

# More Than Enough Forgiving & Forgetting? <sup>1</sup> Statutes of Limitation in Switzerland

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**Abstract:** Traditionally, Swiss law has aimed to forgive and forget a wrongful act after a certain passage of time. But its long-accepted statutes of time limitation have come under pressure, both from popular initiatives (“*Volksinitiativen*”) and international regulations aiming at prolonging time-bars – in particular, regarding sexual offences against minors – and the Rome Statute’s demand that core crimes not fall under time limitation. In practice, the legal battle over criminal charges in asbestos cases has revealed doctrinal and policy-making issues. In Switzerland, criminal negligence that causes harm only many years later can fall under the statute of limitation before the criminal act – technically speaking – is actually committed, because the statute of limitation is linked to the action taken by the alleged perpetrator, not to the manifestation of harm. This legal set-up appears inadequate when one takes the victim’s point of view, from which the harm inflicted ought to give rise to prosecution. The fact that the perpetrator may have even changed over the period of time does not undo the inflicted harm. To resolve such axiological ambiguity, policy decisions are needed.

3991

**Keywords:** statutory limitation; Swiss criminal law; asbestos cases; imprescriptibility; negligence (& the passage of time); popular initiatives (& statutory limitation)

## A. Introduction

Swiss law traditionally has statutes of limitation that aim at forgiving and forgetting a wrongful act after a certain passage of time. The current provisions governing time limitation in criminal law illustrate the Swiss legal tradition, which is characterized by an enlightened penal doctrine as well as the aspiration of legal academics and experts for a rational regulation. The provisions were adopted at the end of the 1930s, when the first Swiss criminal code replaced 26 Cantonal penal codes. The wording of the provisions followed a comprehensive and thoughtful debate on how the passage of time ought to affect prosecution of an allegedly criminal act that took place long ago.<sup>2</sup> Switzerland, approximately 41,000 square kilometers

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<sup>1</sup> Dedicated to Richard Bachmann (1943-2002). The authors wish to thank Justin Bachmann for his assistance in writing this article.

<sup>2</sup> See H. Schultz, *Einführung in den Allgemeinen Teil des Strafrechts*, Bern, 1982, 248; H. Walder, *Probleme bei Fahrlässigkeitsdelikten*, in *Zeitschrift des Bernischen Juristenvereins* (1968), 186 ff.; G. Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat*, Bern, 2011, 87 f.

or 16,000 square miles in size, was, during the 1930s, home to approximately 4.2 million people,<sup>3</sup> who often remained within the national limits throughout their life. Accordingly, life, for many, was characterized by a living environment with a high degree of social control. In the cities, life tended to be more anonymous, while lines of communication to regional areas established a new form of oversight. In 1937, for instance, 285,642 telephone lines existed in Switzerland – with roughly two thirds placed in large cities.<sup>4</sup> While cattle were the cornerstone of the regional economy, industry was well established in small and big cities alike, with the service sector emerging as the economic future of the country.

Currently, Switzerland is home to 8.5 million people, as well as to a diverse array of business, leading research institutions and modern industry and service sectors. Looking at Swiss life today, three quarters of inhabitants live in cities or urban areas. Seemingly everyone owns a smartphone or is linked together by worldwide networks. For many, the idea of how the passage of time affects criminal justice in different situations has ceased to be sufficiently reflected in the provisions of the Swiss Criminal Code of 1937. The pace and interconnectedness of modern life has played a role here, along with the capacity of the sciences to unlock the mysteries of the past and bring to light evidence of crimes alleged to have taken place many years ago. The idea of what exactly criminal justice concerns has, evidently, changed. At the beginning of the 20<sup>th</sup> century, penology focused on the alleged perpetrator, with philosophical ideas shaping the law. Procedural law was tied down in an inquisitorial tradition, with the state bringing charges, and the alleged victim being reduced to a mere witness. Victims have now gained a legal position and the public acknowledges them as stakeholders in a criminal trial.

Discord on the current provisions governing time limitations became apparent when, at the beginning of this millennium, Swiss courts made headlines after time-barring prosecution in the so-called “asbestos cases”, which left over 2,000 victims<sup>5</sup> without a legal remedy in criminal courts.<sup>6</sup> More recently, the popular vote “for the elimination of the statute of limitations with respect to pornographic crimes against children”

<sup>3</sup> Federal Statistical Office, *Swiss Statistical Yearbook 1937*, Basel, 1938, 9 ff. available at <https://www.bfs.admin.ch/bfs/de/home/statistiken/kataloge-datenbanken/publikationen/uebersichtsdarstellungen/statistisches-jahrbuch.assetdetail.350655.html>.

<sup>4</sup> Federal Statistical Office, *Swiss Statistical Yearbook 1937*, Basel, 1938, 182.

<sup>5</sup> Number of cases in the period between 1939-2017 provided by Swiss National Accident Insurance Fund (SUVA): asbestos-related occupational diseases: 5138; deaths due to asbestos-related occupational diseases: 2308; projected number of new asbestos-related cases for years 2018-2040: 3900; available at <https://www.unia.ch/de/arbeitswelt/von-a-z/asbest/30-jahre-asbestverbot>.

<sup>6</sup> See *Neue Zürcher Zeitung*, *Asbestopfer im juristischen Abseits*, 1 October 2013.

(“*Unverjährbarkeitsinitiative*”<sup>7</sup>) and the implementation of the Lanzarote Convention<sup>8</sup> prolonged prescription periods and strengthened the position of victims, in particular, children victimized by sexual offences. The implementation of the Rome Statute<sup>9</sup> brought about the imprescriptibility of certain acts.

While the law has changed, Swiss criminal lawyers seemingly consider the foundational principles of forgiving and forgetting as time-honored and, at the same time, timeless. In general, they have proven to be useful abstract rules to address the axiological ambiguity in the Swiss criminal justice system. Indeed, they have succeeded in balancing conflicting interests in dealing with prosecution or punishment when the alleged crime was committed a long time ago.

## B. Legal Provisions and Basic principles

Switzerland is founded on a commonly shared commitment to local rights and federal obligations, symbolized by its two chamber-parliament (which gives each canton a voice, regardless of its population size) and by its pledge to multilingualism that requires a justice system to work in three languages and, if need be, reconcile different wording in the official Swiss languages. This overall picture is important to understanding the current Swiss law on prescription of criminal offenses, building on cantonal law, and shaped by Federal law and popular vote.

3993

## I. Generals

Switzerland’s federal law builds upon three levels: the communes, the cantons and the confederation.<sup>10</sup> Competences are shared among these three levels. Traditionally, however, the cantons have been the Swiss lawmakers,

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<sup>7</sup> On 1 March 2006, the association “*Marche Blanche*” submitted the popular initiative, see Federal Gazette no. 30 of 24 July 2007, 5369 (BBI 2007 5369). The amendment has been in force since 1 January 2013, see Federal Gazette no. 29 of 19 July 2011, 5977 (BBI 2011 5977).

<sup>8</sup> The Lanzarote Convention is the first international convention that criminalizes different forms of sexual abuse and aims to strengthen the fight against sexual exploitation and abuse of children and to ensure the prevention of such attacks. The amendment has been in force since 1 July 2014, see Federal Gazette no. 32 of 8 August 2012, 7571 (BBI 2012 7571).

<sup>9</sup> The Rome Statute of the International Criminal Court was adopted at a diplomatic conference in Rome on 17 July 1998. The Rome Statute is an international treaty that establishes the criminal liability of individuals under international law, strengthening human rights and establishing general principles of criminal law internationally. Switzerland ratified the Rome Statute in October 2001 and it entered into force on 1 July 2002. Available at <https://www.fedlex.admin.ch/eli/cc/2002/586/de>.

<sup>10</sup> For more details, see M. Oesch, *Constitutional Law*, in M. Thommen (Ed), *Introduction to Swiss Law*, Zürich, 2018, 145 ff.

although federal law does, in practice, govern criminal justice.<sup>11</sup> The conflicting interests in regulation and the interplay among the levels is illustrated by the roughly 70 year-time lapse between the adoption of the Swiss Criminal Code (hereinafter: SCC<sup>12</sup>) in 1942, on the one hand, and the Swiss Code of Criminal Procedure (hereinafter: SCCP<sup>13</sup>) in 2011, on the other.

