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The Passive Personality Principle and the General Principle of *Ne Bis In Idem*

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1. Introduction

Historically, criminal proceedings have been in the hands of victims. It was largely left to them to seek punishment for the offender. Like a pendulum, this position shifted when, for good reason, the state seized criminal proceedings. The victim is instead akin to a piece of evidence.¹

However, over the last few decades, victims' rights in national as well as international criminal proceedings have again changed and their position has been strengthened as well.² To keep the image of the pendulum: it has now swung back. However, this begs the following question: has it swung too far? Besides the ongoing efforts of the EU to strengthen the rights of victims,³ a comparison of the laws in force indicates a wide variance in the actual protection offered to victims.⁴ As a result, the position of a victim might be stronger in his country of origin than in the country where the crime was actually committed. Therefore, in 'transnational crimes'⁵ victims might wish to move the proceedings over the border to their country of origin, if this is at all possible. Such interests can, for example, include the possibility of adding a civil claim based on the offence to the criminal proceedings,⁶ and also the other

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1 E. O'Hara, 'Victim Participation in the Criminal Process', 2005 *Journal of Law and Policy*, pp. 235 et seq.

2 Within the European Union (EU) victims' rights have been strengthened with the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JH). With this Decision the standard of protection within the EU has been strengthened as well as the right to receive information. Furthermore, assimilation has been achieved with regard to compensation, see Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. However, this Council Directive is limited to 'violent intentional crime'; Art. 1 CD 2004/80/EC. For Switzerland see: J. Riniker, *Opferrechte des Tatzeugen – Die Problematik des Opferbegriffs nach OHG und die strafrechtliche Qualifikation der Verletzung der psychischen Integrität*, 2011, pp. 12 et seq.; M. Pieth, *Schweizerisches Strafprozessrecht – Grundriss für Studium und Praxis*, 2012, pp. 100 et seq.; F. Bommer, *Offensive Verletztenrechte im Strafprozess*, 2006, pp. 2 et seq.

3 For example, the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JH); Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

4 Communication from the Commission to the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM(2011) 274 final of 18 May 2011, p. 2.

5 Transnational crimes are considered to be criminal acts with cross-border effects which means that the nationality of the perpetrator and the victim might differ and/or the crime is committed across borders. For the term 'Organised Transnational Crime' see C. Fijnaut, 'Transnational Crime and the Role of the United Nations in Its Containment through international Cooperation: A Challenge for the 21st Century', 2000 *European Journal of Crime, Criminal Law and Criminal Justice* 8, no. 2, pp. 119 et seq.; T. Krüssmann, *Transnationales Strafprozessrecht*, 2009, pp. 87 et seq.

6 Compare for Switzerland: Art. 122(1) Code de procédure pénale Suisse du 5 octobre 2007 (SR 312.0; Swiss Criminal Procedure Code referred to in the following as S-CPC). E.g. a civil claim cannot be included within criminal proceedings in the USA. However, in American criminal proceedings the judge may order the perpetrator to pay restitution to a victim as part of the criminal sentence; S. Jones, 'Forfeiture and Restitution in the Federal Criminal System: The Conflict of Victims' Rights and Government Interests', 2011 *Criminal Law Brief* 6, no. 2, p. 27.

rights offered to a party⁷ in the criminal proceedings which might be beneficial to the victim. By using the somewhat controversial⁸ passive personality principle, victims do actually have – in some countries – the possibility to bring criminal proceedings home.⁹ Strengthening the position of the victim has also had an influence on the rights of the accused. For example, moving proceedings can lead to several trials and convictions in different countries for the same act. Therefore, the new role of victims has to be taken into account when talking about the prohibition of double jeopardy¹⁰ and the question of whether or not there is a cross-border influence on this principle.

To illustrate this dilemma, the scenario below highlights the different questions which are likely to arise. For ease of reference, this scenario is referred to as the ‘Entrepreneur X scenario’.

The Entrepreneur X Scenario

Entrepreneur X, a Dutch national, runs a company with its headquarters in the Netherlands and a production site in Nigeria. Due to his mismanagement, environmental damage such as polluted fish ponds, farmland, forests and drinking water occur in Nigeria. Indeed, several people, two of them Y and Z who are Swiss, became seriously ill after drinking polluted water and eating intoxicated fish. Y and Z, who do not know the national language of Nigeria, are seeking to have criminal proceedings commenced in Switzerland. However, not only may Switzerland have an interest in passing a judgment on X, but Nigeria or maybe even the Netherlands might also be interested based on the principle of territoriality in the case of Nigeria or based on the active personality principle in the case of the Netherlands.

Various jurisdictions equip supposed victims with certain tools within criminal proceedings.¹¹ Besides the attempts of the EU to strengthen victims’ rights,¹² also the Swiss regulation has enhanced them. Whilst it started with the implementation of the Victim Support Act in 1993,¹³ victims have been increasingly vested with exhaustive rights during the last two decades.¹⁴ This leads to the situation that Switzerland provides victims with further-reaching rights than most other countries. Hence, the Swiss regulation will be used as an example to extract a possible principle as to how the influence of victims on the prohibition of double jeopardy in transnational crime can be limited.

Therefore, it will be argued along the Entrepreneur X scenario which interest victims have in seeking to move proceedings to Switzerland. Furthermore, the article will discuss under which premises the passive personality principle can be invoked and which influence the principle of *ne bis in idem* has in cross-border crimes. While it is acknowledged that the scenario also raises issues as to the hierarchy of the different claims to jurisdiction, that issue is beyond the scope of this paper.

2. Victims’ rights

Over the last few decades, the pendulum of victims’ rights in criminal proceedings has – at least in Europe – swung back. In most European criminal proceedings the position of the victim has shifted from being an object to being a subject; the victim is no longer just a piece of evidence. Nonetheless, the actual status and the rights associated with this position still vary from one country to another. In Switzerland, for example, victims’ rights have a strong position within criminal proceedings. Their actual rights will be discussed briefly in this section.

To start with, the following has to be taken into consideration: In Switzerland, there is a distinction between a ‘victim’ and a ‘person suffering harm.’¹⁵ The latter is regarded as one who has had certain

7 Such as the right to be informed about the main actions and in some countries to challenge an abatement of action (e.g. § 172 German Criminal Procedure Code (G-CPC)).

