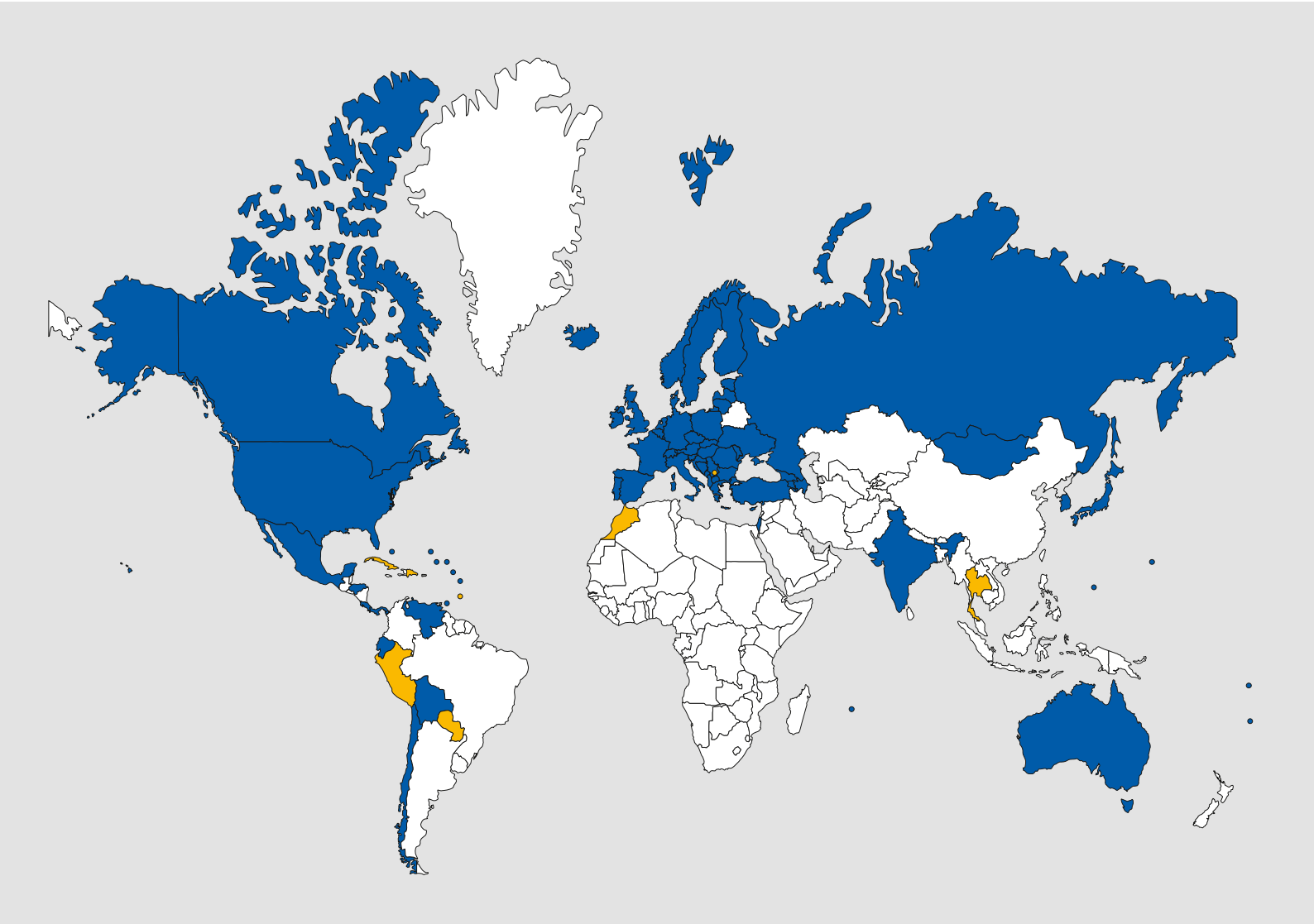
Annual Activity Report 2017
Mutual Legal Assistance



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In 2017, Switzerland signed the Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons. Switzerland has entered into mutual treaty undertakings with many of the world's states via the underlying treaty instrument, the Convention on the Transfer of Sentenced Persons (states parties are shown in blue). Switzerland has also concluded bilateral instruments for such transfers with certain other countries (shown in orange).

May 2018

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Editorial

What would you do? Would you approve someone's extradition to a state in which they have claimed in legal proceedings that they would not have a fair trial, have to suffer inhuman detention conditions, or might even be tortured? Perhaps you would answer the question in much the same way as the Federal Act on International Mutual Assistance in Criminal Matters: if there is sufficient indication that the fears of the person concerned are likely justified, and they might genuinely be subjected to treatment that violates human rights, or to serious procedural defects, they may not be extradited.

As a general rule, Swiss legal assistance proceedings should support only those foreign criminal proceedings which comply with the minimum standards set down in the European Convention on Human Rights or the International Covenant on Civil and Political Rights. Applying this rule at the individual case level is not always straightforward, however, especially since the decision does not merely concern a 'case', but the real-life future fate of a human being. And the true facts may not be at all clear. It is a problem faced not only in extradition proceedings, but also in certain constellations relating to the handover of evidence to foreign states.

Answering these difficult questions falls to the Federal Office of Justice, the executing legal assistance authorities, the Federal Criminal Court and the Federal Supreme Court. In many cases, the answer is found by balancing the interests that are at stake. For example, the Federal Office of Justice may obtain assurances from the requesting state, in which the latter undertakes genuinely to abide by the aforementioned minimum standards in the case in hand. The principle of supportive legal assistance that is enshrined in Swiss law requires that efforts are made at least to explore this sort of solution, before legal assistance is refused entirely.

The content of this year's Annual Activity Report includes a look at selected cases which have raised some particularly difficult issues in terms of the minimum standards for human rights and the rule of law. Wishing you an instructive read,

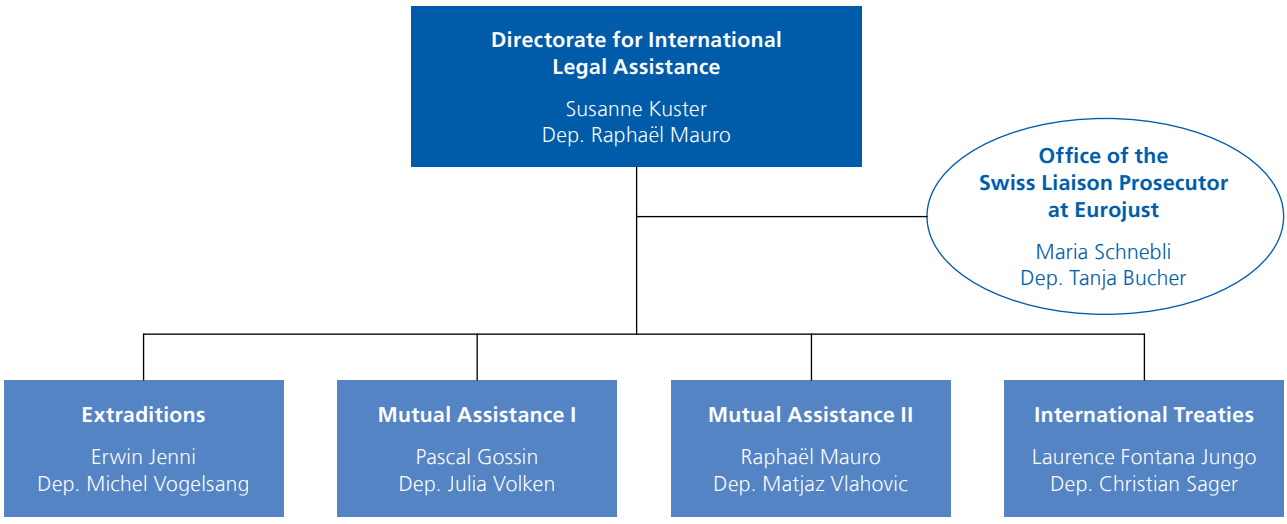
Susanne Kuster,
Vice-Director FOJ, Head of the Division for International Legal Assistance (until the end of April 2018)

1 The Division for International Legal Assistance and its Units

1.1 The Division

The Division for International Legal Assistance DILA forms part of the Federal Office of Justice FOJ. It is structured into four Units and the office of Switzerland's liaison prosecutor at Eurojust. It employs 46 staff (37.5 full-time equivalents), numbering 33 women and 13 men from all parts of Switzerland.

Organisational chart
(status: April 2018)



Overview of principal tasks

- Ensuring the rapid provision of international legal assistance in criminal matters as Switzerland's central authority in the field
- Submitting and receiving Swiss and foreign requests for cooperation, unless the authorities concerned are permitted to contact each other directly
- Making certain decisions with regard to legal assistance requests, extraditions, transfers of sentenced persons, and criminal prosecution and sentence enforcement on behalf of another state
- Performing a supervisory role in the fulfilment of requests for legal assistance
- Enhancing the legal foundations for legal assistance in criminal matters
- Performing various operational duties, including those connected with legal assistance in civil and administrative matters

1.2 The Units and their remits

Extraditions

- Extradition: orders the arrest of a person wanted by another country so that they can be handed over to that country. Decides on the person's extradition in the first instance. Right of appeal against any ruling by the Federal Criminal Court. Arranges for extradition to be carried out. At the request of Swiss public prosecutors or enforcement authorities, submits search requests and formal extradition requests to foreign governments.
- Criminal prosecution on behalf of another state: handles Swiss and foreign requests to assume criminal proceedings in cases in which extradition is not possible or appropriate. Reviews the conditions for and decides on requests to foreign governments. Receives, reviews and forwards foreign requests to the competent Swiss criminal prosecution authority, and may also decide whether or not to accept the foreign request in consultation with that authority.
- Sentence enforcement on behalf of another state: receiving and submitting requests.
- Transfer of sentenced persons to their country of origin to serve the remainder of their sentence: the Unit makes the decision in collaboration with the competent cantonal authorities.
- Other tasks: transfer of persons wanted by an international criminal court, or of witnesses in custody.

