
Transnational Legal Theory
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/rtlt20

# Bird's-eye view and worm's-eye view: towards a defendant-based approach in transnational criminal law

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Published online: 20 Jul 2015.

*Transnational Legal Theory*, 2015
http://dx.doi.org/10.1080/20414005.2015.1042233



# Bird's-eye view and worm's-eye view: towards a defendant-based approach in transnational criminal law

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While the classic approach to transnational law provides a valuable tool for identifying the legal frameworks governing transborder occurrences, it falls short of covering all relevant aspects of transnational criminal law (TCL). This article argues that criminal law – unlike other areas of law – is fundamentally a state-oriented concept, leading to unique problems when implemented across state borders, especially for the individual facing penal power. A theoretical concept of TCL must therefore not only map extensions of state powers from high above, but also look for the individual's position in the possibly overlapping normative orders on the ground. The current predominant bird's-eye view must be modified according to the worm's-eye view. In doing so, the specific features and resulting problems of TCL will emerge. From this modified point of view, a main challenge is the establishment of a globally recognised coordination scheme, which will protect the legal position of individuals – particularly defendants – affected by states exercising their *ius puniendi* across borders.

**Keywords:** transnational criminal law; defendant based-approach; general principles; *ne bis in idem;* jurisdiction in criminal matters; conflicts of jurisdiction; European criminal law



## I. Introduction

For several decades now, scholars have been debating the emergence and consequences of legal frameworks providing the structure necessary to exercise the *ius puniendi* in a transnational setting.[1] The historical dimension is central to this discussion: the founding and consolidation of state jurisdiction rests upon the Westphalian model of a state, based on territoriality and a monopoly of force,[2] which is

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[1]Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) 3–23; Kai Ambos, *Internationales Strafrecht* (CH Beck, 4th edn 2014) 2–5; Helmut Satzger, *International and European Criminal Law* (CH Beck, 2012) 2.

[2]Daniel-Erasmus Khan, 'Territory and Boundaries' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 225, 233–5.

well-established in Europe and elsewhere and accompanied by the transfer of prosecuting power from the victim to the public.[3] This development has not only proven favourable for building state power but has also granted defendants a guarantee of due process when being charged with a crime.[4] The phenomenon, however, did not turn out to be a win-win situation for everyone involved, since some defendants lost domestic privileges[5] and some victims lost control over the conflicts that aggrieved their rights.[6] The adoption of criminal codes and the establishment of state courts, as well as the appointment of governmental judges and subsequently of public prosecution services ('*Staatsanwaltschaften*'), have been key factors in the rise of the Westphalian state because they allowed specific state organs to exercise the monopoly of force according to public law within a given territory.[7] The concept translates into different forms of jurisdiction – prescriptive, adjudicative and enforcement – which all originate from a state's interest in maintaining its legal order.[8]

The emergence of transnational criminal law (TCL) – a special branch of transnational law pertaining to transnational criminal cases[9] – calls into question the basic features of criminal law, namely the monopoly of force within a given territory, since it rests on the assumption that states may exercise power across borders in the field of criminal law. This explains the fierce political struggle, as well as the legal debate, over a possible transfer of the *ius puniendi* from the state level to the supranational level. In Europe, the debate surrounding a broad European Union

[3]For a recent analysis of criminal laws being public laws, see e.g. Malcolm Thorburn, 'Criminal Law as Public Law' in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2014) 21.

[4]See Frederick Mark Gedicks, 'Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment' (2009) 58(3) *Emory Law Journal* 585.

[5]Sabine Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' (2013) 9 *Utrecht Law Review* 90.

[6]Nils Christie, 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology* 1, 7–9.

[7]See, for example, from a historical point of view: Hinrich Rüping and Günter Jerouschek, *Grundriss der Strafrechtsgeschichte* (CH Beck, 2007) 26–29, 97–99; Frank Meyer, *Strafrechtsgenese in Internationalen Organisationen* (Nomos, 2012) 601–11; from a philosophical point of view: RA Duff, 'Responsibility, Citizenship, and Criminal Law' in Duff and Green (n 3) 125, 131–41; from an international criminal law point of view: Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9 *Utrecht Law Review* 68, 69–72.

