COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 9 September 2001 Consult/ICC (2001) 25

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY SWITZERLAND

On 22 June 2001, the Federal Assembly approved the Rome Statute by 181 votes to 8 and 43 votes to 0 respectively. The related legislation was published officially on 3 July 2001:

1. Federal Law amending the Criminal Code and the Military Criminal Code (infringements of provisions on the administration of justice in international Courts) of 22 June 2001:

in French: http://www.admin.ch/ch/f/ff/2001/2768.pdf
in Italian: http://www.admin.ch/ch/i/ff/2001/2592.pdf
in German: http://www.admin.ch/ch/d/ff/2001/2906.pdf

2. Federal Law on co-operation with the International Criminal Court of 22 June 2001:

in French: http://www.admin.ch/ch/f/ff/2001/2748.pdf
in Italian: http://www.admin.ch/ch/i/ff/2001/2572.pdf
in German: http://www.admin.ch/ch/d/ff/2001/2885.pdf

An unofficial English translation of the Federal Law on co-operation with the International Criminal Court will be available shortly.

3. Federal Decree on the approval of the Rome Statute of the International Criminal Court of 22 June 2001:

in French: http://www.admin.ch/ch/f/ff/2001/2801.pdf
in Italian: http://www.admin.ch/ch/i/ff/2001/2624.pdf
in German: http://www.admin.ch/ch/d/ff/2001/2939.pdf

These three items of legislation are subject to an optional referendum. The deadline for the collection of 50,000 signatures requesting a popular vote is 11 October 2001.

If no referendum is held, Switzerland will be able to deposit its ratification instrument with the Secretary General of the United Nations without delay.

In addition, the Federal Council's message of 15 November 2000 remains valid, in that the draft laws submitted to the chambers at that time have undergone only slight editorial changes in the course of parliamentary debates:

in French: http://www.admin.ch/ch/f/ff/2001/359.pdf
in Italian: http://www.admin.ch/ch/i/ff/2001/311.pdf
in German: http://www.admin.ch/ch/d/ff/2001/391.pdf

The same applies to the Statute itself:

in French (original language): http://www.admin.ch/ch/f/ff/2001/561.pdf
in Italian: http://www.admin.ch/ch/i/ff/2001/505.pdf
in German: http://www.admin.ch/ch/d/ff/2001/596.pdf

In the field of substantive criminal law, particularly in relation to Articles 5 to 8 of the Rome Statute, implementation is still under way and will continue even after Switzerland has ratified the Statute. An interdepartmental working group has been set up and has taken some key decisions. A first preliminary draft law exists, but cannot yet be published.

The main issues are as follows:

- implementation methods (re-use or reformulation of the definitions in the Statute?/ insertion into ordinary criminal codes or creation of a new code for international crimes?);
- delimitation of the jurisdiction of military Courts and ordinary Courts;
- delimitation of the jurisdiction of the cantonal and federal prosecuting authorities;
- need to implement the provisions of Part III of the Statute; and
- universal jurisdiction.

Concerning the immunity of Heads of State – a subject of particular interest for the meeting – I would like to inform you that Switzerland has no specific problems to tackle in that regard, as our federal councillors do not enjoy absolute immunity in domestic matters.

However, the surrender by a State of its own nationals has raised some questions of a constitutional nature. Parliament, by a large majority, concurred with the opinion expressed by the Federal Council in the message of 15 November 2001 (p. 451 – 453):

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p. 451

Constitutionality

Under Article 54 of the Constitution, foreign affairs fall within the remit of the Confederation. The Federal Assembly's authority to approve international treaties is provided for in Article 166(2) of the Constitution.

According to Article 141(1.d) of the Constitution, international treaties are subject to an optional referendum if they are of indefinite duration and may not be denounced, if they provide for accession to an international organisation or if they involve multilateral unification of law. It is true that the present agreement may be denounced (Article 127 of the Rome Statute), but it provides for accession to an international organisation (Article 4(1)). The Statute is therefore subject to an optional referendum under the rule on international treaties, and it is not necessary to determine whether it involves a multilateral unification of law.

There may even be a question as to whether the Statute should be put to a compulsory referendum, pursuant to Article 140 (1.b) of the Constitution. This provision stipulates that a referendum is compulsory in the case of accession to collective security organisations or supranational communities. The Rome Statute does not constitute a collective security organisation. It remains to be determined whether it is covered by the concept of a supranational community as defined by this provision. For this to be the case, it would have to

meet the following four cumulative conditions: have bodies made up of independent persons who are not bound by instructions given by the State of which they are nationals (first condition), who fulfil their functions by taking majority rather than unanimous decisions (second condition), whose decisions enter into force directly and are directly binding on individuals (third condition) and whose substantive functions are relatively extensive (fourth condition)[1]. In the case of the International Criminal Court, the fourth condition is not met. Although the Rome Statute recognises the Court's jurisdiction for a number of crimes (Articles 5 to 8 of the Statute), the fact remains that its jurisdiction is limited in several respects: it is limited, first of all, to the enforcement of criminal law; secondly, to a very specific category of crime; and, finally, to cases in which States Parties do not themselves ensure the prosecution of offences charged (principle of complementarity).