8 See A. Heinrich, *Das passive Personalitätsprinzip im deutschen Strafrecht*, 1994, pp. 185 et seq.; C. Ryngaert, *Jurisdiction in International Law*, 2008, pp. 92 et seq.; J. Meyer, ‘The vicarious administration of justice: An overlooked basis of jurisdiction’, 1990 *Harvard International Law Journal* 31, p. 113.

9 See for instance Art. 7 Code pénal suisse du 21 décembre 1937 (SR 311.0; Swiss Criminal Code referred to in the following as S-CC).

10 The terms ‘*ne bis in idem*’ and ‘double jeopardy’ will be used as synonyms in this text.

11 See for an overview in Europe: M. Brienen & E. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, 2000.

12 See note 2, supra.

13 *Feuille Fédérale* 1992-645, 2470.

14 See below, Section 2.

15 See Arts. 115 et seq. Swiss Code of Criminal Procedure (S-CPC). See e.g. the German Code of Criminal Procedure which has no distinction

rights violated.¹⁶ This can be a natural person as well as a legal entity.¹⁷ A ‘victim,’ on the other hand, is an aggrieved party who has been violated physically, sexually or psychologically.¹⁸ Therefore, a victim *stricto sensu* can only be a natural person.¹⁹ Still, the victim *stricto sensu* as well as the person suffering harm have to declare that they want to participate in the proceedings either as a criminal claimant (*Strafkläger*) and/or a civil claimant (*Zivilkläger*),²⁰ otherwise without such a declaration, they are not a party to the criminal proceedings²¹ and are therefore just regarded as being ‘[an]other person involved in the proceedings.’²² The demand for prosecution²³ is regarded as such a declaration which means that the victim has the position of a party in the proceedings filing the complaint.²⁴

Once they hold the position of a party to the criminal proceedings, the rights of the two categories only vary to a minor extent. Both can introduce a civil claim based on the offence into the criminal proceedings.²⁵ One of the main advantages of this for a victim is the less onerous burden of proof, and lower costs than in ordinary civil proceedings.²⁶ Another benefit is that the public prosecutor is responsible for gathering the necessary evidence for the civil claim if the case is thereby ‘not unduly extended or delayed.’²⁷ As a consequence, the victim has greater means to access evidence than he or she would have in normal civil proceedings.

As a party to proceedings, a victim would also have a right to a fair hearing and consequently also the possibility to access the records.²⁸ But as a victim *stricto sensu*, there are some further rights which are not necessarily connected to his or her position as a party to the proceedings.²⁹ For example, the public can be excluded from the hearings if the interests of the victim, such as the right of privacy,³⁰ are in need of protection.³¹ Furthermore, special protection measures are provided for victims in a strict sense. According to Article 152 S-CPC, victims have the right not to be confronted by the accused unless the right to be heard cannot be guaranteed in another way or the interests of the prosecution prevail.³²

like the S-CPC. Just the position as an injured party (*Der Verletzte*) is provided. On the other hand, in the Austrian Code of Criminal Procedure there is just the position of the known victim, see § 65 et seq. A-CPC.

16 Art. 115 S-CPC.

17 G. Mazzucheli & M. Postizzi, ‘Artikel 115’, in M. Niggli et al. (eds.), *Basler Kommentar Schweizerische Strafprozessordnung*, 2011, marginal note 31; N. Schmid, *Handbuch des schweizerischen Strafprozessrechts*, 2009, marginal note 684.

18 Art. 116 S-CPC.

19 For further notices see: G. Mazzucheli & M. Postizzi, ‘Art. 116’, in M. Niggli et al. (eds.), *Basler Kommentar Schweizerische Strafprozessordnung*, 2011, marginal note 4.

20 Art. 118 S-CPC; this has to be declared explicitly to the prosecuting criminal authorities, see G. Mazzucheli & M. Postizzi, ‘Art. 118’, in M. Niggli et al. (eds.), *Basler Kommentar Schweizerische Strafprozessordnung*, 2011, marginal notes 4 et seq. with further remarks.

21 Mazzucheli & Postizzi, supra note 17, marginal notes 4 et seq.; C. Riedo et al., *Strafprozessrecht sowie Rechtshilfe in Strafsachen*, 2011, marginal note 681.

22 Art. 105(1)(a) S-CPC.

23 According to Art. 30 S-CC the complaint can be filed by any person who suffers harm due to the criminal act. The complaint has to be filed within 3 months after discovering the identity of the suspect; Art. 31 S-CC.

24 Art. 104 S-CPC; Riedo et al., supra note 21, marginal note 682; H. Küffer, ‘Art. 105’, in M. Niggli et al. (eds.), *Basler Kommentar Schweizerische Strafprozessordnung*, 2011, marginal note 14.

25 Art. 122 S-CPC; it is disputed whether this demand for prosecution must also be regarded as putting oneself forward as a *Zivilkläger* (civil claimant). Some authors argue that with this demand one merely asks for sentencing, not for a clarification of the civil claim as well; e.g. A. Eicker, ‘Die Schweizerische Strafprozessordnung im Überblick – Anknüpfung an Bestehendes, Vereinheitlichung und hohe Regelungsdichte’, 2010 *Recht* 28, no. 6, pp. 194 et seq.; L. Droese, ‘Die Zivilklage nach der schweizerischen Strafprozessordnung’, *HAVE*, 2011, p. 52. Others are of the point of view that the demand for prosecution has to be regarded as a civil claim as well; *Botschaft StPO*, 1171; N. Schmid, *Schweizerische Strafprozessordnung: Praxiskommentar*, Art. 118 marginal note 4.

However, within the civil law system, most countries provide the possibility to introduce a civil claim in criminal proceedings, e.g. for the Netherlands see Brienens & Hoegen, supra note 11, p. 668. In comparison, in the common law system, a civil claim cannot usually be instigated in criminal proceedings. But the criminal judge may order compensation as part of the sanction. Still, the victim does not have to submit an application; for the USA see Jones, supra note 6, p. 27; for England and Wales: Brienens & Hoegen, supra note 11, p. 258.

26 N. Ruckstuhl et al., *Strafprozessrecht unter Einschluss der forensischen Psychiatrie und Rechtsmedizin sowie kriminaltechnischen und naturwissenschaftlichen Gutachtens*, 2011, marginal note 396 as well as 411 et seq.; S. Gless & R. Echle, ‘Opferansprüche mit Konfliktpotential. Hierarchisierung von Jurisdiktionen im Strafrecht’, in N. Quelloz et al. (eds.), *Droit pénal et diversités culturelles*, 2012, p. 226. However, there are certain scenarios in which costs can be imposed on victims; see Art. 427 S-CPC.