[8]On the various forms of jurisdiction in the context of criminal law, see Michiel JJP Luchtman, 'Towards a Transnational Application of the Legality Principle in the EU's Area of Freedom, Security and Justice?' (2013) 9 *Utrecht Law Review* 11, 17–23; Anna Petrig, 'The Expansion of Swiss Criminal Jurisdiction in Light of International Law' (2013) 9 *Utrecht Law Review* 34.

[9]I.e., acts that are not international core crimes but are committed in or affect more than one jurisdiction. See Sabine Gless and John A.E. Vervaele, 'Editorial: Law Should Govern. Aspiring General Principles for Transnational Criminal Justice' (2013) 9 *Utrecht Law Review* 1.

(EU) mandate on shaping and adopting criminal law and criminal procedure serves as a prominent example.[10]

By and large, little attention has been given to a theory of TCL up until now. The various fields – such as law flowing from 'suppression conventions' adopted within the United Nations (UN) framework, rules governing mutual legal assistance and European criminal law – have instead sprouted in their own peculiar ways with little connection to each other. Only recently has the growing interest in the basics of TCL led to new discussions about its theoretical underpinnings. For some scholars, the crucial question is: *What is the nature of transnational criminal law?* This question moves beyond the traditional distinction between two bodies of law we can define quite clearly: national criminal law, and international criminal law *stricto sensu*, i.e. the core crimes codified in the Rome Statute of the International Criminal Court (ICC Statute) and grave breaches of international humanitarian law.[11] For others, it seems more important to consider *what transnational criminal law actually does*, especially with regard to the individuals affected by it.[12] The divide is not, as one might initially think, between theorists striving to categorise and practitioners handling the impact. The divide is rather between the particular legal approaches to TCL: on the one hand, classic state-oriented, international public law scholars see TCL as the international 'suppression conventions and the consequences for state policies in criminal justice'.[13] Scholars of criminal law, on the other hand,[14] look rather for the effects of TCL enforcement on particular individuals, such as procedural rights and criminal defence on the side of the defendant in practice, or a possible powerlessness on the side of the victim to file a private claim on its own merits.[15] What

[10]See, for example, the 'Lisbon judgment' of the German Bundesverfassungsgericht: BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr (1-421), www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, paras 252–5; Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10 *German Law Journal* 1241, 1250; Petter Asp, *The Substantive Criminal Law Competence of the EU* (Skrifter utgivna av Juridiska fakulteten vid Stockholms, 2012) 43–69.

[11]Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002); see Neil Boister, '"Transnational Criminal Law"?' (2003) 14(5) *European Journal of International Law* 953; Claus Kress, 'International Criminal Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2009) 6–9.

[12]For early contributions see Albin Eser, Otto Lagodny and Christopher L Blakesley, *The Individual as Subject of International Cooperation in Criminal Matters* (Nomos, 2002).

[13]But 'suppression conventions' are not blind to individual rights either; see e.g. International Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS (entered into force 3 June 1983), Art 8(2).

[14]Classic textbooks on transnational or international criminal law include Boister (n 1) and Christine Van den Wyngaert, *International Criminal Law* (Kluwer, 2nd rev edn 2000).

[15]See e.g. Malin Thunberg Schunke, *Whose Responsibility?* (Intersentia, 2013); Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing, 2012).

may seem an insignificant difference at first glance translates into various aspects of how TCL is seen: is the concern that one state will infringe the *ius puniendi* of another? Or does the concern lie with the individual facing numerous states all expanding their penal powers? This article advocates an individual-based approach that acknowledges the individual's position in TCL, and especially pays attention to the legal position of the defendant. Such an approach requires a reassessment of our understanding of the *ius puniendi*'s impact in a transnational setting, and an evaluation of the consequences for individuals. The plea for an adequate coordination scheme among cooperating states – one that protects the legal position of the interests of individuals – is at the centre of a new individual-based approach to TCL.



## II. Definitions of transnational criminal law (TCL)

When academic discussions consider the concept of TCL, the first question is: How is TCL defined? While there are quite clear notions of *national* criminal law, as well as of international criminal law *stricto sensu*, a commonly shared definition of *transnational criminal law* does not yet exist.

