

National Criminal Law in a Comparative Legal Context

Volume 2.1

General limitations on the application of criminal law

- Principle of legality
- Extraterritorial jurisdiction

Australia, Bosnia and Herzegovina, Hungary, India, Iran,
Japan, Romania, Russia, Switzerland, Uruguay, USA

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Extraterritorial jurisdiction – the applicability of domestic criminal law to activities committed abroad

Switzerland

1. General issues

The rules on the geographical scope of application (*räumlicher Geltungsbereich; conditions de lieu*) define the conditions under which Swiss criminal law is applicable to specific conduct taking place within Swiss territory or abroad, that is, how far Switzerland's penal power (*Strafrechtshoheit; pouvoir répressif*) reaches. The entirety of rules defining the geographical scope of application of Swiss criminal law is referred to as international criminal law (*internationales Strafrecht; droit pénal international*).¹

Whether Switzerland is competent to adjudicate upon a case, that is, when it has criminal jurisdiction (*Gerichtsbарkeit; pouvoir juridictionnel*) is a different question to the geographical scope of application of Swiss criminal law and is of a procedural nature. However, if Switzerland possesses penal power, it generally also has criminal jurisdiction. Yet a separate issue is the determination of the competent court within Switzerland according to the rules laid down in arts. 340 ff. StGB. Having a forum (*Gerichtsstand; for*) in Switzerland requires that it has penal power and criminal jurisdiction.²

a) Scope of protection provided by domestic criminal offenses

What legally protected interests (*Rechtsgüter; biens juridiques protégés*) Swiss criminal norms seek to protect is a separate question to the potential applicability of domestic criminal norms to extraterritorial conduct.³

¹ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3 StGB, p. 179, § 1; Roth/Moreillon-Harari/Liniger Gros, Intro aux art. 3 à 8 StGB, p. 28, § 5; Trechsel/Noll, Strafrecht AT, p. 57.

² Hurtado Pozo, Droit pénal, pp. 63–64, §§ 176–177; Trechsel/Noll, Strafrecht AT, p. 57 citing BGE 108 IV 145, 146 E.2; Roth/Moreillon-Harari/Liniger Gros, Intro aux art. 3 à 8 StGB, pp. 28–29, §§ 5–10.

³ Ambos, Internationales Strafrecht, pp. 13–14, §§ 31–33; Schultz, AT Strafrecht, p. 104.

Most Swiss criminal provisions do not differ whether the holder of a legally protected interest is a national or a foreigner. Thus, for example, life and limb, property, reputation and privacy, freedom and sexual integrity of foreigners and Swiss nationals are equally covered by the provisions of Title 1–5 StGB.

Some offenses, however, only aim at protecting national legally protected interests. Thus, the so-called “felonies and misdemeanors against the State and national defense” (Title 13 StGB) exclusively protect Swiss interests. However, since these offenses are often committed from abroad, the rules on the geographical scope of application foresee that such conduct is subject to Swiss criminal law (art. 4 StGB).⁴

On the other hand, a set of provisions explicitly safeguards foreign interests, such as art. 250 StGB protecting foreign money and stamps from counterfeiting and art. 255 StGB prohibiting forgery of foreign documents. Furthermore, the Swiss Criminal Code contains a Title on “disturbance of foreign relations” (Title 16 StGB), threatening with punishment behavior such as insulting a foreign state (art. 296 StGB) or violating foreign territorial sovereignty (art. 299 StGB). However, these provisions primarily aim at prohibiting conduct detrimental to Switzerland’s relations with foreign states and are thus the expression of a national interest; foreign interests are only secured collaterally.⁵

b) Location within legal system where applicability of domestic criminal law abroad is treated

The set of rules defining the geographical scope of application of Swiss criminal law is referred to as international criminal law. This notion is misleading in that these norms do not constitute international but rather domestic law. They define autonomously, albeit within the limits of international public law, the scope of domestic penal power, namely whether Swiss criminal law is applicable to facts featuring an extraterritorial moment.⁶

Rules defining the geographical scope of application of Swiss criminal law can not only be found in the General Part of the Swiss Criminal Code (arts. 3–8 StGB) but also in specific offense descriptions contained in the Special Part of the Swiss Criminal Code⁷ and in the secondary criminal law⁸ (*Nebenstrafrecht; droit pénal accessoire*).⁹

⁴ See below 3.b.

⁵ Niggli/Wiprächtiger-Omlin, vor Art. 296, p. 2123, § 2.

⁶ Hurtado Pozo, *Droit pénal*, p. 61, §§ 171–172; Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3 StGB, p. 179, § 1; BGE 119 IV 113, 116 E. 1c.

⁷ E.g., art. 240 para. 3 StGB or art. 245 no. 1 para. 3 StGB.

⁸ E.g., art. 19 no. 4 BetmG.

⁹ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 179, § 2 and Art. 7 StGB, p. 219, § 13.

The provisions defining the geographical scope of application of Swiss penal law are substantive criminal norms and not of a procedural nature.¹⁰

c) Overview of the major principles governing the exercise of jurisdiction

– Jurisdictional principles

First and foremost, Swiss criminal law is applicable to offenses committed in Switzerland (principle of territoriality).¹¹ However, the legislature extended the application of Swiss criminal law to certain extraterritorial conduct if specific connecting factors (*Anknüpfungspunkte*; *points de rattachement*) exist, which legitimize the extension of Swiss penal power to offenses committed abroad.

One such connecting factor justifying the application of Swiss law to an offense is the Swiss nationality of the offender (active personality principle)¹² or the victim (passive personality principle).¹³ In addition, Swiss criminal law is applicable to ships and aircraft flying the Swiss flag (flag principle).¹⁴ Furthermore, the fact that a specific offense violates the interests of the Swiss State may trigger the application of Swiss criminal law (protective principle).¹⁵

Some offenses are considered to be of such a grave nature that every state is equally competent to apply its law even absent any link, that is, legitimizing connecting factor, to the offense in question (universality principle).¹⁶ A specific link to the offense is also not required in the case where Switzerland exercises its penal power by representation for another state (representation principle).¹⁷

– Order of rank

The principle of territoriality (art. 3 StGB), which follows from the state's sovereignty over its territory (*Gebietshoheit*; *souveraineté territoriale*), is the primary basis for applying domestic criminal law. It is given priority over other principles providing a basis for the exercise of criminal jurisdiction (arts. 4–7 StGB).¹⁸

¹⁰ *Hurtado Pozo*, Droit pénal, p. 63, § 178; Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 181, § 8.

¹¹ See below 2.

¹² See below 4.

¹³ See below 3.c.

¹⁴ See below 2.d.

¹⁵ See below 3.b. *Hurtado Pozo*, Droit pénal, p. 63, § 179; Trechsel-Trechsel/Vest, Vor Art. 3 StGB, p. 15, § 5.

¹⁶ See below 5.

¹⁷ See below 6. *Hurtado Pozo*, Droit pénal, pp. 63–64, §§ 179–180.

¹⁸ *Donatsch/Tag*, Strafrecht I, p. 61; *Hurtado Pozo*, Droit pénal, p. 67, § 192; Trechsel-Trechsel/Vest, Art. 3 StGB, p. 19, § 1.

If, in a specific case, the exercise of extraterritorial jurisdiction can be based on multiple jurisdictional principles, then the principle that is given priority is that which imposes the least conditions for the application of Swiss criminal law. Despite this, the subsidiarity rule of art. 7 para. 1 StGB has to be observed, according to which the active and passive personality principle only apply if the conditions of art. 4 (protective principle), art. 5 (universal jurisdiction over specific offenses committed against minors) or art. 6 StGB (representation principle based on international agreements) are not met.¹⁹

d) Taking foreign legal norms into account

– Application of Swiss criminal law as a fundamental principle

The Swiss judge does not apply foreign criminal norms as such, even if conduct carried out abroad is under consideration. Rather, Swiss criminal law is applied, whether the offense is committed within Switzerland (art. 3 StGB) or abroad (arts. 4–7 StGB).

