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## The Expansion of Swiss Criminal Jurisdiction in Light of International Law

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### Introduction

Over the last few decades, a global trend of extending the reach of domestic penal power can be witnessed. This expansive approach to (prescriptive and adjudicative)<sup>1</sup> jurisdiction is driven by a number of factors, namely the increasingly transnational nature of criminal conduct.<sup>2</sup> The changing face of crime, however, can hardly be the sole explanation for the ‘movement (...) towards bases of jurisdiction other than territoriality’<sup>3</sup> since the sum of territorial jurisdictions exercised by states affected by a specific transnational offence could, at least theoretically, provide an equally effective response – except for areas under no jurisdiction, such as the high seas. The increased readiness of domestic legislatures to endow their domestic law with a long arm in order to respond to criminal conduct beyond their borders possibly goes back to a different understanding of what link is necessary (if at all) for empowering a domestic judge with the authority to address extraterritorial conduct. One factor contributing to a broader

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1 In the following article, the term ‘jurisdiction’ refers to ‘prescriptive jurisdiction’, which is, however, quasi-identical to ‘adjudicative jurisdiction’ in the realm of criminal law: jurisdiction to prescribe denotes a state’s competence ‘to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court’ (Restatement of the Law, Third, 1987 (Foreign Relations Law of the United States), § 401(a)). Prescriptive jurisdiction thus defines the geographical scope of application of domestic law (C. Ryngaert, *Jurisdiction in International Law*, 2008, p. 9). Adjudicative jurisdiction denotes a state’s competence ‘to subject persons or thing to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings’ (Foreign Relations Law of the United States, § 401(b)). Prescriptive jurisdiction is sometimes also referred to as ‘legislative competence’ and adjudicative jurisdiction as ‘judicial competence’ (see, e.g., V. Beken & G. Vermeulen, *Finding the Best Place for Prosecution: European Study on Jurisdiction Criteria*, 2002, p. 9, Para. 9). In the realm of criminal law, prescriptive jurisdiction generally coincides with adjudicative jurisdiction. In other words, the exercise of the *ius puniendi* by a specific state implies the application of its domestic criminal law. This follows from the fact that domestic criminal courts – notwithstanding whether they adjudicate territorial or extraterritorial conduct – as a general rule only apply their municipal criminal norms (Council of Europe – European Committee on Crime Problems, ‘Extraterritorial Criminal Jurisdiction’, 1992 *Criminal Law Forum* 3, no. 3, p. 458; G. Hallevey, *A Modern Treatise on the Principle of Legality in Criminal Law*, 2010, pp. 82-83; specifically on German criminal law, see K. Ambos, *Internationales Strafrecht: Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht – Rechtshilfe*, 2011, p. 3, Para. 5). Thus, Swiss courts only apply Swiss criminal law regardless of whether the conduct under consideration has been committed within or outside its national borders. While the Swiss judge never applies foreign criminal provisions as such, we will see later that foreign law is taken into account to some extent by virtue of the double criminality requirement and the *lex mitior* principle: A. Petrig, ‘Extraterritorial Jurisdiction – The Applicability of Domestic Criminal Law to Activities Committed Abroad in Switzerland’, in U. Sieber et al. (eds.), *National Criminal Law in a Comparative Legal Context: General Limitations on the Application of Criminal Law*, 2011, pp. 319-321.

2 International Law Commission, ‘Report of the International Law Commission: 58th Session (1 May-9 June and 3 July-11 August 2006)’, UN Doc. A/61/10 (2006), Annex E – Extraterritorial Jurisdiction, Paras. 1 and 18.

3 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, [2002] ICJ Reports, Para. 47.

understanding of when domestic prosecutions are warranted may be the increased significance of human rights law, specifically the positive obligation of states to protect persons under their jurisdiction from harmful conduct emanating from private persons.<sup>4</sup>

As will be demonstrated in detail, the Swiss legislature clearly followed this expansive trend. Since the Swiss Criminal Code (*Schweizerisches Strafgesetzbuch*) entered into force in 1942,<sup>5</sup> the legislature has continuously added new extraterritorial jurisdictional bases or extended the scope of existing bases.<sup>6</sup> It has followed this expansive approach with particular resolve in the last decade.<sup>7</sup>

The growing number of instances in which Swiss criminal law applies to extraterritorial conduct and which – at least for some jurisdictional bases – has effectively set the bar rather low when it comes to subjecting activities committed abroad to Swiss criminal jurisdiction certainly has its advantages. Most notably, such unilateral expansion of the geographical reach of domestic criminal law by many states concurrently results in a dense jurisdictional net. This net often enmeshes most components of a specific transnational criminal event and persons participating therein, and thus it has the beauty of (at least theoretically) denying ‘safe havens’<sup>8</sup> to alleged transnational offenders and to avoid impunity. Hence, the supposed victim’s chances of seeing the alleged wrongdoer brought to justice are greatly enhanced. The reduction or even elimination of jurisdictional gaps is thus – undeniably – of utmost importance for the investigation and prosecution of transnational offences.<sup>9</sup>

However, the unilateral expansion of domestic penal power does not come without its drawbacks. For instance, third states may perceive assertions of extraterritorial jurisdiction as excessive and oppose them. Opposition runs the gamut from diplomatic protest to the institution of international proceedings, as France did in the *Lotus* case adjudicated by the Permanent Court of Justice in 1927.<sup>10</sup> Furthermore, the uncoordinated expansion of domestic criminal jurisdiction may lead to jurisdictional overlaps and conflicts. Seen from the perspective of an acting individual, it may be virtually impossible to foresee and predict with reasonable certainty what domestic law(s) will ultimately govern his conduct of transnational *portée*. In such a situation, the individual can no longer be sure he is acting legally if aligning his conduct solely with the law in force at the place where he acts or omits to act.<sup>11</sup> Rather, various domestic legal frameworks must potentially be observed all at once, which seems to overstretch the legal fiction that the acting individual should know the law. Moreover, in situations of conflicting prescripts stemming from different municipal laws, which are concurrently applicable, it might be impossible to entirely align one’s conduct.<sup>12</sup> This has a negative impact on the principle of legality. What is more, since the acting individual may not be able to anticipate which domestic criminal law applies, its norms can hardly be said to have a deterrent effect on the individual in question. Hence, a classical goal of criminal law seems

4 See Section 3.1, *infra*.

5 Swiss Criminal Code of 21 December 1937, status of 1 October 2012 (*Code pénal suisse du 21 décembre 1937, état le 1er octobre 2012*, RS 311: the abbreviation RS stands for *Receuil systématique du droit fédéral*, where federal legal acts in force in Switzerland are collected in a systematic order, and the number indicates the thematic area to which an act belongs) [hereinafter, the ‘old Swiss Criminal Code’ refers to the Swiss Criminal Code before its new General Part, and thus ‘Swiss Criminal Code’ refers to the new general jurisdictional provisions, which entered into force on 1 January 2007]; a translation of the Swiss Criminal Code by the Federal Authorities of the Swiss Confederation is available at <[www.admin.ch/ch/e/rs/c311\\_0.html](http://www.admin.ch/ch/e/rs/c311_0.html)> (last visited 25 April 2013), since English is not an official language of the Swiss Confederation, the translation has no legal force.

6 The article at hand is limited to provisions providing for criminal jurisdiction, which are contained in the Swiss Criminal Code either in its ‘General Part’ (Books 1 and 3) and referred to as general jurisdictional rules or in its ‘Special Part’ defining various offences, some of which are equipped with a jurisdictional rule (Book 2). The article does not take into account jurisdictional rules contained in secondary criminal law, i.e. federal statutes including, amongst others, criminal provisions. On the various locations of jurisdictional rules in Swiss criminal law, see Petrig, *supra* note 1, pp. 317-318.

7 See Sections 1.1-1.6, *infra*.

8 International Law Commission, *supra* note 2, p. 416, Para. 220.

9 United Nations Office on Drugs and Crime, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 2004, p. 104, Para. 210.

10 International Law Commission, *supra* note 2, Para. 28.

11 By making the application of extraterritorial bases of jurisdiction dependent on double criminality, i.e. that the offence is also liable to punishment at the place of commission, the basic idea that the observance of the law of the place of commission is sufficient can be re-established: P. Popp & P. Levante, ‘Vor Art. 3’, in M. Niggli & H. Wiprächtiger (eds.), *Basler Kommentar: Strafrecht I*, 2007, Para. 26. However, as we will see later, double criminality is not always required for triggering the application of Swiss criminal law to extraterritorial conduct.

12 See, e.g., International Chamber of Commerce, ‘Extraterritoriality and Business’, p. 1, <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2006/Extraterritoriality-and-business/>> (last visited 25 April 2013); the statement expresses the difficulty of foreseeing and aligning conduct because of jurisdictional overlaps.

to be compromised.<sup>13</sup> Additionally, if it is alleged that an individual committed a transnational offence, there is a real risk of double prosecution and punishment if several states decide to actually exercise their penal power over the same person for the same conduct.

As will be shown, the Swiss legislature is not indifferent to the problem and issues raised by its expansive approach to criminal jurisdiction. In order to – at least partially – accommodate concerns relating to the application of Swiss criminal law to extraterritorial conduct, some jurisdictional provisions of the Swiss Criminal Code require that foreign law be taken into account to some extent by virtue of the double criminality requirement and the *lex mitior* principle. In order to temper the negative effects resulting from positive jurisdictional conflicts, notably to reduce the risk of double jeopardy, Swiss judges are obliged to take foreign judgments into account by way of three distinct principles governing the situation where a foreign criminal judgment has already been issued.<sup>14</sup>

This development in Swiss law, which can be observed in other states as well, and the drawbacks it may bring begs the question whether such an expansive approach towards jurisdiction is permissible – or even encouraged or requested by international law. Against this background, this article ultimately explores the extent to which international law informs the reach of domestic penal power and concludes that international law is Janus-faced with regard to the question of the geographical scope of domestic criminal law. While some of its rules push for long-arm jurisdiction others put limits on the domestic legislature's endeavour to expand the reach of its domestic criminal law. In light of this, the idea of adopting general principles on an international level to govern the definition of the scope of domestic prescriptive and adjudicative jurisdiction for transnational cases is tempting, albeit difficult to realize.

## **1. Switzerland's expansive approach to criminal jurisdiction**

By virtue of a constitutional amendment adopted in 1898 by the Swiss people, the Confederation – in lieu of the Cantons – became competent to legislate in the field of substantive criminal law.<sup>15</sup> The unified Swiss Criminal Code, which was passed by Parliament in 1937,<sup>16</sup> confirmed in a popular vote the following year<sup>17</sup> and entered into force in 1942,<sup>18</sup> originally contained four provisions defining the reach of Swiss penal power. According to these general jurisdictional rules, Swiss criminal law applied based on the principles of territoriality, active and passive personality and the protective principle.<sup>19</sup> When viewed from a comparative perspective, these early jurisdictional provisions – especially the broadly construed territoriality principle extending to certain forms of extraterritorial conduct and the passive personality principle – provided Switzerland with rather far-reaching jurisdiction.

An initial step towards extending the geographical scope of application of Swiss criminal law occurred when its state security provisions were revised in the early 1950s, which was deemed necessary in light of the post-war political order and to convert emergency legislation adopted during World War II into ordinary legislation.<sup>20</sup> The catalogue of new and bolstered offences regarding protection of the security and independence of the Swiss Confederation were all subjected to the protective principle<sup>21</sup> and it thus gained more importance. In the early 1980s, the existing jurisdictional bases – the principles of

13 Ryngaert, *supra* note 1, p. 93.

14 See Section 2, *infra*.

15 Dispatch of the Federal Council to the Federal Assembly in support of a proposed Swiss Penal Code (*Message du Conseil fédéral à l'Assemblée fédérale à l'appui d'un projet de code pénal suisse (du 23 juillet 1918)*, FF 1918 IV 1: the abbreviation FF stands for *Feuille fédérale*, which contains *travaux préparatoires* and other materials relating to Swiss legislation; initially cited by year, volume and page number and later by year and page number only), p. 1.

16 Order of Parliament on the Swiss Penal Code (*Arrêté du Parlement concernant le Code pénal suisse (du 21 décembre 1937)*, FF 1937 III 645), pp. 625-736.

17 Federal Council Decree on the outcome of the popular vote on the Swiss Penal Code (*Arrêté du Conseil fédéral concernant le résultat de la votation populaire du 3 juillet 1938 sur le code pénal suisse du 21 décembre 1937 du 5 octobre 1938*, FF 1938 II 551), p. 551.

18 Art. 401(1) old Swiss Criminal Code.

19 Arts. 3-7 old Swiss Criminal Code.

20 Dispatch of the Federal Council to the Federal Assembly in support of legislation partially revising the Swiss Penal Code (*Message du Conseil fédéral à l'Assemblée fédérale à l'appui d'un projet de loi révisant partiellement le code pénal suisse (du 20 juin 1949)*, FF 1949 I 1233), pp. 1249 and 1251-1258.