27 Art. 313 S-CPC.

28 Art. 107 S-CPC.

29 Pieth, supra note 2, pp. 103 et seq.

30 Schmid, supra note 17, marginal note 275.

31 Art. 70(1)(a) and Art. 117(1)(a) S-CPC; Pieth, supra note 2, p. 104.

32 Schmid, supra note 17, marginal note 847.

In cases involving victims of a sexual offence, a confrontation against the will of the victim can only take place in order to uphold the right of the defence to be heard.³³

Besides these procedural rights, further rights for the victim *stricto sensu* are laid down, as in most other countries,³⁴ in the Victim Support Act.³⁵ They are supported in different ways, such as counselling and immediate assistance, long-term assistance, a contribution to the costs for assistance from third parties, compensation for financial loss, satisfaction for pain and suffering as well as the remission of procedural costs.³⁶

Both the Victim Support Act, as well as the S-CPC, require the prosecuting criminal authorities to inform the victim about victim aid services.³⁷ If the victim agrees, the prosecutors must submit his or her name and address to a counselling centre.³⁸ The victim aid services will then get in touch with the victim and assist him or her as provided by the Victim Support Act.

One of the great advantages of the Swiss legal system is that financial aid will be paid even if the offender is not able to reimburse the costs according to the Victim Support Act. In other words: the victim has a claim against the state.³⁹ However, according to the Swiss Federal Court, this financial aid is not a liability of the state.⁴⁰ Therefore, satisfaction according to the civil law has to be set apart from satisfaction according to the Victim Support Act.⁴¹ Hence, under some circumstance, the victims' aid services can deviate from the decision of the civil or criminal judge.⁴² Nonetheless, the advantages which are provided by the Victim Support Act are still apparent and show that the pendulum has indeed swung very far.

But a legal interest is not the only reason to move proceedings across a border. There might also be reasons of convenience such as linguistic hurdles or a lack of knowledge of the legal system in the place where the crime was committed.⁴³ Excessive travelling costs must also be considered.

As a result, the reasons for moving proceedings across a border can vary considerably. The most likely reasons for a move to take place are either legal or practical; for example, linguistic barriers or travelling distances. However, if the victim is Swiss, the strong position they hold in the proceedings might outweigh any other advantages. For example, in the scenario involving Entrepreneur X discussed above, the Swiss victims may wish to pursue the prosecution in Switzerland on the basis of a lack of knowledge of the local language. Furthermore, travelling from Switzerland to Nigeria on several occasions to take an active part in the proceedings may be inconvenient and expensive. Moreover, the Swiss legal system does allow a case to take place at home and it offers extensive rights for the victims.

33 Art. 153(2) S-CPC.

34 Victim Aid Statutes which aim to support victims are e.g. also known in Australia (<<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/V/VictCrimAsA09.pdf>>, last visited 23 April 2012) as well as in most countries of Europe (for an overview see Brienen & Hoegen, supra note 11) and in the United States with its Crime Victims' Rights Act, 18 USC § 3771 (for further information see: M. Boland & R. Butler, 'Crime Victims' Rights. From Illusion to Reality', 2009 *Criminal Justice* 24, no. 1, pp. 4 et seq.).

35 Loi fédérale du 23 mars 2007 sur l'aide aux victimes d'infractions (SR 312.5).

36 Art. 2 Victim Support Act.

37 Art. 8 Victim Support Act.

38 Art. 305(3) S-CPC; for a discussion on the interaction between the protection of one's personality and the protection of victims see: D. Kettiger & M. Schwander, 'Artikel 305 Abs. 3 StPO: Zwischen Persönlichkeits- und Opferschutz', 2011 *Jusletter*, no. 10.

39 P. Gomm, 'Artikel 4', in P. Gomm & D. Zehntner (eds.), *Kommentar zum Opferhilfegesetz vom 23. März 2007 über die Hilfe an Opfer von Straftaten*, marginal notes 1 et seq.; he also points out that financial aid can be paid by the victim support services before a decision by the criminal court is taken. In this case, a subrogation of the claims occurs.

40 BGer (Swiss Federal Court Decision not published in the official collection; *Arrêt du Tribunal Fédéral Suisse pas publiés dans le Recueil officiel*) 1A.299/2000, E. 2. b).

41 BGer 1A.299/2000, E. 3. b).

42 BGer 1A.299/2000, E. 3. b); a diversion is e.g. justified if the victims' aid services, on the basis of having considered their own evidence, determine new facts which were unknown or not taken into consideration by the deciding authorities. Also see P. Gomm, 'Einzelfragen bei der Ausrichtung von Entschädigung und Genugtuung nach dem Opferhilfegesetz', in Solothurnischer Juristenverein (ed.), *Solothurner Festgabe zum Schweizerischen Juristentag*, 1998, p. 683, who points out that the proceeding according to the Victim Support Act is an administrative procedure. He also lists further reasons for a diversion; p. 685.

43 A. Eicker, 'Zur Vermeidung simultaner Strafverfahren im zwischenstaatlichen Kontext: Modell einer (über)individuell-konkreten Kriterien-Gewichtung', 2005 *Strafverteidiger*, no. 11, p. 633 in a case where the victim and the offender had the same nationality but the crime was committed abroad. He also points out that there are certain interests of the offender, such as resocialisation and reflections concerning the execution of custodial sentences, which have to be taken into consideration.

3. Moving proceedings across the border

Y and Z may want to be parties in the criminal proceedings and to profit from the assistance granted by the Victim Support Act. Thus, they may wish to move the criminal proceedings back home. Therefore, the question arises as to whether or not Swiss jurisdiction can be invoked (3.1.). Furthermore, another line of discussion is what a victim has to do in order to commence an investigation in Switzerland and what the prosecuting criminal authorities have to take into consideration (3.2.).

3.1. Establishing jurisdiction in criminal law by using the passive personality principle

Jurisdiction is inherently linked to state sovereignty. Traditionally, a distinction is made between the jurisdiction to prescribe, the jurisdiction to adjudicate and the jurisdiction to enforce.⁴⁴ Part of the latter is not only the rendering of the judgment, but also the conduct of the investigations.⁴⁵ The starting point for the establishment of jurisdiction in criminal law is usually – as generally invoking jurisdiction on foreign soil is controversial⁴⁶ – the territorial principle,⁴⁷ but there are also other recognised genuine links which enable a state to establish jurisdiction.⁴⁸ However, this article will merely deal with the passive personality principle as a possible tool to move proceedings across the border.