The unification of the 26 cantonal criminal codes into one Swiss – or Helvetic – criminal code, the SCC, was an important step for the harmonization in criminal justice in a rather small, but locally diverse country. Without a common basis in substantive law, prosecution inside Switzerland with its strong cantons would have been inefficient. In addition, the federal lawmaker conceded the local diversity of moral concepts – for instance, regarding abortion or adultery. The SCC established “local pockets” with blanket norms for the cantons to decide on incrimination for termination of pregnancies or fornication.<sup>14</sup>

Even after the cantons had merged together regarding substantive law, procedural law remained a cantonal piecemeal. Many agreed that the variety of cantonal criminal procedural regulations proved to be inefficient with enhanced mobility of the population and complicated procedures for inter-cantonal prosecution.<sup>15</sup> But only at the turn of the millennium did the Helvetic SCCP come into reach.<sup>16</sup> In 2011, when one harmonized criminal procedural code replaced 26 cantonal codes of criminal procedure as well as the Procedural Code on Federal Criminal Justice, the Administrative Criminal Procedure Code and the Criminal Procedure Code of the Swiss Military, the inquisitorial forerunner rules had given way to a more modern thinking that empowered the victim, not only with a right to press charges, but also to block them if privacy was affected (for instance, in the case of sexual offences).<sup>17</sup>

The legal position of victims in the Swiss criminal justice system is important for time limitations. This came into play with a popular vote in 2008, which pushed for imprescriptibility regarding certain sexual offences. To understand this series of actions, it is imperative to understand the Swiss

<sup>11</sup> See art. 3 and art. 123 Federal Constitution of the Swiss Confederation of 18 April 1999, in force since 1 January 2000 (as of 1 January 2021), available at <https://www.fedlex.admin.ch/eli/cc/1999/404/en>.

<sup>12</sup> Swiss Criminal Code of 21 December 1937, in force since 1 January 1942 (as of 1 July 2020), available at [www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en).

<sup>13</sup> Swiss Criminal Procedure Code of 5 October 2007, in force since 1 January 2011 (as of 1 March 2021), available at <https://www.fedlex.admin.ch/eli/cc/2010/267/en>.

<sup>14</sup> For the cantonal differences, see *Neue Zürcher Zeitung*, *Frauen suchen sich für Abtreibungen liberale Kantone*, 8 August 2016.

<sup>15</sup> See M. Thommen, *Criminal Procedure*, in M. Thommen (Ed), *Introduction to Swiss Law*, Zürich, 2018, 397 f.

<sup>16</sup> See the report, *Aus 29 mach 1*, Bern, 1997, 13 ff. which was published by a commission of experts for the “harmonization of the procedural law”.

<sup>17</sup> Cf. R. Echle, *Die Adhäsionsklage nach der Schweizerischen Strafprozessordnung und der Anspruch des Beschuldigten auf ein faires Verfahren*, Diss. Basel, 2019, 18 ff.

law-making process: Regarding important legislation, the government first sends out a proposal for national consultation (“*Vernehmlassungsverfahren*”), during which all interested parties are invited to comment.<sup>18</sup> By allowing everyone to participate in the legislative procedure (stakeholders are formally invited), the legal proposal is considered democratically legitimized. After in-depth (and often long) debates with experts and practitioners, a preliminary draft is adopted by the two chambers of parliament and handed over to the Federal Council.<sup>19</sup> As soon as an act is published in the Federal Gazette (“*Bundesblatt, BBl*”),<sup>20</sup> the 100-day period for popular referendums commences. If 50,000 Swiss citizens sign a petition (“*Referendum*”) against the enactment of a federal act, it will be put to a national poll.<sup>21</sup>

Another instrument with which Swiss citizens can control law-making is the so-called “popular initiative”. If 100,000 Swiss citizens sign an initiative for a revision of the Federal Constitution, the government must act on it.<sup>22</sup> It is important to note that such an initiative can cover any legal area, not only constitutional matters, strictly speaking. For this reason, following the vote in November 2008 by Swiss citizens in favor of the popular initiative about changing the statute of limitations (initiative “for the elimination of the statute of limitations with respect to pornographic crimes against children”), the constitution was amended.<sup>23</sup>

Aside from peculiarities of the popular votes, the Swiss criminal justice system is typical for a continental European criminal justice system. It is based on a detailed and rationally organized body of laws, drawing on long established principles like *nullum crimen, nulla poena sine lege* (“no penal sanction without a proper legal base”) or the *ultima ratio*-clause limiting the use of criminal punishment for situations where the state sees no other adequate way to preserve social peace.

It is against this backdrop that we have to read the comprehensive provisions laid down in the SCC that govern statutory limitations on the right to bring charges, statutory limitations on the right to apply punishment, as well as legal regulations on confiscation during the passage

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<sup>18</sup> See Swiss Federal Office of Justice, *Hearings zum Bericht der Expertenkommission «Vereinheitlichung des Strafprozessrechts», Protokolle und schriftliche Stellungnahmen*, Bern, 1998, 4 ff.

<sup>19</sup> For more details, see M. Thommen, *Swiss Legal System*, in M. Thommen (Ed), *Introduction to Swiss Law*, Zürich, 2018, 27 ff.

<sup>20</sup> See art. 13 PubLA (Federal Act on the Compilations of Federal Legislation and the Federal Gazette of 18 June 2004), in force since 1 January 2005 (as of 26 November 2018), available at <https://www.fedlex.admin.ch/eli/cc/2004/745/en>.

<sup>21</sup> See art. 141 Constitution.

<sup>22</sup> For more details, see M. Thommen, *Swiss Legal System*, in M. Thommen (Ed), *Introduction to Swiss Law*, Zürich, 2018, 24 f.

<sup>23</sup> As a consequence of the approval of the vote (which was quite narrow by 51.9 %), art. 123b was added to the Constitution.

of time and mutual legal assistance after a case is time-barred in Switzerland.<sup>24</sup>

Complying with the maxim of *nullum crimen*, the SCC law painstakingly defines the periods of limitation for prosecution and the commencement of the statutory prescription for the limitation of prosecution rights (art. 97 and 98 SCC, see below B.II.) and the right to apply punishment (art. 99 and 100 SCC, see below B.III.).

## II. Statutory Limitation of Prosecution Rights

The statutory limitation of prosecution rights strives to balance the interests of a defendant not to have to stand trial for a crime allegedly committed a long time ago, on the one hand, and the interest of the victim and broader public to see justice served, even after a long time has passed, on the other. Here, pragmatic considerations must be made about the time-window for prosecuting and adjudicating criminal offenses.

It is important to note that the duration of criminal trials is, in principle, not a pressing problem in Switzerland.<sup>25</sup> Currently, more than 95% of all criminal proceedings finish with a summary penalty order (“*Strafbefehl*”) – a time-saving variation of plea-bargaining.<sup>26</sup> However, there is a grey area, as in theory prosecution services are obliged to press charges when in doubt about whether an act constitutes a crime.<sup>27</sup> But obviously, not all crimes can be prosecuted. So in practice, a certain amount of criminal cases face time limitations. Especially with regard to petty crimes, the handling of particular cases could be seen as a sort of “discretionary prosecution”, which conflicts with the Swiss idea of mandatory prosecution.<sup>28</sup>

Overall, time limitations rarely appear in debates on efficiency of criminal justice, but rather as an object of doctrinal debates.<sup>29</sup> For instance,

<sup>24</sup> For detailed references to the various concrete problems, see M. Zurbrugg, *Basler Kommentar Strafrecht*, Vor. art. 97-101 SCC, no. 38 ff.; F. Baumann, *Basler Kommentar Strafrecht*, art. 70/71 SCC, no. 73 f.; G. Fiolka, *Basler Kommentar Internationales Strafrecht*, art. 5 IMAC (Mutual Assistance Act), no. 1 ff.

<sup>25</sup> Although there have been and still are some very long criminal trials, in particular, in complex proceedings investigated by the Office of the Attorney General (OAG). The procedure in the Behring case took, for example, 12 years, see *Annual Report of the Office of the Attorney General of Switzerland*, Bern, 2016, 12.