From an interstate perspective, the application of Swiss law to conduct taking place abroad may lack legitimacy. From an offender's perspective, 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 (*Legalitätsprinzip; principe de la légalité*).²⁰ In order to accommodate these concerns, foreign criminal law is taken into account to some extent. On the one hand, some jurisdictional principles make the application of Swiss criminal law contingent upon double criminality, that is, that the conduct is also punishable at the *locus delicti commissi*.²¹ On the other hand, in some instances the milder sanction of the foreign law is considered when fixing the sentence according to Swiss law.²²

– Principle of double criminality

Some jurisdictional principles make the application of Swiss criminal law to an offense committed abroad contingent upon the requirement that the conduct in question is also liable to punishment at the place where it was committed, that is, they require double criminality (*beidseitige Strafbarkeit; double incrimination*).²³

¹⁹ Eicker, Swiss International Criminal Law, p. 308 and p. 315; Roth/Moreillon-Henzelin, Art. 7 StGB, p. 79, § 3.

²⁰ II.A.3.

²¹ See below 1.d.

²² See below 1.d.; Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 190, § 26; Riklin, Verbrechenslehre, p. 121, § 35.

²³ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 190, § 26. Whether double criminality is required with regard to each of the principles establishing extraterritorial jurisdiction is addressed in relation to each principle individually: see below 3.–6.

When deciding whether the double criminality requirement is fulfilled, the Swiss judge takes foreign law into account *ex officio*; the alleged offender does not bear any burden of proof.²⁴

According to the Swiss Federal Supreme Court (*Schweizerisches Bundesgericht; Tribunal fédéral suisse*), the principle of double criminality does not require complete identity between the foreign and domestic criminal norm (*Normidentität; identité complète des normes pénales*). Rather, it is sufficient that the conduct in question matches the objective and subjective definitional elements of an offense under both laws. Elements pertaining to unlawfulness, culpability or additional pre-requisites of criminal liability are not to be taken into account.²⁵ The consequences of the criminal offense do not have to be the same, that is, the type of sanction can differ; however, the addressee of the sanction has to be identical. Procedural norms are not relevant in the context of double criminality. The conduct under consideration has to be punishable under both laws at the time of commission of the offense and not the time of the judgment.²⁶

– *Lex mitior*

Some jurisdictional principles foresee the so-called *lex mitior* principle according to which an offender, who is subject to Swiss law, cannot be punished more severely for an offense committed abroad than he would be under the law of the locus of commission.²⁷ The principle is statutorily defined as follows:

Art. 6 para. 2 StGB and Art. 7 para. 3 StGB²⁸

The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.

The Swiss judge does not apply foreign criminal norms as such. Rather, when fixing the sanction according to Swiss law, he has to exercise his discretion by observing a possibly milder punishment under foreign law. Hence, the penalty that would be imposed under foreign law constitutes the maximum sentence that he can pronounce.²⁹

²⁴ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 190, § 29.

²⁵ II.C.2.c.

²⁶ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, pp. 190–191, §§ 27–28; Popp, Internationale Rechtshilfe, pp. 142–143, §§ 211–212 and pp. 148–153, §§ 220–228; Roth/Moreillon-Henzelin, Art. 6 StGB, p. 71, § 21.

²⁷ The bases of jurisdiction to which the *lex mitior* principle applies is addressed in relation to each jurisdictional principle individually: see below 3.–6.

²⁸ The wording of the French and Italian versions of art. 6 para. 2 StGB and art. 7 para. 3 StGB is identical; the German wording of the two provisions varies slightly. All translations of legal provisions are the author's own, unless otherwise provided.

²⁹ Botschaft StGB, p. 1997/Message StGB, p. 1803; Hurtado Pozo, Droit pénal, p. 66, § 191; Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, pp. 192–193, §§ 30–31.

When determining the sanction under foreign law, the judge does not have to consider the abstract penalty as foreseen in the foreign criminal provision, but rather has to determine the concrete liability of the offender in the case in issue. By comparing the sanction under foreign and Swiss law, the overall effect of the sanction (*Gesamtwirkung der Strafe; conséquences globales des sanctions*) has to be considered, that is, including the modalities of the sanction (e.g., suspended versus unsuspended sentence) and the enforcement (e.g., house arrest versus confinement in a penitentiary). Since the punishment under foreign law constitutes the maximum penalty that the Swiss judge can impose, the *lex mitior* principle prevents the offender from being treated differently to someone undergoing trial for the same offense at the locus of commission.³⁰

e) Taking foreign criminal judgments into account

Since every state can define its penal power autonomously within the limits of international public law, several states may subject the same offense to their domestic criminal law and jurisdiction. Hence, it is possible that according to the Swiss rules on the geographical scope of application, Swiss criminal law is applicable to an offense which could be or has already been judged in a foreign criminal procedure.

The principle of *ne bis in idem*,³¹ which prohibits a person from being tried or punished again for an offense for which he or she has already been finally acquitted or convicted in accordance with the law and penal procedure of each country, does not bar prosecution for the same facts in two different states.³² In addition, no clear international rules on how to solve positive conflicts of competence among states exist. Thus, an offender could potentially be tried and punished by several states for the same offense. Therefore, Swiss international criminal law foresees some principles, which govern the situation where a foreign criminal judgment has already been issued.³³

³⁰ Botschaft StGB, p. 1997/Message StGB, p. 1803; Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, pp. 192–193, §§ 30–31.

³¹ Art. 14 para. 7 ICCPR and Art. 4 protocol no. 7 ECHR

³² Frowein/Peukert, EMRK-Kommentar, art. 4 protocol no. 7 ECHR, p. 712, § 2; Nowak, ICCPR Commentary, art. 14 ICCPR, p. 356, § 99.

³³ Donatsch/Tag, Strafrecht I, p. 47; Hurtado Pozo, Droit pénal, p. 74, §§ 213–214; Roth/Moreillon-Harari/Liniger Gros, Art. 3 StGB, p. 35, § 16; Trechsel/Noll, Strafrecht AT, p. 57. The bases of jurisdiction to which the principle of imputation, extinction or enforcement applies is addressed in relation to each basis of jurisdiction individually: see below 3.–6.

– *Principle of imputation*

In order to temper the consequences of double jeopardy, that is, that the offender can be tried again for the same facts in another state, the so-called principle of imputation (*Anrechnungsprinzip; principe de l'imputation*) obliges the Swiss judge to take into account a sentence served abroad. In concrete terms, this requires that he has to subtract a fully or partially enforced foreign sanction from the sentence he pronounces for the same offense. The principle thus reflects the idea of *ne bis poena in idem*, that is, that an offender shall not be punished twice for the same facts, and therefore prevents “an unfair accumulation of sentences.”³⁴ The principle is statutorily defined as follows:

Art. 3 para. 2 StGB / art. 4 para. 2 StGB³⁵

2 If the offender has been convicted abroad for the offense and if the sentence has been fully or partially enforced abroad, the judge must count the enforced sentence toward the sentence to be pronounced.

With regard to measures (*Massnahmen; mesures*), the Criminal Code states the following rule:

Art. 5 para. 3 StGB / art. 6 para. 4 StGB / art. 7 para. 5 StGB³⁶

If the offender has been convicted abroad for the offense and if the sentence has only been partially enforced abroad, the judge must count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

The principle only applies to enforced sentences. Thus, neither an acquittal nor a suspended (*bedingte Strafe; peine avec sursis*) or prescribed sentence (*verjährte Strafe; peine prescrite*) pronounced in a foreign proceeding has to be taken into account by the Swiss judge. The same holds true if the sanction was waived, for example, due to an amnesty (*Amnestie; amnistie*) or pardon (*Begnadigung; grâce*). Also the remainder of a sentence in case of parole (*bedingte Entlassung; libération conditionnelle*) is not considered. Finally, a monetary penalty (*Geldstrafe, peine pécuniaire*) can only be counted towards the Swiss sentence if it has been paid.³⁷

A direct crediting can take place if the foreign and domestic judgments foresee the same type of sanction; however, if the modalities of enforcement are fundamen-

³⁴ Trechsel-Trechsel/Vest, Art. 3 StGB, p. 19, § 6 citing BGE 105 IV 225, 227 E. 3; Hurtado Pozo, Droit pénal, pp. 74–75, § 214.

