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ECBA REPORT FOR SWITZERLAND (2005)

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I. LEGISLATIVE UPDATE

Entry into force of the new Law on DNA profiles

On 1 January, 2005, a new law on DNA profiles entered into force. The law authorizes the creation of a nation-wide database of DNA profiles and regulates the use of DNA profiles in criminal investigations.

Entry into force of the new law on secret investigations

On 1 January, 2005, a new law on secret investigations entered into force. The law allows the police to infiltrate organized criminal groups, the identity of the agent being kept secret, even to the parties to a trial, with the exception of the judge. The right of the parties to ask questions of the infiltrated agent remains guaranteed.

Towards the introduction in the Criminal Code of new provisions on crimes against humanity and genocide

In August 2005, the Federal Council decided to consider the introduction in the Swiss Criminal Code of new provisions on crimes against humanity and genocide. The Justice Department had previously taken the view that crimes which would constitute crimes against humanity were sufficiently covered by the existing provisions of the Criminal Code. The crime of Genocide had been introduced by a special law in 2000. Both crimes had to be reconsidered as a result of the ratification by Switzerland of the Rome Statute.

Modification of the general part of the Criminal Code

In 2005, the Federal Council adopted some modifications to the general part of the Criminal Code relating to penalties and sanctions. These modifications primarily concern the conditions under which a judge may order the internment of the sentenced person (as an alternative to imprisonment) and suspended sentences.

Unification of the Criminal Procedure Law

In 2005, draft bills for a Swiss Code of Criminal Procedure (*Strafprozessordnung,* StPO) and a Swiss Code of Juvenile Criminal Procedure (J*ugendstrafprozessordnung*, JStPO), respectively, were proposed to the Parliament in order to replace Switzerland's 26 cantonal codes of criminal procedure, and the corresponding federal regulations. In future, not only will criminal offences be defined in a standard manner in the Swiss Penal Code (*Strafgesetzbuch*), but they will also be prosecuted and judged according to the same procedural rules. Abolition of the differing regulations of the various cantons in favour of nationwide legislation improves the equality of laws [you mean citizens?] as well as legal certainty. It also permits crime to be combated more effectively. Furthermore, a standard procedural code benefits lawyers and makes it easier for prosecuting authorities to deploy staff across cantonal borders. It will also further facilitate international cooperation.

The two bills provide for the principle of discretionary prosecution, which allows prosecuting authorities to refrain from prosecution in certain cases. They also provide for agreements between perpetrator and victim (in the form of a settlement or mediation), as well as plea bargaining between those charged with criminal offences and the public prosecutor's office. Additional changes include greater rights of defence, the extension of certain victims' rights, broader witness protection and the monitoring of bank accounts as a new coercive measure. All in all, the two bills represent a solution aimed at bringing about a fair balance between the conflicting interests involved in criminal proceedings.

As in the past, the structure of the courts remains essentially a matter for the cantons. The standard code of procedure nonetheless specifically requires a standard model for case prosecution. Characteristic of the future model of public prosecution is the absence of an investigating magistrate. The public prosecutor's office will lead preliminary proceedings, conduct the examinations, bring charges and pursue the cases before the courts.

Another particular feature is that the strong position of the public prosecutor's office is balanced by a court dealing specifically with coercive measures, as well as by greater rights of defence. The principle of directness is also intended as a further counterweight; essentially, the court will form its opinion on the basis of its own observations in the primary hearing, although in certain cases it is also able to refer to the evidence collected in preliminary proceedings (principle of indirectness).

Criminal procedure as it applies to juveniles is governed by a separate law, which contains provisions which differ from those of the StPO. Like other areas involving the administration of justice relating to juvenile crime, all stages of the prosecution process are entrusted to a specialised judicial authority. The special judge assigned to juvenile cases is the ruling body in cases of minor and moderate gravity and also monitors the execution of sanctions. In – rare – serious cases, legal judgment is passed by the juvenile court.

II. INTERNATIONAL TREATIES AND DEVELOPMENTS

Accession to the Schengen Acquis and ratification / entry into force of other agreements with the European Union

In 2005, the Swiss people approved the ratification by the Parliament of an agreement between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen acquis. This agreement will have important implications for mutual assistance in fraud and tax matters, as well as for police cooperation. In particular, the Schengen police co-operation measures provide for mutual assistance and direct information exchange between police services, cross-border surveillance and pursuit of suspects, improved communication links and information exchange via central law-enforcement agencies. In addition, Switzerland is now part of the Schengen Information System (SIS).

The Parliamant has also agreed to sign a series of treaties with the Member States of the European Union which will enhance cooperation between Switzerland and the Member States of the European Union to counter fraud and all other illegal activities to the detriment of their financial interests. The Parliament finally agreed to sign a treaty on the taxation of savings, which provides for new means of administrative assistance in cases of tax fraud and other similar cases relating to payment of taxes on savings. However, the assistance remains in principle limited to cases of tax fraud rather than tax evasion.