21 FF 1949 I 1233, *supra* note 20, p. 1258; amended Art. 4 old Swiss Criminal Code, which entered into force on 5 January 1951 (published in RO 1951 116: the abbreviation RO stands for *Recueil officiel du droit fédéral* where federal legal acts are published in chronological order, cited by year and page number).

territoriality, active and passive nationality and the (expanded) protective principle – were complemented by a further provision providing Switzerland with extraterritorial jurisdiction. This new provision required the application of Swiss criminal law to offences where, by virtue of an international agreement, Switzerland is under a duty to either extradite or prosecute the alleged offender.<sup>22</sup>

In 2007, the completely revised General Part of the Swiss Criminal Code,<sup>23</sup> which includes general jurisdictional rules,<sup>24</sup> entered into force. Therewith, the reach of Swiss penal power expanded considerably. Firstly, based on the representation principle, the application of Swiss criminal law was extended to include situations where a request is made to extradite an alleged offender from Switzerland but refused for a reason unrelated to the nature of the offence.<sup>25</sup> Secondly, two instances where Switzerland can exercise universal jurisdiction were added to the Swiss Criminal Code: Swiss criminal law can be applied to a set of offences against minors abroad<sup>26</sup> and to extraterritorial conduct that qualifies as a ‘particularly serious felony that is proscribed by the international community’.<sup>27</sup> In July 2012, a provision criminalizing female genital mutilation entered into force, equipped with a jurisdictional rule specifically for this crime and embodying an absolute and unrestricted universality principle. The expansion of Swiss criminal jurisdiction with the new General Part of the Swiss Criminal Code, as well as the recently introduced jurisdictional provision regarding the offence of female genital mutilation, gave new momentum to the discussion on what minimum link is necessary to justify the exercise of domestic criminal jurisdiction.

### ***1.1. A territoriality principle tantamount to the exercise of extraterritorial jurisdiction***

Today, the territoriality principle is the primary basis for jurisdiction in criminal law matters.<sup>28</sup> This also holds true for Swiss criminal law.<sup>29</sup> However, it was only with the rise of the modern and fully sovereign national state in the 17<sup>th</sup> century that territorial connections began to supersede jurisdiction based on nationality.<sup>30</sup> According to the territoriality principle, domestic criminal law is applicable to offences committed within the territory of the respective state.<sup>31</sup> Under Swiss law, Article 3(1) of the Swiss Criminal Code statutorily defines this principle for felonies and misdemeanours: ‘Any person who commits a felony or misdemeanour in Switzerland is subject to this Code.’ This provision is also applicable to contraventions<sup>32</sup> and offences defined in federal laws other than the Swiss Criminal Code, unless they contain deviating rules on the geographical scope of application of Swiss criminal law.<sup>33</sup> The principle of territoriality is thus intrinsically linked with the notion of ‘territory’, on the one hand, and the concept of the ‘place of commission’, on the other.

With regard to the first element, the notion of ‘Switzerland’ in Article 3 of the Swiss Criminal Code refers to the territory of the Swiss State as defined by domestic and public international law.<sup>34</sup> It encompasses not only the land surface within the State’s borders but also the airspace above it and the subsoil beneath it, such as tunnels and mines.<sup>35</sup> Swiss criminal law also applies *ratione loci* to foreign diplomatic missions and international organizations physically present in Switzerland. The theory that

22 Dispatch on the European Convention on the Suppression of Terrorism and the modification of the Swiss Penal Code (*Message concernant la Convention européenne pour la répression du terrorisme et la modification du code pénal suisse du 24 mars 1982, FF 1982 II 1*), pp. 11-12.

23 Adopted by the Swiss Parliament on 13 December 2002 and published in RO 2006 3459.

24 Arts. 3- 8 Swiss Criminal Code.

25 Art. 7(2)(a) Swiss Criminal Code.

26 Art. 5 Swiss Criminal Code.

27 Art. 7(2)(b) Swiss Criminal Code; wording of the translation of the Swiss Criminal Code by the Federal Authorities of the Swiss Confederation, see note 5, supra.

28 Council of Europe – European Committee on Crime Problems, supra note 1, p. 446; Beken & Vermeulen, supra note 1, p. 11.

29 This follows, inter alia, from a systematic reading of the jurisdictional rules laid down in Arts. 3-8 Swiss Criminal Code, where the provision defining the territoriality principle precedes all other jurisdictional rules.

30 Ryngaert, supra note 1, pp. 42 and 47-54.

31 Council of Europe – European Committee on Crime Problems, supra note 1, p. 446.

32 Art. 104 Swiss Criminal Code stipulates that, subject to the changes set forth in Arts. 105-109 Swiss Criminal Code, the provisions of the First Part of the Swiss Criminal Code pertaining to felonies and misdemeanours (and thus the territoriality principle defined in Art. 3 Swiss Criminal Code) also apply to contraventions.

33 Art. 333(1) Swiss Criminal Code.

34 M. Shaw, ‘Territory in International Law’, 1982 *Netherlands Yearbook of International Law* 13, Sections 2 and 6 (definition of territory under public international law) and J. Hurtado Pozo, *Droit pénal: Partie générale*, 2008, pp. 67-68, Paras. 194-196 (definition of Swiss territory).

35 Hurtado Pozo, supra note 34, p. 67, Para. 194.

the land parcels on which they are located do not belong to the host state's territory is outdated. Therefore, conduct taking place in these premises falls within the geographical scope of application of Swiss law. Yet, the application of Swiss criminal law in these situations may be hindered by diplomatic immunities and, hence, due to *ratione personae* considerations.<sup>36</sup>

Finally, in line with public international law,<sup>37</sup> ships and aircraft flying the Swiss flag are not considered to be floating or flying parts of Swiss territory.<sup>38</sup> Rather, offences committed on board such vessels are subject to Swiss criminal law based on the flag state principle.<sup>39</sup>

Rather than through an expanded definition of 'territory' – where public international law does not provide states with a wide margin of interpretation<sup>40</sup> – it is by broadly defining the concept of the 'place of commission' that states can extend the reach of the territoriality principle so that it also includes extraterritorial conduct. However, there is little agreement among states on 'how little of the offence need take place or have effect in the State before it can claim territorial jurisdiction'.<sup>41</sup> Various tests have been developed to determine the minimum territorial link necessary to give rise to a place of commission in the respective state. The Swiss legislature has opted for a very broad test along the lines of the ubiquity theory: an offence is considered to have been committed in Switzerland if either the place where the criminal conduct was carried out *or* the place where the criminal result occurred is located in Switzerland.<sup>42</sup> The ubiquity theory as defined by the Swiss legislature<sup>43</sup> thus combines the theory of acting (also known as the objective territoriality principle<sup>44</sup>) and the theory of result (sometimes referred to as the effects doctrine<sup>45</sup>). According to the theory of acting, only the place of conduct is deemed to be a place of commission; meanwhile, under the theory of result, only the place where the criminal result occurs, i.e. where the conduct committed abroad displays its effects, qualifies as a place of commission.<sup>46</sup>

According to the ubiquity theory expressed in Article 8(1) of the Swiss Criminal Code, an offence is considered to have been committed in Switzerland if either the place where the offender acted (crime of commission) or where he failed to act contrary to a duty (crime of omission) is located within Swiss territory. Thereby, it is sufficient that only one of the objective definitional elements of the offence<sup>47</sup> was

36 Hurtado Pozo, supra note 34, p. 68, Para. 195, citing BGE 109 IV 156, where the Swiss Federal Supreme Court decided that Swiss criminal courts are competent to prosecute criminal acts allegedly committed by persons occupying the Polish embassy in Switzerland (the abbreviation BGE refers to judgments by the Swiss Federal Supreme Court).

37 For a long time the jurisdiction of the flag state over its ships has been based on the fiction of the territoriality or quasi-territoriality of ships (see, e.g., *The Case of the S.S. "Lotus" (France v Turkey)*, Judgment [1927] PICJ, Series A, no. 10P, p. 25; *US v Flores*, 289 US 137 (1933), p. 585). Today, the floating territories doctrine has been abandoned (R.J. Dupuy & D. Vignes, *A Handbook on the New Law of the Sea*, 1991, p. 407) and is considered to be superfluous (I. Brownlie, *Principles of Public International Law*, 2008, p. 113).

38 On abandoning the floating territories doctrine in relation to aircraft and ships under Swiss law, see, e.g., Dispatch of the Federal Council to the Federal Assembly on amendment of the aviation law (*Message du Conseil fédéral à l'Assemblée fédérale concernant la modification de la loi sur la navigation aérienne (du 28 septembre 1962)*, FF 1962 713), p. 728: 'On évite ainsi volontairement de faire de l'aéronef, même par une fiction, une «partie volante du territoire national». Le droit de légiférer et d'appliquer des règles de droit n'est pas considéré comme découlant de la souveraineté territoriale de l'Etat d'immatriculation; il s'agit au contraire d'une juridiction sur les personnes et sur les biens, d'un for constitué par la communauté organisée à bord sous l'autorité du commandant. Ce sont en principe les mêmes considérations que nous vous avons soumises dans notre message du 22 février 1952, concernant le projet de la loi sur la navigation maritime sous pavillon suisse.'

39 With regard to ships, the flag state principle is laid down in Art. 4 Swiss Federal Law of 23 September 1953 on Navigation under the Swiss Flag (*Loi fédérale sur la navigation maritime sous pavillon suisse du 23 septembre 1953*, RS 747.30). Regarding aircraft, the flag state principle is provided for in the Air Navigation Law, namely Arts. 11 and 97 (*Loi fédérale sur l'aviation du 21 décembre 1948*, RS 748.0).

40 On the notion of 'territory' under international law, see Shaw, supra note 34, Sections 2 and 6.

41 G. Gilbert, *Responding to International Crime*, 2006, p. 76.

42 Art. 8 Swiss Criminal Code; M. Harari & M. Liniger Gros, 'Art. 8', in R. Roth & L. Moreillon (eds.), *Commentaire Romand: Code pénal I*, 2009, p. 90, Para. 10.

43 There is no unified and unequivocal definition of the ubiquity doctrine and states give different meanings to the concept: Council of Europe – European Committee on Crime Problems, supra note 1, pp. 446-447.

44 See, e.g., International Law Commission, supra note 2, Para. 11: 'The objective territoriality principle may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts outside its territory when a constitutive element of the conduct sought to be regulated occurred in the territory of the State.'

45 See, e.g., International Law Commission, supra note 2, Para. 12: 'The effects doctrine may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State.'

46 Hurtado Pozo, supra note 34, p. 69, Para. 199 and p. 70, Para. 201.

47 Under Swiss criminal law, every offence is composed of objective and subjective definitional elements. While the subjective elements relate to the offender's inner world (see note 76, *infra*), the objective elements are those aspects of an offence that display or manifest themselves externally, that is, discernible conditions, factors and changes in the outside world, such as the description of who can commit the offence, the incriminated conduct, the object on which the criminal act or omission is performed, the result of the criminal

(partially) fulfilled in Switzerland.<sup>48</sup> Further, the provision stipulates that the place where the offence displays its effect, i.e. where the result of the allegedly criminal conduct occurs, gives rise to a place of commission in Switzerland. The newer case law of the Swiss Federal Supreme Court interprets the notion of ‘result’ as synonymous with its definition in the context of result offences. Hence, only those changes in the outside world that correspond to an objective definitional element of the offence qualify as a result in the sense of Article 8 of the Swiss Criminal Code.<sup>49</sup> If, from the offender’s perspective, the result occurs at a random place, it should not give rise to a place of commission; rather, only the place where the result was intended to occur according to the offender’s intention should qualify as such.<sup>50</sup>

Article 8(2) of the Swiss Criminal Code defines the place of commission with regard to attempted offences. An attempt gives rise to a place of commission in Switzerland if it was committed on Swiss territory or if the result should have occurred there according to the offender’s intention. Thus, due to the nature of attempts, the place where the criminal result occurs is actually substituted by the place where the result should have occurred according to the author’s intention.<sup>51</sup> Mere preparatory acts generally do not give rise to a place of commission in Switzerland. Rather, the threshold of an attempt must be reached. An exception constitutes punishable preparatory acts pertaining to specific crimes exhaustively listed in Article 260<sup>bis</sup>(1) of the Swiss Criminal Code.<sup>52</sup>

It is also by participating in an offence that a person can become caught in the jurisdictional maelstrom of Switzerland. A black-letter legal norm on participation and the determination of the place of commission is missing from Swiss criminal law. According to case law, the criminal conduct of one co-perpetrator in Switzerland gives rise to a place of commission in Switzerland for all co-perpetrators. Likewise, and in line with the relative ubiquity theory, the criminal result obtained on Swiss territory by one co-perpetrator establishes a place of commission in Switzerland for every co-perpetrator.<sup>53</sup> An instigator acting abroad has committed an offence in Switzerland if the result of the instigation occurred in Switzerland or, in the case of an attempt, the result should have occurred in Switzerland. The concept is the same for persons who aid and abet an offence from abroad and the result occurs in Switzerland. However, the Swiss Federal Supreme Court has put a limit on the reach of Swiss criminal law with regard to persons instigating or aiding and abetting in Switzerland an offence committed abroad: they are not subject to Swiss criminal law based on the territoriality principle (which does not exclude the application of Swiss criminal law to such persons based on so-called extraterritorial bases of jurisdiction).<sup>54</sup> Some scholars criticize this view and argue in favour of expanding the reach of Swiss criminal law so as to at least cover those cases where the principal offence is punishable in the state where it was committed.<sup>55</sup>

Despite this limitation, it can be concluded that the Swiss legislature and courts shaped the territoriality principle in a way that allows for the exercise of jurisdiction over extraterritorial conduct in a rather complete and comprehensive fashion. The legislature did so by opting for a broad localization theory when drafting the jurisdictional rules of the unified Swiss Criminal Code in the late 1930s. When revising the General Part of the Swiss Criminal Code at the turn of the millennium, it did not question the idea of a territoriality principle with extraterritorial reach.<sup>56</sup> The Swiss Federal Supreme Court has also contributed to a broad territoriality principle. Where the provisions defining the territoriality

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conduct and the causality between conduct and result: A. Petrig, ‘Objective Aspects of the Offense in Switzerland’, in U. Sieber et al. (eds.), *National Criminal Law in a Comparative Legal Context: Defining Criminal Conduct*, 2011, p. 255.