³⁵ All translations of the Swiss Criminal Code (StGB) are the author's own.

³⁶ The wording of the French versions of art. 5 para. 3, art. 6 para. 4 and art. 7 para. 5 StGB is identical; the German wording varies slightly among the provisions.

³⁷ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, pp. 200–201, §§ 46–47; Roth/Moreillon-Harari/Liniger Gros, Art. 3 StGB, p. 35, § 17 and p. 36, §§ 19–23.

tally different, a direct crediting may not be adequate. If the type of sanction varies between the foreign and domestic judgments (e.g., monetary penalty and imprisonment) a conversion has to take place; thereby the judge can exercise some discretion.³⁸

– *Principle of extinction*

According to the principle of extinction (*Erledigungsprinzip; principe de l'extinction*), Switzerland does not prosecute an offender for a specific offense if he has been acquitted by final judgment abroad or if the sentence has been enforced, waived or is barred by a statute of limitations with regard to that offense. 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.³⁹

However, a 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*, that is, if it violated fundamental principles of the Federal Constitution or the ECHR. It is quite unclear what this criteria, which was only introduced during the parliamentary debate and thus in the very final phase of the legislative process, encompasses.⁴⁰ The principle of extinction is statutorily defined as follows:

Art. 5 para. 2 StGB / art. 6 para. 3 StGB / art. 7 para. 4 StGB

Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not to be prosecuted for the same offense in Switzerland, if:

- a. he has been acquitted abroad by final judgment;
- b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

With regard to the territoriality principle,⁴¹ that is, offenses committed in Switzerland, the principle of extinction additionally requires that the foreign proceedings took place at the request of Swiss authorities. It is defined as following in the Swiss Criminal Code:

Art. 3 para. 3 StGB

3 Subject to a serious violation of the fundamental principles of the Federal Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR), an offender who has been prosecuted abroad

³⁸ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 201, § 47.

³⁹ Donatsch-Donatsch, Art. 3 StGB, pp. 33–34, § 13; Hurtado Pozo, Droit pénal, pp. 75–76, §§ 215–218.

⁴⁰ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, pp. 197–198, § 41; Roth/Moreillon-Harari/Liniger Gros, Art. 3 StGB, pp. 43–46, §§ 62–77.

⁴¹ See below 2.a.

at the request of the Swiss authorities will not be prosecuted in Switzerland for that offense, if:

- a. he has been acquitted abroad by final judgment;
- b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

– *Principle of enforcement*

According to the principle of enforcement (*Vollzugsprinzip; principe de l'exécution*) a foreign sanction, which has not or has only partially been enforced abroad, is enforced in Switzerland. With regard to measures, 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.⁴²

The principle of enforcement is only foreseen with regard to the territoriality principle and is defined as follows:

Art. 3 para. 4 StGB

If the offender who has been prosecuted abroad at the request of the Swiss authorities did not serve the sentence abroad, it is enforced in Switzerland; if he served it only partially, the remainder of the sentence is served in Switzerland. The judge decides whether a measure, which has not or has only partially been enforced abroad, is executed or continued in Switzerland.

2. Principle of territoriality

a) General issues

– *The principle of territoriality and its statutory definition*

According to the principle of territoriality (*Territorialitätsprinzip; principe de la territorialité*), Swiss criminal law is applicable to every person (regardless of his or her nationality), who commits an offense in Switzerland.⁴³ The principle is thus intrinsically linked with the notion of territory⁴⁴ and the concept of locus of commission.⁴⁵ For felonies and misdemeanors, the principle of territoriality is stated in art. 3 StGB:

Art. 3 StGB [Felonies or misdemeanors committed in Switzerland]

1 Whoever commits a felony or misdemeanor in Switzerland is subject to this law.
[2–4] [...].⁴⁶

⁴² Roth/Moreillon-Harari/Liniger Gros, Art. 3 StGB, p. 47, §§ 78–81.

⁴³ Hurtado Pozo, Droit pénal, p. 67, § 193.

⁴⁴ See below 2.c.

⁴⁵ See below 2.b.

⁴⁶ For art. 3 paras. 2, 3 and 4 StGB see above 1.e.

This provision is also applicable to contraventions (art. 104 StGB). Art. 3 StGB applies in addition to offenses defined in federal laws other than the Criminal Code, unless they contain deviating rules on the geographical scope of application of Swiss criminal law (art. 333 para. 1 StGB).⁴⁷

– *Foreign criminal law and foreign criminal judgments*

With regard to the principle of territoriality, foreign criminal law is not taken into account, either by requiring double criminality or via the *lex mitior* principle.⁴⁸ This holds true even if the criminal conduct was carried out abroad and the principle of territoriality only applies because the result was obtained in Switzerland.⁴⁹ However, foreign judgments are taken into account: art. 3 StGB not only foresees the principle of imputation (art. 3 para. 2 StGB) but also the principles of extinction (art. 3 para. 3 StGB) and enforcement (art. 3 para. 4 StGB).⁵⁰

b) Concept of locus of commission / *locus delicti commissi*

– *Statutory definition*

According to art. 3 para. 1 StGB, Swiss criminal law applies to any person who commits an offense in Switzerland. When the locus of commission is deemed to be in Switzerland is defined in art. 8 StGB:

Art. 8 para. 1 StGB [Locus of commission]

- 1 A felony or misdemeanor is deemed to have been committed where the offender acted or where he failed to comply with a duty to act and where the result occurred.
- 2 An attempt is deemed to have been committed where the offender accomplished it and where the result should have occurred according to his conception.

Accordingly, for an offense to fall within the geographical scope of application of Swiss criminal law it thus suffices that either the place where the criminal conduct was carried out (act or omission) *or* the place where the criminal result occurred is located in Switzerland. Art. 8 StGB thus follows the so-called ubiquity theory (*Ubiquitätstheorie; théorie de l'ubiquité*), and not the theory of acting, by which only the place of conduct is deemed to be a *locus delicti commissi*, or the theory of result which considers only the place where the criminal result occurs as constituting the locus of commission.⁵¹

⁴⁷ II.C.2.a.

⁴⁸ See above 1.d.

⁴⁹ See below 2.b.

⁵⁰ See above 1.e.

⁵¹ *Hurtado Pozo*, Droit pénal, p. 60, § 199 and p. 70, § 201.

– *Place where the offender carried out the criminal conduct*

If the place where the offender acted (crime of commission) or where he failed to act contrary to duty (crime of omission) is located in Switzerland,⁵² the offense is considered to be committed in Switzerland, that is, the specific conduct falls within the geographical scope of application of Swiss criminal law. Thereby, it suffices that only one of the objective definitional elements of the offense was (partially) fulfilled in Switzerland. However, mere preparatory acts carried out in Switzerland are generally not enough to give rise to a locus of commission; rather, an attempt is necessary. Also conduct taking place after the criminal offense has ended (*Beendigung; épuisement*)⁵³ is irrelevant for determining the locus of commission.⁵⁴

– *Place where the criminal result occurs*

According to the ubiquity theory entrenched in art. 8 StGB, a crime is also deemed to have been committed where its result (*Erfolg; résultat*) occurs. Keeping in line with the newer case law of the Swiss Federal Supreme Court,⁵⁵ the notion of result should be understood as synonymous with its definition in the context of result offenses (*Erfolgsdelikte; délits matériels*). Thus, only those changes in the outside world are considered to be a result in the sense of art. 8 StGB, which correspond to an objective definitional element of the offense.⁵⁶

If from the offender's perspective the result occurs at a random place, this place should not qualify as a locus of commission. Rather, only those places where the result should have occurred according to the offender's conception should be considered as *locus delicti commissi*. This limitation is deduced from art. 8 para. 2 StGB pertaining to attempted crimes, which should *a fortiori* apply to completed offenses.⁵⁷

– *Attempt*

An attempt⁵⁸ gives rise to a *locus delicti commissi*, if it was committed in Switzerland or if the result should have occurred in Switzerland according to the offender's conception. Thus, art. 8 para. 2 StGB also follows the ubiquity theory. However, given the nature of an attempt, the place where the criminal result occurs

⁵² II.D.4.a.