UN and other multilateral treaties

On 23 September 2005, Switzerland ratified the Optional Protocol to the United Nations Convention against Torture.

Agreements in the framework of the Council of Europe

On 1 February 2005, Switzerland became a Party to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No. 182).

Bilateral agreements

On 11 November 2005, Switzerland and Mexico signed a treaty on mutual assistance in criminal matters. The treaty has not yet entered into force. In Latin America, Switzerland is already party to such treaties with Peru and Ecuador, and it has signed treaties of mutual assistance in criminal matters with Brazil, Argentina and Chile.

III. CASE LAW

The extradition of the former Russian atomic energy minister, Mr. Evgeniy Adamov

Evgeniy Adamov, the former Russian atomic energy minister, was arrested in Bern on 2 May 2005, following a petition from the United States. He has since been held in custody on the basis of an extradition warrant issued on 3 May. The US criminal prosecution authorities suspect him of embezzling some US$ 9 million destined for nuclear safety upgrades, and of having transferred the funds to various US companies under his control.

The Swiss Federal Office of Justice (FOJ) also issued an extradition warrant on 7 June 2005 based on a Russian request for extradition. The office of the Russian Attorney General had instituted proceedings against the same Mr Adamov on the grounds of fraud that he was alleged to have committed during his time in office. The facts stated in the Russian extradition request were not exactly the same as those of the US arrest petition, although both cases essentially concerned the unlawful appropriation of funds intended to improve nuclear safety.

On 30 September 2005, the FOJ concluded that all of the conditions for Mr Adamov's extradition to the United States had been fulfilled and ordered his extradition to the United States. Therefore, the FOJ granted the US extradition request precedence over that of Russia.

Key factors in the decision to accord priority to the US extradition request were Adamov's citizenship and the chances of his onward extradition. Had priority been given to Russia, Adamov's Russian citizenship would have meant that he could not subsequently have been extradited onward to the United States. This would have resulted in an unacceptable failing of the prosecution process. In contrast, United States was both willing and able to deport Adamov to Russia once criminal proceedings in the United States had been completed and any custodial sentence served. Such an approach accommodates the right to prosecution of both the United States and Russia and prevents a failing of the prosecution process. The FOJ therefore authorized the United States to deport Adamov to Russia.

However, on 22 December 2005, the Swiss Federal Court overturned the FOJ decision to send Adamov to the United States. Ruling on Adamov's appeal, it concluded that the Russian extradition request had priority under international law, as Russia is the country where the alleged crimes took place. It added that, on its own, the US extradition request was not valid under Swiss law because the alleged crimes were committed by a foreign functionary to the United States in a foreign fiscal system. The Court said extradition for prosecution in the United States would only be permitted under Swiss criminal law if it was in tandem with a Russian case and, even then, any Russian prosecution would take priority. On the other hand, Russian prosecutors have formally guaranteed that they will investigate the US charges against Adamov, therefore limiting the risks of an absence of prosecution for the crimes allegedly committed in the US jurisdiction.

This ruling put an end to eight months of legal wrangling, finger-pointing and Cold War-style political posturing that began when Adamov was arrested in Bern on 2 May 2005.

References to the relevant case law of the Swiss Federal Court:

- ATF 132 II 81-102 (1A.288/2005), dated 22 December 2005
- 1S.18/2005, dated 14 July 2005
- 1A.290/2005, dated 23 January 2006

The Abacha funds handed over to Nigeria

Between 1993 and 1998, Sani Abacha, former President of Nigeria, is said to have plundered more than $2.2 billion from the coffers of the Central Bank of Nigeria. About $700 million was frozen in Switzerland in 1999 on request of the Swiss judicial authorities. Since 1999, the Swiss authorities have been working closely and successfully with the Nigerian authorities on the Abacha case: much documentary evidence has been seized and gathered in execution of mutual assistance requests, and more than $200 million was returned to Nigeria in a first payment in December 2003. In February 2005, the Swiss Federal Court decided that a further $458 million should be returned. It concluded that these assets were clearly the proceeds of crime and could therefore be returned to Nigeria without the latter having to issue a confiscation order. This course of action permits the assets in question to be returned quickly to the country to which they are owed, and is also progressive in an international context.

Switzerland is the first country in which Abacha funds were deposited to have returned those assets to Nigeria. What has to be emphasized is that the assistance was granted purely on the basis of Swiss national legislation (in particular the Swiss Money Laundering Act and the Swiss Act on Mutual Assistance in Criminal Matters), as there is no bilateral or multilateral treaty in this field between Switzerland and Nigeria. One other particular of the case is that the money was not sent back to Nigeria directly, but was placed under the control of the World Bank, so that the use of the money repatriated to Nigeria is monitored. The World Bank confirmed in September 2005 that Switzerland had repatriated a further $290 million. The balance of $170 million is now being paid to Nigeria through the Bank for International Settlements in Basel.

References to the relevant case law of the Swiss Federal Court:

ATF 131 II p. 169-184, dated 7 February 2005 (1A.215/2004) and cited references.