48 Hurtado Pozo, *supra* note 34, p. 70, Paras. 201-202.

49 P. Popp & P. Levante, ‘Art. 8’, in M. Niggli & H. Wiprächtiger (eds.), *Basler Kommentar: Strafrecht I*, 2007, p. 231, Para. 7; BGE 105 IV 326, 330 E. 3.g.

50 Popp & Levante, *supra* note 49, p. 232, Para. 8. This limitation is deduced from Art. 8(2) Swiss Criminal Code pertaining to attempted crimes, which should *a fortiori* apply to completed offences.

51 Harari & Liniger Gros, *supra* note 42, p. 99, Paras. 55–58; S. Trechsel & H. Vest, ‘Artikel 8 StGB’, in S. Trechsel & M. Pieth (eds.), *Schweizerisches Strafgesetzbuch: Praxiskommentar*, 2013, p. 34, Para. 5.

52 Trechsel & Vest, *supra* note 51, pp. 33-34, Para. 2.

53 Popp & Levante, *supra* note 49, p. 234, Para. 13; Harari & Liniger Gros, *supra* note 42, p. 98, Paras. 48–49.

54 A. Donatsch & B. Tag, *Strafrecht I: Verbrechenslehre*, 2006, p. 51; Harari & Liniger Gros, *supra* note 42, pp. 98-99, Para. 54; both citing BGE 104 IV 77, 86–87 E. 7b.

55 Harari & Liniger Gros, *supra* note 42, pp. 98–99, Para. 54, with references to scholars maintaining this view.

56 However, the Swiss legislature slightly changed the wording of the respective provisions in order to enhance their precision: A. Eicker, ‘Das Schweizerische Internationale Strafrecht vor und nach der Revision des Allgemeinen Teils des Strafgesetzbuches: Zur Interpretation des “engen Bezug” als verstecktes Opportunitätsprinzip’, 2006 *Schweizerische Zeitschrift für Strafrecht* 124, pp. 295–320, pp. 303-304.

principle and the place of commission are scant and fragmentary, for instance regarding the question of when participation in an offence gives rise to a place of commission in Switzerland, it has generally interpreted them in such a way as to provide the territoriality principle with extraterritorial reach.<sup>57</sup> It has thus equipped the territoriality principle with a long arm where black-letter law did not do so explicitly.

Due to the broad localization theory contemplated in Article 8 of the Swiss Criminal Code, by which conduct physically taking place abroad is constructively brought within Swiss territory, the usual division between territorial and extraterritorial jurisdiction is, in many instances, without any substance. In such cases, the line between the two concepts blurs and the exercise of territorial jurisdiction is tantamount to what is commonly referred to as ‘exercising extraterritorial jurisdiction.’<sup>58</sup> When applying Swiss criminal law based on so-called extraterritorial bases of jurisdiction, foreign law, i.e. the law of the place of commission, is taken into account through either the double criminality requirement or the *lex mitior* principle.<sup>59</sup> However, if Swiss penal power is exercised over conduct committed abroad based on the (broadly construed) territoriality principle, there is no room to take foreign law into account. This seems coherent and logical when considering the territoriality principle as an isolated concept: the logic is that Swiss law applies to conduct taking place in Switzerland. However, when looking at the territoriality principle in combination with the broad localization theory under Swiss criminal law, the place of commission in Switzerland is not a natural but a constructed one. The rationale of applying domestic law (and not taking foreign law into account) to conduct taking place domestically may be questioned when the place of commission is in the prosecuting state merely by virtue of a legal fiction. Arguably, the safeguard of considering the law of the real and physical place of commission by means of a double criminality requirement or the *lex mitior* principle should apply in such a case – as it generally does when exercising ‘true’ extraterritorial jurisdiction.

### ***1.2. Far-reaching extraterritorial jurisdiction based on nationality since the 1940s***

States, especially those following the continental legal tradition, generally provide for extensive criminal jurisdiction based on the nationality of the offender.<sup>60</sup> That a state can apply its criminal law to its nationals and prosecute them in domestic courts is hardly contested.<sup>61</sup> From a public international law perspective, the justification is found in the principle of nationality, i.e. the state’s power over its nationals. From a national perspective, it may allow for the prosecution of an alleged offender (and thus avoid potential impunity) while respecting the prohibition on extraditing its own nationals.<sup>62</sup>

Various states, especially those with legal systems rooted in civil law, also provide domestic criminal jurisdiction over offences allegedly committed against its nationals. Whether the nationality of the victim is a sufficient jurisdictional link under international law is a controversial topic of discussion.<sup>63</sup> The passive personality principle is, inter alia, criticized since for the alleged perpetrator, who generally does not know the nationality of the victim, the law by which his conduct will be governed is hardly foreseeable.<sup>64</sup> Yet, the view that the principle is controversial is not universally shared and the principle has gained acceptance over the last few years (at least for particular offences), as evidenced by, inter alia, its adoption by an increasing number of states.<sup>65</sup> It should be noted that a series of international conventions, for

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57 Not only was the provision of the old Swiss Criminal Code on the place of commission silent in this respect, but the current Art. 8 Swiss Criminal Code does not explicitly govern the issue either. Therefore, in the future, courts will continue to play an important role in defining the extraterritorial reach of the territoriality principle under Swiss Criminal Law: Eicker, supra note 56, p. 303.

58 Gilbert, supra note 41, p. 76.

59 On these two principles, see Petrig, supra note 1, pp. 319-321.

60 Council of Europe – European Committee on Crime Problems, supra note 1, p. 448.

61 Ryngaert, supra note 1, p. 89.

62 Ambos, supra note 1, p. 41, Para. 39. Under Swiss law, for example, a Swiss national may not be extradited or surrendered to a foreign state without his consent: see, e.g., Art. 25(1) Swiss Federal Constitution (*Constitution fédérale de la Confédération suisse du 18 avril 1999, RS 101*), and Art. 7 Federal Act on International Mutual Assistance in Criminal Matters (*Loi fédérale du 20 mars 1981 sur l’entraide internationale en matière pénale, RS 351.1*; a translation of this legal act by the Federal Authorities of the Swiss Confederation is available at <[www.admin.ch/ch/e/rs/c351\\_1.html](http://www.admin.ch/ch/e/rs/c351_1.html)> (last visited 25 April 2013)).

63 Ryngaert, supra note 1, p. 92; Ambos, supra note 1, p. 53.

64 Ambos, supra note 1, p. 53, Para. 71, Ryngaert, supra note 1, p. 93.

65 International Law Commission, supra note 2, Para. 15; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, [2002] ICJ Reports, Para. 47; Council of Europe – European Committee on Crime Problems, supra note 1, p. 450.

example in the field of counter-terrorism, even encourage states to establish the passive personality principle for the offences covered by the respective treaty.<sup>66</sup>

Despite the controversy surrounding the passive personality principle, the Swiss legislature included it in the original Swiss Criminal Code of 1937 alongside the active personality principle.<sup>67</sup> The provisions on the active and passive personality principles considerably broadened the geographical scope of application of Swiss criminal law. With the revision of the General Part of the Swiss Criminal Code, which entered into force in 2007, the gist of the active and passive personality principles remained untouched.<sup>68</sup> However, under current law, the two principles are less prominently featured and are both contained in Article 7 of the Swiss Criminal Code – a subsidiary provision going beyond these two principles entitled ‘Other offences committed abroad.’<sup>69</sup> The requirements for Swiss criminal law to apply based on the Swiss nationality of the alleged offender (the active personality principle) or supposed victim (the passive personality principle) have been unified with this new jurisdictional provision and are found in Article 7(1)(a) to (c) of the Swiss Criminal Code.

Article 7(1) of the Swiss Criminal Code stipulating the conditions for triggering the active and passive personality principles does not explicitly state that the alleged offender or supposed victim has to possess Swiss nationality. However, this requirement follows *e contrario* from the introductory sentence of Article 7(2) of the Swiss Criminal Code.<sup>70</sup> It suffices that the alleged offender acquired Swiss nationality after the commission of the offence as long as he is Swiss at the time of the judgment. Whether he possesses other nationalities in addition to Swiss nationality is immaterial.<sup>71</sup> The latter also holds true for the supposed victim,<sup>72</sup> who has to be a Swiss national at the time the offence was committed or the result obtained.<sup>73</sup>

In addition to the nationality requirement, the three conditions set forth in Article 7(1) of the Swiss Criminal Code must all be met in order to apply Swiss criminal law based on the active or passive nationality principle. Firstly, double criminality is required, i.e. the offence must also be punishable in the state where the offence was committed. Thereby, the Swiss judge takes foreign law into account *ex officio* and the suspect does not bear any burden of proof.<sup>74</sup> According to the case law of the Swiss Federal Supreme Court, double criminality does not necessarily require that the foreign and domestic criminal laws be identical. Rather, it suffices that the conduct in question matches the objective<sup>75</sup> and subjective definitional elements of an offence<sup>76</sup> under both laws. Further requirements of criminal liability, for example relating to unlawfulness and culpability or additional prerequisites of criminal liability,<sup>77</sup> need not be taken into account. Also, the consequences of the criminal offence do not have to be the same under both laws – that is, the type of sanction can differ. However, the subject of the sanction has to be

66 Council of Europe – European Committee on Crime Problems, *supra* note 1, p. 450.

67 See Art. 5 old Swiss Criminal Code stipulating the passive personality principle and Art. 6 old Swiss Criminal Code regarding the active personality principle.

68 The requirements under which the active and the passive personality principles apply have been slightly changed. Thus, for instance, under the new jurisdictional provision, the passive personality principle no longer applies to minor offences: P. Popp & P. Levante, ‘Art. 7’, in M. Niggli & H. Wiprächtiger (eds.), *Basler Kommentar: Strafrecht I*, 2007, p. 223.

69 The subsidiary nature of the provision follows from its introductory sentence: ‘Any person who commits a felony or misdemeanour abroad where the requirements of Articles 4, 5 or 6 are not fulfilled is subject to this Code if (...)’: Popp & Levante, *supra* note 68, p. 222, Para. 1.

70 The introductory sentence of Art. 7(2) Swiss Criminal Code stipulates the principle of representation in cases where Switzerland has refused extradition for a reason unrelated to the nature of the offence and the universality principle for particularly serious offences reads: ‘If the person concerned is not Swiss and if the felony or misdemeanour was not committed against a Swiss person (...)’.

71 S. Trechsel & H. Vest, ‘Artikel 7 StGB’, in S. Trechsel & M. Pieth (eds.), *Schweizerisches Strafgesetzbuch: Praxiskommentar*, 2013, p. 31, Para. 9, citing BGE 117 IV 369, 372, E. 3-7.

72 Trechsel & Vest, *supra* note 71, p. 29, Para. 3.

73 Popp & Levante, *supra* note 68, p. 225.

74 Popp & Levante, *supra* note 11, p. 190, Paras. 26 and 29.

75 On the notion of ‘objective definitional elements of an offence’ under Swiss law, see note 47, *supra*.

76 The subjective definitional elements of an offence describe the acting person’s inner attitude towards his conduct and thus relates to the offender’s inner world. Swiss criminal law requires that the alleged offender acts either with intent or negligence: A. Petrig, ‘Subjective Aspects of the Offense in Switzerland’, in U. Sieber et al. (eds.), *National Criminal Law in a Comparative Legal Context: Defining Criminal Conduct*, 2011, p. 453.