Mutual Assistance I: seizure and handover of assets

- Legal assistance proceedings in cases involving politically exposed persons (PEP): may also conduct the corresponding domestic proceedings independently.
- Forwards Swiss requests for legal assistance to foreign authorities and, following a preliminary review, delegates foreign requests for assistance in connection with the seizure and handover of assets (asset recovery) to the competent cantonal or federal executing authorities, unless the authorities concerned are permitted to communicate directly. Supervises the execution of the request, incl. right of appeal against the decision of the legal assistance authorities and the Federal Criminal Court.
- Precautionary measures, e.g. account freezes, may be ordered in urgent cases.
- Decides on the further use of evidence (doctrine of speciality).
- Collaborates on asset recovery-related issues within national and international bodies and working groups.
- Negotiates with other States or cantonal and federal authorities about sharing arrangements for confiscated assets at national and international level.
- Provides legal assistance to the International Criminal Court and other international criminal tribunals.
- Handles cases involving the unsolicited provision of evidence and information to foreign criminal prosecution authorities.

Mutual Assistance II: obtaining evidence and service of documents

- Forwards Swiss requests for legal assistance to foreign authorities and, following a preliminary review, delegates foreign requests for assistance in connection with the collection of evidence to the competent cantonal or federal executing authorities, unless the authorities concerned are permitted to communicate directly. Supervises the execution of the request, incl. right of appeal against the decision of the legal assistance authorities and the Federal Criminal Court.
- Precautionary measures, e.g. account freezes, may be ordered in urgent cases.
- Central offices for cooperation with the USA and Italy: independently conducts legal assistance proceedings, including asset recovery (generally in the case of the USA; in the case of Italy in complex or particularly important cases concerning organised crime, corruption or other serious offences). Negotiates with these States about sharing arrangements for confiscated assets.
- Decides on the further use of evidence (doctrine of speciality).
- Gives consent for findings transmitted via administrative assistance channels to be forwarded to a foreign prosecuting authority.
- Forwards information for the purposes of criminal prosecution.
- Processes requests for legal assistance concerning cultural property.
- Processes and forwards requests for service in criminal matters.
- Handles requests for legal assistance to gather evidence and serve documents in civil and administrative cases.

International Treaties

- Negotiates bilateral treaties and other instruments concerning mutual legal assistance in criminal matters (extradition, accessory legal assistance, transfers of sentenced persons), and participates in negotiations on multilateral conventions in this field. Supports these initiatives as they pass through the political process.
- Drafts and supports legislative projects related to legal assistance in criminal matters.
- Provides input into other legislative instruments and projects relating to legal assistance.
- Supports the Division's management as it draws up strategies relating to policy and law-making in all of the DILA's fields of activity.
- Represents the Division on steering committees active in the field of legal assistance in criminal matters, specifically those of the Council of Europe and the UN.

Office of the Swiss Liaison Prosecutor at Eurojust

- Gathers information, coordinates and establishes direct contact where there are enquiries from Swiss prosecuting authorities or from Eurojust concerning international criminal investigations.
- Organises and participates in coordination and strategic meetings at Eurojust.
- Provides information and advice to the Swiss criminal prosecution and executing legal assistance authorities at cantonal and federal level about the services and support available from Eurojust and/or the Office of the Swiss Liaison Prosecutor.

– Reports to the Eurojust advisory group, which is chaired by the DILA and comprises representatives of the Swiss Conference of Public Prosecutors (i.e. the cantonal public prosecutors' offices) and the Office of the Attorney General of Switzerland.

1.3 Additional resources for the Swiss Liaison Prosecutor at Eurojust

Based on the number of cases in which it is involved, Switzerland regularly features as the most important third-party state for Eurojust. The workload for the liaison prosecutor is thus correspondingly heavy. The number of cases she has opened has remained at a high level since she took up her post in April 2015 (2015: 47; 2016: 90; 2017: 70). To be able to continue handling the many and varied aspects of this work in the future, Switzerland has now increased its presence at Eurojust. Tanja Bucher, formerly public prosecutor with Division I of the Office of the Public Prosecutor of the canton of Zurich, which is responsible among other things for legal assistance in criminal matters, joined the Office of the Swiss Liaison Prosecutor at Eurojust in December 2017 as Deputy Liaison Prosecutor.

2 Operations in 2017

This section cannot provide a complete overview of the operations of the Division for International Legal Assistance in 2017. Rather, individual topics and cases have been chosen to illustrate the diversity of the DILA's remit and activities. In addition to cases which have attracted considerable media coverage, this selection also includes issues that were important behind the scenes, or which are particularly significant from the legal perspective.

2.1 Human rights: the guiding principle behind legal assistance in criminal matters

Where human rights are concerned, among the instruments ratified by Switzerland are the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR; SR 0.101) and the International Covenant of 16 December 1966 on Civil and Political Rights (ICCPR; SR 0.103.2). Specific reference to these two instruments is also made in Article 2 of the Swiss Federal Act on International Mutual Assistance in Criminal Matters (IMAC; SR 351.1). The article states that a request for cooperation in criminal matters will not be granted if there are reasons to believe that the foreign proceedings would not comply with the principles laid down in the ECHR and the ICCPR. In addition to other principles, significant importance is attached here to the prohibition of torture and the right to a fair trial. The principles embodied in these two instruments of human rights must be observed not only when applying the IMAC. In fact, they also take precedence over the many international treaties which Switzerland has concluded with other states, governing extradition and other forms of legal assistance. The same is true even if the relevant reservations have not been agreed in any given treaty.

Examining the issue of whether or not basic rights are likely to be infringed in a given case falls within the remit of all authorities tasked with providing mutual legal assistance. Extradition procedures are certainly worthy of particular mention in this respect, because their purpose is to hand over an individual sought abroad to the requesting state so that they can be prosecuted or

It is imperative that human rights are respected.
Image: Thinkstock, Nito100

serve their sentence. As the body which must decide on such requests in the first instance, the DILA has a special responsibility here. Given the depth of interference in the rights of the person concerned, particular care and consideration must be given to establishing the extent to which the person's human rights are likely to be infringed. An appeal against a DILA decision ordering extradition may be lodged with the Federal Criminal Court and, in especially important cases, ultimately with the Federal Supreme Court. The decisions of these two courts thus often deal with the associated issues.

The example of extradition proceedings in which the person being prosecuted claims that, if extradited, they risk being detained in conditions which violate human rights – e.g. overcrowded prisons, no contact with family members and inadequate medical care – illustrates the established practice with regard to extradition proceedings.

According to legal precedent, in extradition proceedings the person who is being prosecuted must present a credible case that they would, objectively and genuinely, face a serious breach of human rights in the requesting state. Abstract claims are not sufficient. Provided sufficient a priori grounds have been given, the DILA will review such a complaint in detail, analyse the circumstances that have been claimed, and may also involve other authorities. In particular, it may request a response and additional information from the requesting state. If the competent courts in the requesting state have already examined the complaints made in the extradition proceedings, they may be reviewed only cautiously in the Swiss proceedings.

If the DILA is convinced that the complaints that have been made cannot be upheld, extradition will be ordered. However, should it conclude that the person being prosecuted might be exposed in the requesting state to treatment that violates human rights, it will investigate whether or not this risk might be eliminated by means of diplomatic assurances, or reduced to such a low level that it is only theoretical. If even such assurances cannot sufficiently reduce the risk of a violation of basic rights, the DILA will refuse extradition.

Such claims are not the only instances in which it may be necessary to obtain these forms of assurances. They may also be required owing to special circumstances or the general human rights situation in a given country. Specifically, these assurances cover the procedural rights laid down in the ECHR and in the ICCPR. They are usually accompanied by assurances stating that the Swiss authorities may visit the extradited person in custody at any time, without supervision, and that they may observe the criminal proceedings abroad to ensure compliance with the assurances that have been given.

Switzerland has a tradition of extradition by means of diplomatic assurances that stretches back around 40 years. A more recent practice has been to make the provision of accessory legal assistance conditional upon the issue of such assurances. Experience with this approach has been essentially positive, as it allows the full scope of legal assistance to be provided. It also improves the legal protection afforded to those concerned.

One case which attracted public attention during the year under review owing to its human rights dimension – the alleged violation of human rights – concerns a Spanish request for the extradition of an individual on the grounds of participation in a criminal organisation (the Basque separatist group ETA). Following an extensive analysis, the DILA approved the extradition, its decision being upheld by the Federal Criminal Court. The Federal Supreme Court was ultimately not required to rule on the case, because Spain subsequently withdrew its extradition request on the grounds that the sentence that had been passed had become statute-barred.

Spain accused of torture.
Image: Keystone, Ennio Leanza

Disputed allegations of torture

In 2015, Spain requested the extradition of Nekane Txapartegi on the grounds of participation in a terrorist criminal organisation. The extradition was subsequently challenged, primarily on the grounds that the Spanish judgment on which the extradition request was based had been obtained under torture (see the DILA 2016 Annual Activity Report, Section 2.1 'Fighting organised crime').

Having examined the file closely, the DILA decided on 22 March 2017 to extradite Txapartegi to Spain.

Despite the many documents presented in the course of the extradition proceedings, the DILA believed there was reason to doubt the credibility of the claims made by the defence.