It should be noted that, in the case of the EFTA Court, the Federal Council - taking the view that the Court's jurisdiction was limited to the application of competition law - also concluded that the supranational dimension did not constitute sufficient grounds for a compulsory referendum regarding international treaties.[2]

Another question is whether the Statute necessitates an amendment to the Constitution. Under Article 89 of the Statute, a State Party must surrender to the International Criminal Court any person found in its territory, if the Court so requests. Such a person may be one of its own nationals. It is therefore necessary to consider whether this obligation is compatible with Article 25(1) of the Constitution, which provides that Swiss nationals may not be expelled from the country and may not be surrendered to a foreign authority without their consent. It is not possible to make a reservation to the Statute (Article 120 of the Statute); nor is it permitted – contrary to the provisions for co-operation with the two *ad hoc* tribunals – to make the surrender of a Swiss national absolutely conditional on that person being returned to Switzerland for the enforcement of any sentence that may be handed down.

However, it is doubtful whether Article 25 of the Constitution can be applied to the surrender of a person to an international Court. The difference between the extradition of a person to a foreign State and the surrender of a person to an international body is not a matter of wording, but a distinction between two concepts which derives from the Statute itself. Article 102 of the Statute draws a clear distinction between surrender, which it defines as the delivering up of a person by a State to the Court, and extradition, which it defines as the delivering up of a person by one State to another. It can therefore be argued that surrender to the Court does not fall within the scope of Article 25(1) of the Constitution, since this provision – at least in the German ("dürfen ausgeliefert werden") and Italian ("possono essere estradate") versions – refers only to extradition. Whereas, in the case of extradition, a sovereign State hands over one of its citizens to the criminal justice authorities of another sovereign State over whose procedures it has no influence, in the case of surrender, a citizen is handed over to an independent and impartial international body which the requested State Party helped to set up and organise and for which it shares the responsibility. States parties must ensure that the International Criminal Court at all times meets the requirements of the basic rights laid down

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[1] Message of 23 October 1974 concerning new provisions on referendums regarding international treaties; FF 1974 II 1156 et seq.

[2] Message of 18 May 1992 concerning approval of the Agreement on the European Economic Area; FF 1992 IV 527 et seq.

in the Statute. States must assume this responsibility, for example, through their participation in the Assembly of States Parties. The European Court of Human Rights has also established a distinction between the concept of extradition to another State and that of surrender to an international Court[3].

Even if a conclusion is reached that Article 25(1) of the Constitution is applicable in such cases, it can be claimed that surrender represents an admissible restriction of the basic right of every Swiss national not to be extradited and handed over against his or her will to a foreign authority; such a restriction must, however, meet the conditions of Article 36 of the Constitution, which are that it must have a legal basis (paragraph 1), be justified on public interest grounds or for the purpose of protecting another person's basic right (paragraph 2), be proportional to the intended aim (paragraph 3) and not affect the actual substance of the basic right (paragraph 4). In this case, the legal basis is provided by Article 16 of the Federal Law on co-operation with the International Criminal Court, and the public interest requirement is met by the prosecution of the crimes covered by the Statute; moreover, the criteria of proportionality and the inviolability of the substance of the basic right are fulfilled because a Swiss national would be surrendered to the Court only if Switzerland decided not to prosecute - a scenario which is very difficult to imagine, if only because of the detrimental image such a decision would convey to the international community.

Mention should also be made of Article 103(3) of the Statute, which states that the Court may take into account the sentenced person's nationality when designating the State responsible for enforcing the sentence. Switzerland - by issuing, pursuant to Article 103(1) of the Statute, a declaration in which it states its willingness to accept its own nationals for the enforcement of their sentences – has established the necessary basis for a Swiss citizen to be returned to Switzerland for the enforcement of a sentence if, contrary to all expectations, such a case were to arise.

Moreover, in practice, the considerations expressed here are generally theoretical: there is every reason to believe that the Swiss prosecuting authorities are now, and will be in the future, willing and able to prosecute and sentence Swiss citizens who have committed crimes of the kind covered by the Statute.

In conclusion, it follows from the foregoing that there is no reason to make approval of the Rome Statute subject to a compulsory referendum under Article 140(1.b) of the Constitution and that there is no need to amend Article 25(1) of the Constitution. However, approval of the Statute is subject to an optional referendum under Article 141(1.d.2) of the Constitution.

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[3] European Court of Human Rights, decision of 4 May 2000, Mladen Naletilic v. Croatia; application number 51891/99, paragraph 1.b. The case concerned the surrender of the applicant to the International Criminal Tribunal for the former Yugoslavia.