77 Under Swiss criminal law, the general requirements of criminal liability are, in a nutshell, the following: human conduct, fulfilment of the objective and subjective definitional elements of the offence, unlawfulness, culpability and (exceptionally) additional prerequisites of criminal liability; see A. Petrig, ‘Concept and Systematization of the Criminal Offense in Switzerland’, in U. Sieber et al. (eds.), *National Criminal Law in a Comparative Legal Context: Defining Criminal Conduct*, 2011, pp. 105-111.

the same under Swiss and foreign law. When deciding on double criminality, it is relevant whether, at the time of the commission of the offence (rather than at the time of the judgment), the conduct was liable to prosecution at the place of commission.<sup>78</sup> Alternatively, Article 7(1) of the Swiss Criminal Code provides that the active or passive personality principle can be applied to an offence that was committed in a place not subject to criminal jurisdiction, such as the high seas.<sup>79</sup> The second criterion to be fulfilled in order to apply Swiss law based on the principle of active or passive nationality is that the alleged offender is voluntarily present in Switzerland; according to some authors, even involuntary presence suffices.<sup>80</sup> Alternatively, the presence of the offender can be obtained through lawful extradition proceedings. However, presence achieved by way of abduction, deception or circumvention of extradition proceedings does not fulfil the presence requirement.<sup>81</sup> Lastly, the crime in question must be an extraditable offence under Swiss law,<sup>82</sup> yet the alleged offender has not been extradited. The reason for non-extradition, such as the absence of an extradition request or because such a request has been rejected – is irrelevant.<sup>83</sup> This third requirement is intended to prevent offenders who commit minor offences abroad from being subjected to Swiss criminal law, i.e. that extraterritorial jurisdiction does not extend to petty crimes.<sup>84</sup>

In sum, the principles of active and passive personality already available under the old Swiss Criminal Code, which entered into force in 1942, have been maintained under the new General Part in force since 2007. However, instead of two separate provisions, the principles are somewhat hidden in a more general provision on extraterritorial jurisdiction. Yet, the requirements which are necessary for Swiss criminal law to apply based on the nationality of the alleged offender or supposed victim remain the same under the new jurisdictional provision. Thus, the broad approach to criminal jurisdiction based on nationality has been recently confirmed.

### ***1.3. A first expansive step in the 1950s: a bolstered protective principle***

In addition to a territoriality principle embracing extraterritorial criminal conduct and the active and passive personality principles, the Swiss Criminal Code of 1937 stipulated the application of Swiss criminal law based on the protective principle. The protective principle allows for the application of municipal criminal law to a set of offences that violate the interests of the respective state. Applying domestic law based on the protective principle is generally justified by every state's right to self-defence.<sup>85</sup> Since offences that violate fundamental state interests are likely to emanate from abroad, taken in conjunction with the presumption that a third state may not have (sufficiently severe) laws in place to prosecute such offences or lack an interest in prosecuting alleged offenders, it is deemed important that the victim state can apply its own criminal law in such instances.<sup>86</sup>

Under public international law, the protective principle as such is a recognized basis for applying domestic criminal law to conduct committed abroad, yet its reach is contested. While doctrine and case law hold that the principle serves to protect 'essential interests of the State', opinions on what they concretely encompass differ and a tendency to stretch the concept can be observed. Thus, some states not only define the protection of national security, the public purse, the security of public services, and diplomatic and consular missions as essential state interests, but interpret the notion broadly so as

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78 Popp & Levante, *supra* note 11, pp. 190-191, Paras. 27-28; P. Popp, *Grundzüge der internationalen Rechtshilfe in Strafsachen*, 2001, pp. 142-143, Paras. 211-212 and pp. 148-153, Paras. 220-228; M. Henzelin, 'Art. 6', in R. Roth & L. Moreillon (eds.), *Commentaire Romand: Code pénal I*, 2009, p. 71, Para. 21.

79 Art. 7(1)(a) Swiss Criminal Code.

80 Henzelin, *supra* note 78, p. 72, Para. 24.

81 Art. 7(1)(b) Swiss Criminal Code.

82 The notion of 'extraditable offences' is defined in Art. 35 Federal Act on International Mutual Assistance in Criminal Matters.

83 Art. 7(1)(c) Swiss Criminal Code; Dispatch on amending the Swiss Criminal Code (general provisions, entry into force and implementation) and the Military Criminal Code and a federal law governing the criminal status of minors (*Message concernant la modification du code pénal suisse (dispositions générales, entrée en vigueur et application du code pénal) et du code pénal militaire ainsi qu'une loi fédérale régissant la condition pénale des mineurs du 21 septembre 1998, FF 1998 1787*), pp. 1804-1805; M. Henzelin, 'Art. 7', in R. Roth & L. Moreillon (eds.), *Commentaire Romand: Code pénal I*, 2009, p. 81, Para. 11.

84 FF 1998 1787, *supra* note 83, p. 1804.

85 Hurtado Pozo, *supra* note 34, pp. 76-77, Para. 220.

86 M. Harari & M. Liniger Gros, 'Art. 4', in R. Roth & L. Moreillon (eds.), *Commentaire Romand: Code pénal I*, 2009, p. 49, Para. 8.

to include environmental and industrial interests, the protection of their capital markets, or national aviation or shipping.<sup>87</sup>

The definition of which state interests qualify as ‘essential’ is not only relative but bears the impression of the respective *Zeitgeist*. The Swiss legislature first defined these interests when adopting the state security provisions of the Swiss Criminal Code of 1937, which are amenable to the protective principle. Some years later, these state security provisions were deemed insufficient in light of growing right and left-wing extremism in a Europe that was standing on the doorstep of war and were therefore bolstered by way of emergency legislation.<sup>88</sup> Following World War II, the Swiss Criminal Code’s provisions on state security were revised. This was considered necessary in order to recast the emergency legislation as ordinary and democratically legitimized criminal provisions and to adapt them to the transformed risk matrix of the new political order,<sup>89</sup> most notably to be prepared for risks emanating from communist movements and states.<sup>90</sup> These new or bolstered state security provisions of the Swiss Criminal Code were all subjected to the protective principle, which thereby gained importance.<sup>91</sup>

The current wording of the provision establishing the protective principle stipulates that persons who commit an offence listed in Title 13 of the Swiss Criminal Code<sup>92</sup> – entitled ‘Felonies and Misdemeanours against the State and National Security’ – are subject to the Swiss Criminal Code. Swiss criminal law thus applies to a limited number of extraterritorially committed offences which potentially endanger the state’s existence, national security or other vital state interests.<sup>93</sup> The offences triggering the protective principle include high treason,<sup>94</sup> attacks on the independence of the Confederation,<sup>95</sup> diplomatic treason,<sup>96</sup> the moving of national boundary markers,<sup>97</sup> political and military espionage,<sup>98</sup> attacks on the constitutional order<sup>99</sup> or unlawful association.<sup>100</sup> The catalogue of offences mentioned in the provision is exhaustive. Thus, the protective principle set forth in Article 4(1) of the Swiss Criminal Code cannot be applied to any other criminal conduct. However, various provisions of secondary Swiss criminal law<sup>101</sup> also foresee the protective principle.<sup>102</sup> Despite the expansion of the protective principle in the 1950s by subjecting new and bolstered state security provisions to it, Switzerland still pursues a rather narrow and conservative approach to ‘essential State interests.’ An exception may be observed in the provision on industrial espionage, which is amenable to the protective principle,<sup>103</sup> where it is questionable whether such conduct endangers Switzerland’s independence or national security.

#### 1.4. Extension of domestic jurisdiction driven by international law in the 1980s

In the 1980s, the legislature added a provision to the Swiss Criminal Code allowing for its application to offences that Switzerland is, by virtue of an international agreement, obliged to prosecute if it does not extradite the alleged offender.<sup>104</sup> Thereby, Switzerland exercises jurisdiction in representation, i.e. it prosecutes offences committed abroad under Swiss criminal law instead or on behalf of third states having a closer link to the offence.<sup>105</sup>

87 Council of Europe – European Committee on Crime Problems, *supra* note 1, pp. 451-452.

88 FF 1949 I 1233, *supra* note 20, p. 1238.

89 FF 1949 I 1233, *supra* note 20, p. 1233.

90 FF 1949 I 1233, *supra* note 20, pp. 1238-1239.

91 FF 1949 I 1233, *supra* note 20, p. 1242.

92 Arts. 265-278 Swiss Criminal Code.

93 Hurtado Pozo, *supra* note 34, p. 76, Para. 219 and p. 77, Para. 221.

94 Art. 265 Swiss Criminal Code.

95 Art. 266 Swiss Criminal Code.

96 Art. 267 Swiss Criminal Code.

97 Art. 268 Swiss Criminal Code.

98 Arts. 272-274 Swiss Criminal Code.

99 Art. 275 Swiss Criminal Code.

100 Art. 275<sup>ter</sup> Swiss Criminal Code.

101 See, e.g., Art. 33(4) Federal Law on War Material (*Loi fédérale du 13 décembre 1996 sur le matériel de guerre, RS 514.51*).

102 P. Popp & P. Levante, ‘Art. 4’, in M. Niggli & H. Wiprächtiger (eds.), *Basler Kommentar: Strafrecht I*, 2007, p. 207, Para. 1.

103 Art. 273 Swiss Criminal Code read together with Art. 4 Swiss Criminal Code.

104 Art. 6<sup>bis</sup> old Swiss Criminal Code.

105 P. Popp & P. Levante, ‘Art. 6’, in M. Niggli & H. Wiprächtiger (eds.), *Basler Kommentar: Strafrecht I*, 2007, pp. 215-216, Para. 1; some authors consider the application of Swiss criminal law based on this provision to constitute an exercise of universal jurisdiction: see, e.g., Eicker, *supra* note 56, pp. 301-302 (regarding Art. 6<sup>bis</sup> old Swiss Criminal Code) and pp. 310-311 (regarding Art. 6 Swiss Criminal Code).

Public international law undeniably has the function of limiting the jurisdiction of states.<sup>106</sup> However, it can also be the driving force behind an expansion of domestic criminal jurisdiction, as is the case here.<sup>107</sup> Concretely, it was Switzerland's ratification of the European Convention on the Suppression of Terrorism of 1977<sup>108</sup> that resulted in a general jurisdictional provision stipulating the principle of representation for offences where Switzerland is obliged under an international agreement to either prosecute or extradite the alleged offender. The four jurisdictional bases contained in the Swiss Criminal Code at that time – the principles of territoriality, active and passive nationality and the protective principle – would not have always provided Switzerland with jurisdiction over persons suspected of having engaged in conduct qualifying as an offence for which international law stipulates a duty to extradite or prosecute.<sup>109</sup> Therefore, in order to be able to ratify this and other conventions on transnational criminal law containing an *aut dedere aut iudicare* clause and to live up to the obligation to prosecute an alleged offender if Switzerland decides not to extradite him or her, this new general jurisdictional provision was included in the Swiss Criminal Code in the early 1980s.<sup>110</sup> The provision, with some minor modifications to its wording,<sup>111</sup> was carried over to the new General Part of the Swiss Criminal Code.<sup>112</sup>

According to Article 6 of the Swiss Criminal Code, four criteria must be met in order to apply Swiss criminal law to offences for which a duty to extradite or prosecute exists. Firstly, the offence must have been committed abroad. Secondly, Switzerland has an obligation under an international agreement to prosecute this type of offence. Various international treaties, namely in the field of human rights,<sup>113</sup> health,<sup>114</sup> transportation<sup>115</sup> and terrorism,<sup>116</sup> contain such an obligation. Thirdly, since Switzerland is acting on behalf of a third state having a closer link to the offence, the provision requires that the offence is also punishable at the place of commission (double criminality)<sup>117</sup> or, alternatively, that the place of commission is not subject to any penal power, such as the high seas.<sup>118</sup> Lastly, the offender has to be (voluntarily)<sup>119</sup> present in Switzerland and has not been extradited. Whether extradition has priority over prosecution or *vice versa*, or whether Switzerland can only prosecute after an extradition request from the competent third state has been filed and rejected, can only be answered by considering a specific international agreement.<sup>120</sup>

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106 International Law Commission, *supra* note 2; see also, e.g., Ryngaert, *supra* note 1, Chapter 2 on 'Public International Law Approaches to Jurisdiction', and M. Stigall, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law', 2012 *Hastings International and Comparative Law Review* 35, no. 2, Section V entitled 'Limitations on Extraterritorial Jurisdiction in International Law'.

107 See also Section 3.1, *infra*, on international law pushing for long-arm jurisdiction.

108 1977 European Convention on the Suppression of Terrorism, *European Treaty Series* No. 090 (*Convention européenne du 27 janvier 1977 pour la répression du terrorisme*, RS 0.353.3).

109 Switzerland had ratified other international agreements containing an *aut dedere aut iudicare* clause before it became a party to the European Convention on the Suppression of Terrorism of 1977. However, unlike the European Convention on the Suppression of Terrorism of 1977, which merely obliges State Parties to extradite alleged terrorists or to establish jurisdiction over so-called terrorist offences (Art. 6), these other agreements require State Parties to criminalize specific conduct under domestic law. For each offence adopted under Swiss criminal law in implementation of such an international agreement, the Swiss legislature defined its extraterritorial reach in the respective offence description, i.e. the scope of criminal jurisdiction was defined with respect to the specific offence of terrorism only and not by means of a general jurisdictional rule: Popp & Levante, *supra* note 105, p. 216.