Since the passive personality principle is somewhat controversial, this section will first look at the question of its validity according to international law (3.1.1.) before turning to the regulation according to Swiss Criminal Law (3.1.2.).

3.1.1. Validity according to international law

Under international law, the principle of non-interference prohibits any intervention in the domestic affairs of another state.⁴⁹ This principle raises the question whether some assertions of jurisdiction over a crime committed on foreign territory are in breach of international law. In this context, the passive personality principle seems to interfere with the principle of non-interference as where a state establishes jurisdiction over a crime committed on foreign soil on the basis of the nationality of the person affected, this link seems to be a rather insufficient reason to justify interference with another state's sovereignty.⁵⁰ Therefore, the passive personality principle is controversial under international criminal law.⁵¹ Some authors further criticise the passive personality principle on the basis that it is 'the most aggressive basis for extraterritorial jurisdiction'⁵² and that the perpetrator cannot anticipate which law would be applicable since he often does not know the victim's nationality.⁵³

On the other hand, the protection of one's own citizens is a well-accepted principle in international law.⁵⁴ Furthermore, the International Court of Justice (ICJ) noted in the case of the S.S. *Lotus* that there is no 'general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory'.⁵⁵ Moreover, several states use the passive personality

44 A. Peters, *Völkerrecht: Allgemeiner Teil*, 2012, p. 146; Ryngaert, *supra* note 8, pp. 11 et seq. as well as pp. 23 et seq.

45 K. Ambos, *Internationales Strafrecht*, 2011, § 1 marginal note 4.

46 Peters, *supra* note 44, pp. 146 et seq.; Ryngaert, *supra* note 8, p. 21.

47 Peters, *supra* note 44, p. 147. However, the ICJ noted in the *Lotus* case that unless there is a rule against extraterritorial jurisdiction, it is permitted.

48 For a complete overview of the genuine links according to Swiss Criminal Law see 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*, Vol. 2.1, 2011, pp. 324 et seq.

49 Ryngaert, *supra* note 8, pp. 144 et seq.

50 The main reasoning is the protection of its own citizens, whilst in national cases there is also an actual need to enforce national law and to strive for a general deterrence.

51 Heinrich, *supra* note 8, pp. 185 et seq.; Ryngaert, *supra* note 8, pp. 92 et seq.; Meyer, *supra* note 8, p. 113.

52 Ryngaert, *supra* note 8, p. 92.

53 Meyer, *supra* note 8, pp. 113 et seq.; Ryngaert, *supra* note 8, p. 93.

54 For example, the protection of one's citizens is foreseen in Article 36(1)(c) Vienna Convention on Consular Relations. The active personality principle is also a well-recognized 'genuine link' to establish jurisdiction. See Heinrich, *supra* note 8, pp. 187 et seq., who points out that the genuine link has to refer to the crime and not the perpetrator.

55 PSCJ Ser. A, no. 10, 10. R. Higgins, *Problems and Process: International law and how we use it*, 1995, p. 66, points out that this decision relied on the circumstance of a collision on the high seas where there is no jurisdiction. Therefore she claims that this decision cannot be alleged to be an argument for the use of the passive personality principle for a crime committed on the territory of another.

principle to establish jurisdiction⁵⁶ and it is also laid down in various international conventions.⁵⁷ However, since it is controversial, and there is a variety in state practice, it arguably cannot be considered to be customary international law.⁵⁸

As the passive personality principle and its legitimacy are controversial, some authors probe the question whether there is a need to narrow its application by stipulating a dual criminality requirement before it can be applied.⁵⁹ However, this would still be insufficient. In addition to dual criminality, a legitimate interest should also be required in those cases in which a proceeding has already taken place.⁶⁰

Concluding, the passive personality principle cannot be considered to be customary international law. However, under the reasoning of the ICJ in the case of *S.S. Lotus* and the fact that several states apply the passive personality principle it has to be considered as a legitimate link to exercise jurisdiction over a crime committed abroad.

3.1.2. Regulation according to the Swiss Criminal Code

As pointed out, the passive personality principle is a legitimate link to exercise jurisdiction even over a crime committed abroad. Still, the question arises as to which conditions have to be met so that Switzerland can claim jurisdiction over Entrepreneur X as Y and Z – both Swiss citizens – have become ill after drinking polluted water.

According to the passive personality principle, which is laid down in Article 7 S-CC, jurisdiction can be established if the offence was committed against a Swiss national and if the following requirements are met:

First of all, the victim of the offence has to be Swiss.⁶¹ This can be a natural person, of course. Whether a corporate entity can also be considered to be ‘Swiss’, remains contentious.⁶² In any event, nationality is determined as at the time of the commission of the offence. Possible dual citizenship is – according to the prevailing opinion in Switzerland – of no significance.⁶³ However, in this context it needs to be pointed out that the passive personality principle, according to Swiss law, is not connected to the wording of the S-CPC. The Swiss Criminal Code says nothing as to whether the ‘Swiss’ national has to be a victim *stricto sensu* or not.⁶⁴ A harmonization of the two statutes would be desirable.⁶⁵

In essence, then, there are four further limitations on the passive personality principle. First, it is only applicable if the offence is liable to prosecution at the place of commission or the place is not subject to criminal law jurisdiction.⁶⁶ The second criterion is therefore dual criminality.⁶⁷ One of the reasons for this condition is the principle of legality,⁶⁸ as only then can a guilty mind be expected.⁶⁹ If a crime has been committed on different territories, the criterion of dual criminality is fulfilled if the act is punishable in

56 For example: Switzerland, Germany, Austria, France, Finland, Mexico, Brazil.

57 See e.g. Art. 5(1)(d) International Convention against the Taking of Hostages; Art. 15(2)(a) UN Convention against Transnational Organized Crime.

58 T. Maruhn & S. Simon, ‘Die völkerrechtlichen Voraussetzungen der Strafgewalt in transnationalen Fallgestaltungen’, in A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht*, 2012, p. 31; Heinrich, supra note 8, p. 186.

59 Heinrich, supra note 8, pp. 189 et seq.

60 See below, Section 4.

61 Art. 7(2) S-CC e contrario. Just having a residence permit is not sufficient according to Swiss law; this is contrary to Finnish Law where it is sufficient for a foreigner to have his or her permanent residence in Finland (Chapter 1 § 5 F-CC).