### A. *The classic definition of transnational law – and its application to criminal law*

In attempting to define transnational law, a natural starting point is the classic definition as provided by *Philip Jessup* in the 1950s: transnational law is law that regulates actions or events that transcend national frontiers.[16] This definition can be refined for the criminal law context, as, for instance, *Neil Boister* does in the current volume when he assigns to TCL the area of 'crimes established through treaty obligations in multilateral crime suppression conventions such as the 1988 Vienna Convention – the so-called "treaty crimes" or "crimes of international concern"'.[17] Such a definition is based on a law enforcement approach and holds a public international law perspective but, at first glance, works well for the identification of emerging legal areas of transnational crime control where new rules transcend national jurisdictions and are thus 'concerned with governance of transnational criminal actions', such as UN conventions aimed at the criminal prosecution of certain conduct ('suppression conventions') or – more intensified – the EU areas of freedom, security and justice.[18] According to Boister, the specific criminal law branch of transnational law, i.e. TCL, involves 'the indirect suppression by

[16]Philip Jessup, *Transnational Law* (Yale University Press, 1956) 2.
[17]Neil Boister, 'Further reflections on the concept of transnational criminal law', this volume.
[18]Annika Suominen, 'What Role for Legal Certainty in Criminal Law within the Area of Freedom, Security and Justice in the EU?' (2014) 2(1) *Bergen Journal of Criminal Law and Criminal Justice* 1, 3–6.

international law through domestic penal law of criminal activities that have (i) actual or (ii) potential transboundary effects or (iii) transboundary moral impacts'.[19] This approach to defining and assessing TCL, however, is primarily concerned with the governance of transnational criminal actions by way of international 'suppression conventions' or other forms of cooperative law.

Therefore, the question is: does a continuation of the classic definition provide an adequate lens through which the transformation of legal institutions can be studied in an evolving, globalising society?[20] The history, substance and effect of criminal law suggest that it needs a slightly different approach: one more tailored to the peculiarities of criminal law, since this legal field stands out with regard to its outcomes, namely a possible punishment. Criminal law therefore appears to be state-fixed because of its particular purpose of authorising a society's response to alleged crimes.[21] The classic justification for a harsh reaction, such as public prosecution or punishment of certain conduct, is that such conduct runs counter to society's will and therefore stands in opposition to the law of the land.[22] This fundamental rationale can justify the grave consequences of government action that the alleged wrongdoers face – such as search and seizure, imprisonment or even execution.[23] These distinctive features have determined longstanding principles of criminal law and criminal procedure, shaped the legal frameworks surrounding these areas of law, and influenced how we think about the *ius puniendi*.

### B. *The bird's-eye view of TCL*

In a manner of speaking, Boister's approach in this volume to defining and assessing TCL represents the bird's-eye view of the global landscape of normative frameworks.[24] The focus is on rule-making and rule-enforcement, essentially taking a top-down approach.

Boister[25] uses the example of cross-border money laundering to illustrate how the origin of a particular asset is often concealed when moved across state

[19]Boister, this volume.
[20]Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2012) 21 *Transnational Law & Contemporary Problems* 305, 307 et seq.
[21]See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 2010) 74; Duff (n 7) 131–41; Anne Schneider, 'The Basic Approach to Jurisdiction in Private and Criminal Law' in Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol II: Rights, Principles and Model Rules* (Nomos, 2014) 227.
[22]Duff (n 7) 125, 131–41. For further information on the implications of the 'principle of legality' or '*Gesetzlichkeitsprinzip*' for TCL, see e.g. Sabine Gless, *Internationales Strafrecht* (Helbing Lichtenhahn Verlag, 2011) 291–5; Luchtman (n 8) 23–26.
[23]On the part of the victim the consequence of state prosecution is the inability or rather restriction to accuse in one's own name or a collection of damages.
[24]Boister, this volume.

borders.[26] Today, and more so than in the past, the rules applicable to tracing a 'dirty' money trail, as well as the rules governing whether a certain act will be deemed money laundering, are not solely within the competence of a national system but are rather issued by many different players.[27] For instance, international law adopted within the UN system obligates state parties to criminalise money laundering on the basis of, among other UN instruments, the so-called Palermo Convention.[28] However, no thought was given to the question of how to safeguard individual rights at the international level. The national lawmaker must then translate the international standards into national law, properly phrasing the mandate placed on the individual by such standards. In addition, regional bodies, such as the Organization for Economic Cooperation and Development (OECD) and its Financial Action Task Force (FATF),[29] set standards regarding how to handle assets that cross borders.[30] Institutions handling money transfers, and the bodies controlling them, may establish soft law by way of self-regulation, like the Basel Committee on Banking Supervision (BCSB)[31] or the International Association of Insurance Supervisors (IAIS)[32].