The Spanish authorities had made a formal declaration that no unlawful action had been taken against Nekane Txapartegi, and had also submitted all of the records relating to the criminal proceedings and to the proceedings connected with the torture allegations. In addition, the review of the files revealed irregularities in the statements made by Txapartegi.

Nekane Txapartegi appealed against the DILA's decision to the Federal Criminal Court. She also lodged an appeal with the Federal Administrative Court against the 24 March 2017 decision of the State Secretariat for Migration SEM to reject the application for asylum that she had made following her detention pending extradition (the appeal was rejected in decision E-2485/2017 of 27 November 2017).

The Federal Criminal Court rejected the appeal against the DILA's extradition ruling in its decision of 30 June 2017, thereby upholding the latter's decision (RR.2017.97 and RR.2017.69 + RP.2017.32). This decision also overruled the defence's objection that the offence in question was a political one. Txapartegi then appealed against the Federal Criminal Court ruling before the Federal Supreme Court.

On 15 September 2017, the Spanish Ministry of Justice withdrew its formal extradition request after the Spanish judicial authorities found that the remainder of the custodial sentence that Nekane Txapartegi was to have served in Spain had become statute-barred. In response, the DILA immediately released her from detention pending extradition.

Under certain circumstances, international bodies may examine cases concerning human rights issues that have been subject to final and absolute judgments in the adjudicating state. The UN Committee against Torture (CAT) is one such body. In one case involving Turkey, a legally enforceable extradition ruling was not enforced as a result.

UN Committee against Torture veto

On 16 August 2017, the CAT sent the DILA a decision in the case of a Turkish citizen of Kurdish ethnicity who had appealed against his extradition to Turkey. It had concluded that, in this case, the diplomatic assurances provided by Turkey would not protect the man against the risk of torture, and that his extradition would violate Article 3 of the UN Convention against Torture. Immediately upon receiving the decision, the DILA ordered that the man be released.

The man had been given a final and absolute sentence to life in prison in Turkey in 1989. He had been found guilty of shooting a man in a vendetta a year previously. After escaping from a Turkish prison – his twin brother having taken his place during a prison visit – he arrived in Switzerland in 1992 and submitted an application for asylum, which was rejected two years later. He was nonetheless admitted on a provisional basis because the asylum authorities judged his removal to be inadmissible at that time.

In 2012, Turkey applied to the Swiss authorities for the man's extradition. Following long, drawn-out extradition proceedings, the DILA's extradition ruling became final and absolute following the decision of the Federal Supreme Court on 28 April 2016. A further request for asylum was also turned down. On this basis the DILA then approved the man's extradition to Turkey.

The CAT's decision put a final halt to the enforcement of that extradition, which had already been initiated.

Of course, human rights aspects must be considered not only in extradition cases, but also in all forms of collaboration on criminal law cases. In 2017, for example, the FOJ refused accessory legal assistance in a case involving Russia, owing to a number of uncertainties in this regard.

Refusal in cases of reasonable doubt

The Russian authorities were investigating an oligarch who was suspected of defrauding the Bank of Moscow out of several billion roubles. The Office of the Attorney General of Switzerland OAG had to rule on a request for legal assistance that had been submitted to Switzerland in this regard.

Since the conditions for the provision of legal assistance appeared to be met, the OAG initially granted the request, and ordered the freezing of a number of bank accounts, containing some 350 million francs in total. In the course of legal assistance proceedings, the individuals concerned claimed that the criminal proceedings in Russia had ignored various procedural rights granted under Articles 5 and 6 ECHR. These objections were examined by the OAG, the FOJ and the Federal Department of Foreign Affairs FDFA within their own particular areas of authority. The individuals concerned subsequently claimed further procedural errors and submitted documents supporting their allegations. Having again reviewed the file in detail, the Swiss authorities concluded that the cluster of various incidents surrounding the case gave reason to doubt the fairness of this specific Russian trial, specifically in connection with the right to an independent and impartial tribunal, and the right to effective defence. Legal assistance was therefore refused, and the release of the frozen assets ordered.

2.2 Returning assets acquired unlawfully (asset recovery): one aim, two parties

International movements of capital nowadays are characterised by their speed and complexity. For reasons of discretion, or to conceal the identity of their beneficial owners, assets are often moved abroad via a large number of intermediaries, be they natural persons or legal entities. Establishing the exact routes of these flows of capital, in order to recover the assets concerned, is therefore a difficult and time-consuming task.

Two parties are involved in recovering assets that have been acquired unlawfully: the country to which the assets have been moved, and the country to which they are to be returned. Recovery is routed primarily through the channels of international legal assistance in criminal matters, upon application from the country of origin (the requesting state) to the country in which the assets in question are located. It is vital that the two countries cooperate to achieve the desired outcome.

As a major financial centre which manages some 30 percent of assets globally, Switzerland has often granted requests for the return of unlawfully acquired assets, and thereby gained international recognition. However, amid the successes that have been achieved, it should not be forgotten that, in certain cases, recovering assets can be extremely difficult.

Most asset recovery proceedings run smoothly, but experience has shown that they can be handled successfully only with the active participation of the country in which the unlawfully acquired assets originate. This country must be prepared to lend its full support.

Even with that support, the asset recovery process can be stalled by the requirements laid down in national or international treaty law, or necessitate a change in the law.

The active involvement of the country of origin is particularly important when proceedings concern politically exposed persons (PEP, i.e. [former] heads of state and their entourages). As a rule, assets will be returned on the basis of a legally enforceable forfeiture order issued by the country of origin. This order must be based on the assets having been found to be of illegal origin. Yet it is precisely these two points which pose major challenges: in particular following a change of regime, the assets' country of origin will often not have the necessary financial or human resources, or the expertise, to demonstrate the link between crimes committed on its sovereign territory and the assets that have been moved abroad. Moreover, in many cases, in the interests of national reconciliation the decision is made to grant the responsible figures from the previous regime, as well as business figures associated with it, full or at least partial immunity from prosecution if they voluntarily bring their assets back from abroad. In such cases, ongoing legal assistance proceedings may become redundant, or be concluded in simplified form owing to the consent of those concerned.

Tunisia: national reconciliation efforts as a basis for asset recovery

Tunisia requested legal assistance from Switzerland in January 2011, immediately after the fall of President Ben Ali. On 10 September 2011, close cooperation between the two countries enabled Tunisia to submit a formal legal assistance request that complied with the requirements of Swiss law. The DILA subsequently delegated its execution to the OAG. The request named around 50 individuals who were members of the former president's immediate circle to a greater or lesser degree.

Key pieces of evidence were then handed over to Tunisia at the end of 2015, after the country had provided an assurance that it would comply with the necessary procedural guarantees. From this point onwards, the Tunisian state was responsible for conducting the associated criminal proceedings and for issuing the forfeiture orders that would provide the basis for an application to Switzerland to return the frozen assets.

In the interests of successfully returning the assets that had been frozen in Switzerland, Switzerland provided Tunisia with expert support to permit a more efficient examination and review of the banking documents that the Swiss authorities had supplied in response to the Tunisian request for legal assistance. This close cooperation between Switzerland and Tunisia facilitated smooth legal assistance proceedings and the handover of the assets to the Tunisian state.

Several strands of the legal assistance proceedings were brought to a close in 2016 and 2017, following reconciliation agreements between a number of Ben Ali's associates and the Tunisian Truth and Dignity Commission. The conclusion of these agreements permitted the return of frozen assets to Tunisia with the consent of the individuals concerned. They approved the handover of the assets located in Switzerland to the Tunisian state in simplified proceedings. In this way, Tunisia received a little more than 3.5 million euros in 2017.

The OAG is currently still processing several legal assistance requests from the Tunisian authorities. The next steps will depend on the progress of criminal proceedings in Tunisia against members of former president Ben Ali's inner circle.

Protest and revolution in the Arab world.
Image: Keystone, MAXPPP/Quentin Top/Wostok Press

In one case in 2017 concerning important players in the Italian economy rather than politically exposed persons, Switzerland was also able to return assets on the basis of a settlement between these parties and the Italian state. It took several years to reach the agreement, during which complex proceedings were also conducted under the legal assistance umbrella. Ultimately, the assets that had been frozen in Switzerland were returned via channels other than legal assistance.

The ILVA steelworks: end of a long-running legal dispute.
Image: Keystone, LaPresse

The ILVA case: assets returned on the basis of an agreement in the country of origin

The Milan public prosecutor's office was conducting criminal proceedings against the Riva family and other individuals on suspicion of serious and ongoing embezzlement, and fraudulent accounting by means of invoices for transactions which had never taken place. Specifically, the Italian authorities' investigations had found that considerable sums of money belonging to the ILVA group of companies had been misappropriated and found their way to the Riva family.

In its legal assistance request of 21 May 2013, the Milan public prosecutor's office asked for four accounts at a Zurich bank to be frozen. Executing the request was delegated to the Zurich public prosecutor's office, which ordered the seizure of assets worth 1.2 billion euros. On 11 May 2015, the competent examining magistrate in Milan issued a money transfer order to the effect that the assets that had been seized in Switzerland were to be used to subscribe for bonds issued by the ILVA group of companies. The Milan public prosecutor's office then withdrew its request for legal assistance on 3 June 2015, so that the assets could be transferred, as requested by the account holder's payment order to the bank. It was claimed that the transfer was to permit the bonds to be subscribed for, so that these bonds could then be seized instead of the original assets.