62 Affirmative: P. Popp & P. Levante, ‘Art. 7’, in M. Niggli et al. (eds.), *Basler Kommentar Strafrecht I Art. 1-110 StGB*, 2007, marginal note 3; S. Trechsel & P. Noll, *Schweizerisches Strafrecht – Allgemeine Voraussetzungen der Strafbarkeit*, 2004, p. 61; limited BGE 121 IV 145. Negative: H. Schultz, ‘Die räumliche Geltung des Strafgesetzes (StrGB Artikel 3-6, 202 Zif. 5, 240 Abs. 3, 245 Zif. 1 Abs. 2): Die einzelnen Regeln’, *Fiches Juridiques Suisse*, 1209, 9. Differentiating: U. Cassani, ‘Die Anwendbarkeit des schweizerischen Strafrechts auf internationale Wirtschaftsdelikte (Art. 3-7 StGB)’, 1996 *Schweizerische Zeitschrift für Strafrecht*, no. 3, pp. 242 et seq.

63 Popp & Levante, supra note 62, marginal note 13 with further references; S. Trechsel & H. Vest, ‘Art. 7’, in S. Trechsel & M. Pieth (eds.), *Schweizerisches Strafgesetzbuch – Praxiskommentar*, 2012, marginal note 3; A. Donatsch & B. Tag, *Verbrechenslehre*, 2006, p. 59.

64 For the differences between a victim according to Art. 116 S-CPC and an aggrieved party (Art. 115 S-CPC) see above, Section 2.

65 As concurrent jurisdiction can occur, a limitation on victims *stricto sensu* should be taken into consideration.

66 Art. 7(1)(a) S-CC.

67 According to the principle of dual criminality legal assistance is only granted if the offence described in the request is also punishable according to Swiss criminal law.

68 P. Popp & P. Levante, ‘Vor Art. 3’, in M. Niggli et al. (eds.), *Basler Kommentar Strafrecht I Art. 1-110 StGB*, 2007, marginal note 26; for the need for dual criminality in cases of extradition see Riedo et al., supra note 21, *Strafprozessrecht*, marginal notes 3359 et seq.

69 D. Oehler, *Internationales Strafrecht*, 1983, marginal note 128.

one of those places.⁷⁰ This has to be decided according to the legal situation at the time when the crime was committed.⁷¹

Second, the person concerned has to be in Switzerland or has to be extradited to Switzerland due to the offence. It is also sufficient that the alleged offender is in Switzerland of his own volition.⁷² On the other hand, if the accused leaves the country, there is no statutory basis on which to prosecute the person in question.⁷³

Third, the offence needs to be one which allows extradition according to Swiss Law. The relevant question is whether or not extradition to the place of commission is possible.⁷⁴ This merely has to be determined according to the Mutual Assistance Act;⁷⁵ the existence of an extradition treaty with the other state is irrelevant.⁷⁶ The reasons for a denial of extradition are insignificant⁷⁷ and the lack of an extradition request has no influence on that issue either.⁷⁸ Another question which arises is whether a request for extradition has priority over a proceeding which has already been commenced in Switzerland. Some commentators argue that due to the territoriality principle such a request has priority. Furthermore, Switzerland has a duty – according to this opinion – to prosecute if it does not wish to extradite the individual to the state where the offence was committed.⁷⁹ On the other hand, the Swiss Federal Court has pointed out that the authorities can waive such an inquiry if it is obvious that there will not be a fair process and therefore the interests of the victim will not be adequately dealt with.⁸⁰

Finally, the principle of disposition (*Erledigungsprinzip*) may intervene. According to that principle, no further prosecution in Switzerland is feasible if the person was acquitted or the sentence has been served or waived or has prescribed.⁸¹ Whether a suspended sentence has the same effect is often discussed and remains controversial.⁸² As the principle of deduction (*Anrechnungsprinzip*) in Article 7(5) S-CC determines that a partly served sentence has to be taken into account at the sentencing stage in Switzerland,⁸³ such a circumstance cannot invoke the principle of disposition. It should solely be considered under this principle if the period of probation has been fulfilled.⁸⁴ If the sentence has not been fully served and/or the probation has not been fulfilled, the principle of deduction takes place, and therefore a prior sentence will just be taken into consideration.⁸⁵

To refer back to our scenario, some of the victims were Swiss. Bodily harm is most certainly liable to prosecution in Nigeria as well. Furthermore, in Switzerland the penalty is – in cases of common assault – a custodial sentence of up to 3 years.⁸⁶ Switzerland could therefore claim jurisdiction if X was in

70 Popp & Levante, supra note 68, marginal note 26.

71 Popp & Levante, supra note 68, marginal note 26; for the legal situation in Germany see Ambos, supra note 45, § 3 marginal notes 49 et seq., who points out that the question whether there is dual criminality or not, cannot just be decided according to the elements of certain crimes. Instead, a distinction has to be made between substantive culpability, the procedural prosecution and the actual prosecution of a commitment. Whilst the first point (including grounds for justification and grounds for an excuse) has undoubtedly to be considered, the second one has no influence on the question whether there is a dual criminality.

72 Popp & Levante, supra note 62, marginal note 6.

73 BGE 108 IV 145, 147.

74 Popp & Levante, supra note 62, marginal note 9.

75 Loi fédérale du 20 mars 1981 sur l'entraide internationale en matière pénale (SR 351.1).

76 G. Stratenwerth, *Strafrecht Allgemeiner Teil: Die Straftat*, 2011, § 5 marginal note 22.

77 A. Eicker, 'Das Schweizerische Internationale Strafrecht vor und nach der Revision des Allgemeinen Teils des Strafgesetzbuchs – zur Interpretation des "engen Bezug" als verstecktes Opportunitätsprinzip', 2006 *Schweizerische Zeitschrift für Strafrecht*, no. 3, p. 306; Popp & Levante, supra note 62, marginal note 9, who point out that the grounds for a discretionary refusal merely have to be considered if they rely on the alleged offence.

78 See BGE 76 IV 209, 212 (confirmed in BGE 119 IV 113, 116) for the active personality principle. This point of view has been adopted by the literature, see e.g. Stratenwerth, supra note 76, § 5 marginal note 22.

79 BGE 121 IV 145, 148; H. Schultz, *Bericht und Vorentwurf zur Revision des Allgemeinen Teils und des Dritten Buches 'Einführung und Anwendung' des schweizerischen Strafgesetzbuches*, 1987, pp. 14 et seq.