⁵³ For the issue of the end of a crime see II.F.2.b.

⁵⁴ *Hurtado Pozo*, Droit pénal, p. 70, §§ 202–204; Trechsel-Trechsel/Vest, Art. 3 StGB, p. 19, §§ 2–3.

⁵⁵ Niggli/Wiprächtiger-Popp/Levante, Art. 8, p. 231, § 7; BGE 105 IV 326, 330 E. 3.g.

⁵⁶ II.D.6.

⁵⁷ Niggli/Wiprächtiger-Popp/Levante, Art. 8, p. 232, § 8.

⁵⁸ II.F.2.

is substituted by the place where the result should have occurred according to the author's perception.⁵⁹

While mere preparatory acts generally do not give rise to a *locus delicti commissi* in Switzerland, the so-called punishable preparatory acts (*strafbare Vorbereitungshandlungen*; *actes préparatoires délictueux*) pertaining to specific crimes exhaustively listed in art. 260^{bis} para. 1 StGB do so:

Art. 260^{bis} para. 3 StGB [Punishable preparatory acts]

3 Also punishable is whoever commits a preparatory act abroad, if the intended offenses will be committed in Switzerland. Article 3 paragraph 2 is applicable.

– *Participation*

In the case of co-perpetration (*Mittäterschaft*; *coauteur*),⁶⁰ the criminal conduct of one co-perpetrator in Switzerland establishes a locus of commission in Switzerland for all co-perpetrators. Likewise, the criminal result obtained on Swiss territory by one co-perpetrator gives rise to a *locus delicti commissi* in Switzerland for every co-perpetrator.⁶¹

In the case of perpetration by means (*mittelbare Täterschaft*; *participation en qualité d'auteur médiate*),⁶² the place where the indirect perpetrator (*mittelbarer Täter*; *auteur médiate*) influenced the innocent agent (*Tatmittler*; *instrument humain*) as well as the place where the latter acted, or omitted to act, or where the result of the offense occurred, are deemed to be a locus of commission.⁶³

An instigator (*Anstifter*; *instigateur*) is deemed having committed a crime in Switzerland even if he acted abroad if the result of the instigation occurred in Switzerland or, in the case of an attempt, the result should have occurred in Switzerland. The same holds true for an aider and abettor (*Gehilfe*; *complice*) contributing to the offense from abroad, if the result of the crime is obtained in Switzerland.⁶⁴

However, according to the Swiss Federal Supreme Court, persons instigating or aiding and abetting in Switzerland an offense committed abroad, are not subject to Swiss criminal law based on the territoriality principle (other principles establish-

⁵⁹ Roth/Moreillon-Harari/Liniger Gros, Art. 8 StGB, p. 99, §§ 55–58; Trechsel-Trechsel/Vest, Art. 8 StGB, p. 32, § 5.

⁶⁰ II.G.3.a.

⁶¹ Niggli/Wiprächtiger-Popp/Levante, Art. 8, p. 234, § 13; Roth/Moreillon-Harari/Liniger Gros, Art. 8 StGB, p. 98, §§ 48–49.

⁶² II.G.3.a.

⁶³ Donatsch/Tag, Strafrecht I, p. 51; Roth/Moreillon-Harari/Liniger Gros, Art. 8 StGB, p. 98, § 51.

⁶⁴ Donatsch/Tag, Strafrecht I, p. 51; Roth/Moreillon-Harari/Liniger Gros, Art. 8 StGB, p. 98, § 54.

ing criminal jurisdiction may, however, subject the person to Swiss law).⁶⁵ Doctrine criticizes this view and argues that Swiss criminal law should be applicable under the condition that the principal offense is punishable in the state where it is committed.⁶⁶

c) Territory of states (definition)

The notion of “Switzerland” as used in art. 3 para. 1 StGB refers to the territory of the Swiss State as defined by domestic and international public law.⁶⁷ It encompasses not only the land surface within the state borders but also the airspace above it and the subsoil (e.g., tunnels and mines) beneath it.⁶⁸

Diplomatic missions are no longer considered to be parcels of land of the state they are representing. Rather, the penal power of Switzerland extends to these portions of territory, that is, Swiss criminal law applies *ratione loci*. However, its application might be inhibited because of diplomatic immunities and thus due to *ratione personae* considerations.⁶⁹

d) Extension by flag principle “*territoire flottant*”

– Flag principle as an independent basis of jurisdiction

In the past, ships and aircraft flying the flag of Switzerland were assimilated to Swiss territory. Thus, Switzerland claimed territorial jurisdiction over its vessels based on the fiction that they are floating parts of its territory. However, to keep in line with international public law, under which the *territoires flottants* doctrine was abandoned, the application of Swiss criminal law to its vessels is today based on the so-called flag principle (*Flaggenprinzip; principe du pavillon*). Under Swiss law, the flag principle is independent from the territoriality principle and constitutes a jurisdictional basis of its own.⁷⁰

According to the flag principle, the state whose flag a ship or aircraft is flying has jurisdiction (*Hoheitsgewalt; juridiction*) over the vessel; one aspect of jurisdiction is the exercise of penal power. Switzerland has thus penal power over criminal conduct taking place on board ships and aircraft registered in Switzerland, regard-

⁶⁵ *Donatsch/Tag*, *Strafrecht I*, p. 51; Roth/Moreillon-Harari/Liniger Gros, Art. 8 StGB, pp. 98–99, § 54; both citing BGE 104 IV 77, 86–87 E. 7b.

⁶⁶ Roth/Moreillon-Harari/Liniger Gros, Art. 8 StGB, pp. 98–99, § 54.

⁶⁷ For the geography of Switzerland, see in general I.A.1.

⁶⁸ *Hurtado Pozo*, *Droit pénal*, pp. 67–68, § 194; Trechsel-Trechsel/Vest, Art. 3 StGB, p. 19, § 3.

⁶⁹ *Hurtado Pozo*, *Droit pénal*, p. 68, § 195 and pp. 126–128, §§ 376–381.

⁷⁰ *Colombini*, *Droit étranger*, p. 39; *Hurtado Pozo*, *Droit pénal*, p. 68, § 196.

less of the place where the offense is committed or the nationality of either the offender or the victim. Through the application of the flag principle potential jurisdictional loopholes resulting from the fact that Swiss vessels are navigating beyond Swiss borders can be closed.⁷¹

– *Flag principle with regard to ships*

With regard to ships, the flag principle is laid down in the Federal Law of 23 September 1953 on Navigation under the Swiss Flag (Navigation Law):⁷²

Art. 4 Navigation Law [Scope of application of Swiss law]⁷³

1 On the high seas Swiss federal law is exclusively applicable on board Swiss ships. In territorial waters Swiss federal law is applicable insofar as the coastal State does not declare its law mandatorily applicable. [...]

2 Offenses in the sense of the Criminal Code and of other federal criminal provisions, which are committed on board a Swiss ship, are however subject to Swiss law regardless of the place where the ship was located at the time of the commission of the offense.

3 The criminal provisions of this law apply regardless whether the offense was committed abroad or in Switzerland.

4 The offender is not punished in Switzerland, if:

- he has been acquitted abroad by final judgment for the felony or misdemeanor;
- if the sanction, which was imposed abroad for the same offense, has been enforced, waived or is barred by the statute of limitations.

If the sanction has only partially been enforced abroad, it is given credit for the enforced part.

On the high seas, Swiss federal law exclusively applies to Swiss vessels (first sentence of art. 4 para. 1 Navigation Law). In the territorial waters of third states, Swiss law only applies if the coastal state's law is not mandatorily applicable (second sentence of art. 4 para. 1 Navigation Law). However, this distinction between the high seas and other geographical areas is not upheld with regard to penal law: Swiss criminal law is always exclusively applicable regardless of where the ship flying the Swiss flag was navigating when the offense was committed on board (art. 4 paras. 2 and 3 Navigation Law). Thus, according to the flag principle, Switzerland claims the exclusive application of Swiss criminal law over conduct taking place on board ships flying the Swiss flag.⁷⁴

⁷¹ *Riklin*, *Verbrechenslehre*, p. 119, § 28.