<sup>26</sup> M. Thommen, *Criminal Procedure*, in M. Thommen (Ed), *Introduction to Swiss Law*, Zürich, 2018, 418 f.

<sup>27</sup> Cf. art. 324 para. 1 and art. 319 para. 1 SCC. For details on the principle “in dubio pro duriore”, see Swiss *Bundesgericht Entscheidungen* Vol. 143 IV page 241, 243 (BGE 143 IV 241, 243); Vol. 138 IV page 186, 190 (BGE 138 IV 186); Vol. 137 IV page 219, 226 (BGE 137 IV 219).

<sup>28</sup> Cf. M. Pieth, *Schweizerisches Strafprozessrecht*, Basel, 2016, 41 f.

<sup>29</sup> See, for example, M. Schubarth, *Erlöschen der Strafgewalt zufolge Verjährung – Konsequenzen für die Rechtsnatur der Verjährung und für Fragen der Auslieferung*, in *Schweizerische Zeitschrift für Strafrecht* (2011), 6 ff.; S. Gless, *Zeitliche Differenz zwischen*



when scholars discuss the nature of statutory limitations: Are these procedural arrangements, substantive laws on forgetting and forgiving – or pragmatic resolutions to not waste precious resources in criminal justice systems? This question is addressed below.<sup>30</sup>

## 1. Periods of Statutory Limitation

Art. 97 para. 1 SCC establishes a cascade of periods of statutory limitation, reflecting the seriousness of the crime. According to this provision, the right to prosecute is limited to

- 30 years if the offence carries a life sentence;
- 15 years if the offence carries a prison sentence of more than three years;
- 10 years if the offence carries a prison sentence of three years; and
- 7 years<sup>31</sup> if the offence carries a different penalty.

As soon as a judgment is issued by a court of first instance or another judicial authority,<sup>32</sup> *before* the limitation period is up, the time limit no longer applies (art. 97 para. 3 SCC).<sup>33</sup>

The basic rules established in art. 97 para. 1 SCC are modified (following the rules set in art. 97 para. 2 and 4 SCC) in cases of sexual crimes involving children (art. 187) and/or dependent persons (art. 188) as well as when the victims of certain offences against life and limb involve a child under 16 years. Some of these modifications were adopted as a result of obligations laid down in the Lanzarote Convention. Others were consequences of popular vote, such as the already mentioned the initiative “for the elimination of the statute of limitations with respect to pornographic crimes against children”. The initiative entered into force on 1 January 2013 and it changed the exclusion of statutory limitations for certain crimes.<sup>34</sup>

3997

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*Handlung und Erfolg – insbesondere als Herausforderung für das Verjährungsrecht*, in Goldammer’s Archiv für Strafrecht (2006), 689 ff.

<sup>30</sup> See *infra* D.I.

<sup>31</sup> A motion is an instruction by either a parliamentary group or an Assembly member of the Federal Council to submit a bill to the Federal Assembly or to take certain measures. The motions, Jositsch 08.3806 and Janiak 08.3930 (“*Limitation Periods for Economic Offenses*”), which were submitted on 15 and 18 December 2008, demanded that the Federal Council extend the limitation periods in criminal law for economic offenses. Since there is no precise definition for the term “economic offenses” and the statute of limitations should be determined for as many offenses as possible according to the same criteria, the preliminary draft proposed an increase to the most serious offences that are subject to the penalty of imprisonment for up to three years or a fine. The amendment has been in force since 1 January 2014, see Federal Gazette no. 50 of 11 December 2012, 9253 (BB1 2012 9253).

<sup>32</sup> For the Swiss Federal Supreme Court’s broad understanding of the term “court”, see Swiss *Bundesgericht (BGer)* 6B\_178/2019 of 1 April 2020.

<sup>33</sup> For more details, see E. Trachsel, *Die Verjährung gemäss den Art. 70-75<sup>bis</sup> des Schweizerischen Strafgesetzbuches*, Zürich, 1990, 82; G. Stratenwerth, *Die Verjährung beim Unterlassungsdelikt*, in M.A. Niggli, J. Hurtado Pozo, N. Queloz (Eds), *Festschrift für Franz Riklin*, Zürich, 2007, 246 f.

<sup>34</sup> See *infra* B.IV.b.

On 16 June 2010, Switzerland signed the aforementioned Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). The Lanzarote Convention is based on the European consensus that certain forms of child abuse require a comprehensive approach that include efficient prosecution. The convention obliges signatory states to criminalize sexual abuse of children, child prostitution, child pornography and forced participation of children in pornographic performances. The statute of limitations for prosecution runs at least until the victim has attained the age of 25 (see art. 97 para. 2 SCC) and, as a consequence of the implementation of the Lanzarote Convention in Switzerland, it now includes more crimes. Recently, the prolonged statute of limitations also commenced application for the offence of recruiting children for pornographic demonstrations according to art. 197 para. 3 SCC.<sup>35</sup> The longer period of time before one must press charges is intended to guarantee victims of particular crimes (listed in art. 97 para. 2 SCC) a sufficient period of time to decide if they wish to go to court after they have reached the age of majority.<sup>36</sup>

## 2. Commencement of Periods of Statutory Limitation

The duration of a time limit is not the only difficult issue to resolve. The question of when the time period should commence in the lead up to a statutory limitation is also a matter of contention. At first glance, some might think the answer is clear: “When the perpetrator commits the crime.” Lawyers, however, know that it can be rather difficult in practice to pinpoint that precise moment.

In Switzerland, for instance, the asbestos cases highlighted one difficulty, namely, the statutory limitation when criminal negligence results in severe harm only years after the action.<sup>37</sup> With the unlawful act and the resulting harm separated by a large period of time, the question arises as to when the time period of statutory limitations in such a case should commence? Would it be reasonable to assume that the time period should only begin to run at the time when the harm manifests many years after the careless act? From a victim’s perspective, this would be the only way in which the prosecution claim would remain secure, no matter how much time has elapsed after the careless act that eventually led to harm.

As a basic rule in Swiss law, the period of limitation starts on the day on which the offender *performs* the allegedly criminal act (see art. 98 para. 1

<sup>35</sup> For more details, see W. Wohlers, *Strafbarkeit des Umgangs mit Kinderpornografie*, in *Aktuelle Juristische Praxis* (2020), 390.

<sup>36</sup> See M. Zurbrugg, *Basler Kommentar Strafrecht*, art. 97 SCC, no. 22 ff.

<sup>37</sup> The same problem occurred in other cases, for example, in the collapse of a ceiling in a swimming pool many years after the construction, see Swiss *Bundesgericht Entscheidungen* Vol. 115 IV page 199, 204 ff. (BGE 115 IV 199).



lit. a. SCC).<sup>38</sup> A straight reading of this wording suggests that, in cases of criminal negligence, the statute refers to the careless act and deems it irrelevant whether the harm caused by it is tangible immediately or surfaces many years later.<sup>39</sup>

It is important to note that Swiss law explicitly addresses various specific situations that require more nuanced regulation. The Swiss lawmaker, for instance, adopted a rule for multi-stage crimes: where an offence consists of a series of acts carried out at different times, prescription starts on the day on which the final act is carried out (see art. 98 para. 1 lit. b SCC); or for criminal conduct that continues over a period of time, prescription starts on the day on which the criminal conduct ceases (see art. 98 para. 1 lit. c SCC).

Despite the detailed provision, in practice, not surprisingly, the application raises various problems. Even the basic rule (see art. 98 para. 1 lit. a SCC) caused major problems, in particular, in the initially mentioned cases, when criminal proceedings were not launched until after the onset of the delayed effects of an allegedly criminal action, for instance, exposure of human beings to hazardous material. In those cases, factory workers who were exposed to toxic substances decades earlier ultimately suffered the hazardous effects, caused by the exposure during the work in the plant.<sup>40</sup> Those superiors and bosses, who were responsible for workplace safety and health protection, but decided to ignore safeguards had a good chance of escaping prosecution due to the statute of limitation. If workers fell sick and died many years later, Swiss law made it difficult to press charges due to the respective phrasing. In plain language: In Switzerland an alleged crime can fall under the statute of limitation before it is actually committed, because the statute of limitation is linked to the action taken by the alleged perpetrator, not to the manifestation of harm. This peculiarity of Swiss law caused a derailment of prosecution in the asbestos cases.