In response, on 19 June 2015 the Zurich public prosecutor's office ordered that the account freezes be lifted to permit the bank in question to make the asset transfer that the account holder had requested. An appeal against this order was lodged with the Federal Criminal Court. In its decision of 18 November 2015, the Court refused to consider the appeal owing to the lack of legitimation on the part of the appellants. It did, however, declare the order issued by the Zurich public prosecutor's office to be invalid. The Court took the view that the lifting of account freezes so that the bank could carry out the account holder's payment order, as requested by the Milan public prosecutor's office, was unlawful. It also concluded that the money transfer order issued by the Italian examining magistrate did not constitute a measure under criminal law, and that the application for assistance did not, in fact, refer to criminal matters. As a result, the Zurich public prosecutor's office was not even responsible for carrying out the request. The Federal Criminal Court held that a conditional withdrawal of a legal assistance request was not possible, and that legal assistance proceedings could only be concluded on the basis of Article 80*c* (consent) or Article 80*d* IMAC (final ruling). The DILA lodged an appeal against this decision before the Federal Supreme Court.

In view of the strategic importance which the Italian government attached to the ILVA group, and in particular given the questionable employment and environmental situation

surrounding the ILVA plant in Taranto, efforts were made to find a solution to refinancing ILVA's operations. On 24 May 2017, the Milan public prosecutor's office announced that an agreement – the 'Accordo Riva' – had been reached between the receivers of the ILVA group, the various parts of the group, and the members of the Riva family. This agreement also covered the Swiss accounts, it was reported. The Milan public prosecutor's office thus withdrew its legal assistance request to have assets in Switzerland frozen. The Zurich public prosecutor's office subsequently unfroze the bank accounts in question, allowing 1.2 billion euros to be transferred to Italy, to be used to subscribe for bonds issued by the ILVA group.

The Federal Supreme Court ruled on 10 August 2017 that the DILA's appeal had become invalid, and decided only on court costs. As part of this decision, the Court held, in summary, that the original plan – to return, with the account holder's consent, the assets that had been frozen under legal assistance proceedings – was lawful. It ruled that the account holder had had the opportunity to challenge the money transfer order in both Italy and Switzerland. She had also cooperated with the authorities by signing a payment order for the bank, which constituted consent to the seized assets being handed over to the Italian authorities. The Federal Supreme Court also upheld the criminal law nature of the request for legal assistance, and the responsibility of the executing Zurich authority. Furthermore, it stated that unfreezing the accounts to permit the bank to carry out the account holder's payment instructions, aimed at returning the assets to the foreign state, was lawful. In the view of the Court, the authorities had proceeded correctly, and the order issued by the Zurich public prosecutor's office should not have been declared invalid. The Federal Supreme Court stated that the DILA's appeal should probably have been upheld. The Court's decision means that the assets could have been returned even if no 'Accordo Riva' had been concluded.

In some cases, assets cannot be handed over to a requesting state until it changes its own legislation.

Peru: subsequent legislation permits handover

The competent public prosecutor in Peru was conducting a criminal investigation into the former Peruvian president Alberto Fujimori as well as other accused, on the grounds of corruption and other offences. While in office, Fujimori was alleged to have awarded defence contracts, as well as orders for aircraft and other goods, with the aid of his then-advisor and secret service chief Vladimiro Montesinos Torres, and received illegal commission in return. The orders were said to have been placed by means of emergency decrees and secret presidential orders.

The Zurich public prosecutor's office has received around 35 requests for legal assistance in connection with this web of cases since November 2000. Some of these could not be considered for reasons such as an insufficient description of the facts. The other requests were executed up to 2006, and the evidence that was collected – primarily banking documents – was sent to Peru. Switzerland has also already handed over 93 million dollars to Peru, with a further approximately 23 million dollars remaining frozen in Swiss accounts in connection with the investigations. However, since the persons concerned have to date evaded criminal prosecution, and Peruvian law does not permit suspects to be tried in absentia, it has not yet been possible to conclude a number of the criminal proceedings, and present Switzerland with any legally enforceable forfeiture order.

The former head of Peru's secret service in court with his lawyer.
Image: Keystone, Martin Mejia

In the light of this problem, in 2015 Peru passed a law allowing the state independently to confiscate assets which have been acquired by criminal means (known as 'perdida de dominio', or confiscation in rem). Under this law, Peru has so far been able to issue two forfeiture orders in this case.

In 2016, the Peruvian government submitted two requests to Switzerland for the release of assets, and attached the final and absolute forfeiture orders. In early 2017, the Federal Criminal Court upheld one of the release orders issued by the Swiss executing authority. The other order had not been challenged.

Both sets of legal assistance proceedings have since been closed at the legal level, but the Peruvian authorities have given notice that further asset release requests will follow. At the political level, Switzerland and Peru are currently negotiating the detailed arrangements for returning assets as part of an asset recovery strategy. On the Swiss side, these negotiations are being handled by the FDFA.

This case illustrates the difficulties that some states requesting legal assistance face in ordering the confiscation of assets, and achieving their release. It is therefore important for a requesting state for it to be lawful to hand over assets as part of Swiss legal assistance proceedings, even if the legal foundation for confiscation in the requesting state is created only after the request for assistance has been submitted. It can also be key that the handover of assets continues to be regarded as proportionate even when those assets have been frozen for many years, if the protracted nature of the proceedings has been caused to some extent by the behaviour of the person concerned.

The three examples given above show the many different options for securing the recovery of assets. However, the following example highlights the fact that there are also situations in which assets cannot be returned for legal reasons.

Egypt: complex proceedings are ultimately unsuccessful

After President Mubarak of Egypt was overthrown in February 2011, Switzerland reacted immediately and, based on the Federal Constitution, ordered the freezing of assets held in Switzerland by former president Mubarak and his inner circle. In parallel with the freeze, the OAG commenced criminal proceedings against members of the deposed president's inner circle owing to suspicions of money laundering, and also ordered the assets held by these individuals in Switzerland to be seized.

Egypt subsequently submitted dozens of requests to Switzerland for legal assistance concerning around 50 individuals closely associated with the former president. The DILA checked the formal aspects of the requests, and concluded that they did not satisfy the requirements of Swiss law.

Switzerland then gave Egypt a number of opportunities to complete these legal assistance applications, or to supply new requests that complied with Swiss law. Ultimately, the DILA was able to delegate four of the requests to the Swiss executing authority, but at the same time found that the other requests still failed to satisfy the requirements of Swiss law. Specifically, it was not possible to determine either the extent to which the individuals under prosecution were involved in the events being investigated in Egypt, or the connection between those offences and Switzerland. The Egyptian requests for legal assistance thus lapsed, and proceedings were concluded.

The four requests for legal assistance which appeared at first glance to satisfy the formal requirements of Swiss law were delegated to the OAG for execution. Seizures were ordered under legal assistance provisions. The OAG nonetheless found that certain of the conditions for further implementation had not been met, because the criminal proceedings in Egypt underlying some of those requests for assistance had since ended in acquittal, or the offences in question had become statute-barred. The OAG therefore closed the legal assistance proceedings in August 2017, and lifted the seizures that had been ordered under legal assistance provisions. The assets that had been ordered seized as part of the OAG's criminal proceedings (worth around 430 million francs) remained frozen, however.

In view of the circumstances described above, the federal authorities notified Egypt on 28 August 2017, via the Swiss representation in Cairo, that legal assistance in the Mubarak case must be regarded as closed.

The conclusion of legal assistance proceedings has had two principal effects. Firstly, the account freezes ordered by the Federal Council are being lifted gradually upon application by the persons concerned. Secondly, in accordance with Federal Supreme Court precedent, as a party to the OAG's criminal proceedings, Egypt is able to enforce its right to inspect the corresponding files.

The grounds that resulted in the conclusion of legal assistance proceedings in connection with the overthrow of former Egyptian president Mubarak are purely legal in nature. Switzerland remained willing to cooperate at all times, and also supported Egypt in a number of ways with its criminal prosecution of members of the former president's inner circle.

It is not always easy for a state requesting legal assistance to distinguish between the legal requirements, on the one hand, and the political component, on the other. Even where the requested state displays the political will to ensure the rapid return of assets allegedly acquired unlawfully, there may still be legal and practical obstacles to overcome. In particular, it is often difficult to establish a clear link between the criminal offences committed abroad and the assets located in Switzerland. In many cases, the events in question happened many years in the past, and can be proven only with great difficulty.

In such complex cases it is therefore important for the parties concerned in both the requesting and requested state to work closely together. This also involves coordinated communications on the part of the various information departments in their dealings with domestic and foreign media. Switzerland's embassies have an important role to play, here, and offer extremely valuable support. The political situation in states requesting legal assistance can change very rapidly, resulting in existing contacts being replaced by new ones. It is sometimes even difficult to know which service or which person is representing the requesting state in its dealings with Switzerland, which can lead to delays and misunderstandings, or even tension.

2.3 Cooperation with international courts

I International Criminal Court

Switzerland is vehement in its opposition to impunity for the core crimes under international law. First and foremost, it supports the International Criminal Court (ICC), which is responsible for trying the most serious crimes which affect the international community as a whole: genocide, crimes against humanity, and war crimes. The crime of aggression will be added to this list from 17 July 2018 onwards. The legal foundation for this permanent court, which has its seat in The Hague, is the Rome Statute, which was adopted in 1998 and came into force in 2002.

The ICC is an expression of the 123 States Parties' determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". It is not an international appeals court which reviews national criminal judgments by courts of final instance, but rather complements national criminal justice systems. The ICC is brought in only where the national authorities responsible for criminal prosecutions are themselves unwilling or unable to prosecute core crimes under international law. This may be the case, for example, where the national authorities are controlled by individuals who are themselves partly responsible for committing the crimes in question, or if the national criminal justice system has collapsed as a result of war.

