, prosecutors, and the Pre-Trial-Chamber, to prevent such cases from going to the ICC. The problem would not be solved by trying to narrow the definitions through the Elements of Crimes. Switzerland does not, however, oppose adapting outdated language which has been transplanted to the Statute from old Conventions or sweeping rules (i.e., some weapons prohibition clauses) directed at States and not at individuals. Sometimes, such adaptations to the Statute have allowed the PrepCom to dissipate some of the reservations which the United States had held about the Statute. The delegations have been generally willing to make such changes wherever the United States has expressed genuine legal concerns.

In trying to achieve consensus about the formulation of Elements of Crimes, the delegations struggled mostly with the essentially technical and legal problems described above. It was most encouraging to see that virtually no delegation was trying to politicize the discussion. Even delegations which had vehemently opposed the inclusion or formulation of certain crimes in the Statute have participated loyally in trying to find Elements of Crimes that do match the definition which is now consecrated in the Statute. It is only natural that this task is more difficult for certain crimes than for others. But, even where the political implications of a crime are obvious, it has been heartening to note remarkable political restraint from all sides and a genuine willingness to define crimes. In this spirit, the delegations have achieved consensus on the Elements for most of the crimes discussed and prospects seem excellent that the delegates would be able to bridge the remaining differences, as long as the atmosphere of genuine good will and loyal respect for the terms of the Statute continues to prevail.

The process of elaborating Elements of Crimes and Rules of Evidence and Procedure for the ICC has thus far played an important role in strengthening the already broad support for the Statute. States that voted in favor of the Rome Statute and signed or even ratified it, work hand in hand with States that abstained in Rome or even voted against the Statute. Furthermore, the process helped heal some of the wounds that were inflicted by the difficult decisions that the vast majority of States felt compelled to make during the Rome Conference. If the PrepCom is able to continue working in this spirit in the forthcoming sessions, the prospect for the ICC to become a truly universal court will certainly be improved.

19. In most cases these thresholds and safeguards were strongly favored and influenced by the delegations of the United States, the United Kingdom, and France.