### III. Statutory Limitations for the Execution of a Sentence

Statutory limitations for the execution of a sentence prevent the law enforcement authorities from the continuous possibility of enforcing a sentence that has been pronounced. According to art. 441 para. 1 SCCP, statute-barred sentences can no longer be enforced. Statutory limitations of the right to apply punishment reflect that, on the one hand, the offender needs to be protected from being punished a long time after the event, the

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<sup>38</sup> The official translation “the day on which the offender *committed the offence*” (available at <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>) is not accurate as the original text refers to the *performance of the act*.

<sup>39</sup> See *infra* D.II.2.

<sup>40</sup> Today, asbestos is banned in Switzerland. In 1989, the Federal Council decided on the ban which has been in force since March 1990. Switzerland was one of the first countries to ban asbestos.

reason being that he or she will not be exactly the same person as they were at the time when the sentence was pronounced. The later a sentence is enforced, the weaker the need, in the view of society, to punish.<sup>41</sup> On the other hand, the victims' interests must not be neglected. Whether a punishment is only pronounced or also enforced can make a difference, especially in the personal process of healing and moving on from the offence. Nevertheless, the victim's need for atonement may also diminish with the lapse of time if he or she has come to terms with the crime and its consequences.<sup>42</sup> Additionally, the deterrent effect of the pronounced sentence is considered to have been effective if no further crime was committed by the perpetrator.<sup>43</sup>

## 1. Periods of Statutory Limitation

According to art. 99 para. 1 SCC, the limitation period for the execution of a sentence is (a) 30 years if a prison sentence of life has been imposed; (b) 25 years if a custodial sentence of ten or more years has been imposed; (c) 20 years if a custodial sentence at between five and ten years has been imposed; (d) 15 years, if a custodial sentence of between one and five years has been imposed; (e) five years if any other sentence has been imposed.

Art. 99 para. 2 SCC acknowledges two situations when the limitation period for a custodial sentence is extended: (a) by the time served by the offender without interruption or any other custodial sentence or measure executed immediately beforehand; (b) by the length of the probationary period in the case of release on parole.

## 2. Commencement of Periods of Statutory Limitation

According to art. 100 SCC, the limitation period begins on the day on which the judgment becomes legally enforceable and, in the case of suspended sentences or the execution of another sanction, on the day on which the execution of the penalty is ordered. After the expiration of the time periods regulated in art. 99 para. 1 lit. a-e SCC, the perpetrator enjoys legal certainty that the punishment can no longer be enforced.<sup>44</sup> This regulation results from the consideration that punishment delayed by many years is of little use. It can be argued that the execution of a punishment is no longer necessary after a certain period of time after the verdict, because the long-

<sup>41</sup> Cf. M. Nydegger, *Wenn Polanski nicht Polanski wäre – Gedanken zu Verjährung und dem Umgang mit Kriminalität*, in *forumpoenale* (2010), 50.

<sup>42</sup> Cf. M. Zurbrugg, *Basler Kommentar Strafrecht*, Vor art. 97-101 SCC, no. 47.

<sup>43</sup> Cf. H. Satzger, *Die Verjährung im Strafrecht*, in *Jura, Juristische Ausbildung* (2012), 434.

<sup>44</sup> See M. Killias, N. Markwalder, A. Kuhn, N. Dongois, *Grundriss des Allgemeinen Teils des Schweizerischen Strafgesetzbuchs*, Bern, 2017, 314 f.

lasting fear of the execution of the sentence is punishment enough for the defender.<sup>45</sup>

#### IV. Exclusion from Statutory Limitation

As already mentioned, Switzerland has traditionally been a country that accepts time limits for legal action. But the public's perception of the effect that the passage of time ought to have on crimes as well as relevant international law have changed the Swiss code. Today, art. 101 para. 1 SCC bars certain offences from statutory limitation, namely, genocide (lit. a), crimes against humanity (lit. b) and war crimes (lit. c), felonies that have caused or threatened to cause danger to life and limb to a large number of persons as a method of extortion or duress (lit. d) as well as certain sexual offences when involving children under the age of 12 (lit. e). This more recent turn to imprescriptibility is particularly based on two different strands.

##### *a) Standard Set by the Rome Statute*

First, the legislator wished to comply with the obligations arising from the Rome Statute and, at the same time, take into account the concerns about the statute of limitations for international crimes that have always been raised.<sup>46</sup> Switzerland's accession to the Rome Statute of the International Criminal Court on 12 October 2001 created the need for an amendment.<sup>47</sup> According to art. 29 of the Rome Statute, genocide, crimes against humanity, war crimes and aggression cannot be subject to time prescription. To comply with the standard set in the Rome Statute, the relevant crimes in the SCC (art. 264–264n) are not subject to the statute of limitations as stated in art. 101 SCC. The exclusion from statutory limitations is justified by the seriousness of the core crimes. These ought not to be forgotten, in particular, because of their impact on the community as a whole. Such grave crimes are considered etched into the collective memory, with traces that will always persist in some form and deserve to be punished at all times.<sup>48</sup> It is possible that in case of such crimes, the main perpetrators may have a network of contacts that allow them to go underground and avoid prosecution for a long time, which again might render criminal proceedings difficult or possibly even futile for many years.<sup>49</sup> Even though the thought of imprescriptibility of these crimes may be, in principle, undisputed, the line of argument does not

<sup>45</sup> Cf. S. Zimmermann, *Strafrechtliche Vergangenheitsaufarbeitung und Verjährung*, Freiburg i. Br., 1997, 42 f.

<sup>46</sup> Cf. N. Capus, *Ewig still steht die Vergangenheit?*, Bern, 2006, 77 ff.

<sup>47</sup> The amendment has been in force since 1 January 2011, see Federal Gazette no. 21 of 27 Mai 2008, 3863 (BB1 2008 3863).

<sup>48</sup> Cf. M. Zurbrugg, *Basler Kommentar Strafrecht*, art. 101 SCC, no. 3.

<sup>49</sup> See Swiss Federal Office of Justice, *Ergänzende Massnahmen im Bereich des Strafrechts zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshof, Vorentwurf und Erläuternder Bericht*, Bern, 2005, 58 f.

resolve in a straightforward way the axiological ambiguity when balancing conflicting interests of prosecution or punishment when the alleged crime was committed a long time ago. Nevertheless, not only the “evidentiary problem”<sup>50</sup> should be taken into account, but also our general understanding that criminal justice cannot resolve historical events.<sup>51</sup>

### ***b) Popular Vote for the Elimination of Time Limits for Certain Sexual Offences***

Another change of traditional time limits was brought by the popular vote on the initiative “for the elimination of the statute of limitations with respect to pornographic crimes against children”.

The popular vote was based on a call to strengthen victims’ legal rights, but mixed with a “getting tough on crime” agenda that was intended to have a deterrent effect on perpetrators<sup>52</sup> and was popular with the electorate. After the endorsement by Swiss voters, the criminal code was amended as follows: According to art. 101 para. 1 lit. e SCC, there is no statute of limitations for certain specific criminal offenses against children. This modification of the rules applies for: sexual crimes involving children (art. 187 SCC); indecent assault (art. 189 SCC); rape (art. 190 SCC); sexual acts with persons incapable of judgement or resistance (art. 191 SCC); sexual acts with persons in institutional care, prisoners and persons on remand (art. 192 para. 1 SCC); and exploitation of a person in a position of need or dependency (art. 193 para. 1 SCC) if committed against children under the age of 12. The popular vote aimed for “justice for victims” of certain crimes regardless of how much time had elapsed after the crime took place.

The extraordinarily wide time window for pressing charges concerned some Swiss scholars, who saw a conflict with the criminal justice’s strong commitment to rehabilitation. The concern was that prosecution after such a long passage of time served retribution, i.e. punishing an injustice for the sake of the injustice, rather than the rational justification for punishment normally prevalent in Swiss law.<sup>53</sup>

Another issue arose with Swiss procedure being strongly rooted in the inquisitorial tradition: With the amendment, the position of the victim seems strengthened – nevertheless, criminal proceedings always invade the victim’s privacy. Therefore, it must be considered whether it still makes

<sup>50</sup> See *infra* C.