With its long humanitarian tradition and in its capacity as the depositary state for the Geneva Conventions, Switzerland provided significant support for the establishment of a strong and independent court. It ratified the Rome Statute in 2001, and at the same time enacted the legislative amendments that were immediately necessary to allow cooperation with the ICC.

States Parties have a duty to cooperate fully with the ICC. Since the Court does not have its own investigative police force, in conducting its proceedings it is largely reliant on that cooperation. The foundation for Swiss cooperation in this regard is provided by the Federal Act on Cooperation with the International Criminal Court (SR 351.6). Forming part of the DILA, a central authority with wide-ranging powers is intended to ensure that cooperation runs as smoothly as possible. The central authority receives requests from the Court and decides on the scope and details of cooperation.

Transfer

The DILA receives the formal requests for arrest from the ICC and determines whether or not the conditions for transfer to the ICC are met. If this is the case, it will order the arrest of the person who is being sought, issue a transfer warrant, and rule in the first instance on their transfer. If a Swiss citizen is transferred by Switzerland to the ICC, once the proceedings have concluded the DILA will request the return of the person concerned, so that they can serve their sentence in Switzerland.

The International Criminal Court in The Hague, Netherlands.
Image: Keystone, Branko de Lang

Accessory legal assistance
The DILA also receives applications for other forms of cooperation with the ICC (taking of evidence, including witness statements, hearing of suspects, searches and seizures, service of documents, etc.). It decides in the first instance whether or not cooperation is permissible, orders the necessary action, and mandates a cantonal or federal authority to execute the request. The DILA may also authorise ICC prosecutors to conduct independent investigations (such as the taking of witness statements) on Swiss sovereign territory.

Custodial sentences
Since the ICC is not able itself to execute custodial sentences, it depends on the support of the host state and the other States Parties. At the request of the ICC, Switzerland may take charge of executing a final and absolute judgment if the convicted individual holds Swiss citizenship or is ordinarily resident in Switzerland. The DILA will decide in consultation with the competent cantonal authority about whether or not to take on this executive function. The sentence handed down by the ICC is binding upon the Swiss authorities.

Cooperation with the ICC in 2017
The central authority received three requests for legal assistance from the ICC in 2017. In two cases, the DILA was able to hand over the evidence requested by the Court before the end of the year. Specifically, the Office of the Prosecutor of the ICC had asked Switzerland to provide interview records, to support investigations into a private aircraft with connections to Switzerland and an African state, as well as for technical support with analysing telephone numbers. In carrying out the requests, the DILA was assisted by both cantonal and federal authorities.

II Ad-hoc tribunals and successor mechanism

In the wake of conflicts in the former Yugoslavia and in Rwanda, Switzerland laid down the rules of cooperation with the ad-hoc tribunals in The Hague and Arusha (Tanzania) in 1995 in the Federal Act on Cooperation with International Courts for the Prosecution of Serious Violations of International Humanitarian Law (SR 351.20). In 2003, the scope of the law was extended to cover cooperation with the Special Court for Sierra Leone. Once these ad-hoc tribunals had succeeded in completing a large pro-

portion of pending war crimes proceedings, the UN Security Council established a successor court, known as the Mechanism for International Criminal Tribunals (UN MICT), to conduct the final trials. In 2012, Switzerland once again extended the scope of the relevant legislation to permit cooperation with the MICT.

In 2017 for the first time, the DILA received two requests for legal assistance from the MICT. Switzerland was asked, for example, to provide a death certificate for an individual whose last known residential address was in this country. The Office of the Prosecutor of the MICT also asked the DILA for permission to interview an individual as a witness on Swiss sovereign territory.

III New mechanism to combat impunity in Syria

During the year under review the DILA closely observed ongoing developments with regard to the new mechanism to combat impunity in Syria. Known as the International, Impartial and Independent Mechanism on international crimes committed in Syria (IIIM), it was established by the UN General Assembly in 2016 and is headquartered in Geneva. The IIIM is intended to gather information to support investigations into those responsible for the crimes that have been committed in the Syrian Arab Republic since March 2011. The DILA is also in regular contact with the FDFA and OAG in this regard. Work is currently under way to examine the legal foundations on which Swiss prosecuting authorities might cooperate with the IIIM, as well as the scope of any such cooperation.

2.4 Follow-up: ... whatever happened to ...?

Dynamic legal assistance measures

Dynamic legal assistance measures also featured in the 2016 Annual Activity Report, after the Federal Criminal Court had responded for the first time to the procedure proposed by the DILA in such cases, and deemed it lawful. The matter then came before the Federal Supreme Court during the year 2017. This higher court concluded that there was no legal foundation for the use of the procedure in question, at least not where telecommunications surveillance is concerned.

The problem with dynamic legal assistance is that it challenges the boundaries of classic legal assistance legislation: for dynamic measures, such as the monitoring of telecommunications, to make sense, the information that is gathered must be handed over continually to the requesting state – before the person concerned has been notified of the legal assistance measures. This results in a conflict between criminal prosecution interests and the grant of party rights under the IMAC. In principle, before any evidence that has been collected on the basis of a legal assistance request is handed over, the person concerned must be given a legal hearing, and the legal assistance proceedings must have been concluded by means of a final ruling, or the consent of the affected individual. To resolve this conflict, in its guidelines the DILA had advised the legal assistance authorities to order the early and, in some cases, ongoing handover of information when they issued their initial decree granting the request for legal assistance, without disclosing this decree to the person concerned for the time being. However, an assurance would have to be obtained from the requesting state that the information would initially be used for investigative purposes only. After the information had been handed over to the requesting state, and as soon as foreign criminal proceedings would allow, the person concerned was to be notified of the legal assistance proceedings, and these were to be continued. That would then permit the requesting authority to use the information and documents that had previously been handed over additionally as evidence.

As stated above, the Federal Criminal Court issued its initial response to this proposed procedure in 2016, concluding that it was lawful to hand over telephone surveillance data to the requesting authority for investigative purposes only, without granting the person concerned a legal hearing (FCC, decisions RR.2016.174 and RR.2016.175-176 of 21 December 2016). Appeals against these decisions were nonetheless upheld by the Federal Supreme Court in March 2017 (decisions 1C_1/2017 and 1C_2/2017 of 27 March 2017). In its deliberations, the Court found that there was no legal foundation for the early handover of telephone surveillance data to a foreign authority without granting a legal hearing to the person concerned, and without the issue of a final ruling. The Federal Supreme Court did admit, however, that the procedure under discussion might be useful in certain cases, but that the corresponding change to the law would be required for it to be permissible. Furthermore, the Federal Supreme Court did not instruct the legal assistance authority to demand that the foreign authority return findings that had unlawfully been transmitted prematurely, as the defect could be rectified by a subsequent final order. This has since happened: at least in the principal points of interest here, in its decisions of

3 and 9 October 2017, the Federal Criminal Court rejected the appeals that had been lodged against the relevant final rulings issued by the executing authority (FCC, decisions RR.2017.86-87 of 3 October 2017 and RR.2017.95 of 9 October 2017). The Federal Supreme Court did not allow the appeals lodged against these decisions (decisions 1C_586/2017 and 1C_564/2017 of 30 October 2017).

The decisions of the Federal Supreme Court mean that the procedure proposed by the DILA in its guidelines can no longer be applied where telecommunications surveillance is being conducted in response to a request for legal assistance. Thus, owing to the absence of a legal foundation, it is not possible to hand over telephone surveillance data (pertaining to call content) to the requesting authority early and on an ongoing basis without granting a legal hearing to the person concerned. At the practical level, in many cases this will mean that legal assistance will have to be refused, or the request for assistance withdrawn, because the risk of collusion makes notifying the persons concerned unthinkable.

The following nonetheless also emerges from the Federal Supreme Court's decisions: findings in similar (pending) cases which have already been handed over under the procedure proposed by the DILA – before the Federal Supreme Court's decisions were issued – do not have to be requested back from the foreign authorities. The defect can be remedied by a subsequent final ruling. In addition, where express provision is made to that effect in an international treaty (such as joint investigation teams, covert investigations, interview by video conference), information from legal assistance measures can still be handed over early and on an ongoing basis. That is because the corresponding legal foundation exists. Furthermore, the IMAC contains the legal basis for handing over electronic communications traffic data (ancillary data, rather than actual content) to foreign authorities at an early stage for investigative purposes.

Efforts are under way to create a legal foundation in the IMAC for efficient cooperation with foreign authorities on dynamic legal assistance measures. In view of the implementation of the Council of Europe Convention on the Prevention of Terrorism, and its Additional Protocol, two new provisions have been proposed that would permit the handover of information and evidence at an early stage, and also govern the use of joint investigation teams. These provisions are intended to permit dynamic legal assistance that meets the changing needs of international cooperation, and enables the use of effective, modern methods. Their primary purpose is to prevent terrorist attacks, improve prosecution and speed up cooperation. Considering their content, these provisions will be applicable only under certain conditions, however.

The Frauenfeld 'Ndrangheta cell

In early 2015, the Italian Ministry of Justice asked Switzerland to extradite several individuals suspected of being members of a Swiss branch of the criminal 'Ndrangheta organisation, which is part of the Italian Mafia. The case became known publicly as the 'Frauenfeld 'Ndrangheta cell'. Following a number of arrests, the 13 individuals were given conditional releases from custody.