⁷² Bundesgesetz über die Seeschifffahrt unter der Schweizer Flagge vom 23. September 1953 (Seeschiffahrtsgesetz/Loi fédérale sur la navigation maritime sous pavillon suisse du 23 septembre 1953), SR/RS 747.30.

⁷³ All translations of the Navigation Law are the author's own.

⁷⁴ *Colombini*, *Droit étranger*, p. 41.

The effect of a foreign judgment in Switzerland is laid down in art. 4 para. 4 Navigation Law which states the principle of extinction (first sentence) as well as the principle of imputation (second sentence).⁷⁵

– *Flag principle with regard to aircraft*

With regard to aircraft, the flag principle is stated in the Federal Law of 21 December 1948 on Air Navigation (Air Navigation Law).⁷⁶

Art. 11 para. 3 Air Navigation Law [Geographical scope of application of the law]⁷⁷

3 Swiss law applies on board Swiss aircraft abroad, insofar as the law of the State, in or over which the aircraft is located, does not mandatorily apply.

Art. 97 Air Navigation Law [Offenses on board Swiss aircraft]

1 Swiss criminal law is also applicable to offenses, which are committed on board Swiss aircraft outside Switzerland.

2 Crew members of a Swiss aircraft are subject to Swiss criminal law even if the offense was committed outside the aircraft but within the scope of their duties.

3 Criminal prosecution is only admissible if the offender is in Switzerland and is not extradited to a third State or if he is extradited to Switzerland for the offense in question.

4 Article 6 no. 2 of the Criminal Code [today Article. 6 para. 3 of the Criminal Code] applies regardless of the nationality of the offender.

Similar to ships, Swiss criminal law is applicable to offenses committed on board aircraft flying the Swiss flag regardless of where the aircraft is located, that is, whether it is on or over Swiss or foreign territory or in the airspace above areas under no jurisdiction (art. 97 para. 1 Air Navigation Law). In addition, crew members of Swiss aircraft are subject to Swiss criminal law even if they commit an offense abroad and outside the aircraft, as long as the crime was committed in connection with their duties. According to art. 97 para. 4 Air Navigation Law, the principle of extinction as defined in art. 6 para. 3 StGB applies.⁷⁸

3. Protective principle

a) General issues

The protective principle and the passive personality principle share a common rationale. They both allow the application of Swiss criminal law to offenses which

⁷⁵ See above 1.e.

⁷⁶ Bundesgesetz über die Luftfahrt vom 21. Dezember 1948 (Luftfahrtgesetz/Loi fédérale sur l'aviation du 21 décembre 1948), SR/RS 748.0.

⁷⁷ All translations of the Air Navigation Law are the author's own.

⁷⁸ See above 1.e.

violate interests, the safeguarding of which Switzerland, potentially, attaches higher importance than does any third state, and which may not be sufficiently protected by foreign criminal law. However, apart from this common rationale, the two principles are governed by separate rules and apply under different conditions.

b) Protection of the state

– *The protective principle and its statutory definition*

The protective principle (*Realprinzip/Staatsschutzprinzip; principe de la compétence réelle/principe de protection étatique*) is laid down in art. 4 StGB:

Art. 4 StGB [Felonies and misdemeanors committed abroad against the State]

1 Whoever commits a felony or misdemeanor against the State or national defense (arts. 265–278), is also subject to this law.

2 If the offender has been convicted abroad for that offense and if the sentence has been fully or partially enforced abroad, the judge counts the enforced sentence toward the sentence to be pronounced.

Art. 4 para. 1 provides that persons committing an offense listed in Title 13 StGB (arts. 265–278 StGB), which is entitled “felonies and misdemeanors against the State and national defense,” are subject to the Swiss Criminal Code. Hence, Swiss law applies to a limited number of extraterritorially committed offenses, which potentially endanger the state’s existence, national security or other vital state interests.⁷⁹ Among these offenses are high treason (art. 265 StGB), attacks on the independence of the Confederation (art. 266 StGB), moving of national boundary marks (art. 268 StGB), industrial espionage (art. 273 StGB), attacks on the constitutional order (art. 275 StGB) or unlawful association (art. 275^{ter} StGB).

Art. 4 para. 1 StGB cannot be applied to any other offense of the Criminal Code since the catalogue of offenses mentioned in the provision is exhaustive. However, various provisions of the secondary criminal law also foresee the protective principle (e.g., art. 33 para. 4 Federal Law on War Material⁸⁰ or art. 89 para. 4 Air Navigation Law).⁸¹

– *Rationale behind the principle of protection of the state*

The exercise of the protective principle is generally justified by every state’s right to self-defense.⁸² Given that offenses violating fundamental state interests are

⁷⁹ Hurtado Pozo, *Droit pénal*, p. 76, § 219 and p. 77, § 221.

⁸⁰ Bundesgesetz über das Kriegsmaterial vom 13. Dezember 1996 (Kriegsmaterialgesetz/Loi fédérale sur le matériel de guerre du 13 décembre 1996), SR/RS 514.51.

⁸¹ Niggli/Wiprächtiger-Popp/Levante, *Art. 4*, p. 207, § 1.

⁸² Hurtado Pozo, *Droit pénal*, pp. 76–77, § 220.

likely to emanate from abroad, taken in conjunction with the presumption that third states may not have (sufficiently severe) laws in place to prosecute such offenses or that they would lack an interest to prosecute alleged offenders, the victim state should have the right to subject offenders to their own criminal law.⁸³

– *Foreign criminal law and foreign criminal judgments*

Since foreign law would most probably either not or not sufficiently protect fundamental interests of the Swiss State, the protective principle does not take into account foreign criminal law.⁸⁴ The application of the principle (to an increasing number of offenses) could thus be problematic in the light of the principle of legality.⁸⁵ With regard to foreign criminal judgments, the principle of imputation applies (art. 4 para. 2 StGB).⁸⁶

c) Passive personality principle

– *Statutory definition*

The principles of active⁸⁷ and passive personality are both statutorily defined in art. 7 para. 1 StGB and are subject to the same requirements:

Art. 7 StGB [Other offenses committed abroad]

1 Whoever commits a felony or misdemeanor abroad, without the requirements of articles 4, 5, and 6 having been met, is subject to this law, if:

- a. the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power;
- b. the offender is in Switzerland or is extradited to Switzerland because of that offense; and
- c. according to Swiss law extradition is permissible for that offense, but the offender is not extradited.

2 If the offender is not a Swiss national or if the felony or misdemeanor was not committed against a Swiss national, paragraph 1 is only applicable if: [...]

3 The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.

4 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:

- a. he has been acquitted abroad by final judgment;
- b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

⁸³ Roth/Moreillon-Harari/Liniger Gros, Art. 4 StGB, p. 49, § 8.

⁸⁴ See above I.d.

⁸⁵ II.A.3.; Hurtado Pozo, Droit pénal, p. 78, § 222.

⁸⁶ See above I.e.

⁸⁷ See below 4.

5 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge counts the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

Art. 7 para. 1 StGB also applies to felonies and misdemeanors defined in the secondary criminal law (art. 333 para. 1 StGB).⁸⁸ However, the provision does not apply to contraventions since they do not qualify as extraditable offenses as required by art. 7 para. 1 lit. c StGB.⁸⁹

– *Requirements for the passive personality principle to apply*

For the passive personality principle to apply, the requirements listed in art. 7 para. 1 StGB have to be fulfilled cumulatively. In addition, the victim has to be a Swiss national; this follows *e contrario* from art. 7 para. 2 StGB.⁹⁰

- Double criminality or place under no penal power

According to art. 7 para. 1 lit. a StGB, the passive personality principle only applies if, inter alia, the offense is also punishable at the locus of commission. Hence, it requires double criminality (*doppelte Strafbarkeit; double incrimination*).⁹¹ Alternatively, the principle also applies if the crime was committed in a place, which is not subject to any penal power (art. 7 para. 1 lit. a StGB), such as the high seas.⁹²

- Offender's presence in Switzerland

Art. 7 para. 1 lit. b StGB requires that the offender, who committed an offense abroad, is voluntarily (or even involuntarily)⁹³ present in Switzerland. Alternatively, presence of the offender can also be obtained through extradition, which must be based on a lawful procedure. Presence achieved by way of abduction, deception or circumvention of extradition proceedings does not fulfill the presence requirement of art. 7 para. 1 lit. b StGB.⁹⁴

- Extraditable offense and non-extradition of the offender

Art. 7 para. 1 lit. c StGB further stipulates that the crime under consideration has to be an extraditable offense (*Auslieferungsdelikt; infraction donnant lieu à extra-*

⁸⁸ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 222, § 1.