80 BGE 121 IV 145, 148.

81 See Art. 7(4) S-CC: 'Unless the offence involves a gross violation of the principles of the Federal Constitution and the ECHR, the person concerned shall not be liable to further prosecution in Switzerland for the offence if:

- a. he has been acquitted of the offence abroad in a legally binding judgment;
- b. the sentence that was imposed abroad has been served, waived, or has prescribed.'

82 Popp & Levante, supra note 68, marginal note 36 with further references.

83 Art. 7(5) S-CC.

84 For the same point of view: Trechsel & Vest, supra note 63, Art. 3 marginal note 9; Schultz, supra note 62, p. 5. For a different view: J.-L. Colombini, *La prise en consideration du droit étranger (penal et extra-pénal) dans le jugement penal*, 1983, p. 64.

85 Art. 7(5) S-CC.

86 Art. 123(1) S-CC; in cases of a serious assault the custodial sentence will not exceed ten years (Art. 122 S-CC).

Switzerland or was extradited to Switzerland. In conclusion, jurisdiction can be established in this case according to the passive personality principle as long as the principle of disposition does not intervene.

3.2. Moving proceedings across the border

Since Switzerland could invoke jurisdiction on the basis of the passive personality principle, there still remains the question of what Y and Z would need to do to commence proceedings in Switzerland and to move the case back home.

First of all, in order to commence an investigation, the prosecuting criminal authorities need to receive evidence of a crime. In most cases involving a crime abroad, the victim has to take action. This can either be by reporting the crime to the authorities (if it is an offence subject to public prosecution *ex officio*) or by filing a demand for prosecution (if it is a criminal offence requiring a complaint to be made for the prosecution to be initiated). The demand for prosecution has to be filed in writing or orally⁸⁷ within 3 months.⁸⁸ The addressees are the police or the public prosecutor.⁸⁹

Once the Swiss prosecuting criminal authorities have knowledge of a crime which is within their jurisdiction, they are generally required to open an investigation.⁹⁰ However, the public prosecutor may still exercise discretion in deciding whether or not to prosecute certain offences.⁹¹ According to Article 8 S-CPC, the authorities can pass on the proceedings if the requirements of either Articles 52, 53 or 54 S-CC are met.⁹² Additionally, they have discretion if 'the offence is of negligible importance in comparison with the other offences with which the accused is charged as regards the expected sentence or measure', 'if any additional penalty imposed in combination with the sentence in the final judgment would be negligible' or 'if an equivalent sentence imposed abroad would have to be taken into account when imposing a sentence for the offence prosecuted'.⁹³

Furthermore, Article 8 S-CPC provides that prosecution should not continue if the authority of another country has already prosecuted the offence or if the prosecution has been assigned to such an authority.⁹⁴ Nonetheless, this discretion, other than the discretion according to Article 8(1) S-CPC, is subject to the reservation that no prevailing interest of a victim exists.⁹⁵ Typically, such an interest can be found in the possibility to bring a civil claim based on the offence in the criminal proceedings.⁹⁶ The prevailing opinion points out that in those cases the use of discretion would not be appropriate as the private claimant (*Privatkläger*) has imposed its interest in the proceedings.⁹⁷ As a result, in cases in which the proceedings are moved to Switzerland by the victim, such an interest must be taken as given. Therefore, the principle whereby the public prosecutor has discretion to prosecute certain offences cannot apply in those circumstances, which is another indication that the pendulum has swung too far. Hence, it should be considered by the public prosecutor or the court that not just the interests of the victims are to be taken into consideration when deciding to use discretion. Especially the wish to add a civil claim within the criminal process, which would otherwise not have a forum in Switzerland, cannot be regarded as a prevailing interest. Consequently, a second criminal trial in Switzerland or in any other country should not merely be based on the financial interests of victims.

However, according to the prevailing opinion, this has the following consequence: The victims of Entrepreneur X would at least need to file a demand for prosecution to actually move the proceedings

87 Art. 304(1) S-CPC.

88 See Art. 31 S-CC according to which the period 'begins on the day that the person entitled to file a complaint discovers the identity of the suspect'.

89 Art. 304(1) S-CPC, the authority responsible for prosecuting contraventions cannot be the addressee in cases of the passive personality principle as the fourth criterion (extradition must be possible) would not have been fulfilled.

90 Art. 7 S-CPC; Schmid, *supra* note 17, marginal notes 164 et seq.

91 Art. 8 S-CPC; Schmid, *supra* note 17, marginal note 183.

92 Art. 8(1) S-CPC.

93 Art. 8(2) S-CPC.

94 Art. 8(3) S-CPC.

95 Art. 8(2) and (3) S-CPC: 'Unless it is contrary to the private claimant's overriding interests'.

96 G. Fiolka & C. Riedo, 'Art. 8', in M. Niggli et al. (eds.), *Basler Kommentar Schweizerische Strafprozessordnung*, 2011, marginal note 62; Schmid, *supra* note 17, marginal note 190.

97 Schmid, *supra* note 17, marginal note 190; Fiolka & Riedo, *supra* note 96, marginal note 62; R. Roth, 'Art. 8', in A. Kuhn & Y. Jeanneret, *Commentaire Romand: Code de procédure pénale Suisse*, 2011, marginal notes 19 et seq.

back home across the border. In cases in which civil claims are instigated, the discretion of the public prosecutor is limited – according to the prevailing opinion – and an investigation has to be opened.

4. The principle of *ne bis in idem*

As has been shown, Y and Z could move the case across the border. Therefore, they would need – at least – to report the crime and argue that the passive personality principle is applicable. Following the limited discretion, they would need to start a criminal proceeding. However, this could lead to the situation that several states may initiate proceedings. As a result, the alleged offender – in this scenario X – faces several proceedings at once as besides Switzerland, also Nigeria and the Netherlands could claim jurisdiction. This is another indication that the pendulum in the victims' position in criminal proceedings may have swung too far. Therefore, the question arises whether this pendulum can be pointed in the right direction at least with the help of the principle of *ne bis in idem*.