Up to the end of 2016, the DILA ordered all 13 to be extradited to Italy. Those concerned appealed against these rulings to the Federal Criminal Court. One person could be extradited to Italy as early as 10 February 2017 because he was unable to submit a justified appeal by the deadline. It its decisions of 21 July 2017, the Federal Criminal Court rejected all 12 of the remaining appeals against the DILA's extradition rulings. In particular, the Court held that the facts presented in the Italian extradition request fulfilled all of the criteria for participation in a criminal organisation as defined in Article 260ter of the Swiss Criminal Code. It also approved extraordinary extradition in accordance with Article 36 paragraph 1 IMAC. The offences alleged by the Italian authorities also being subject to Swiss jurisdiction, this article permits extradition only under certain circumstances. On this point, the Court found that extradition was justified in the cases in question, and that the DILA had not exceeded the scope of its discretionary powers in adjudicating the matter.

Following the decisions of the Federal Criminal Court, the DILA ordered renewed arrests, specifically because of the now-greater risk that those concerned might attempt to evade justice. On 28 July 2017, 11 individuals were arrested in the canton of Thurgau, and one in the canton of Zurich, and placed in detention pending extradition. Three individuals accepted the 21 July 2017 decisions of the Federal Criminal Court, and were extradited to Italy a short time later.

A further nine alleged members of the Frauenfeld 'Ndrangheta cell appealed to the Federal Supreme Court. In its decisions of 21 September 2017, the Court refused to consider these appeals. This rendered the DILA's extradition rulings final and enforceable, and these nine individuals were handed over to Italy soon afterwards.

2.5 The Office of the Swiss Liaison Prosecutor within the EU: a win-win situation

In 2017 as in the past, the Office of the Swiss Liaison Prosecutor at Eurojust was actively involved in the prosecution of crimes within the EU. The cases concerned those initiated by the Swiss authorities in which support from European partners was required or requested. They also included those of such a dimension that Eurojust or its member states believed it necessary to involve the Swiss authorities.

Football: Office of Swiss Liaison Prosecutor coordinated operation

The Office of the Swiss Liaison Prosecutor at Eurojust coordinated a cross-border operation connected with criminal proceedings being conducted by the OAG in a network of football-related cases.

These efforts were primarily to ensure the simultaneous execution of the OAG's requests for legal assistance to France, Italy, Spain and Greece, in a joint campaign. On 'Action Day', this operation was coordinated from a special Coordination Centre in The Hague. Its main task while the operation was underway was to guarantee the flow of information between the responsible public prosecutors and police authorities. Coordinated operations like these can ensure that premises searches, asset seizures and police interviews can successfully be conducted at the same time in a number of different countries.

This was the first time in the history of Eurojust that such a Coordination Centre had been organised by the office of a liaison prosecutor from a third-party state.

Switzerland and Romania join forces to fight human trafficking

The criminal prosecution authorities in the canton of Vaud suspected members of a Romanian family of coercing women in Romania and bringing them to Switzerland to work as prostitutes against their will. Specifically, they were accused of using the 'loverboy' method, involving threats, constant surveillance and psychological pressure, to force them into sex acts with clients and then to hand over the money they earned as a result.

Discussions between the Office of the Swiss Liaison Prosecutor and the Romanian representatives at Eurojust revealed that investigations were also being conducted against the same family members, and for the same offences, in Romania. It was then decided to set up a joint investigation team (JIT) to handle the case.

The JIT offered an opportunity to share knowledge and thus conduct investigations in both countries as efficiently as possible. This approach makes it possible for the less privileged countries within the EU, in particular, to conduct complex and costly criminal proceedings that might otherwise be impossible for them. This is because Eurojust assumes the costs of the JIT. With this financial support, Eurojust makes a decisive contribution to fighting crime in its partner states.

The fight against human trafficking is an international one.
Image: Thinkstock, Microgen

3
New instruments of cooperation

In 2017 the DILA once again enjoyed a variety of contact with foreign states in connection with a number of issues which arose with regard to the creation of bilateral or multilateral legal foundations for cooperation. The year under review also saw the conclusion of negotiations on treaties and other instruments of legal assistance, some of which had been protracted. Successes during the year included a treaty with Indonesia on legal assistance in criminal matters, as well as an agreement with France to set up joint investigation teams. The framework of memoranda of understanding on legal assistance in criminal matters was also expanded with the negotiation of such an instrument with Sri Lanka. At the multilateral level, Switzerland signed a Council of Europe protocol which is aimed at rectifying defects in the current instruments permitting the transfer of sentenced persons and sentence enforcement on behalf of another state.

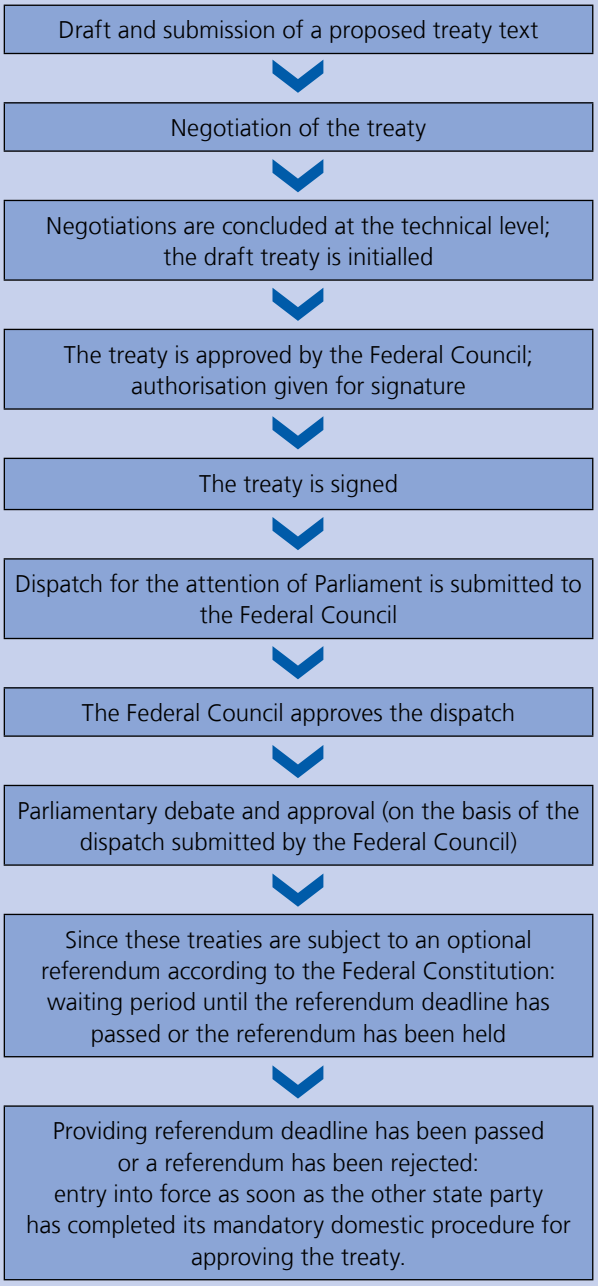
Treaty on mutual legal assistance in criminal matters with Indonesia

In August 2017, just under two and a half years after the first round of negotiations, Switzerland concluded a treaty with Indonesia on legal assistance in criminal matters. The objective was to create a binding foundation for cooperation between the two countries' judicial authorities on the prosecution and punishment of criminal offences, and thus be able to combat international crime more effectively. Negotiations were conducted on the basis of a draft treaty submitted by Switzerland which reflected the rules of the IMAC and the relevant provisions of the multilateral instruments issued by the Council of Europe and the UN. The new text follows the outline of previous mutual legal assistance treaties negotiated by Switzerland in the criminal law domain. Like these earlier instruments, it governs the conditions for granting legal assistance, lists the permitted legal assistance measures and the arrangements for their execution, the requirements that a request must fulfil, and the possible reasons for refusing to provide assistance. It also contains the basic rules for the applicable procedures.

The treaty is intended to help consolidate legal assistance relations with a southern Asian state that is important in view of its size and economic potential, and to make such assistance more efficient. It has still to be approved by the Federal Council and, subsequently, by the Swiss parliament.

From draft to treaty on legal assistance in criminal matters

The process from the submission of a draft text to the entry into force of a bilateral treaty on mutual legal assistance in criminal matters is often a time-consuming one that can take several years. It requires a variety of stages, which the DILA plays a significant role in preparing:



Model agreement to deploy a joint French-Swiss investigation team

To permit the deployment of French-Swiss JITs, a model agreement was drafted that was approved by France on 27 July 2017 and by Switzerland on 4 August 2017.

Investigation teams like these are a means of international cooperation which is based primarily on Article 20 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Second Additional Protocol; SR 0.351.12) and on the 'Joint Investigation Teams' practical guide issued by the Council of the European Union on 14 February 2017. This guide updates the previous handbook on joint investigation teams. JITs make the fight against organised crime and terrorism, in particular, more efficient.

The model agreement is a legal assistance measure: it forms the basis of a concrete agreement between Swiss and French public prosecutors and judges (as well as relevant individuals and authorities in other affected states, where appropriate) in cases which require coordinated action and liaison between the countries concerned. This agreement governs most aspects of the JITs' activities. It can be very important when cooperation needs to be swift, for example to prevent a terrorist attack. It applies for a limited period and serves a defined purpose, i.e. criminal investigations in one, two or more affected countries. Information and evidence are gathered in accordance with the law of that country in which the JIT is operating, and is shared under the terms defined in the agreement. JITs thus offer an efficient means of cooperation, which makes it easier to coordinate investigations and criminal prosecutions that are being conducted in parallel in one or more states.

It was important to Switzerland that the model agreement with France should state clearly that the information and pieces of evidence gathered in Switzerland may be used only as indications to continue investigations, but not as evidence per se, when charging a suspect or conducting a trial as part of the French criminal proceedings for which the JIT was established. This information and evidence may not be used as evidence until the corresponding legal assistance proceedings in criminal matters have been concluded, and the information and evidence gathered in Switzerland has been passed on by the competent Swiss judicial authority in accordance with the requirements of Swiss law.