⁸⁹ See below 3.c.

⁹⁰ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 223, § 2.

⁹¹ See above 1.d.

⁹² Art. 98 UNCLOS.

⁹³ Roth/Moreillon-Henzelin, Art. 6 StGB, p. 72, § 24.

⁹⁴ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 223, § 6; Trechsel-Trechsel/Vest, Art. 7 StGB, p. 28, § 7.

dition) under Swiss law. Art. 35 IRSG defines the notion of extraditable offense as follows:

Art. 35 para. 1 IRSG [Extraditable offences]⁹⁵

1 Extradition shall be permitted if, according to the documents supporting the request, the offense

- a. is punishable not only under the law of Switzerland but also under the law of the requesting State by a sanction with deprivation of liberty for a maximum period of at least one year or with a more severe sanction and
- b. is not subject to Swiss jurisdiction.

Thus, offenders who have committed minor offenses (*Bagatelldelikte; cas de peu d'importance*) against Swiss nationals abroad are not subject to Swiss criminal law and to Swiss criminal jurisdiction based on the passive personality principle.⁹⁶

In addition, art. 7 para. 1 lit. c. StGB requires that the offender not be extradited from Switzerland. The reason why the offender is not extradited is irrelevant; it could, for example, be because no third state requested the offender's extradition or because an extradition request was rejected.⁹⁷

- Swiss nationality of the victim

While the provision on the passive personality principle of the old Criminal Code (art. 5 aStGB)⁹⁸ explicitly required that the victim has to be a Swiss national, this is no longer the case under art. 7 para. 1 StGB. However, from the introductory sentence of art. 7 para. 2 StGB it follows that for the passive personality principle to apply, the victim has to be a Swiss national.⁹⁹ Whether the victim possesses further nationalities in addition to the Swiss nationality is irrelevant.¹⁰⁰

⁹⁵ All translations of provisions of the Federal Act on International Mutual Assistance in Criminal Matters (IRSG) in this chapter are taken from the unofficial translation of the IRSG provided by the Swiss Confederation, available at www.rhf.admin.ch/rhf/de/home/straf/recht/national/sr351-1.html [last visited: 13 July 2010].

⁹⁶ Botschaft StGB, p. 1998/Message StGB, p. 1804.

⁹⁷ Botschaft StGB, p. 1998/Message StGB, pp. 1804, 1805; Roth/Moreillon-Henzelin, Art. 7 StGB, p. 81, § 11.

⁹⁸ I.G.2.

⁹⁹ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 222, § 2.

¹⁰⁰ Trechsel-Trechsel/Vest, Art. 7 StGB, p. 27, § 3.

4. Active personality (nationality) principle

a) General issues

– *The active personality principle and its statutory definition*

According to the active personality principle (*aktives Personalitätsprinzip; principe de personnalité active*), offenders having Swiss nationality are subject to Swiss criminal law for specific offenses committed abroad if certain requirements are fulfilled.¹⁰¹

While under the old Criminal Code¹⁰² the active and passive personality principles¹⁰³ were regulated in two separate norms (arts. 5 and 6 aStGB), they are now both statutorily defined by the same provision (art. 7 para. 1 StGB).¹⁰⁴

– *Requirements for the active personality principle to apply*

The active and passive personality principles are not only governed by the same provision (art. 7 para. 1 StGB), but their application is also subject to the same cumulative requirements. According to art. 7 para. 1 StGB, a Swiss offender having committed a felony or misdemeanor abroad is subject to Swiss criminal law if the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power (lit. a), the offender is in Switzerland or is extradited to Switzerland for that specific offense (lit. b), and according to Swiss law extradition is permissible for the offense in question but the offender is not extradited (lit. c).¹⁰⁵

The only difference between the application of the principles is that for the passive personality principle to apply, the victim has to be a Swiss national, while with regard to the active personality principle the offender has to possess Swiss nationality. While the provision on the active personality principle of the old Criminal Code (art. 6 aStGB)¹⁰⁶ explicitly mentioned this nationality requirement, this is no longer the case under art. 7 para. 1 StGB. However, the criterion can be inferred from the introductory sentence of art. 7 para. 2 StGB.¹⁰⁷ Whether the perpetrator possesses further nationalities in addition to the Swiss nationality is irrelevant; it also suffices that he became a Swiss national after the commission of the offense as long as he is Swiss at the time of the judgment.¹⁰⁸

¹⁰¹ See below 4.a.

¹⁰² I.G.2.

¹⁰³ See above 3.c.

¹⁰⁴ See above 3.c.

¹⁰⁵ See above 3.c.

¹⁰⁶ I.G.2.

¹⁰⁷ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 222, § 2; see above 3.c.

¹⁰⁸ Trechsel-Trechsel/Vest, Art. 7 StGB, p. 29, § 9 citing BGE 117 IV 369, 372, E. 3-7.

b) Legitimacy

The *ratio legis* behind enacting a rule that allows the application of Swiss criminal law to a Swiss national, who has committed an offense abroad has first and foremost to be seen in the prohibition upon the extradition of nationals. According to art. 25 para. 1 BV and art. 7 IRSG, no Swiss national may, without his written consent, be extradited or surrendered to a foreign state for prosecution. Without foreseeing the active personality principle, a Swiss national could rejoin Switzerland after having committed an offense abroad and could neither be extradited nor prosecuted (unless any other jurisdictional principle would apply). Thus, the active personality principle helps to avoid the impunity of Swiss nationals who have committed an offense abroad.¹⁰⁹

c) Extension by principle of domicile

According to the principle of domicile (*Domizilprinzip; principe de domicile*), an offender is subject to the law and jurisdiction of a specific state for offenses committed abroad, if he has his domicile in that state. Rather than the nationality of the offender, it is his domicile, that is, his principal place of residence, which forms the legitimizing connecting factor for subjecting a person to a specific state law and jurisdiction.¹¹⁰

The principle of domicile as an independent jurisdictional principle is unknown to Swiss criminal law. However, some norms of the secondary criminal law take into account the domicile rather than the nationality of the offender in circumstances where Switzerland is exercising jurisdiction in a representative capacity (representation principle).¹¹¹ An example of this is provided in art. 38 para. 4 JStG and art. 101 para. 1 SVG.¹¹²

Art. 38 para. 4 JStG¹¹³

4 The competent Swiss authority can assume criminal prosecution at the request of the foreign authority if:

- a. the juvenile has his domicile in Switzerland or is Swiss national;
- b. the juvenile committed an offense abroad, which is also punishable under Swiss law; and
- c. the requirements for criminal prosecution according to art. 4–7 StGB are not fulfilled.

¹⁰⁹ Botschaft StGB, p. 1998/Message StGB, pp. 1804/1805; Trechsel-Trechsel/Vest, Art. 7 StGB, p. 29, § 9 and p. 30, § 12.

¹¹⁰ Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 190, § 24.

¹¹¹ See below 6.

¹¹² Niggli/Wiprächtiger-Popp/Levante, Vor Art. 3, p. 190, § 24.

¹¹³ All translations of provisions of the Federal Law on the Criminal Law Applicable to Minors (JStG) are the author's own.

Art. 101 para. 1 SVG

1 Whoever commits a violation of traffic rules abroad [...] and is liable to punishment at the locus of commission, is prosecuted in Switzerland at the request of a competent foreign authority if he lives in Switzerland and is permanently settled here and does not subject himself to the foreign penal power.