However, there are different ways as to how to handle a prior decision of a foreign court. According to the principle of disposition, there will be no further criminal prosecution (for example, in the Netherlands). Another approach is the 'dual sovereignty' doctrine according to which a decision of a foreign court will be ignored completely (e.g. the USA). The third way is the principle of deduction. In this case, a former sentence will be imputed on the second sentence (e.g. in Germany).⁹⁸

This situation, in which a second prosecution can take place in another country, which is simply not the case if the principle of disposition is applicable, is inconsistent with the fundamental reasoning of criminal law. In particular, the influence on the offender might rather be the reverse when compared with the pursued aim. If we recall those basic ideas of the reasons for criminal law, we first of all remember the goal of righting the wrong as part of the absolute theory.⁹⁹ For example Schultz pointed out that in the sense of the absolute theory the sentencing is to achieve an '*Ausgleich der Tatschuld*'.¹⁰⁰ However, a sentence has to be balanced. A perpetrator will not be positively influenced with a second conviction for the same act. He or she will simply not understand the underlying reasoning. Also in the eyes of the general preventive theory,¹⁰¹ a second sentence is not needed. The public's trust in the legal system has already been strengthened with the first conviction. Therefore, there is no substantial reason – either theoretical or substantive – for a second trial if the first one has taken place according to constitutional guarantees.

This situation, therefore, interferes with the basic principle of *ne bis in idem*. Most countries have laid down a prohibition on double jeopardy in their national statutes. Switzerland has done so in Article 11 S-CPC:

'No person who has been convicted or acquitted in Switzerland by a final legally binding judgment may be prosecuted again for the same offence.'

The basis of this regulation is laid down in Article 4 of Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, neither the prohibition defined in Protocol No. 7 nor the one in Article 11 S-CPC have an international impact.¹⁰² As in most other countries, the Swiss regulation is limited to national convictions only or, in other words, a sentence in another country does not prevent a further criminal proceeding in Switzerland.¹⁰³ Nonetheless, Switzerland can refuse legal assistance if the accused is in Switzerland and a criminal proceeding concerning the same crime

98 W. Gropp, 'Kollision nationaler Strafgewalten – nulla prosecution transnationalis sine lege', in A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht*, 2012, pp. 55 et seq., with further references.

99 Stratenwerth, *supra* note 76, pp. 33 et seq.

100 H. Schultz, *Einführung in den Allgemeinen Teil des Strafrechts – Ein Grundriss, Band I*, 1982, p. 50.

101 Stratenwerth, *supra* note 76, p. 46.

102 B. Tag, 'Art. 11', in M. Niggli et al. (eds.), *Basler Kommentar Schweizerische Strafprozessordnung*, 2011, marginal note 4, who points out that the suspension of the prosecution is not sufficient to prevent another proceeding. See also the wording of Art. 4 Protocol No. 7: 'No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.'

103 Tag, *supra* note 102, marginal note 12.

is pending in Switzerland per se.¹⁰⁴ However, this rule is limited to cooperation in criminal matters and does not include the rules of extradition.¹⁰⁵ Furthermore, extradition can be refused if the accused has been acquitted according to material reasons or the case has been suspended in Switzerland or in the country where the crime was committed or if the sentence has been served, waived or temporarily suspended.¹⁰⁶ These rules in cases of legal assistance in criminal matters do expand the reach of *ne bis in idem* somewhat. Nevertheless, the Swiss legal system does not grant an extensive principle of *ne bis in idem* in transnational crime.¹⁰⁷

This situation can lead to a certain imbalance in the position of the accused. The (alleged) offender may face multiple trials.¹⁰⁸ He is therefore exposed to the psychological burden repeatedly, has to bear the brunt of multiplied legal costs in case of several convictions and may have to serve another sentence for the same act. On the last point, some relief is provided in cases of the passive personality principle with the principle of deduction. According to this principle, the court has to take a partly served sentence imposed abroad into account, but not a suspended sentence.¹⁰⁹ Regardless of this, the principle of deduction, which has to be considered in cases where the same act has to be judged,¹¹⁰ prohibits the accumulation of sentences but does not mitigate the other effects of a further trial.¹¹¹

Another oddity which occurs is the fact that by moving criminal proceedings back home to Switzerland a forum for the civil claim can be implemented which is not provided by private international law.¹¹² The Swiss victim of a transnational crime, therefore, gains another forum by using a claim for damages in connection with a criminal proceeding. This raises the issue as to whether there is still a forum for the civil claim in Switzerland, if the criminal procedure is completed with a summary penalty order or the civil claim is referred to civil proceedings by the criminal court.¹¹³ In favour of opening up a forum in Switzerland, one could point out that the judgment of the criminal court, with which e.g. a decision in principle is taken and for further settlements is referred to the civil court,¹¹⁴ cannot be binding on another state. Furthermore, one could contend that losing the forum would be inconsistent with the ruling of discretion in Article 8 S-CPC. On the other hand, one could state that a forum is neither provided in the Federal Act on International Private Law¹¹⁵ nor in the new Lugano Convention.¹¹⁶ Since criminal proceedings should not be abused to open up an unforeseen forum, a referral to the civil proceedings should lead to the loss of the forum in Switzerland.

As shown, the national prohibition is not sufficient to prevent a further trial in cases of a transnational crime and it does not run rings around the pendulum in cases of transnational crime. Nonetheless, Switzerland is a party to the Schengen acquis (SA)¹¹⁷ which provides an internationalized *ne bis in idem* principle in Article 54 of the Schengen Implementing Convention. According to this article, 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.¹¹⁸ There have been discussions and decisions¹¹⁸ by the European Court of Justice (ECJ)

104 Art. 66 Mutual Assistance Act.

105 A. Eicker, *Transstaatliche Strafverfolgung*, 2004, p. 62.

106 Art. 5 Mutual Assistance Act.

107 Eicker, supra note 105, p. 64.

108 R. Linke, 'Zwischenstaatliche Kompetenzkonflikte auf dem Gebiet des Strafrechts', in D. Oehler & P.G. Pötz (eds.), *Aktuelle Probleme des Internationalen Strafrechts – Festschrift für Heinrich Grützner zum 65. Geburtstag*, 1970, p. 86; P. Lagodny, 'Viele Strafgewalten und nur ein transnationales ne-bis-in-idem?', in A. Donatsch et al. (eds.), *Strafrecht, Strafprozessrecht und Menschenrechte – Festschrift für Stefan Trechsel zum 65. Geburtstag*, 2002, pp. 255 et seq.

109 Art. 7(5) S-CC; Popp & Levante, supra note 68, marginal note 46.

110 J. Hurtado Pozo, *Droit pénal – Partie générale*, 2008, marginal notes 213 et seq.; Popp & Levante, supra note 68, marginal note 45.

111 Linke, supra note 108, p. 87.

112 Art. 129 Loi fédérale du 18 décembre 1987 sur le droit International privé (SR 291; Federal Act on International Private Law) which provides for a Swiss forum only if the respondent has his domicile or habitual residence in Switzerland or the tortious act was committed on Swiss soil. In cases of the passive personality principle, Swiss civil law therefore provides no forum for civil claims.