110 FF 1982 II 1, *supra* note 22, p. 6.

111 For an overview of the changes, see Eicker, *supra* note 56, pp. 310-311. Thus, for instance, the requirement that 'the act is also liable to prosecution at the place of commission' (double criminality) has been complemented by the alternative that 'no criminal law jurisdiction applies at the place of commission', such as on the high seas.

112 Art. 6 Swiss Criminal Code.

113 E.g. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 *United Nations Treaty Series* p. 85 (*Convention du 10 décembre 1984 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, RS 0.105).

114 E.g. 1971 Convention on Psychotropic Substances, 1019 *United Nations Treaty Series* p. 175 (*Convention du 21 février 1971 sur les substances psychotropes*, RS 0.812.121.02).

115 E.g. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 *United Nations Treaty Series* p. 177 (*Convention du 23 septembre 1971 pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile*, RS 0.748.710.3).

116 E.g. 1999 International Convention for the Suppression of the Financing of Terrorism, 2178 *United Nations Treaty Series* p. 197 (*Convention internationale du 9 décembre 1999 pour la répression du financement du terrorisme*, RS 0.353.22).

117 On the double criminality requirement under Swiss Criminal Law, see Section 3, *supra*.

118 Popp & Levante, *supra* note 105, pp. 216-218, Paras. 2-7.

119 Not requiring voluntariness: Henzelin, *supra* note 78, p. 72, Para. 24.

120 Popp & Levante, *supra* note 105, p. 218, Para. 8; Henzelin, *supra* note 78, p. 74, Paras. 31-32.

### 1.5. *The new Swiss Criminal Code of 2007: a door opener in terms of jurisdiction*

It was the new General Part of the Swiss Criminal Code, which entered into force in 2007, that gave considerable impetus to the extraterritorial reach of Swiss penal power. No less than three bases of extraterritorial jurisdiction previously unknown to Swiss law were introduced in the amended code. The least contested jurisdictional ground is the one allowing for the application of Swiss law to cases where Switzerland has refused a request for extradition for a reason unrelated to the nature of the offence, which is based on the principle of representation.<sup>121</sup> More controversial, and only introduced in the new General Part of the Swiss Criminal Code during the parliamentary debates and thus in the final stages of the Swiss legislative process,<sup>122</sup> is the jurisdictional basis allowing for the application of Swiss law to offences qualifying as a ‘particularly serious felony that is proscribed by the international community’.<sup>123</sup> However, the most hotly contested jurisdictional basis added to the Swiss Criminal Code is the provision allowing for the application of Swiss criminal law to a set of offences committed against minors abroad, a provision that requires neither double criminality nor the residence of the alleged offender in Switzerland.<sup>124</sup> This absolute universality principle gave new momentum to the discussion on the minimum link required between a criminal case and the prosecuting state.

#### 1.5.1. *A jurisdictional expansion to foster respect for bars to extradition*

Article 7(2)(a) of the Swiss Criminal Code provides for the application of Swiss criminal law to cases where Switzerland has refused a request for extradition for a reason unrelated to the nature of the offence. This provision aims at reconciling two competing interests. On the one hand, Switzerland is obliged to respect certain bars to extradition, which, *inter alia*, protect the individual rights of the alleged offender.<sup>125</sup> On the other hand, Switzerland has an interest in extraditing individuals suspected of having engaged in criminal conduct so as not to grant a safe haven and foster impunity. In the past, this tension has provoked some disrespect for the mandatory grounds for refusing an extradition request.<sup>126</sup> Providing Swiss criminal jurisdiction in such cases is understood as a way out of this dilemma and a means to realize both interests.

The application of Swiss criminal law based on this jurisdictional ground is only possible if neither the alleged offender nor the supposed victim is a Swiss national.<sup>127</sup> Furthermore, the offence must also be liable to prosecution at the place of commission or the place of commission is not subject to criminal law jurisdiction. In addition, the alleged offender must be in Switzerland and extradition is permitted for the offence under Swiss law but the alleged offender is not being extradited.<sup>128</sup> However, Swiss criminal law does not apply if an extradition request was refused because of the nature of the offence, notably offences of a political, military or fiscal nature.<sup>129</sup> In cases where the extradition request was denied for any reason other than the nature of the offence, the representation principle contained in Article 7(2)(a) of the Swiss Criminal Code is applicable, provided the other criteria are met.<sup>130</sup> Under Swiss law,<sup>131</sup> an extradition request shall not be granted, for example, if foreign proceedings would not meet the requirements of the European Convention on Human Rights<sup>132</sup> or the International Covenant on Civil and Political Rights.<sup>133</sup>

121 Art. 7(2)(a) Swiss Criminal Code.

122 Popp & Levante, *supra* note 68, pp. 226-227, Para. 16.

123 Art. 7(2)(b) Swiss Criminal Code; wording of the translation of the Swiss Criminal Code by the Federal Authorities of the Swiss Confederation, see note 5, *supra*.

124 Art. 5 Swiss Criminal Code.

125 An important bar to extradition flowing from human rights law and international refugee law is the principle of non-refoulement. Under Swiss law, the prohibition of refoulement is expressed in, *inter alia*, Art. 2(a)-(b) of the Federal Act on International Mutual Assistance in Criminal Matters.

126 Popp & Levante, *supra* note 68, p. 223, Para. 6.

127 Introductory words of Art. 7(2) Swiss Criminal Code.

128 Art. 7(1)(a)-(c) Swiss Criminal Code read together with Art. 7(2) Swiss Criminal Code.

129 Art. 7(2)(a) Swiss Criminal Code; see, e.g., Art. 3 Federal Act on International Mutual Assistance in Criminal Matters; FF 1998 1787, *supra* note 83, p. 1805.

130 Henzlin, *supra* note 78, p. 82, Para. 17.

131 See, e.g., Art. 2(a) Federal Act on International Mutual Assistance in Criminal Matters.

132 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 *United Nations Treaty Series* p. 222 (*Convention du 4 novembre 1950 de sauvegarde des droits de l'homme et des libertés fondamentales*, RS 0.101).

133 1966 International Covenant on Civil and Political Rights, 999 *United Nations Treaty Series* p. 171 (*Pacte international du 16 décembre 1966 relatif aux droits civils et politiques*, RS 0.103.2).

*1.5.2. A fairly well-established idea: universal jurisdiction over particularly serious offences*

Since the new General Part of the Swiss Criminal Code entered into force in 2007, Swiss criminal law is applicable to offences qualifying as a ‘particularly serious felony that is proscribed by the international community’<sup>134</sup> if certain other criteria are met. First of all, neither the offender nor the victim is a Swiss national.<sup>135</sup> Furthermore, the person subject to prosecution must be present in Switzerland.<sup>136</sup> In addition, the offence must be an extraditable offence under Swiss law but the alleged offender is not actually extradited<sup>137</sup> and the offence in question must also be liable to punishment at the place of commission.<sup>138</sup>

Unlike other jurisdictional principles operating on the basis of a link between the offence and the prosecuting state, the universality principle does not require such a connection. Rather, it is said to apply solely based on the nature of the offence, i.e. it is the nature of the act which in itself confers jurisdiction on a state.<sup>139</sup> According to international law, offences amenable to the universality principle are those of particular seriousness, most notably offences comprised in the category of ‘international core crimes’, such as certain violations of international humanitarian law and acts of torture.<sup>140</sup> Despite this delimitation, there remains some ambiguity regarding the offences that meet this seriousness threshold. The same holds true for Article 7(2)(b) of the Swiss Criminal Code requiring the offence to be a ‘particularly serious felony that is proscribed by the international community’. Identifying the offences that fall within the ambit of this provision of Swiss criminal law is quite a controversial topic in both doctrine and politics.<sup>141</sup> Authors following a normative approach maintain that the provision applies to crimes recognized under international customary law and constituting *ius cogens*, such as genocide, crimes against humanity or the crime of aggression. Others follow a functional approach, according to which a particularly grave offence outlawed by the international community can only be one prohibited or criminalized by an international instrument, such as a statute of an international tribunal. Either way, the criterion remains vague and has been criticized as such.<sup>142</sup>

*1.5.3. A controversial idea: universal jurisdiction for offences against minors abroad*

Most criticism and scepticism surrounding the universality principle stems from Article 5 of the Swiss Criminal Code, which subjects a set of offences committed against minors abroad to an absolute universality principle. The principle applies to the offences of trafficking in human beings,<sup>143</sup> indecent assault,<sup>144</sup> rape,<sup>145</sup> sexual acts with a person incapable of proper judgment or resistance<sup>146</sup> or encouraging prostitution<sup>147</sup> if the victim of each of these offences was under 18 years of age. Further, the offences of sexual acts with children<sup>148</sup> if the victim was younger than 14 years and aggravated pornography<sup>149</sup> if the articles or representations depict sexual acts with children are amenable to the universality principle as stipulated in Article 5 of the Swiss Criminal Code.<sup>150</sup> From this catalogue of offences it follows that the

134 Art. 7(2)(b) Swiss Criminal Code; wording of the translation of the Swiss Criminal Code by the Federal Authorities of the Swiss Confederation, see note 5, supra.

135 Introductory words of Art. 7(2) Swiss Criminal Code. The provision requires that the alleged offender does not possess Swiss nationality at the time of judgment; the nationality at the time of the commission of the crime is immaterial; the victim must be a non-Swiss national either at the time of the commission of the offence or the moment when the criminal result occurs: Popp & Levante, supra note 68, p. 225, Paras. 12-13; BGE 117 IV 369, 372, E. 3-7.

136 Art. 7(2) Swiss Criminal Code read together with Art. 7(1)(b) Swiss Criminal Code; Popp & Levante, supra note 68, p. 225, Para. 11. On the presence requirement according to Art. 7(1)(b) Swiss Criminal Code, see Section 1.2, supra.

137 Art. 7(2) Swiss Criminal Code read together with Art. 7(1)(c) Swiss Criminal Code; Popp & Levante, supra note 68, p. 225, Para. 11.

138 Art. 7(2) Swiss Criminal Code read together with Art. 7(1)(a) Swiss Criminal Code; alternatively, the requirement is also fulfilled if the place of commission is not subject to criminal jurisdiction; Popp & Levante, supra note 68, p. 225, Para. 11; Trechsel & Vest, supra note 71, p. 33, Para. 14, criticize the fact that double criminality is required for the exercise of the universality principle for particularly serious offences.

139 Ryngaert, supra note 1, pp. 100-101.

140 Henzelin, supra note 83, pp. 82-83, Para. 20; Ryngaert, supra note 1, pp. 110-115.

141 Henzelin, supra note 83, pp. 82-83, Para. 20.

142 Popp & Levante, supra note 68, pp. 226-227, Paras. 16-17; Henzelin, supra note 83, pp. 83-84, Paras. 22-29.

143 Art. 182 Swiss Criminal Code.

144 Art. 189 Swiss Criminal Code.

145 Art. 190 Swiss Criminal Code.

146 Art. 191 Swiss Criminal Code.

147 Art. 195 Swiss Criminal Code.

148 Art. 187 Swiss Criminal Code.

149 Art. 197(3) Swiss Criminal Code.

150 Art. 5(1)(a)-(c) Swiss Criminal Code.

provision aims to better protect children from sexual and commercial exploitation. This jurisdictional basis was introduced when the General Part of the Swiss Criminal Code was revised, mainly due to four parliamentary requests requiring relevant legislative action.<sup>151</sup> A corresponding provision did not exist under the old Swiss Criminal Code and may also be exceptional from a comparative law perspective.