5. Universality principle*– Universality principle and its rationale*

According to the universality principle, a person can be subjected to Swiss criminal law and jurisdiction, even if the crime was not committed in Switzerland (principle of territoriality), if neither the offender nor the victim are Swiss nationals (active and passive personality principle, and if the offense does not violate fundamental state interests (protective principle). It is generally admitted that universal jurisdiction is provided solely based on the nature of the offense and only over the most serious crimes of concern to the international community as a whole. However, which offenses should concretely enter the category of crimes covered by universal jurisdiction is quite controversially discussed in doctrine and politics.¹¹⁴

In the Swiss Criminal Code the principle of universality is embodied in two different provisions for two distinct types of offenses: art. 5 StGB provides universal jurisdiction over a defined set of offenses against minors committed abroad while art. 7 StGB foresees the exercise of universal jurisdiction over particularly serious crimes, which are outlawed by the international community as a whole.

– Universality principle for particularly grave offenses

Art. 7 para. 2 lit. b StGB allows for the application of Swiss law to an offender who committed a particularly grave offense abroad, which is outlawed by the international community as a whole, even absent any link to Switzerland, such as the place of commission or the nationality of the offender or victim.¹¹⁵ This provision was only introduced during the parliamentary debates and thus in the final stages of the legislative process.¹¹⁶

Art. 7 StGB [Other offenses committed abroad]

1 Whoever commits a felony or misdemeanor abroad, without the requirements of articles 4, 5, and 6 having been met, is subject to this law, if:

- a. the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power;

¹¹⁴ Roth/Moreillon-Henzelin, Art. 7 StGB, pp. 82–83, § 20.

¹¹⁵ See below 6.

¹¹⁶ Niggli/Wiprächtiger-Popp/Levante, Art. 7, pp. 226–227, § 16.

- b. the offender is in Switzerland or is extradited to Switzerland because of that offense; and
 - c. according to Swiss law extradition is permissible for that offense, but the offender is not extradited.
- 2 If the offender is not a Swiss national or if the felony or misdemeanor was not committed against a Swiss national, paragraph 1 is only applicable if:
- a. [...]
 - b. the offender committed a particularly grave offense, which is outlawed by the international community.
- 3 The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.
- 4 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:
- a. he has been acquitted abroad by final judgment;
 - b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.
- 5 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge is to count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

The introductory sentence of art. 7 para. 2 StGB requires that the offender does not possess Swiss nationality at the moment of the judgment (the nationality at the time of commission of the crime is not considered).¹¹⁷ For the universality principle to apply the victim must be a non-Swiss national either at the time of the commission of the offense or the moment when the criminal result occurred.¹¹⁸

Besides these negative requirements, a “particularly grave offense, which is outlawed by the international community” must have been committed (art. 7 para. 2 lit. b StGB). This criterion is criticized for being quite vague.¹¹⁹ Authors following a normative approach maintain that the provision applies to crimes recognized under international customary law, respectively *ius cogens*, such as genocide, crimes against humanity or the crime of aggression. Others follow a functional approach according to which a “particularly grave offense, which is outlawed by the international community” can only be one defined by an international instrument, such as a statute of an international tribunal.¹²⁰

¹¹⁷ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 225, § 12; BGE 117 IV 369, 372, E. 3-7.

¹¹⁸ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 225, § 13.

¹¹⁹ Niggli/Wiprächtiger-Popp/Levante, Art. 7, pp. 226–227, §§ 16–17; Roth/Moreillon-Henzelin, Art. 7 StGB, p. 83, §§ 22–23.

¹²⁰ Roth/Moreillon-Henzelin, Art. 7 StGB, pp. 83–84, §§ 24–29.

From the introductory sentence of art. 7 para. 2 StGB it follows that the requirements of para. 1 (double criminality, the offender's presence in Switzerland, non-extradition of the offender)¹²¹ apply in addition to those set out in para. 2.

Foreign law is taken into account in that the double criminality requirement also applies to offenses prosecuted under the universality principle (art. 7 para. 2 referring to the application of art. 7 para. 1 StGB). However, some authors argue that the double criminality requirement would be inappropriate in the context of universal jurisdiction and most probably would not have been intended by the legislature.¹²² Also the *lex mitior* principle applies (art. 7 para. 3 StGB).¹²³ With regard to the effects of foreign judgments, art. 7 para. 4 StGB states the principle of extinction and art. 7 para. 5 StGB foresees the principle of imputation.¹²⁴

– *Offenses against minors (art. 5 StGB)*

Art. 5 StGB provides universal jurisdiction over a set of offenses against minors committed abroad. The provision aims at better protecting children from sexual and commercial exploitation.

Art. 5 StGB [Offences against minors committed abroad]

1 Subject to this law is whoever is in Switzerland, is not extradited and who committed one of the following offenses abroad:

- a. trafficking in human beings (art. 182), sexual duress (art. 189), rape (art. 190), sexual acts with a person incapable of proper judgment or resistance (art. 191) or furtherance of prostitution (art. 195), if the victim is less than 18 years old;
- b. sexual acts with children (art. 187), if the victim was less than 14 years old;
- c. aggravated pornography (art. 197 no. 3), if the objects or performances have sexual acts with children as a content.

2 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:

- a. he has been acquitted abroad by final judgment;
- b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

3 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge is to count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

Art. 5 para. 1 StGB lists four requirements: First of all, the locus of commission has to be outside Switzerland. This is only the case if the conduct was carried out

¹²¹ See above 3.c.

¹²² Trechsel-Trechsel/Vest, Art. 7 StGB, pp. 30–31, § 14.

¹²³ See above 1.d.

¹²⁴ See above 1.e.

abroad and the result occurred abroad (*e contrario* from art. 8 para. 1 StGB).¹²⁵ Secondly, the offender has to be voluntarily present in Switzerland. Thereby, it is sufficient that the offender is present in Switzerland for a short period of time, for example, as a tourist or even only on transit. Thirdly, it is required that the offender not be extradited. Finally, universal jurisdiction is only provided over the offenses exhaustively listed in art. 5 para. 1 lit. a–c.¹²⁶

Art. 5 StGB neither requires that the offense be also punishable at the locus of commission (double criminality) nor does it state the *lex mitior* principle.¹²⁷ According to the drafting materials, this should help in avoiding impunity due to a lack of legislation in the state where the offense was committed.¹²⁸ With regard to the effect of foreign judgments, art. 5 StGB stipulates the principles of extinction (para. 2) and imputation (para. 3).¹²⁹

6. Representation principle

– *In general*

The representation principle (*stellvertretende Strafrechtspflege; compétence par représentation*) enables Switzerland to exercise its criminal jurisdiction over an offense committed abroad instead or on behalf of a third state having a closer link to the offense. The representation principle is provided for in art. 6 StGB (regarding extraterritorial offenses for whose prosecution Switzerland is obliged by international agreement) and art. 7 para. 2 lit. a StGB (regarding offenses where an extradition request was rejected).

– *Representation principle as defined in art. 6 StGB*

Art. 6 StGB [Offenses committed abroad prosecuted pursuant to an obligation resulting from an international agreement]

1 Whoever commits a felony or misdemeanor abroad, which Switzerland is obliged to prosecute pursuant to an international agreement, is subject to this law, if:

- a. the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power; and
- b. the offender is in Switzerland and is not extradited to a third State.

2 The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.

¹²⁵ See above 2.b.

¹²⁶ Niggli/Wiprächtiger-Popp/Levante, Art. 5, p. 210, § 2 and p. 212, §§ 5–8.

¹²⁷ See above 1.d.

¹²⁸ Niggli/Wiprächtiger-Popp/Levante, Art. 5, p. 212, § 3.

¹²⁹ See above 1.e.

- 3 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:
 - a. he has been acquitted abroad by final judgment;
 - b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.
- 4 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge is to count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

The application of Swiss law based on the representation principle is conditioned upon the following cumulative criteria: firstly, the offense must have been committed abroad.¹³⁰ Secondly, Switzerland must explicitly be obliged to prosecute this type of offense by virtue of an international agreement. Various international treaties contain such a duty to prosecute, namely in the field of human rights,¹³¹ health,¹³² transportation¹³³ or terrorism.¹³⁴ Thirdly, since Switzerland is acting on behalf of a third state having a closer link to the offense, it is required that the offense also be punishable at the place of commission (double criminality)¹³⁵ or alternatively, that the *locus delicti commissi* is not subject to any penal power (e.g., the high seas).¹³⁶ Finally, the offender has to be (voluntarily)¹³⁷ present in Switzerland and has not been extradited. Whether extradition has priority over prosecution and *vice versa*, or whether Switzerland can only prosecute after an extradition request from the competent third state was filed and rejected, can only be answered with regard to a specific international agreement.¹³⁸

¹³⁰ See above 2.b. and c.