<sup>51</sup> For example, the Swiss project “*Kinder der Landstrasse*”, which ran over several decades of the 20th century (from 1926-1972), and involved Yenish children being separated from their parents in a brutal way and against their will, has never been prosecuted; for more details, see N. Capus, *Ewig still steht die Vergangenheit?*, Bern, 2006, 77 ff.

<sup>52</sup> For more information about the initiative, see <https://www.humanrights.ch/de/ipf/menschenrechte/kinder/unverjaehrbarkeit-sexueller-straftaten-kindern>.

<sup>53</sup> Cf. M. Nydegger, *Wenn Polanski nicht Polanski wäre – Gedanken zu Verjährung, Vergeltung und dem Umgang mit Kriminalität*, in *forumpoenale* (2010), 50.

sense to prosecute a crime after many years, as a criminal investigation may intrude the personal sphere of the victim.<sup>54</sup> It is also questionable whether the victim still is able to reconstruct the real sequence of the event after a long period of time, as memory is an uncertain witness.<sup>55</sup>

In summary, the adoption of the initiative showed that there is undoubtedly a societal demand for very strong protection of children from sexual crimes, which has now been brought into law. Nevertheless, Switzerland holds on to its tradition of a strong time prescription with art. 101 para. 2 SCC giving a court the discretion to impose a more lenient penalty in case an offence has been excluded from statutory limitation, but would have been time barred if the normal rules of Articles 97 and 98 SCC applied.

The retrospective change of the statutory limitation in art. 101 para. 1 lit. e SCC in cases of certain sexual crimes against children has led to complex transitional arrangements, which might cause confusion for legal practice.<sup>56</sup> Therefore, art. 101 para. 3 SCC regulates the transitional provisions according to the adoption of the popular vote and the accession to the Rome Statute.

## V. Consequences of a Crime Falling Under a Statute of Limitations

If a crime falls under a statute of limitations, not only are prosecution or punishment as such blocked, but Switzerland will also not engage in mutual legal assistance in criminal matters.<sup>57</sup> The state's right to confiscate the proceeds of crime is regulated by a separate provision (art. 70 para. 3 SCC), which postulates a general time period of 7 years, unless the crime is subject to a longer time period.<sup>58</sup>

4003

## C. Rationale Underlying the Statutory Limitation

What is the rationale underlying the Swiss statutory limitation? It appears to be a mixture of different notions, including holistic ideas of “time healing”<sup>59</sup> as well as punitive considerations (like an alleged perpetrator

<sup>54</sup> See T. Frischknecht, *Zur Eidgenössischen Volksinitiative «für die Unverjährbarkeit pornografischer Straftaten an Kindern»*, in *Schweizerische Zeitschrift für Strafrecht* (2008), 441 ff.

<sup>55</sup> See N. Capus, *Die Annahme der Unverjährbarkeits-Initiative. Ein Kommentar zur eidgenössischen Abstimmung*, in *forum poenale* (2009), 111 f.

<sup>56</sup> According to the provision added in art. 101 para. 3 SCC, the statute of limitations does not become effective if these crimes were not yet time-barred under the law in force at the time of the amendment.

<sup>57</sup> *Swiss Bundesgericht Entscheidungen* Vol. 137 IV page 25 (BGE 137 IV 25).

<sup>58</sup> For further references see *Swiss Bundesgericht Entscheidungen* Vol. 141 IV page 305 (BGE 141 IV 305).

<sup>59</sup> *Swiss Bundesgericht Entscheidungen* Vol. 134 IV page 297, 305 (BGE 134 IV 297).

potentially repenting and no longer requiring punishment)<sup>60</sup> and the acknowledgment of procedural risks (as it used to be difficult to prove that a crime had been committed long after the event).<sup>61</sup> In addition, pragmatic considerations play a role: In an overall assessment, the prosecution of acts that took place long ago may not be the best use of scarce law enforcement resources.<sup>62</sup> The mix of rationales obfuscates any clear guidance for practitioners on how to resolve the axiological ambiguity of time limitation in concrete cases and how to balance conflicting interests when an alleged crime was committed long ago.

With certain fundamental decisions the Swiss lawmaker addressed the axiological ambiguity of time limitation, for instance, with the provision that prescribes that the time for statutory limitation starts to run when “the offender committed the crime”, followed by a rule for crimes committed with several actions or a rule for criminal conduct that continues over a period of time.<sup>63</sup> However, the complexity of criminal law doctrine is difficult to cover with a general rule. When, for instance, is a crime committed – like criminal negligence – that requires a breach of duty *and* a harm inflicted? In certain situations, like in the asbestos cases, a huge time discrepancy may occur between the allegedly criminal violation of a safety obligation and the harm caused.<sup>64</sup> An alleged perpetrator may have acted in a criminally negligent way, as a young person starting a business, and the harm caused by a violation of a duty may only be tangible for the victim many years later. Does the healing effect of the passage of time begin with the (allegedly criminal) action or when the harm inflicted becomes visible?

Here, Swiss law basically takes a pragmatic procedural approach: With the passage of time, it may become impossible to efficiently proceed with a criminal case if the evidentiary problem cannot be resolved,<sup>65</sup> and the risk of errors increases.<sup>66</sup> Case law has based this approach on a principle of

<sup>60</sup> Cf. H. Satzger, *Die Verjährung im Strafrecht*, in Jura, Juristische Ausbildung (2012), 434; N. Capus, *Ewig still steht die Vergangenheit?*, Bern, 2006, 29.

<sup>61</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV page 297, 305 ff. (BGE 134 IV 297); E. Trachsel, *Die Verjährung gemäss den Art. 70-75<sup>bis</sup> des Schweizerischen Strafgesetzbuches*, Zürich, 1990, 37 f.

<sup>62</sup> See N. Capus, *Ewig still steht die Vergangenheit?*, Bern, 2006, 30 f.; for more details, see F. del Pero, *La prescription pénale*, Diss. Lausanne, 1993, 39 ff.

<sup>63</sup> For more details, see S. Gless, «...hebt die Zeit sich selber auf» – *Strafverfolgung in Spätschadensfällen*, in H.-U. Paeffgen et al. (Eds), *Strafrechtswissenschaft als Analyse und Konstruktion, Festschrift für Ingeborg Puppe zum 70. Geburtstag*, Berlin, 2011, 473 ff.; see Art. 98 SCC.

<sup>64</sup> See *infra* D.II.

<sup>65</sup> DNA evidence tends to show the opposite as modern science can perform a time-warp, bringing to light evidence for alleged crimes that took place many years ago. Also, with the help of digital evidence, any information seems to be easily reproducible. For more details, see S. Gless, *Zur Aktualität von Vergessen und Vergeben im digitalen Zeitalter*, in Goldammer’s *Archiv für Strafrecht* (2017), 255 ff.

<sup>66</sup> Cf. M. Zurbrugg, *Basler Kommentar Strafrecht*, Vor art. 97-101 SCC, no. 49; M. Killias, G. Jenny, *Verjährungsregelung bei Kindsmisbrauch: Fehlurteile programmiert*, in plädoyer (1998), 28 f.



criminal policy, too: A long lapse of time may render punishment unnecessary, perhaps even detrimental to the cause of (re-)integrating an offender into society. If the alleged offender does not commit any other breach of law and does not need resocialization, it is to the public's benefit to drop charges due to an especially long lapse of time.<sup>67</sup> Such thinking, however, appears to be rather "perpetrator-friendly". From a victim's point of view, it could be argued that the harm is done and the fact that a perpetrator has changed does not undo the inflicted pain. To resolve such axiological ambiguity, policy decisions are needed.