Under Article 5(1) of the Swiss Criminal Code, the exercise of jurisdiction based on this provision is subject to four requirements. First of all, the place of commission has to be outside Switzerland, which is only the case if the conduct was carried out abroad and the result occurred abroad.<sup>152</sup> Secondly, the offender has to be voluntarily present in Switzerland, although temporary presence is sufficient, i.e. for tourism purposes or while in transit. It was only during the parliamentary debate that the required connection between the alleged offender and Switzerland was lowered. Instead of the more demanding criterion of residence or domicile in Switzerland, as was proposed in the draft law, Parliament deemed it sufficient to require the simple presence of the suspect in Switzerland.<sup>153</sup> Thirdly, it is required that the offender is not extradited. Finally, universal jurisdiction is only provided over the above-mentioned offences, which are exhaustively listed in Article 5(1) of the Swiss Criminal Code.<sup>154</sup>

It follows from these applicability criteria that the exercise of the universality principle over specific offences committed against minors abroad is of an absolute and unrestricted nature. Those arguing that the reach of Swiss penal power under this norm is too far-reaching also label it the 'extreme universality principle'.<sup>155</sup> Most criticism is engendered by the fact that Article 5 of the Swiss Criminal Code does not require that the offence in question is also criminalized at the place of commission (double criminality).<sup>156</sup> Furthermore, the catalogue of offences contained in Article 5 of the Swiss Criminal Code is criticized for being a somewhat random selection of crimes. For instance, the provision does not incorporate attacks against life and limb, which are crimes against minors of similar gravity to those amenable to universal jurisdiction by virtue of Article 5 of the Swiss Criminal Code.<sup>157</sup>

### 1.6. Expanding jurisdiction for the specific crime of female genital mutilation in 2012

As a general rule, civil law countries define the geographical scope of their domestic criminal law in general jurisdictional provisions, while common law countries rather equip specific offences with extraterritorial reach.<sup>158</sup> Yet, exceptions to this rule exist and Switzerland recently followed the latter legislative technique in order to provide extraterritorial jurisdiction over the offence of female genital mutilation. Next to defining the offence, the legislature adopted a jurisdictional rule stipulating that '[a]ny person who has committed the offence abroad but is now in Switzerland and is not extradited shall be liable to the foregoing penalties'.<sup>159</sup>

From this wording, it follows that – similar to Article 5 of the Swiss Criminal Code governing jurisdiction with regard to specific offences against minors abroad – an absolute and unrestricted universality principle has been introduced.<sup>160</sup> The prosecution of female genital mutilation cases in Switzerland is thus possible without the crime featuring any connection with Switzerland, except for the presence of the offender, who has not been extradited. The presence requirement is already fulfilled if the alleged offender is in Switzerland for transit or for a very short amount of time. It is thus not required that

151 FF 1998 1787, supra note 83, pp. 1800-1801.

152 E contrario Art. 8(1) Swiss Criminal Code.

153 FF 1998 1787, supra note 83, p. 1802.

154 P. Popp & P. Levante, 'Art. 5', in M. Niggli & H. Wiprächtiger (eds.), *Basler Kommentar: Strafrecht I*, 2007, p. 210, Para. 2 and p. 212, Paras. 5-8.

155 Popp & Levante, supra note 154, p. 210, Para. 2.

156 See, e.g., S. Gless, *Internationales Strafrecht: Grundriss für Studium und Praxis*, 2011, pp. 62-65; and Eicker, supra note 56, pp. 312-314, summarizing the view of various scholars on Art. 5 Swiss Criminal Code and the dispensation with the double criminality requirement.

157 U. Cassani & R. Roth, 'Le juge suisse au service de la "communauté des peuples"?' in A. Donatsch & et al. (eds.), *Festschrift für Stefan Trechsel zum 65. Geburtstag*, 2002, p. 459.

158 Ryngaert, supra note 1, pp. 86-87.

159 Art. 124(1) Swiss Criminal Code defines the offence of female genital mutilation, and Art. 124(2) Swiss Criminal Code stipulates the (extraterritorial) reach of the offence.

160 Parliamentary initiative to explicitly suppress genital mutilation committed in Switzerland and abroad by anyone in Switzerland, Report of the Committee on Legal Affairs National Council, Federal Council opinion (*Initiative parlementaire: réprimer explicitement les mutilations sexuelles commises en Suisse et commises à l'étranger par quiconque se trouve en Suisse, Rapport du 30 avril 2010 de la Commission des affaires juridiques Conseil national, Avis du Conseil fédéral du 25 août 2010, FF 2010 5151*), p. 5154.

the suspect has his abode or residence in Switzerland.<sup>161</sup> Swiss law is applicable to cases of female genital mutilation committed abroad whether or not the respective conduct is liable to punishment at the place of commission, i.e. no double criminality is required.<sup>162</sup>

The jurisdictional rule of Article 124(2) of the Swiss Criminal Code extends to all forms of participation in the offences wherever they took place. Thus, for instance, it also covers the usual *modus operandi* where female genital mutilation takes place in the home country of migrants living in Switzerland, but parents or relatives of the supposed victim organize it from Switzerland or assist in the commission of the offence abroad. If such conduct qualifies as aiding and abetting or instigation, prosecution is possible in Switzerland.<sup>163</sup>

In the *travaux préparatoires* this very expansive approach to criminal jurisdiction is mainly explained by a reference to Article 5 of the Swiss Criminal Code stipulating an absolute universality principle for specific offences committed against minors abroad: Not only is female genital mutilation comparable in terms of severity to the offences listed in the provision but the main victim group is also comprised of minors. A self-standing argument for adopting an absolute and unrestricted universality principle and, more specifically, to dispose of the double criminality requirement is that female genital mutilation is punishable under many foreign penal laws and thus, in many cases, the double criminality requirement would not make any difference.<sup>164</sup>

## 2. Tempering the effects of applying Swiss criminal law to extraterritorial conduct

### 2.1. Taking foreign law into account

The Swiss legislature has considerably expanded Swiss criminal jurisdiction since the adoption of the Swiss Criminal Code in 1937. The assertion or the exercise of domestic criminal jurisdiction over offences taking place abroad – whether based on the broadly construed territoriality principle or in application of the provisions providing for extraterritorial jurisdiction – may cause tensions between states if jurisdictional claims are perceived as excessive or as lacking legitimacy.<sup>165</sup> Moreover, conflicts of jurisdiction resulting from the unilateral extension of the reach of domestic criminal law by various states concurrently may be prejudicial to acting individuals and compromise legal certainty, notably the possibility to foresee the applicable law and to align conduct respectively.<sup>166</sup> What is more, from the perspective of an alleged offender, the application of a law, which potentially differs from the law of the place of commission, may raise concerns with regard to the principle of legality.<sup>167</sup> In order to – at least partially – accommodate these concerns, some jurisdictional provisions of the Swiss Criminal Code require that foreign law be taken into account to some extent by virtue of the double criminality requirement and the *lex mitior* principle.

Thus, some bases of extraterritorial jurisdiction of the Swiss Criminal Code are only available if the conduct in question is also liable to punishment at the place of commission, i.e. they require double criminality.<sup>168</sup> This holds true for the active and passive personality principles,<sup>169</sup> the representation

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161 FF 2010 5151, supra note 160, p. 5154; the parliamentary initiative, which requested the inclusion of a provision on female genital mutilation in the Swiss Criminal Code, set a higher threshold for the application of Swiss law: as opposed to the current wording, it made the exercise of Swiss criminal jurisdiction dependent on the alleged offender having his abode in Switzerland.

162 FF 2010 5151, supra note 160, p. 5154; D. Jositsch & A. Murer Mikolásek, 'Der Straftatbestand der weiblichen Genitalverstümmelung', 2011 *Aktuelle Juristische Praxis*, no. 10, p. 1290.

163 Jositsch & Murer Mikolásek, supra note 162, p. 1290. As currently interpreted, the territoriality principle does not apply to persons instigating or aiding and abetting an offence committed abroad in or from Switzerland, the result of which occurs abroad: see Section 1.1, supra. What is more, the active and passive personality principles are often not applicable. Art. 124 Swiss Criminal Code fills this jurisdictional gap.

164 FF 2010 5151, supra note 160, p. 5154.

165 International Law Commission, supra note 2, Para. 28, elaborating on how states oppose excessive assertions of jurisdiction.

166 Ryngaert, supra note 1, p. 157; A. Biehler et al., *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, 2003, p. 7; International Chamber of Commerce, supra note 12, p. 1.

167 Petrig, supra note 1, p. 319.

168 Since double criminality is one of several requirements that must be fulfilled in order to trigger the application of a jurisdictional basis as such, it is discussed in relation to the threshold of application of Arts. 3-7 Swiss Criminal Code.

169 Art. 7(1)(a) Swiss Criminal Code.

principle for offences that Switzerland is obliged to prosecute by virtue of an international agreement<sup>170</sup> and in cases where Switzerland does not extradite for a reason unrelated to the nature of the offence,<sup>171</sup> and – even though criticized by some scholars<sup>172</sup> – for the universality principle for particularly serious offences proscribed by the international community.<sup>173</sup> Meanwhile, the legislature was not ready to introduce this limiting criterion for the universality principle provided over specific offences committed against minors abroad and female genital mutilation. Also, as already stressed, it is irrelevant whether the conduct was liable to punishment at the place of commission when Swiss criminal law is applied based on the territoriality principle – despite the fact that extraterritorial conduct potentially comes within its reach due to the broad localization theory laid down in Article 8 of the Swiss Criminal Code.<sup>174</sup> Furthermore, since foreign law would in most cases fail to sufficiently protect the fundamental interests of Switzerland, the protective principle does not contain a double criminality requirement.<sup>175</sup>

Another tempering measure is the principle of *lex mitior*, which obliges foreign law to be taken into account when actually exercising Swiss criminal jurisdiction over extraterritorial conduct. According to this principle, an offender subject to Swiss criminal law cannot be punished more severely for an offence committed abroad than he would be under the law of the place of commission.<sup>176</sup> Thereby, the Swiss judge does not apply foreign criminal norms as such. Rather, when deciding on the sentence according to Swiss criminal law, he is obliged to exercise his discretion by observing what may be a more lenient punishment under foreign criminal law. The sentence, which would be imposed under the law of the place of commission, constitutes the maximum sentence that he can pronounce.<sup>177</sup> When determining the sentence under foreign criminal law, the judge cannot simply refer to the abstract penalty stipulated in the foreign norm. Rather, he is obliged to ascertain the concrete liability of the offender in the case at hand. By comparing the penalty under foreign and Swiss criminal law, its overall effect must be taken into account, i.e. including the modalities of the penalty, such as a suspended versus an unsuspended sentence, and enforcement considerations, such as house arrest versus confinement in a penitentiary. The rationale of the *lex mitior* principle is thus to ensure that the offender is not treated differently from someone standing trial for the same conduct at the place of commission.<sup>178</sup> Yet the principle does not apply with respect to all jurisdictional bases. The *lex mitior* principle takes effect when Swiss criminal law is applied based on the active and passive personality principles,<sup>179</sup> the representation principle for offences that Switzerland is obliged to prosecute by virtue of an international agreement<sup>180</sup> and in cases where Switzerland does not extradite for a reason unrelated to the nature of the offence,<sup>181</sup> and the universality principle for particularly serious offences proscribed by the international community.<sup>182</sup> However, in cases where the Swiss judge exercises jurisdiction based on the territoriality principle, the protective principle or the universality principle for specific offences committed against minors abroad and female genital mutilation, the penalty is fixed without taking into account a possibly more lenient foreign law. The reasons for not applying the *lex mitior* principle are basically the same as for not including double criminality as a requirement for triggering the application of a specific jurisdictional basis.<sup>183</sup>

## 2.2. Taking foreign judgments into account

Since every state can define its penal power autonomously within the limits of public international law, several states may subject the same offence to their domestic criminal law and jurisdiction. Hence, it is

170 Art. 6(1)(a) Swiss Criminal Code.

171 Arts. 7(1) and (2)(a) Swiss Criminal Code.

172 See Section 1.5.2, supra.

173 Art. 7(1) and (2)(b) Swiss Criminal Code.

174 See Section 1.1, supra.

175 Petrig, supra note 1, p. 332.

176 Petrig, supra note 1, p. 320.

177 Hurtado Pozo, supra note 34, p. 66, Para. 191; Popp & Levante, supra note 11, pp. 192-193, Paras. 30-31.

178 Popp & Levante, supra note 11, pp. 192-193, Paras. 30-31.

179 Art. 7(3) Swiss Criminal Code.

180 Art. 6(2) Swiss Criminal Code.

181 Art. 7(3) Swiss Criminal Code.

182 Art. 7(3) Swiss Criminal Code.

183 Popp & Levante, supra note 11, p. 192, Para. 30.

possible that, according to the Swiss rules on the geographical scope of application, Swiss criminal law is applicable to conduct potentially subject to foreign investigation and prosecution or which has already been judged in foreign criminal proceedings. Thus, an offender could potentially be tried and punished by several states for the same conduct – the risk of double jeopardy is real. Therefore, Swiss criminal law takes foreign judgments into account to some extent. Three principles govern situations where a foreign criminal judgment has already been issued.<sup>184</sup>

The first is the principle of extinction,<sup>185</sup> according to which Switzerland does not prosecute an offender for a specific offence if he has been acquitted by a final judgment abroad or if the sentence has been enforced, waived or is barred by a statute of limitations with regard to that offence. Thus, the principle of extinction, which not only bars double punishment but also double prosecution, is an application of the *ne bis in idem* principle.<sup>186</sup> However, prosecution in Switzerland remains possible despite a foreign acquittal or an enforced, waived or prescribed sentence if the foreign proceeding contradicted the Swiss *ordre public*, i.e. if it violated fundamental principles of the Swiss Federal Constitution or the European Convention on Human Rights. It is rather unclear what this criterion, which was only introduced during the parliamentary debate and thus in the very final phase of the legislative process, encompasses.<sup>187</sup> The principle of extinction applies to all bases of jurisdiction foreseen in the Swiss Criminal Code,<sup>188</sup> except when the suspect is tried based on the protective principle. However, if the alleged offender is prosecuted in Switzerland based on the territoriality principle, the principle of extinction only applies if the person has been prosecuted abroad ‘at the request of the Swiss authorities’.<sup>189</sup>

Secondly, the principle of imputation obliges the Swiss judge to take into account a sentence served abroad. This tempers the consequences of double jeopardy, i.e. that the offender is tried again on the same facts in another state. In concrete terms, the judge has to subtract a fully or partially enforced foreign sentence from the sentence he pronounces for the same conduct.<sup>190</sup> The principle thus reflects the idea of *ne bis poena in idem*, i.e. that an offender shall not be punished twice for the same act, and therefore prevents ‘an unfair accumulation of sentences’.<sup>191</sup> The principle of imputation applies to all general bases of jurisdiction stipulated in Articles 3 to 7 of the Swiss Criminal Code without any exception and to the universality principle provided over the offence of female genital mutilation.<sup>192</sup> Yet, it only applies to enforced sentences. Thus, neither an acquittal nor a suspended or prescribed sentence pronounced in a foreign proceeding has to be taken into account by the Swiss judge. The same holds true if the sentence was waived, for example due to a pardon or amnesty. Also, in cases of parole, the remainder of a sentence is not considered. Finally, a monetary penalty can only be counted towards the Swiss sentence if it has been paid.<sup>193</sup> A direct crediting can take place if the foreign and domestic judgments foresee the same type of penalty; however, if the modalities of enforcement are fundamentally different, direct crediting may not be adequate. If the type of penalty varies between the foreign and domestic judgments

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184 Gless, supra note 156, pp. 51 et seq.; Donatsch & Tag, supra note 54, p. 47; Hurtado Pozo, supra note 34, p. 74, Paras. 213-214; M. Harari & M. Liniger Gros, ‘Art. 3’, in R. Roth & L. Moreillon (eds.), *Commentaire Romand: Code pénal I*, 2009, p. 35, Para. 16; S. Trechsel & P. Noll, *Schweizerisches Strafrecht: Allgemeiner Teil I*, 2004, p. 57.