¹³¹ E.g., Convention against Torture of 10 December 1984 (Übereinkommen vom 10. Dezember 1984 gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe/Convention du 10 décembre 1984 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, SR 0.105).

¹³² E.g., Convention on Psychotropic Substances of 21 February 1971 (Übereinkommen vom 21. Februar 1971 über psychotrope Stoffe/Convention du 21 février 1971 sur les substances psychotropes, SR 0.812.121.02).

¹³³ E.g., Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (Übereinkommen vom 23. September 1971 zur Bekämpfung widerrechtlicher Handlungen gegen die Sicherheit der Zivilluftfahrt/Convention du 23 septembre 1971 pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, SR 0.748.710.3).

¹³⁴ E.g., International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (Internationales Übereinkommen vom 9. Dezember 1999 zur Bekämpfung der Finanzierung des Terrorismus/Convention internationale du 9 décembre 1999 pour la répression du financement du terrorisme, SR 0.353.22).

¹³⁵ See above 1.d.

¹³⁶ Niggli/Wiprächtiger-Popp/Levante, Art. 6, pp. 216–218, §§ 2–7.

¹³⁷ Not requiring voluntariness: Roth/Moreillon-Henzelin, Art. 6 StGB, p. 72, § 24.

¹³⁸ Niggli/Wiprächtiger-Popp/Levante, Art. 6, p. 218, § 8; Roth/Moreillon-Henzelin, Art. 6 StGB, p. 74, §§ 31–32.

If Swiss law is applied based on the representation principle as foreseen in art. 6 StGB, the principles of double criminality (para. 1 lit. a) and *lex mitior* (para. 2) apply.¹³⁹ With regard to the effect of foreign judgments, art. 6 StGB stipulates the principles of extinction (para. 3) and imputation (para. 4).¹⁴⁰

– *Representation principle as defined in art. 7 para. 2 lit. a StGB*

Art. 7 para. 2 lit. a StGB is based on the representation principle. The Swiss Criminal Code is only applicable subsidiarily, that is, when Switzerland refuses to extradite the offender. This seems justified given that neither the victim nor the perpetrator has a link with Switzerland. Swiss law is, however, not applicable if the extradition request was refused by reason of the nature of the offense, for example, if the offense is of a political, military or fiscal nature.¹⁴¹

Art. 7 para. 2 StGB [Other offenses committed abroad]

2 If the offender is not a Swiss national or if the felony or misdemeanor was not committed against a Swiss national, paragraph 1 is only applicable if:

- a. the extradition request was rejected for a reason other than the nature of the offense; or
- b. [...]

The introductory sentence of art. 7 para. 2 StGB requires that the offender not possess Swiss nationality at the time of the judgment (the nationality at the time of commission of the crime does not enter into consideration).¹⁴² For the representation principle to apply the victim must be a non-Swiss national either at the time of the commission of the offense or the moment when the criminal result occurred.¹⁴³

Swiss law is only applicable, if a third state submitted an extradition request to Switzerland, which was refused for a reason other than the nature of the offense (art. 7 para. lit. a StGB). According to Art. 3 IRSG,¹⁴⁴ the political, military or fiscal nature of the offense could constitute a ground for rejecting an extradition request, which in turn would bar the application of Swiss law based on the representation principle.¹⁴⁵

¹³⁹ See above 1.d.

¹⁴⁰ See above 1.e.

¹⁴¹ Botschaft StGB, pp. 1998–1999/Message StGB, p. 1805.

¹⁴² Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 225, § 12; BGE 117 IV 369, 372, E. 3-7.

¹⁴³ Niggli/Wiprächtiger-Popp/Levante, Art. 7, p. 225, § 13.

¹⁴⁴ The English translation of the IRSG provided by the Swiss Federal Administration is available at www.rhf.admin.ch/rhf/de/home/straf/recht/national/sr351-1.html [last visited: 24 May 2011].

¹⁴⁵ Roth/Moreillon-Henzelin, Art. 6 StGB, p. 82, §§ 16–17.

However, if the extradition request is denied for any other reason than the nature of the offense, for example, because the foreign proceeding would not meet the requirements of the ECHR or ICCPR (art. 2 lit. a IRSG), the representation principle of art. 7 para. 2 lit. a StGB would be applicable (if the other criteria are also met).¹⁴⁶

Foreign law is taken into account in that the double criminality requirement also applies to offenses prosecuted under the representation principle (art. 7 para. 2 referring to the application of art. 7 para. 1 StGB). The *lex mitior* principle also applies (art. 7 para. 3 StGB).¹⁴⁷ With regard to the effects of foreign judgments, art. 7 para. 4 StGB states the principle of extinction and art. 7 para. 5 StGB foresees the principle of imputation.¹⁴⁸

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¹⁴⁶ *Ibid.*, p. 82, § 17.

¹⁴⁷ See above 1.d.

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 Pertinent time for determining the nationality of the offender: BGE 117 IV 369

List of abbreviations

AT	Allgemeiner Teil des Strafrechts (General Part of the criminal law)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Official Federal Gazette)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official case reporter of the Swiss Federal Supreme Court; cases are cited by volume, chamber, starting page, page, and paragraph)
BetmG	Bundesgesetz vom 3. Oktober 1951 über die Betäubungsmittel und die psychotropen Stoffe (Betäubungsmittelgesetz)/Loi fédérale du 3 octobre 1951 sur les stupéfiants et les substances psychotropes (Loi sur les stupéfiants), SR/RS 812.121 (Narcotics Act)
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101 (Federal Constitution of the Swiss Confederation of 18 April 1999)
E.	Erwägung (paragraph in cases of the Swiss Federal Supreme Court)
ECHR	Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten/Convention du 4 novembre 1950 de sauvegarde des droits de l'homme et des libertés fondamentales, SR/RS 0.101 (Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1951)
FF	Feuille fédérale (Official Federal Gazette)
JStG	Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht (Jugendstrafgesetz, JStG)/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs (Droit pénal des mineurs, DPMIn), SR/RS 311.1 (Federal Law on the Criminal Law Applicable to Minors of 20 June 2008)

ICCPR	Internationaler Pakt vom 16. Dezember 1966 über bürgerliche und politische Rechte/Pacte international du 16 décembre 1966 relatif aux droits civils et politiques, SR/RS 0.103.2 (International Covenant on Civil and Political Rights of 16 December 1966)
IRSG	Bundesgesetz über internationale Rechtshilfe in Strafsachen (Rechtshilfegesetz, IRSG)/Loi fédérale sur l'entraide internationale en matière pénale (Loi sur l'entraide pénale internationale, EIMP), SR/RS 351.1 (Federal Act on International Mutual Assistance in Criminal Matters)
StGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0 (Swiss Criminal Code of 21 December 1937)
aStGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937 in der Fassung vor Inkrafttreten der Revision des Allgemeinen Teils am 1. Januar 2007 (Swiss Criminal Code of 21 December 1937 in the version before the entry into force of the revision of the General Part on 1 January 2007)
SR/RS	Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral (Classified Compilation of Swiss Federal Legislation)
SVG	Strassenverkehrsgesetz vom 19. Dezember 1958 (SVG)/Loi fédérale du 19 décembre 1958 sur la circulation routière (LCR), SR/RS 741.01 (Road Traffic Act of 19 December 1958)
UNCLOS	Seerechtsübereinkommen der Vereinten Nationen vom 10. Dezember 1982/Convention des Nations Unies du 10 décembre 1982 sur le droit de la mer, SR/RS 0.747.305.15 (United Nations Convention on the Law of the Sea of 10 December 1982)
ZStR	Schweizerische Zeitschrift für Strafrecht