In general, Swiss law strives to strike a balance between conflicting interests, in particular, with a graduation in the length of periods for time limitation depending on the harm inflicted: The more severe a crime, the longer it takes to heal. Thus, the impact of a crime on a victim is taken into account. Nevertheless, in cases of criminal negligence when the result of the offence and the careless act are far apart, as the law stands today, Swiss law favors reading the criminal law as a sort of behavioral rule. Provisions incriminating certain negligence are meant as a warning to every actor to act as prudently as possible. However, only with the occurrence of harm does a negligence act become a crime. As many times, in spite of imprudent actions, no harm occurs, pain inflicted may seem a factor often beyond the actors' control. This approach – which seems more accurate in cases of traffic incidents than workers' toxic exposure – was taken in the Swiss Federal Supreme Court's decision in the asbestos cases in 2008.<sup>68</sup> It held that, after a certain period of time, punishment appears to be neither necessary in terms of criminal policy nor just, as the need to compensate for wrongdoing by imposing a punishment *diminishes over time* and the idea of deterring an offender and correcting him or her loses force.<sup>69</sup> Naturally, civil liability is a different matter.<sup>70</sup>

#### D. Axiological Ambiguity of Statutory Limitations

The principle question remains open: What effect should the passage of time have in criminal justice? The preceding explanations have made it clear that the answer is difficult and requires many decisions to be made. The first is to determine the role to be played by the passage of time in a legal system – is it actually part of substantive law or procedural law and what consequences follow from there? Secondly, the time limitation requires social values to be hierarchized in conflicts of interest, as the asbestos cases have illustrated.<sup>71</sup>

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<sup>67</sup> Cf. H. Satzger, *Die Verjährung im Strafrecht*, in Jura, Juristische Ausbildung (2012), 434.

<sup>68</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV page 297, 305 (BGE 134 IV 297).

<sup>69</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV page 297, 305 (BGE 134 IV 297).

<sup>70</sup> For more details, see C. Widmer Lüchinger, *Die Verjährung bei Asbestschäden*, in *Zeitschrift des Bernischen Juristenvereins* (2014), 460 ff.

<sup>71</sup> See *infra* D.II.1.

## I. Substantive Criminal Law or Procedural Regulation?

What kind of an instrument are statutory limitations, and what is their aim? Do statutory limitations form part of substantive law, because they are about forgiving as time changes the (meaning of a) crime?<sup>72</sup> Or are statutory limitations part of procedural law on forgetting, because the state cannot prove an alleged crime, and a defendant may have little means to contend the charges?

### 1. Iridescent Nature of Statutory Limitations

In Switzerland, the provisions regulating statutory limitations are laid down in the criminal code, not the procedural code. This allocation, however, does not answer our questions about their nature entirely. The location was not a consequence of doctrinaire reflection, but a pragmatic decision due to the fact that substantial law was harmonized in 1942 in Switzerland, while procedural law remained a piecemeal of 26 different cantonal codes plus three federal procedural codes until 2011. As early as 1937 when the SCC was adopted, the Swiss Confederation opted to avoid 29 different regulations on statutory limitation, and thus legislated statutory limitation as part of the Helvetic Criminal Code.

### 2. Does the *nullum crimen* Principle apply?

Depending whether statutory limitations are classified as substantive criminal law or merely as procedural law determines, for instance, whether the *nullum crimen* principle applies, and thus bars criminal prosecution and punishment when it cannot be based on legal rules fixed before the alleged crime took place. In Swiss law, the scope of application of the *nullum crimen* principle is controversial. It is clear that substantive law and, in particular, criminal offences and sanctions must be laid down in written laws, which, for the sake of certainty, must be drafted in a clear and precise fashion. They cannot be changed retroactively. The first two aspects are laid down in art. 1 SCC, which applies to all norms of substantive criminal law, not procedural law. The prohibition of retroactivity is stipulated in art. 2 SCC.<sup>72</sup> The question remains as to whether the *nullum crimen* principle applies to statutory limits.

In favor of the classification of the statutory limitations as substantive criminal law, it can be argued that the statute of limitation determines whether a criminal claim exists.<sup>73</sup> Accordingly, not only the actual statute of limitations, but also the provisions on the imprescriptibility of offenses are

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<sup>72</sup> For more details, see G. Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat*, Bern, 2011, 84 ff.

<sup>73</sup> See M. Killias, N. Markwalder, A. Kuhn, N. Dongois, *Grundriss des Allgemeinen Teils des Schweizerischen Strafgesetzbuchs*, Bern, 2017, 307 f.

found in substantive law (see art. 101 SCC).<sup>74</sup> On the other hand, in favor of the interpretation of the statutes of limitations as an institute of procedural law, it can be argued that the statute of limitation has an effect on the criminal proceedings as well as on the execution of a sentence. Therefore, the existence of the statute of limitation prohibits the enforcement of the pronounced sentence.<sup>75</sup> Ultimately, it seems appropriate to assume a mixed character of substantive and procedural law for the statute of limitation.<sup>76</sup>

Since statutory limitations are of mixed character, their implementation has affirmed the application of the *nullum crimen* principle to statutory limits.<sup>77</sup>

## II. Time-barred – Even Before Manifestation of Harm?

The Swiss statutes of limitation made it into Italian headlines, when at the beginning of this millennium, Italian workers pressed for charges against the owner of an asbestos handling company and others responsible for exposing employees to the hazardous material without proper protection gear, even after the health risks had been revealed by scientists.<sup>78</sup>

### 1. The Paradox of the Asbestos Cases

In 2005, cantonal authorities dismissed a criminal charge for negligent killing and bodily harm caused by exposing workers to asbestos in the 1960s and 1970s in a plant in Glarus, in the northeast of Switzerland.<sup>79</sup> Diseases caused by asbestos fibers have a very long latency period, on average 25 years.<sup>80</sup> Consequently, the deaths and infirmities inflicted by asbestos often only manifest a long time after exposure. According to Swiss law, as explained above, the period of limitation starts on the day on which the offender *performs* the allegedly criminal act, not when the harm occurs.<sup>81</sup> Thus someone who was exposed to asbestos in, say, 1980, and diagnosed with cancer in 2005 ought to have brought charges by 1990 as prosecution

<sup>74</sup> Cf. M. Zurbrugg, *Basler Kommentar Strafrecht*, Vor art. 97-101 SCC, no. 52.

<sup>75</sup> See C. Riedo, *Basler Kommentar Strafprozessordnung*, art. 89-94 SSCP, no. 9.

<sup>76</sup> See E. Trachsel, *Die Verjährung gemäss den Art. 70-75<sup>bis</sup> des Schweizerischen Strafgesetzbuches*, Zürich, 1990, 41 f.; M. Zurbrugg, *Basler Kommentar Strafrecht*, Vor art. 97-101 SCC, no. 57.

<sup>77</sup> See Swiss *Bundesgericht Entscheidungen* Vol. 131 IV page 83, 92 f. (BGE 131 IV 83).

<sup>78</sup> See, for example, Corriere della serra, *Amianto, risarcimento record per le vittime*, 1 March 2007, available at [https://www.corriere.it/Primo\\_Piano/Cronache/2007/05\\_Maggio/01/eternit\\_eredi\\_richiesta\\_risarcimenti\\_amianto.shtml](https://www.corriere.it/Primo_Piano/Cronache/2007/05_Maggio/01/eternit_eredi_richiesta_risarcimenti_amianto.shtml).

<sup>79</sup> Various cases of victims (or relatives of victims) of asbestos-related diseases were brought before the Swiss Federal Supreme Court; see a list available at <https://www.asbestopfer.ch/prozesse-1>.

<sup>80</sup> See Swiss Federal Office of Public Health, *Fact-Sheet, Asbestos: Health aspects and preventive measures*, 2015, 1 f.

<sup>81</sup> See B.II.2.

for negligent manslaughter is time-barred after 10 years.<sup>82</sup> Despite this situation, courts only referred to the wording of the provision governing the commencement of the statutory limitation: According to art. 98 para. 1 lit. a SCC, as mentioned above, the period of limitation starts on the day *on which the offender performed the allegedly criminal act*. In this case, the most recent exposure to asbestos was around 30 years ago.