185 The principle is statutorily defined in Arts. 3, 5(2), 6(3) and 7(4) Swiss Criminal Code.

186 Hurtado Pozo, supra note 34, pp. 75-76, Paras. 215-218.

187 Popp & Levante, supra note 11, pp. 197-198, Para. 41; Harari & Liniger Gros, supra note 184, pp. 43-46, Paras. 62-77.

188 Art. 3(3) Swiss Criminal Code (territoriality principle); Art. 7(4) Swiss Criminal Code (active and passive personality principles); Art. 5(3) Swiss Criminal Code (universality principle for offences against minors abroad); Art. 7(4) Swiss Criminal Code (universality principle for particularly serious offences); the Arts. 124(2) and 7(4) Swiss Criminal Code (universality principle for the offence of female genital mutilation); Art. 6(3) Swiss Criminal Code (representation principle for offences prosecuted in terms of an international agreement); and Art. 7(4) Swiss Criminal Code (representation principle for offences where extradition request was rejected).

189 Art. 3(3) Swiss Criminal Code.

190 The principle is statutorily defined in Arts. 3(2) and 4(2) Swiss Criminal Code; with regard to measures, see Arts. 5(3), 6(4) and 7(5) Swiss Criminal Code.

191 S. Trechsel & H. Vest, ‘Artikel 3 StGB’, in S. Trechsel & M. Pieth (eds.), *Schweizerisches Strafgesetzbuch: Praxiskommentar*, 2013, p. 21, Para. 6, citing BGE 105 IV 225, 227 E. 3; Hurtado Pozo, supra note 34, pp. 74-75, Para. 214.

192 Art. 3(2) Swiss Criminal Code (territoriality principle); Art. 4(2) Swiss Criminal Code (protective principle); Art. 7(5) Swiss Criminal Code (active and passive personality principles); Art. 5(3) Swiss Criminal Code (universality principle for offences against minors abroad); Art. 7(5) Swiss Criminal Code (universality principle for particularly serious offences); Arts. 124(2) and 7(5) Swiss Criminal Code (universality principle for the offence of female genital mutilation); Art. 6(4) Swiss Criminal Code (representation principle for offences prosecuted in terms of an international agreement); and Art. 7(5) Swiss Criminal Code (representation principle for offences where extradition request was rejected).

193 Popp & Levante, supra note 11, pp. 200-201, Paras. 46-47; Harari & Liniger Gros, supra note 184, p. 35, Para. 17 and p. 36, Paras. 19-23.

(e.g. a monetary fine and imprisonment) a conversion has to take place and the judge can exercise some discretion.<sup>194</sup>

Thirdly, according to the principle of enforcement, the (remainder of a) foreign sentence, which has not or has only partially been enforced abroad, is enforced in Switzerland. The person is not subjected to new proceedings in Switzerland. However, the principle only applies if Switzerland claims jurisdiction based on territoriality and only if the person has been prosecuted abroad ‘at the request of the Swiss authorities’.<sup>195</sup> With regard to measures,<sup>196</sup> the Swiss judge has to decide whether it is appropriate to execute a measure of foreign law in Switzerland. Thus, in juxtaposition to sentences, which are automatically enforced in Switzerland, a new proceeding is required.<sup>197</sup> We can thus conclude that the Swiss legislature has not been indifferent to the problems potentially created by the unilateral extension of Swiss criminal law and has tempered its effects by stipulating that foreign law and judgments are taken into account to some extent.

### 3. The expansive approach to criminal jurisdiction in light of international law

The Swiss legislature has clearly followed the global trend of broadening the extraterritorial reach of domestic criminal law. Especially since the 1980s, and with particular resolve in the last decade, it has added jurisdictional bases to the Swiss Criminal Code by virtue of which Swiss criminal law can be applied to conduct taking place abroad. Certain offences – specified crimes against minors and female genital mutilation – have even been subjected to an absolute and unrestricted universality principle. Thus, the idea that a substantiated link between an offence and Switzerland is necessary to warrant domestic prosecution has been abandoned.<sup>198</sup>

We have seen that this unilateral extension of domestic criminal jurisdiction may cause tensions with third states and is not unproblematic for the acting individual in terms of legal certainty and for the alleged offender regarding the prohibition of double prosecution and punishment. Against this background, the jurisdictional rules of the Swiss Criminal Code provide that foreign law and judgments are taken into account to some extent when the Swiss judge applies Swiss criminal law to extraterritorial conduct.<sup>199</sup> However, the effect of these tempering measures is fairly limited since they do not apply in their entirety to all jurisdictional bases. What is more, they do not prevent or solve jurisdictional conflicts but merely temper specific effects that result from applying Swiss law to conduct committed abroad.

This development in Swiss criminal law and the negative impact it potentially has on international relations and for the acting individual and alleged offender begs the question whether such an expansive approach to criminal jurisdiction is permissible under international law – or even encouraged or requested by it.

#### 3.1. International law pushing for long-arm jurisdiction

Various rules of international law are clearly pushing for long-arm criminal jurisdiction, notably in the realm of transnational criminal law and human rights law. Thus, it is a feature of treaties on transnational criminal law<sup>200</sup> to strive for a dense jurisdictional net aimed at avoiding the potential impunity of alleged criminals. Consequently, they encourage and, to some extent, even oblige State Parties to establish criminal jurisdiction over the respective treaty offences even if committed abroad based on different connecting factors, such as the nationality of the alleged offender or the supposed victim.<sup>201</sup>

194 Popp & Levante, supra note 11, p. 201, Para. 47.

195 Art. 3(3) Swiss Criminal Code.

196 On the various measures under Swiss criminal law, see Arts. 56 et seq. Swiss Criminal Code.

197 Harari & Liniger Gros, supra note 184, p. 47, Paras. 78-81.

198 See Section 1, supra.

199 See Section 2, supra.

200 For present purposes, the following definition of ‘transnational criminal law’ is adopted: the ‘body of international treaties dealing with crimes of a transnational character’ (C. Kreß, ‘International Criminal Law’, in Max Planck Encyclopedia of Public International Law, Para. 6, <[www.mpepil.com](http://www.mpepil.com)> (last visited 25 April 2013)); this branch of international criminal law is distinct from the rules defining the prescriptive criminal jurisdiction of states, the law of international cooperation in criminal matters, namely extradition law, and international criminal law stricto sensu establishing individual criminal responsibility directly under international law.

201 To provide just one of many possible examples, the 2000 United Nations Convention on Transnational Organized Crime and the Protocols

In addition to treaties on transnational criminal law, human rights law, which is relevant to the issue of extraterritorial criminal jurisdiction because many transnational criminal offences amount to human rights violations, is a driving force behind the expansion of the geographical scope of domestic criminal law. Even though this body of law primarily aims at protecting the individual from unjustified interferences with his liberties by the state (the obligation to respect), it also imposes a duty on states to protect persons under their jurisdiction from harmful conduct by private persons. This dimension of human rights law namely obliges the legislature to enact (criminal) norms protecting the individual from harmful acts emanating from private persons.<sup>202</sup>

That international law, notably transnational criminal law and human rights law, push for long-arm jurisdiction can be illustrated by the example of the offence of female genital mutilation, which the Swiss legislature recently enclosed in the Swiss Criminal Code and which it equipped with an absolute universality principle. Thus, the Convention on Preventing and Combating Violence against Women and Domestic Violence of the Council of Europe<sup>203</sup> obliges every State Party to establish jurisdiction when the offence is committed on its territory, on board a ship or aircraft flying its flag, by one of its nationals or by a person having his or her habitual residence in its territory.<sup>204</sup> Based on the principle of representation, State Parties are also obliged to establish jurisdiction in cases where the alleged perpetrator is present in their territory and they will not extradite him solely on the basis of his nationality.<sup>205</sup> Moreover, the Convention encourages State Parties to establish jurisdiction over cases where the offence is committed against a girl or a woman who is a national of or a resident of that state.<sup>206</sup> Finally, the Convention explicitly approves of any other type of criminal jurisdiction set up under domestic law so long as it is in line with international law<sup>207</sup> – hence, the already quite comprehensive list of bases of jurisdiction State Parties are obliged or encouraged to enact under municipal law is not exhaustive.<sup>208</sup> What is more, the Convention requires that the threshold for applying national criminal law based on these jurisdictional principles is set low. Most notably, the Convention stipulates that states must not make the application of domestic criminal law to female genital mutilation committed abroad dependent on double criminality.<sup>209</sup> Doing away with the ‘usual rule of dual criminality’ is understood as a ‘major step forward in the protection of victims’,<sup>210</sup> since it allows for the prosecution of the offence even if the practice is not liable to punishment at the place of commission.

In addition to transnational criminal law, human rights law also requires that the offence of female genital mutilation – which may amount to inhuman treatment<sup>211</sup> and discrimination on the basis of sex,<sup>212</sup> and potentially violates the right to the highest attainable standard of health<sup>213</sup> and the right

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There to, 2225 *United Nations Treaty Series* p. 209, contains a series of mandatory grounds of jurisdiction in Arts. 15(1) and (3) and a series of optional grounds of jurisdiction in Arts. 15(2) and (4).

202 A. Peters & T. Altwicker, *Europäische Menschenrechtskonvention*, 2012, pp. 20-21; specifically with regard to female genital mutilation, see Trechsel & Noll, *supra* note 184, pp. 27-28.

203 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *Council of Europe Treaty Series* No. 210. Per Art. 75, the Convention must be ratified by ten states, including eight Member States of the Council of Europe in order to enter into force. As of 19 April 2013, the total number of signatures not followed by ratifications stood at 26 while three states (Albania, Portugal and Turkey) have ratified the treaty: available at <[www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG](http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG)> (last visited 19 April 2013).

204 Art. 44(1) Convention on Preventing and Combating Violence against Women and Domestic Violence.

205 Art. 44(5) Convention on Preventing and Combating Violence against Women and Domestic Violence.

206 Art. 44(2) Convention on Preventing and Combating Violence against Women and Domestic Violence.

207 Art. 44(7) Convention on Preventing and Combating Violence against Women and Domestic Violence.

208 Council of Europe, ‘Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210): Explanatory Report’, Para. 231, <<http://www.conventions.coe.int/Treaty/EN/Reports/Html/210.htm>> (last visited 25 April 2013).

209 Art. 44(3) Convention on Preventing and Combating Violence against Women and Domestic Violence. Furthermore, Art. 44(4) Convention on Preventing and Combating Violence against Women and Domestic Violence stipulates that the exercise of jurisdiction based on the nationality or residence of the alleged perpetrator must not be subordinated to the condition that the prosecution can only be initiated following the reporting by the supposed victim or the laying of information by the state of the place where the offence was committed.

210 Council of Europe, *supra* note 208, Para. 227.

211 Art. 3 ECHR and Art. 7 ICCPR: Trechsel & Noll, *supra* note 184, p. 28.

212 As, e.g., prohibited by the 1979 Convention on the Elimination of All Forms of Discrimination against Women, 1249 *United Nations Treaty Series* p. 13 (*Convention du 18 décembre 1979 sur l'élimination de toutes les formes de discrimination à l'égard des femmes*, RS 0.108); Jositsch & Murer Mikolásek, *supra* note 162, p. 1282.