113 Art. 126(2) and (3) S-CPC.

114 Art. 126(3) S-CPC.

115 Arts. 129 et seq. Federal Act on International Private Law.

116 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3.

117 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 53, 27.2.2008, p. 52.

118 Art. 54 Schengen Implementing Convention.

about what can be considered ‘the same act’¹¹⁹ or a ‘binding ruling’^{120, 121}. Connected with the first question, the Swiss Federal Court also takes into consideration whether the aggrieved party who files a request for prosecution has been listed as a victim in the former proceedings as well.¹²² Even though Article 54 Schengen Implementing Convention is the most expansive cross-national *ne bis in idem* principle.¹²³ However, this rule is only applicable between Contracting States and not in cases where non-contracting states are involved.

As there is no globalized prohibition on double jeopardy, some commentators raise the question whether this principle should be considered as an international human right.¹²⁴ Eicker, furthermore, wonders if customary law has in fact been established as most ad hoc tribunals and now the International Criminal Court (ICC) accept the principle of *ne bis in idem*.¹²⁵ However, to establish customary international law, an international legal opinion (*opinio iuris*) alone will not suffice. Consistent state practice is also required. Such a consistent application of the law cannot be taken as given¹²⁶ and therefore it cannot be seen as customary international law.

As a result, in transnational cases with countries which are not parties to the SA, the prohibition on double jeopardy does not prevent a second trial as it is limited to national convictions. The offender therefore might face a second trial in a country abroad. In our exemplary case, a former conviction in Nigeria would not prevent a further trial in Switzerland under the aspect of the prohibition of double jeopardy. But, a partly served sentence would have to be taken into consideration by the criminal court. On the other hand, a former conviction in the Netherlands would prevent a further trial in Switzerland if the Swiss victims have also been taken into consideration in the ruling of the Dutch court.

5. Conclusion

The strengthening of the victims’ position has not just had an influence on their rights in an ongoing proceeding. Furthermore, victims may cause criminal proceedings to commence in their country of origin by using the passive personality principle. This carries the risk of the alleged offender having to face not just one trial for the same act, but maybe two. The principle of *ne bis in idem* is not strong enough to protect the suspect as it is usually limited to national convictions only. The ability of the principle of *ne bis in idem* to balance the swing of the pendulum is limited.

This may lead to inconsistencies, and an imbalance in legal rights as between an accused and a victim. For example, because the principle of *ne bis in idem* generally only applies within a state, and not between states, the victims of transnational crimes can precipitate a second trial in their country of origin. This means that an (alleged) offender might face several trials in different countries, a burden which does not seem to be justifiable.

119 See e.g. ECJ in Case C-367/05, *Belgium v Norma Kraaijenbrink*, § 28: ‘It follows that the starting point for assessing the notion of same acts within the meaning of Article 54 of the CISA is to consider the specific unlawful conduct which gave rise to the criminal proceedings before the courts of the two Contracting States as a whole. Thus, Article 54 of the CISA can become applicable only where the court dealing with the second criminal prosecution finds that *the material acts, by being linked in time, in space and by their subject-matter, make up an inseparable whole.*’(emphasis added)

120 See e.g. ECJ in Joined Cases C-187/01 and C-385/01, *Germany v Hüseyin Gözütok and Klaus Brügge*, § 31 f.: ‘In those circumstances, the conclusion must be that, where, following such a procedure, further prosecution is definitively barred, the person concerned must be regarded as someone whose case has been “finally disposed of” for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed. In addition, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been “enforced” for the purposes of Article 54. The fact that no court is involved in such a procedure and that the decision in which the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation [...]’(emphasis added).

121 Eicker, supra note 105, pp. 82 et seq.; R.M. Kniebühler, *Transnationales ‘ne bis in idem’ – Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, 2005, pp. 169 et seq.; for the Swiss *ne bis in idem* according to the S-CPC see: Tag, supra note 102, marginal note 12.

122 BGer 1B_148/2012 E. 4.6.

123 Eicker, supra note 105, p. 77.

124 A. Eicker, ‘Der Grundsatz “ne bis in idem” – eine internationale menschenrechtliche Garantie?’, in P. Sutter & U. Zelger (eds.), *30 Jahre EMRK-Beitritt der Schweiz: Erfahrungen und Perspektiven*, 2005 pp. 105 et seq.

125 Eicker, supra note 124, p. 123; for the regulation of the ICC see Art. 20 Rome Statute of the International Criminal Court; as an example of an ad-hoc regulation see Art. 10 Statute of the International Criminal Tribunal for the Former Yugoslavia.

126 Eicker, supra note 124, p. 123.

Secondly, the strengthening of victims' rights leads to a weakening of the position of the accused, something which is also reflected in the most recent Opinion of the Committee of the Regions on 'legislative package on victims' rights'.¹²⁷ The Committee points out that 'solutions must be found to balance the rights of victims while guaranteeing the presumption of innocence in criminal proceedings as well as the individual rights of suspects and convicted criminals'.¹²⁸ This is particularly the case at the beginning of an investigation because there is no certainty about the actual position of the accused in the procedure.

Therefore, the ongoing strengthening of victims' rights does weaken the position of the alleged offender in different ways. The most serious effect is the possibility of a further trial with all its consequences. To put a stop to this and to get the pendulum back in a proper balance, a transnational *ne bis idem* – as it exists in the Schengen area with Article 54 Schengen Implementing Convention – would be a starting point. Another way might be the abolition of the passive personality principle. As mentioned above, it is a rather weak linking point which is – for good reasons – controversial.

However, given the possibility of the impunity of the alleged offender, the demand for abolition may be too far-reaching. Therefore, one should at least think about further requirements for the application of the passive personality principle. Such requirements could include limiting the application to the victim *stricto sensu* and a prohibition on double jeopardy in all circumstances which can be attained by implementing the principle of disposition. This would bring the swinging pendulum back into balance.

Nevertheless, a transnational general principle on limiting victims' rights and their possibility to start a second trial back home cannot yet be deduced. However, with a transnationalised *ne bis in idem* some relief could be provided which – besides Article 54 Schengen Implementing Convention – is not yet the case, except in countries which apply the principle of disposition also in cases of the passive personality principle. ¶

127 OJ C 113, 18.4.2012, p. 56.

128 OJ C 113, 18.4.2012, p. 58, subparagraph 14.