## 2. What Constitutes a Crime that Can Be Forgiven and Forgotten?

By commencing the period of limitation on the day on which the offender *performs* the allegedly criminal act (rather than at a subsequent time), a paradox is created in cases where effects are not suffered until a later date, such as the criminally negligent exposure of workers to toxic material. Since criminal negligence is predicated not only upon carelessness on the part of the offender, but also on manifestation of harm, Swiss law results in crimes being put under the statute of limitation before they have actually been committed.<sup>83</sup> Victims do not even have a chance to demand criminal prosecution, as a crime is already time-barred when the harm manifests. This is detrimental to the rights of victims, who lose any possibility of pressing for criminal charges for the injuries inflicted on them. Despite the general empowerment of victims in criminal cases in Switzerland over the last years, victims in cases when harm becomes tangible only a long time after a negligent behavior of a third person have to take recourse to a torts-based claim before civil courts. In 2008, the asbestos-cases that were presented to the highest Swiss court – the Swiss Federal Supreme Court – were thrown out. The charges of manslaughter and bodily harm were deemed to have lapsed given the ten-year statute of limitations.<sup>84</sup>

The Federal Supreme Court declined to invoke a pragmatic solution. This may have theoretically been available to it because although the German and the French version of the SCC clearly state that the time limitation is to commence upon the commission of the “activity carried out” by the perpetrator (“*die strafbare Tätigkeit ausgeführt*” and “*a exercé son activité coupable*” respectively), the wording in the Italian version of the Swiss Criminal Code is less clear. It does not specifically refer to the activity itself, but more to the crime, in general (“*ha commesso il reato*”). Nonetheless, the legislative materials as well as other provisions make clear that the lawmaker wanted to link time-prescription to the action of an alleged

<sup>82</sup> See infra B.II.1.; art. 117 and 125 SCC order custodial sentence of three years.

<sup>83</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV page 297 (BGE 134 IV 297) with detailed explanations of the paradox and reference to Swiss *Bundesgericht Entscheidungen* Vol. 102 IV page 79, 80 ff. (BGE 102 IV 79); Swiss *Bundesgericht Entscheidungen* Vol. 122 IV page 61, 62 f. (BGE 122 IV 61).

<sup>84</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV page 297, 302 ff. (BGE 134 IV 297).

offender.<sup>85</sup> At the same time, the Swiss lawmaker did realize that with the occurrence of harm, the past breach of duty of care once again enters into the consciousness of the legal community.<sup>86</sup> This was demonstrated in the Italian courts when a criminal trial found the former owner of a plant that had used asbestos guilty of involuntary manslaughter.<sup>87</sup> The path for prosecution had been cleared by Italy's Constitutional Court in 2016, when it stated that even from the strictly material point of view, the death of a person, although caused by conduct long ago, gives rise to a new event that has to be judged in a court.<sup>88</sup> Ultimately, it reveals an unresolved question in criminal law formed by two conflicting positions in legal philosophy, namely: Does the conduct of the perpetrator or the harm inflicted constitute the crime?

### 3. Different Solutions in Neighboring Countries

Swiss legal scholars had pointed to the possible shortfall of the law in cases characterized by long-term effects well prior to the asbestos cases, demanding that the paradox of an alleged crime falling under the statute of limitation before it is actually committed be addressed.<sup>89</sup>

Possible solutions can be found in Germany and Austria. These countries not only neighbor Switzerland, but also share strong common legal roots. Germany – in complete contrast to Switzerland – sees the period of time limitation only start when the harm manifests.<sup>90</sup> In Austria, the time limiting prosecution generally begins when the alleged perpetrator engages in criminal activity.<sup>91</sup> Comparable to Swiss law, the relevant provision does not refer to the manifestation of harm. However, this principle is subject to

4009

<sup>85</sup> For more details, see H. Fischer, *Die Strafverfolgungsverjährung im deutschen und schweizerischen Strafgesetzbuch*, Diss. Basel, 1970, 102; H. Schultz, *Bericht und Vorentwurf zur Revision des Allgemeinen Teils und des Dritten Buches «Einführung und Anwendung des Gesetzes» des Schweizerischen Strafgesetzbuchs*, Bern, 1987, 229 ff.

<sup>86</sup> Cf. H. Fischer, *Die Strafverfolgungsverjährung im deutschen und schweizerischen Strafgesetzbuch*, Diss. Basel, 1970, 131 ff.; H. Schultz, *Bericht und Vorentwurf zur Revision des Allgemeinen Teils und des Dritten Buches «Einführung und Anwendung des Gesetzes» des Schweizerischen Strafgesetzbuchs*, Bern, 1987, 229 ff.

<sup>87</sup> Several lawsuits were filed against the owner, see *Neue Zürcher Zeitung*, *Neuer Asbest-Prozess gegen Stephan Schmidheiny – diesmal wegen «vorsätzlicher Tötung»*, 24 January 2020.

<sup>88</sup> See <http://ibasecretariat.org/lka-italys-hope-and-glory.php> and [https://www.ansa.it/english/news/general\\_news/2016/07/21/constitutional-court-oks-fresh-trial-2\\_b502c172-275b-4acb-86a5-cc3dca1028ce.html](https://www.ansa.it/english/news/general_news/2016/07/21/constitutional-court-oks-fresh-trial-2_b502c172-275b-4acb-86a5-cc3dca1028ce.html).

<sup>89</sup> See H. Walder, *Probleme bei Fahrlässigkeitsdelikten*, in *Zeitschrift des Bernischen Juristenvereins* (1968), 186 ff.; E. Trachsel, *Die Verjährung gemäss den Art. 70-75<sup>bis</sup> des Schweizerischen Strafgesetzbuchs*, Zürich, 1990, 82 ff.

<sup>90</sup> According to Section 78a of the German Penal Code (as of 19 June 2019): “The limitation period begins to run as soon as the offence is completed. If a result constituting an element of the offence occurs later, the limitation period begins to run as of that time”; available at [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0812](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0812).

<sup>91</sup> See Austrian Criminal Code (as of 19 April 2021), § 57 para. 2 available at <https://www.jusline.at/gesetz/stgb/paragraf/57>.

a proviso – a kind of suspension of the running of the statute of limitations.<sup>92</sup> If harm manifests only a long time after a breach of duty, a recalculation takes place or, rather, one could say “the clock runs backwards”. The offence is considered time-barred when either the limitation period lapses following the manifestation of harm or when – after the commission of the negligent act – one and a half times of the limitation period has lapsed (or at least three years).<sup>93</sup> The debates on the legitimacy of the specific set-ups of statutory limitations in the respective jurisdiction illustrate the axiological ambiguity of legal rules on forgetting and forgiving.<sup>94</sup>

#### 4. A New Solution for Switzerland

Although the push for a new approach to time limitation in delayed onset cases did strengthen with the asbestos cases,<sup>95</sup> it would be too late to change the law for the victims in those cases.

##### a) *New Reading of the Law*

Some scholars claim that, in fact, the existent law only needs a new interpretation. One option is reading art. 98 para. 1 lit. a SCC such that an offender *performs* the allegedly criminal negligence, not when he or she *acts* carelessly, but only when the *harm occurs* – as negligence needs both carelessness *and* harm inflicted.<sup>96</sup> According to this view, the traditional reading of art. 98 para. 1 lit. a SCC contradicts the main rationale of time limitation and thus is not acceptable. If time limitation is based on the idea that “time heals all wounds”, the limitation period should only start when the harm occurs and is being felt by the victim and seen by the public.<sup>97</sup>

Whether this new approach has a chance of prevailing is unclear, since the courts maintained a traditional reading of the provisions, most notably because of the wording of art. 98 para. 1 lit. a SCC, which states that the limitation period begins on the day on which the offender acts.<sup>98</sup>

<sup>92</sup> Cf. S. Gless, «...hebt die Zeit sich selber auf» – Strafverfolgung in Spätschadensfällen, in H.-U. Paeffgen et al. (Eds), *Strafrechtswissenschaft als Analyse und Konstruktion, Festschrift für Ingeborg Puppe zum 70. Geburtstag*, Berlin, 2011, 473 f.

<sup>93</sup> See Austrian Criminal Code (Status as of 19 April 2021), § 58 para. 1, available at <https://www.jusline.at/gesetz/stgb/paragraf/58>.

<sup>94</sup> See, for example, S. Gless «...hebt die Zeit sich selber auf» – Strafverfolgung in Spätschadensfällen, in H.-U. Paeffgen et al. (Eds), *Strafrechtswissenschaft als Analyse und Konstruktion, Festschrift für Ingeborg Puppe zum 70. Geburtstag*, Berlin, 2011, 473 ff.

<sup>95</sup> See D. Jositsch, S. Spielmann, *Die Verfolgungsverjährung bei fahrlässigen Erfolgsdelikten*, in Aktuelle Juristische Praxis (2007), 194; C. Widmer Lüchinger, *Die Verjährung bei Asbestschäden*, in Zeitschrift des Bernischen Juristenvereins (2014), 470 ff.