213 See, e.g., Art. 24(1) 1989 Convention on the Rights of the Child, 1577 *United Nations Treaty Series* p. 3 (*Convention du 20 novembre 1989 relative aux droits de l'enfant*, RS 0.107); Jositsch & Murer Mikolásek, *supra* note 162, p. 1282.

to life<sup>214</sup> – is equipped with a broad jurisdictional rule. Thus, the European Court of Human Rights stated in quite robust terms that by virtue of Articles 1 and 3 ECHR, State Parties are required ‘to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment (...) administered by private individuals (...). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.’<sup>215</sup> Arguably, the offence of female genital mutilation under Swiss criminal law only has ‘effective deterrence’ if applicable to conduct abroad given that the offence is generally committed outside the country. That domestic legislatures should provide for extraterritorial jurisdiction for specific offences also finds support in the concluding observations of different human rights treaty supervisory bodies. They not only commend states that have adopted criminal provisions applying to specific transnational offences committed abroad,<sup>216</sup> but also encourage states to enact criminal law provisions dealing with specific transnational offences with a long arm.<sup>217</sup> The Committee on the Rights of the Child even *urged* states to adopt norms with extraterritorial reach criminalizing female genital mutilation.<sup>218</sup>

Overall, various norms of international law lend support to the idea that domestic legislatures are not only allowed to, but are encouraged and sometimes even obliged to equip specific offences with extraterritorial reach.

### 3.2. International law limiting the legislature in expanding the reach of domestic law

While some rules of public international law push for long-arm jurisdiction, others set limits on the endeavour of expanding the reach of domestic penal power. Such limitations derive most notably from general public international law<sup>219</sup> but also from human rights law. While international law is quite specific and precise regarding the expansion of the reach of domestic criminal law with respect to specific transnational offences, the limits that general public international law imposes on states in this matter are quite amorphous. To use the words of ICJ Judge Fitzmaurice: ‘international law does not impose hard and fast rules on States delimiting the spheres of national jurisdictions.’<sup>220</sup> Hence, a set of general jurisdictional rules of an international nature does not yet exist. Moreover, concrete and substance-bound rules, notably those which can be found in the law of the sea, are few and far between.<sup>221</sup> Rather, state jurisdiction is limited by different major principles of general public international law.

214 See, e.g., Art. 2 ECHR and Art. 2 ICCPR.

215 ECtHR 23 September 1998, *A. v The United Kingdom*, appl. no. 25599/94, Para. 22, cited by Trechsel & Noll, *supra* note 184, p. 28.

216 See, e.g., the following statement by the Committee on Economic, Social and Cultural Rights, ‘Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Luxembourg’, UN Doc. E/2004/22 (2003), p. 24, Para. 73 (emphasis added): ‘The Committee welcomes the measures undertaken by the State party to combat trafficking in persons, child pornography and sexual exploitation of women and children. In particular, the Committee welcomes the extraterritorial application of certain provisions of the Penal Code, allowing for the criminal prosecution of persons, both nationals and non-nationals, for sexual crimes committed abroad.’

217 See, e.g., Committee on the Rights of the Child, ‘Concluding Observations: Slovenia’, UN Doc. CRC/C/15/Add.230 (2004), Para. 65 (emphasis added): ‘The Committee recommends that the State party strengthen the legal protection of children against various forms of abuse on the Internet, including child pornography, and introduce legislation which would make Slovene citizens liable to criminal prosecution for child abuse committed abroad.’

218 Committee on the Rights of the Child, ‘Concluding Observations: Netherlands’, UN Doc. CRC/C/15/Add.114 (1999), Para. 18 (emphasis added), held: ‘The Committee welcomes the efforts made and understands the difficulties faced by the State Party in protecting girls within its jurisdiction from female genital mutilation carried out outside its territory. Nevertheless, the Committee urges the State Party (...) to consider adopting legislation with extraterritorial reach which could improve the protection of children within its jurisdiction from such harmful traditional practices.’ See also Committee on the Rights of the Child, ‘Concluding Observations: Austria’, UN Doc. CRC/C/15/Add.251 (2005), Paras. 43-44 (emphasis added), where it stated: ‘While welcoming the legal measures to prohibit and prosecute cases of female genital mutilation (FGM), the Committee is concerned that this practice involving girls and young women in the context of immigrant communities still occurs in Austria and abroad where certain children are taken to perform the procedure and brought back.’ ‘The Committee recommends that the State Party strengthen its efforts to prevent and eliminate this practice (...) by considering the possibility of making punishable by law the acts of those involved in the performance of FGM outside Austria.’

219 On the limits imposed by international law in terms of criminal jurisdiction, see Ryngaert, *supra* note 1, Chapters 2 and 4.

220 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Separate Opinion of Judge Sir Gerald Fitzmaurice, [1970] ICJ Reports 103, p. 105.

221 See, e.g., Art. 27 UNCLOS limiting the coastal state’s jurisdictional competence regarding incidents on board foreign-flagged ships and Art. 97 UNCLOS regulating penal jurisdiction in matters of collision or any other incident of navigation (M.H. Nordquist et al., *United Nations Convention on the Law of the Sea 1982: A Commentary: Volume II: Articles 1 to 85*, 1993, and M.H. Nordquist et al., *United Nations Convention on the Law of the Sea 1982: A Commentary: Volume III: Articles 86 to 132 and Documentary Annexes*, 1995); in addition, customary international law excludes port state jurisdiction in instances relating to the ‘internal economy of ships’ lying in its port (R. Churchill & A. Vaughan Lowe, *The Law of the Sea*, 1999, pp. 54-55; E.J. Molenaar, ‘Port State Jurisdiction’, in *The Max Planck*

The most fundamental, yet vague, limitation imposed on states when defining the geographical reach of their criminal law flows from the principle of the sovereign equality of states and its corollary, the principle of non-intervention. These basic tenets governing interstate relations are laid down in Article 2(1) of the United Nations Charter. States must therefore refrain from extending the scope of application of their domestic criminal law in a way that conflicts with the principle of non-intervention.<sup>222</sup> In order to determine whether a jurisdictional assertion of a state oversteps that limit, the application of an interest-balancing test has been proposed, gauging the interest of state A to apply its law to conduct abroad against the interest of state B to have exclusive jurisdiction over acts and omissions occurring in its territory and not to be forced to tolerate the exercise of jurisdiction by state A.<sup>223</sup> However, given the vague nature of the principles of the sovereign equality of states and non-intervention (and the different state interests to be balanced against each other flowing therefrom), it is difficult to identify the exact point at which a jurisdictional claim would violate Article 2(1) of the United Nations Charter.<sup>224</sup>

A further limiting principle of general public international law is the requirement that the state advancing a jurisdictional claim must have a genuine connection or real link to the matter it aims to subject to its criminal law.<sup>225</sup> This connection or link of a state to persons, property or acts lies at the root of all classical jurisdictional principles.<sup>226</sup> However, more than one state may have a genuine connection or real link to a specific matter (and thus have a legitimate jurisdictional claim), which necessitates a further inquiry into which state possesses the strongest contact point.<sup>227</sup> International law provides various – again rather vague – principles for solving instances of positive conflicts of competence. In line with ICJ Judge Fitzmaurice’s separate opinion in *Barcelona Traction*, some argue that the principle of jurisdictional reasonableness, restraint or moderation is a principle of international law<sup>228</sup> rather than a requirement of comity,<sup>229</sup> which obliges every state ‘to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State.’<sup>230</sup> Further indications for solving positive conflicts of jurisdiction arguably flow from the principle of proportionality. Applied to the law of jurisdiction, it implies that one state’s jurisdictional assertion does not interfere with the interests of another state in a way that is disproportionate to the object or aim of that assertion.<sup>231</sup> Moreover, the doctrine of abuse of rights provides guidance in solving jurisdictional conflicts,<sup>232</sup> which (quite similar to the principle of proportionality) prohibits the exercise of a right in a manner that does not serve a ‘legitimate social goal.’<sup>233</sup>

Limitations on the extension of domestic penal power also flow from international human rights law. It suffices for the purposes at hand to state that all those human rights embodying aspects of the principle of legality, legal certainty and the rule of law, and thus requiring that legal norms must be concrete, accessible, predictable and foreseeable, arguably impose limitations on the reach of extraterritorial criminal jurisdiction.<sup>234</sup>

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*Encyclopedia of Public International Law*, Paras. 1, 7 and 11, <[www.mpepil.com](http://www.mpepil.com)> (last visited 25 April 2013).

222 Council of Europe – European Committee on Crime Problems, supra note 1, pp. 459-460; K. Ambos, ‘Privatdozent am Max-Planck Institut für ausländisches und internationales Strafrecht’, in B. von Heintschel-Heinegg (ed.), *Münchener Kommentar zum Strafgesetzbuch*, Band 1 §§ 1-51 StGB, 2003, pp. 94-95, Para. 19.

223 B.H. Oxman, ‘Jurisdiction of States’, in *Max Planck Encyclopedia of Public International Law*, Para. 9, <[www.mpepil.com](http://www.mpepil.com)> (last visited 25 April 2013); Ryngaert, supra note 1, p. 145; Ambos, supra note 222, pp. 94-95, Para. 19.

224 Ryngaert, supra note 1, p. 145.

225 Ryngaert, supra note 1, pp. 145-146; Ambos, supra note 222, p. 96, Para. 21.

226 International Law Commission, supra note 2, Paras. 10 and 18-21; Ryngaert, supra note 1, p. 134.

227 Ryngaert, supra note 1, p. 134; Ambos, supra note 222, p. 96, Para. 22.

228 Ambos, supra note 222, p. 96, Para. 22.

229 Ryngaert, supra note 1, p. 142; Council of Europe – European Committee on Crime Problems, supra note 1, p. 459.

230 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, supra note 220, p. 105.

231 Ryngaert, supra note 1, p. 148.

232 Ambos, supra note 222, p. 96, Para. 22.

233 Ryngaert, supra note 1, pp. 150-151.

234 See, e.g., M. Luchtman, ‘Towards a Transnational Application of the Legality Principle in the EU’s Area of Freedom, Security and Justice?’, 2013 *Utrecht Law Review* 9, no. 4, pp. 11-33 framing the principle of legality and the issue of criminal jurisdiction in terms of human rights; and J. Lelieur, ‘“Transnationalising” *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty’, 2013 *Utrecht Law Review* 9, no. 4, pp. 198-210 exploring the meaning of the right to security, as, e.g., stipulated in Art. 5(1) ECHR in the context of double jeopardy. See also Council of Europe – European Committee on Crime Problems, supra note 1, pp. 460-463, on the rule of law and how it enhances predictability in terms of the applicable criminal law.

#### 4. Outlook – A need for general principles governing criminal jurisdiction?

It has been demonstrated that the Swiss legislature clearly followed the global trend of broadening the extraterritorial reach of domestic criminal law. Since the adoption of the Swiss Criminal Code in 1937, it has continuously added jurisdictional bases to the Code or bolstered existing ones. The legislature has acted with particular resolve in the last decade and multiplied the instances where Swiss criminal law can be applied to extraterritorial conduct and – for some offences – set the bar for applying Swiss criminal law to conduct committed abroad considerably low. Thus, for instance, specified crimes against minors and female genital mutilation have even been subjected to an absolute and unrestricted universality principle. The Swiss legislature is not indifferent to the problems that may be created by such an expansive approach to jurisdiction and the potential jurisdictional conflicts resulting therefrom, notably in terms of legal certainty and the prohibition of double jeopardy. Yet the rules it has adopted to temper these negative effects – a limited obligation to take foreign law and judgments into account when applying Swiss law to extraterritorial conduct – do not apply to all jurisdictional bases and cannot prevent or solve jurisdictional conflicts. International law does not offer hard and fast rules that guide, coordinate and limit the definition of the geographical scope of application of municipal criminal law by domestic legislatures. Rather, international law informing the determination of the reach of domestic penal power is Janus-faced – some (rather concrete) rules push for long-arm jurisdiction while other (more amorphous) rules put limits on the domestic legislature's endeavour to expand the reach of its domestic criminal law – and thus in many instances is not very explicit as to the limits it imposes on legislatures and courts when defining the reach of the domestic *ius puniendi*. In light of this, the idea of adopting general principles on an international level to govern jurisdictional issues for transnational cases is tempting – and has been since 1935 when the Harvard Draft Convention on Jurisdiction with Respect to Crime was published. Despite various (political and scholarly) efforts following the Convention's publication to create general jurisdictional rules for transnational criminal cases on the international level, such a set of rules does not yet exist. An attempt to do so was renewed in 2006 when the International Law Commission ascertained a 'strong need for codification'<sup>235</sup> regarding extraterritorial jurisdiction and decided to include the topic in its long-term working programme.<sup>236</sup> Whether this and similar endeavours will ultimately succeed in adopting general jurisdictional rules – which integrate the commands flowing from international rules pushing for an expansion but also those limiting the reach of domestic penal power – notably depends on the stance taken by states on jurisdiction: whether they perceive the assertion and exercise of jurisdiction as a concept primarily rooted in and limited by international law or as a pure manifestation of state power. ¶

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235 International Law Commission, *supra* note 2, Para. 3.

236 International Law Commission, *supra* note 2, Para. 257; see also United Nations General Assembly, 'Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/61/454)]', UN Doc. A/RES/61/34 (2006), taking note of this decision.