Memorandum of understanding (MoU) with Sri Lanka

The DILA was able to negotiate a MoU on mutual legal assistance in criminal matters with Sri Lanka during the year under review. This MoU marks a further approach to bilateral cooperation between Switzerland and Sri Lanka in this field. As a soft law instrument, it expressly does not give rise to any legal obligations. Legal assistance will continue to be provided in accordance with the parties' own domestic laws or, where appropriate, under the applicable international conventions. It nonetheless serves to remind both parties of certain principles of cooperation, to list the possible judicial assistance measures, and to set out the practical details. One important organisational change is that, in future, the central authorities of both states (the DILA in Switzerland) will be permitted to communicate with each other directly, and to support each other with the drafting of legal assistance requests. Just as with the other MoUs which the DILA has negotiated in the past, Switzerland and Sri Lanka adopted a model request as part of their negotiations. Addressed to the legal assistance authorities, it is intended to create clarity about the requirements that a request for legal assistance must fulfil for certain important legal assistance measures to be provided. The MoU was signed on 12 December 2017, and came into effect immediately.

Protocol amending regulations on the transfer of sentenced persons

On 22 November 2017, Switzerland was one of the first states to sign the Protocol amending the Additional Protocol to the Council of Europe's Convention on the Transfer of Sentenced Persons. The DILA was significantly involved in the drafting of the protocol, which represents the evolution and modernisation of multilateral legal foundations for the transfer of sentenced persons and sentence enforcement on behalf of other states. It was prompted by a survey among States Parties concerning the application of existing instruments, which brought to light shortcomings in the present arrangements, and the related difficulties putting them into practice.

What changes will the amending protocol bring?

- A person's country of origin will now also be able to assume the enforcement of their sentence in cases in which the person, in the knowledge that a sentence has been passed or criminal investigations are ongoing against them, travels essentially legally from the sentencing state to their home country, and does not return. In the past, the person had to have fled back to their state of origin. (As in the past, a person may be transferred at their own request, as well as against their will as in the cases for which provision already exists.)
- In the case of transfer owing to a subsequent expulsion or removal, there is no longer any need for there to be a cause and effect relationship between the judgment and the expulsion or removal decision: the only key point is that the person is no longer permitted to stay in the sentencing state after they have served their custodial sentence, meaning that they would not be able to be resocialised in this state anyway. The person concerned will nonetheless always be given the opportunity, as at present, to respond to their planned transfer. The transfer cannot be halted simply owing to a lack of any such response, however.
- A deadline has been introduced for the decision on the part of the sentencing state to limit, at the request of the home country, the protection afforded by the rule of speciality (no prosecution, sentencing or limiting of liberty in the home state on the grounds of other criminal offences committed before the transfer). The time for which these special protections apply will also be reduced.

Of particular importance to Switzerland was the extension of the scope of application to cases in which individuals being prosecuted under criminal law in a given state travel essentially legally to their country of origin, and thereby evade the enforcement of a sentence that has been passed against them. In a case involving France, the absence of the relevant legal foundation had unacceptable consequences for the cantonal authorities concerned (see the article entitled 'The dangers of loopholes …' in Section 2.5 of the DILA's 2015 Annual Activity Report). If the country of origin – like Switzerland – does not extradite its own nationals, and an application to assume prosecution is not regarded as desirable or expedient by the sentencing state, the result may be that a person who is the subject of a legally enforceable sentence goes unpunished. This should be avoided.

Like the Convention on the Transfer of Sentenced Persons and its Additional Protocol, the new amending protocol does not force states to cooperate. The country of origin does not have to grant a request to enforce a sentence on behalf of another state. It can nonetheless be assumed that a state that ratifies the protocol will thus also genuinely consider applying it.

The signed amending protocol has still to be approved by the Swiss parliament.

4
The DILA as a service-provider

4.1 2017 Legal Assistance Conference

The DILA's 2017 Legal Assistance Conference was held on 2 November in Bern. The Conference was attended by representatives of criminal prosecution and legal assistance authorities at both cantonal and federal levels. It covered the key issues of interviewing by means of videoconferencing, telecommunications surveillance, gathering data from internet providers in the USA, and the various options for cross-border information-sharing. A total of six presentations identified legal and practical problems, highlighted possible solutions, and answered questions.

Interviewing by means of videoconferencing is a form of dynamic legal assistance which is becoming increasingly talked-about, but it poses certain practical, technical and legal difficulties for the Swiss legal assistance authorities. These were discussed, alongside possible solutions, in the presentation made by the representative of the DILA. The debate on dynamic legal assistance also covered telecommunications surveillance, and specifically the Federal Supreme Court's two landmark rulings in this regard in 2017 (decisions 1C_1/2017 and 1C_2/2017 of 27 March 2017). The Court found that there was no legal foundation for the early handover of telephone surveillance data to a foreign authority without granting a legal hearing to the person concerned and without the issue of a final ruling. This rendered the legal assistance authorities' previous practice unlawful. For further details, including a look at the implications of this ruling, please refer to Section 2.4 of this Activity Report, under 'Dynamic legal assistance measures'. A further current issue increasingly facing and posing problems for the Swiss criminal prosecution authorities is the collection of data from internet providers in the USA. Since most providers are headquartered in the United States, the criminal prosecution authorities have a significant need to obtain the necessary data from the USA via legal assistance channels. This often proves difficult in practice, however, most commonly as a result of US rules of procedure, which establish a number of hurdles. As part of his presentation, the DILA representative offered some advice which might increase the Swiss prosecuting authorities' chances of submitting a successful legal assistance request to the USA.

The afternoon was dedicated to the various options for international information-sharing in a range of areas via legal and administrative assistance channels. The focus here was on the proactive provision of information to foreign partner authorities – an excellent means of strengthening the criminal prosecution process in cases of cross-border crime. As part of legal assistance, a criminal prosecution authority may decide to let its foreign counterpart have information that may be of interest to it, either to open its own criminal proceedings, or because the information will make it easier to pursue an ongoing criminal investigation. Here, the DILA representative spoke about the applicability, content and details of what is referred to as the spontaneous transmission of information and evidence, in accordance with the relevant Article 67*a* IMAC. As an example of this type of cooperation, in which the Swiss authorities are very active (sending some hundred such items of information abroad annually), he mentioned the Montesinos case in Peru: in this instance, information supplied by Switzerland opened the door to an exchange of legal assistance requests between the two countries, and ultimately the recovery by Peru of assets in the double-digit millions (see Section 2.2 above, 'Peru: subsequent legislation permits handover'). In the interests of combating money laundering and terrorism financing effectively, cooperation between financial intelligence units (FIUs) via administrative assistance channels is particularly important. The Head of the Money Laundering Reporting Office MROS, which is the Swiss FIU, reported on possible ways in which the units might work together. In addition to cooperating on foreign requests, the MROS can also transmit information to other FIUs on its own initiative, and under certain circumstances also permit these units to pass it on to their criminal prosecution authorities. Information can also be provided spontaneously in mutual assistance between tax authorities, an option additional to the exchange of information provided for under any double taxation treaty and the rules which apply to the automatic exchange of information AEOI. The Head of the Federal Tax Administration FTA's Division for Exchange of Information in Tax Matters briefed the Conference about the possibilities and arrangements for such cooperation.

The DILA was very pleased to note the considerable interest in this event, as well as the positive feedback from the participants. As the central point of contact for international legal assistance, it is important to the DILA to create and foster platforms for exchange with the Swiss criminal law and legal assistance authorities. As an area in which the federal government and the cantons work together, international legal assistance can only be managed efficiently if knowledge-sharing between the authorities concerned functions smoothly.

4.2 Keep calm and fight crime! Report from the first Swiss-British Joint Legal Practitioners' Day

The interests of Switzerland and the UK in combating global white-collar crime are often closely aligned, not least because the two countries are home to Europe's two largest financial centres. Despite this, operational-level cooperation on legal assistance in criminal matters is not always successful. While the Swiss system of criminal law is rooted in the continental European legal tradition (i.e. civil law), the UK is the seat of the Anglo-American common law tradition. The fact that these systems of criminal law function very differently leads to big potential for misunderstanding between prosecutors.

This prompted the DILA and the British embassy in Bern to hold the first Joint Legal Practitioners' Day, involving criminal prosecutors from both countries, in June 2017. The event was attended by the DILA, representatives of the OAG and cantonal public prosecutors' offices, and from the Federal Office of Police fedpol, on the Swiss side, and representatives of the Crown Prosecution Service, the Serious Fraud Office and HM Revenue and Customs, on the British side. Significant differences emerged even at the macro level in the presentation of the two legal assistance systems. In Switzerland, the criminal investigation revolves around the public prosecutor, who has far-reaching powers as the executive lead of the investigation, and with regard to judicial control of operational resources, with authority to order compulsory measures. In the UK, the separation of powers as it is understood in the Anglo-American system makes such a dual function unthinkable. The British police are largely independent in their investigations, with the public prosecutors' offices having only a judicial role. They represent the sentence that the Crown (the state) would like imposed – or in the case of legal assistance the foreign request – before the British courts. This background also explains a further fundamental difference: in Switzerland, the objective of the criminal investigation led by the public prosecutor is to establish the material truth, and it must therefore contain both incriminating and mitigating elements, while in the UK the public prosecutor is simply the prosecutor in court. Criminal procedure in the UK is based on equality between the prosecution and the defence. The objective is more to ensure that proceedings are fair than to establish the material truth. This should then result in a procedural truth which is accepted as fair, and itself forms the basis of the criminal judgment.