<sup>96</sup> See D. Jositsch, S. Spielmann, *Die Verfolgungsverjährung bei fahrlässigen Erfolgsdelikten*, in Aktuelle Juristische Praxis (2007), 194.

<sup>97</sup> See D. Jositsch, S. Spielmann, *Die Verfolgungsverjährung bei fahrlässigen Erfolgsdelikten*, in Aktuelle Juristische Praxis (2007), 195.

<sup>98</sup> Swiss Bundesgericht Entscheidungen Vol. 134 IV page 297, 302 ff. (BGE 134 IV 297).



### **b) Human Rights Approach**

The axiological ambiguity of time limitation also emerged in the European Court of Human Rights (ECtHR) decision involving the tortious claim of a worker who was diagnosed with malignant pleural mesothelioma (a highly aggressive malignant tumor) in 2004, caused by his exposure to asbestos in the course of his work at a machinery plant during the 1960s and 1970s. He died in 2005.<sup>99</sup> The Swiss courts had dismissed the claim for damages brought by his wife and two children, on the grounds that they were time-barred according to domestic law. However, the European Court of Human Rights held that rules on limitation periods that barred victims from any legal claim for compensation violated victims' rights to have access to courts, in particular, if those suffering from inflicted diseases that could not be diagnosed until many years after the events were barred from collecting damages. In the specific case, the claim for compensation would have had to have been made in 1988 at the latest – 16 years before the disease was diagnosed. The ECtHR held that “in cases where it was scientifically proven that an individual could not know that he or she was suffering from a particular disease, that fact should be taken into account in calculating the limitation period.”<sup>100</sup>

It is interesting to note that regarding torts, Switzerland modified its traditional forgiving stance on time prescription in torts law as a consequence of both the ECtHR's decision and public reproach when victims could not claim compensation due to statutory limitations.<sup>101</sup>

In criminal law, however, the Swiss Federal Supreme Court saw no way prioritizing victims' human rights over the statutory limitations and creating exceptions to time limitations in cases of criminal negligence.<sup>102</sup> At the same time, it acknowledged that art. 2 ECHR<sup>103</sup> protects everyone's life, not only against undue intrusion by the state, but it also gives rise to an obligation on the part of the state to protect individual lives.<sup>104</sup> However, while the court did find that this general obligation does exist, it did not extrapolate upon the specific steps that a state must take to fulfil the duty to

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<sup>99</sup> See European Court of Human Rights (ECtHR), *Case of Howald Moor and Others v. Switzerland*, Application no. 52067/10 and 41072/11, 11 March 2014.

<sup>100</sup> See European Court of Human Rights (ECtHR), *Case of Howald Moor and Others v. Switzerland*, Application no. 52067/10 and 41072/11, 11 March 2014, § 71 ff.

<sup>101</sup> See art. 60 CO (Swiss Code of Obligations of 30 March 1911), in force since 1 January 1912 (as of 1 February 2021), available at [https://www.fedlex.admin.ch/eli/cc/27/317\\_321\\_377/en](https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en). The amendment of the CO is in force since 1 January 2020, see Federal Gazette no. 2 of 21 December 2014, 235 (BBl 2014, 235).

<sup>102</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV page 297, 306 (BGE 134 IV 297).

<sup>103</sup> See European Convention on Human Rights (ECHR) of 4 November 1950 (Status as of 23 February 2012), available at [https://www.fedlex.admin.ch/eli/cc/1974/2151\\_2151\\_2151/de](https://www.fedlex.admin.ch/eli/cc/1974/2151_2151_2151/de).

<sup>104</sup> See, for example, European Court of Human Rights (ECtHR), *Case of Opuz v. Turkey*, Application no. 33401/02, 9 June 2009, § 118 ff.

protect lives. The Swiss court exercises great discretion in assessing which legislative means it wishes to use to ensure the protection of its citizens' lives. Thus, criminal sanctions make up only one tool – an *ultima ratio* – within the framework of criminal policy. In the court's view, statutory limitations for criminal negligence that link the commencement of the time period to the careless *act* and not to the *harm* caused, possibly many years later, is reasonable, in particular when taking the evidentiary difficulties of proving a breach of duty of care for a long ago event into account.<sup>105</sup>

### c) *Law Reform*

As long as the lawmaker does not change the criminal statutory limitations, an alleged wrongdoer cannot be prosecuted in cases where there is delayed onset in the harm suffered, because statutory limitations will come into play before victims experience the harm and have an opportunity to press charges.

In 2009, when an asbestos trial opened in Turin, the Swiss government, responding to a question raised in parliament, said it did not think it appropriate to change the penal code to extend the statute of limitations in cases such as those concerning asbestos. "A longer limit would mainly respond to the desire to find a guilty party and to satisfy the need for revenge," the government replied to a parliamentary question. "From a criminal policy perspective, a criminal conviction does not appear necessary. If, in the meantime, the perpetrator has not committed other crimes, the sentence, whose main aim is to reintegrate the perpetrator into society and to avoid recidivism, would not make much sense."<sup>106</sup>

As a matter of fact, the Swiss Federal Supreme Court conceded that the reading and interpretation of a statute may change over time, even if the wording does not. However, invoking the separation of powers and the rule of law, the court held that the judiciary is bound by the lawmaker's decision and must not aim to reform the law where the parliament decided otherwise.<sup>107</sup>

## E. Conclusion: Lasting Axiological Ambiguity

The effect the passage of time ought to have on criminal justice is a decision closely connected to a society's values and rationale for criminal punishment. The legal rules must accordingly balance the interests of the victims, the public and the (alleged) perpetrators.

<sup>105</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV 297, page 306 (BGE 134 IV 297).

<sup>106</sup> See the response of the Federal Council on 18 November 2009 at the request of National Council Jean-Claude Rennwald from 22 September 2009, 09.3796 Interpellation, *Gerechtigkeit für Asbestopfer*; available at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20093796>.

<sup>107</sup> Swiss *Bundesgericht Entscheidungen* Vol. 134 IV 297, page 302 ff. (BGE 134 IV 297).

Swiss law has traditionally acknowledged the axiological ambiguity, with an approach that takes the different interests into consideration, albeit with a pragmatic focus on the chances of convicting an alleged perpetrator with adequate resources. This is in line with the thinking of the statutory limitation constructed nearly two centuries ago. During recent decades the lawmaker has had to rank victims' interests more highly, in order to comply with a changing legal framework in line with an apparent change in the public's attitude and as reflected by certain popular initiatives. The traditional provisions governing time-bars have become excessively characterized by "forgiving and forgetting" in the eyes of many.

Times have changed and it seems that the Swiss statutory limitation must adapt to the needs of a modern and mobile society, which is internationally connected and, moreover, influenced by contemporary time warps triggered by developments of forensic science or of the inerasable recollection of the internet. Digitalization brings with it an infinite possibility to retain and review data and information. On a human level, however, to be able to forget can remain a blessing that is mirrored in the statute of limitations. The Swiss approach of forgiving and forgetting might find new life when its benefits are greater acknowledged.

As the Swiss Federal Supreme Court explained, there are good reasons why a criminal justice system links its statutory limitation to an alleged criminal action, and not to the harm caused. The state does not want to prosecute an alleged crime where it is hard to prove. Defendants can be put in an unfair position if they have to answer allegations from many years ago. Furthermore, if an individual has not violated the law for many years and, the question can be asked as to what purpose punishment would serve if handed down a long time after an alleged criminal act?

From a victim's point of view, one might think that the Swiss statutory limitation is too offender-friendly and takes the victim's interests too little into account. However, it is possible that with the passing of time, the victim's need for punishment also diminishes, along with any sentiment of having suffered an injustice.

No matter how a jurisdiction addresses the axiological ambiguity of statutory limitations to criminal punishment, an uncontroversial solution seems impossible. Criminal justice may just not be suited to cover the passage of time with an adequate legal approach, because criminal trials are dispute-resolving systems that freeze a situation in a narrow time-window to be resolved in a speedy trial. As always, the interplay of law and the passage of time will remain a fascinating phenomenon.

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