These fundamental differences between the two criminal justice systems cannot be eliminated, neither can the resulting difficulties with regard to legal assistance be discussed away. All of the participants were aware of those facts. With this in mind, three parallel workshops were held to look at the areas of compulsory measures and police cooperation, the confidentiality of legal assistance requests, and asset freezes and the technical aspects of cooperation. In an open and cooperative climate, participants talked about cases they had themselves experienced. In doing so, they formulated specific recommendations for action in the three areas mentioned, with the aim of taking these back to their individual systems of law and authorities. The DILA hopes that the meeting will prove the foundation on which cooperation with an important partner can be improved.

4.3 An overview of the electronic tools on the DILA website

For all areas of international mutual legal assistance in criminal matters:
FOJ website (www.bj.admin.ch>Security>International Mutual Legal Assistance>International Mutual Legal Assistance in Criminal Matters)

- General information: contact address and contact form, activity report, statistics
- Legal basis
- Overview of the individual processes involved in international legal assistance in criminal matters, including links to fact sheets, checklists and models, as well as to the guide to legal assistance (see below)
- State treaty framework and legislative projects

In addition, specifically for accessory legal assistance:
The Legal Assistance Guide (in German, French and Italian – www.rhf.admin.ch)

- Tools for the Swiss authorities for submitting requests for the collection of evidence and service of documents to other states
- Country pages: an overview of the key requirements for requests to individual states for assistance with both civil and criminal cases
- Model requests, as well as forms relating to the collection of evidence and service of documents

Database of Swiss localities and courts (www. elorge.admin.ch)

- This website is aimed primarily at foreign authorities which, by entering a postcode or locality, are able to find out the competent local Swiss authority for international accessory legal assistance in criminal and civil matters, and thus make direct contact
- It also contains a directory of those Swiss authorities which have the power to enter into direct legal assistance relationships with foreign partner authorities to provide and receive accessory legal assistance

5 Selected decisions by Swiss courts on international mutual legal assistance in criminal matters

5.1 Extradition and transfer

- Decision of the Federal Criminal Court RR.2016.311 of 30 January 2017: right to respect for private and family life as defined in Art. 8 ECHR. A mother must be able to care for her young child while serving her sentence in the requesting state.
- Decision of the Federal Criminal Court RR 2016.246 of 14 February 2017 and judgment of the Federal Supreme Court 1C_129/2017 of 20 March 2017: participation in a criminal organisation in the sense of Art. 260ter CC. 'Ndrangheta case.
- Decision of the Federal Criminal Court RR.2016.278 of 1 March 2017: the risk of private retribution does not constitute an obstacle to extradition.
- Decision of the Federal Criminal Court RR 2017.55 of 11 April 2017 and judgment of the Federal Supreme Court 1C_226/217 of 24 May 2017: rights of defence and judgment in absentia. Assurance in the sense of Art. 3 of the Second Additional Protocol to the European Convention on Extradition. Art. 3 ECHR; detention conditions in Italy.
- Decision of the Federal Criminal Court RR. 2017.66 of 20 April 2017: if written form is required, the legal act that is required within a given period cannot validly be undertaken by fax. A credible case must be presented for the fear of a breach of human rights. Principle of good faith in international law.
- Decision of the Federal Criminal Court RR.2016.255 of 4 May 2017: calculating the fee to be paid to official legal counsel.
- Decision of the Federal Criminal Court RR.2017.47 of 1 June 2017: Art. 62 IMAC; seizure of assets to cover the costs of detention pending extradition.
- Decision of the Federal Criminal Court RR.2016.285 of 6 June 2017: detention conditions. As a general rule, health problems do not constitute an obstacle to extradition.
- Decision of the Federal Criminal Court RR.2017.126 of 29 August 2017: transfer of a convicted individual against their will to their country of origin to serve their sentence.
- Decision of the Federal Criminal Court RR.2017.289 of 21 November 2017: Art. 3 ECHR; detention conditions in Macedonia. Extradition to Macedonia is to be made conditional upon the corresponding assurances.

5.2 Accessory legal assistance

- Decision of the Federal Criminal Court RR.2016.170 of 25 January 2017: sealing of records; objections against the decision of the compulsory measures court to unseal records, in the appeal against the final ruling.
- Decision of the Federal Criminal Court RR.2016.147 of 30 January 2017: handover of assets to Peru; denial of grounds for inadmissibility under Arts. 2 and 3 IMAC / Art. 4 para. 1 let. a of the legal assistance treaty between Switzerland and Peru.
- Decision of the Federal Criminal Court RR.2016.74 of 16 February 2017: bribery of foreign public officials; definition of public official under Art. 110 para. 3 CC; 'ne bis in idem' (double jeopardy) principle.
- Decision of the Federal Criminal Court RR.2016.173 of 29 March 2017: handover of interview records produced as part of national criminal proceedings: legitimation; witness protection measures.
- Decision of the Federal Criminal Court RR.2016.182 of 30 March 2017: legal assistance to Turkey: denial of grounds for inadmissibility under Art. 2 IMAC.
- Judgments of the Federal Supreme Court 1C_1/2017 and 1C_2/2017 of 27 March 2017: early and ongoing handover of telephone surveillance data for investigation purposes only, without granting a legal hearing to the person concerned, is unlawful (lack of legal foundation).
- Decision of the Federal Criminal Court RR.2016.206+207+208+210+211+212/213+215/216 of 26 May 2017: legal assistance to Brazil: denial of grounds for inadmissibility under Art. 3 para. 1 let. f of the legal assistance treaty between Switzerland and Brazil / Art. 2 IMAC; dual criminality (bribery of a private individual under Art. 4*a* para. 1 let. a in conjunction with Art. 23 UCA).
- Decision of the Federal Criminal Court RR.2016.75 of 12 July 2017: witness interview by videoconference.
- Order of the Federal Supreme Court 1C_635/2015 of 10 August 2017: legal assistance to Italy (write-off of costs of appeal, and decision on court costs).
- Judgment of the Federal Supreme Court 1C_423/2017 of 30 October 2017: denial of bias on the part of the federal criminal judges who had adjudicated on the legal assistance and extradition proceedings in the same composition of the Court and in the same case; denial of political offence as grounds for inadmissibility under Art. 3 IMAC.
- Decision of the Federal Criminal Court RR.2017.204-206 of 7 November 2017: legal assistance to Venezuela; denial of grounds for inadmissibility under Art. 2 IMAC.
- Decision of the Federal Criminal Court RR.2017.265-277 of 29 December 2017: extension of the principle of speciality; refusal to hear the appeal, as the violation of the principle of speciality must be taken before the criminal court of the foreign state, and no legal remedy exists in Switzerland.

6
Important statistical information on international legal assistance, 2013–2017

Action group	Type of action	2013	2014	2015	2016	2017
Extradition requests to foreign countries		216	259	257	282	**259**
Extradition requests to Switzerland		413	364	397	372	**360**
Search requests to foreign countries		251	289	278	312	**281**
Search requests to Switzerland		21862	24940	29664	33401	**32005**
Prosecution transfer requests to foreign countries		225	220	199	164	**153**
Prosecution transfer requests to Switzerland		65	113	110	117	**133**
Sentence execution requests to foreign countries	Custodial sentences	6	4	5	10	**15**
Sentence execution requests to Switzerland	Custodial sentences	2	6		2	**6**
	Fines		2		5	
Prisoner transfer abroad	At the request of the sentenced person	51	47	48	48	**65**
	Under Additional Protocol		2	3	4	**2**
Prisoner transfer to Switzerland	At the request of the sentenced person	18	14	13	18	**14**
Suspect search for international tribunals		1		1		
Legal assistance requests to Switzerland	Gathering of criminal evidence	1088	1173	1180	1268	**1085**
	Gathering of criminal evidence: supervision	1089	1033	1113	1171	**1333**
	Gathering of criminal evidence: own case	24	33	43	46	**44**
	Handover of assets	15	13	16	13	**14**
	Handover of assets: own case	8	4	2	4	**4**
	Eurojust enquiry	52	89	179	144	**131**
	Gathering of civil evidence	61	44	43	57	**34**

Legal assistance for international tribunals	International Criminal Court	1	2		3	**4**
Legal assistance requests to foreign countries	Gathering of criminal evidence	869	1052	900	982	**946**
	Handover of assets		5	5	6	**5**
	Eurojust enquiry	5	15	50	90	**70**
	Gathering of civil evidence	29	23	13	34	**28**
Secondary legal assistance	For use in criminal proceedings	10	11	10	9	**13**
	For forwarding to third country	7	3	10	7	**2**
Unsolicited legal assistance	To foreign countries (Art. 67*a* IMAC)	133	88	105	114	**121**
	To Switzerland	8	2	3	2	**2**
Document service requests to Switzerland	Criminal law	257	368	306	264	**238**
	Civil law	577	579	586	777	**584**
	Administrative law	79	50	59	55	**102**
Document service requests to foreign countries	Criminal law	744	629	549	552	**562**
	Civil law	952	990	924	855	**917**
	Administrative law	673	587	588	602	**529**
Sharing	International sharing (Swiss forfeiture ruling)	3	6	1	9	**5**
	International sharing (foreign forfeiture ruling)	5	8	5	7	**3**
	National sharing			120*	33	**36**
Instruction to the FDJP	Limitation of cooperation (Art. 1*a* IMAC)		1			
	Authorisations under Art. 271 of the Swiss Criminal Code	1	6			**1**

* Authority for national sharing was only transferred to the DILA from the FOJ Criminal Law Division in 2015.

Judicial decisions

Court	2013	2014	2015	2016	2017
Federal Criminal Court	257	265	242	195	241
Federal Supreme Court	61	50	67	56	79
Total	**318**	**315**	**309**	**251**	**320**