This unsorted coexistence of international, national and even private rule-setting accounts for the legal pluralism[33] typical of certain transnational law settings, opening doors to adaptable models. However, in the field of criminal law, it may lead to a dangerous conflict of laws. When 'two or more legal systems coexist in the same social field',[34] they may offer a flexible solution to newly emerging problems in cross-border situations, but this eventually leads to a minefield for the individual who must abide by such (possibly conflicting) laws. Legal pluralism in TCL is, to some extent, the result of a paradox. On the one hand, the



[25] *Ibid*.
[26] See, for different scenarios, Mark Pieth and Gemma Aiolfi, *A Comparative Guide to Anti-Money Laundering* (Edward Elgar, 2004).
[27] Mark Pieth, 'Vor Art. 305$^{bis}$ Siebzehnter Titel: Verbrechen u. Vergehen gg. die Rechtspflege.' in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar, Strafrecht II, Art. 305$^{bis}$, 305$^{ter}$ inkl. Vorbemerkungen* (Helbing Lichtenhahn Verlag, 2013) 2671, Art 305, nos 18–43.
[28] UN General Assembly, 'United Nations Convention against Transnational Organized Crime' (8 January 2001), Res/55/22.
[29] FATF Recommendations: Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (2012), www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf; for case studies see e.g. Herlin-Karnell (n 15) 146–222.
[30] Pieth (n 27) 23–32.
[31] The Basel Committee is a regulating body for banks, setting standards and providing a forum for cooperation on banking supervisory matters. See www.bis.org/bcbs/about.htm.
[32] The Joint Forum, Initiatives by the BCBS, IAIS and IOSCO to Combat Money Laundering and the Financing of Terrorism (June 2008), www.bis.org/publ/joint05.pdf.
[33] For definitions, see Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869, 870–4.
[34] Boister, this volume.

adoption of national criminal law, as a conceded claim of sovereign statehood in the Westphalian tradition, stands as a self-contained punitive power inflexible to other states' wishes. Yet, on the other hand, such autonomous exercise of state power may easily foil the Westphalian state promise of 'one jurisdiction, one law'. When, for instance, states establish jurisdiction to prosecute crimes committed against their citizens abroad, they *de facto* extend their state borders in order to protect their own nationals extraterritorially.

The individual will not only wish to be subject to the law of one land alone, but will also hope to rely on the Westphalian promise of legal certainty and clear direction on how to act in order to avoid punishment.[35]

Going back to the current debate surrounding TCL, the problem of conflicting laws is neither surprising nor new. Jessup has previously discussed the ideal of legal certainty as a possible obstacle to defining transnational law as a valid concept, stating that

> one purpose of law is certainty. Individual persons, corporations, states, and international organizations must know the rules by which they should govern their conduct from day to day; such certainty cannot exist if decisions are to be rendered according to the whim of the judge who in his travels may have become fascinated by the tribal customs of Papua.[36]

Thus, from the beginning, transnational law has involved a struggle between the promise of Westphalian state order and the need for transborder implementation of certain norms. By now, one would therefore expect an abundance of theories focusing on the legitimate expectation of individuals as the addressees of multiple state powers in a situation of transnational law and how to sort out incoherent normative orders. One would especially expect such theories in the realm of TCL, since it places individuals in a precarious position. Theories that focus on individual interests in TCL, however, are virtually nonexistent. Only recently, when new ideas of global constitutionalism spilled over into areas of transborder criminal justice, has the debate about the individual's position in TCL begun to inch towards the spotlight.[37] However, the relationship between human rights and judicial entitlements, or rather the tangible implications for an individual affected by transnational criminal proceedings, remains unresolved in the overall scenery of multiple sovereign claims for criminal jurisdiction.

[35]See e.g. Mark Pieth, 'Synthesis: Comparing International Standards and their Implementation' in Pieth and Aiolfi (n 26) 445–52; Ingeborg Zerbes, 'Transnationales Korruptionsstrafrecht Gestaltungsmacht privater Akteure hinter staatlichem Regelungsanspruch' in Gralf-Peter Calliess (ed), *Transnationales Recht* (Mohr Siebeck, 2013) 539–54. For a more general discussion in light of EU criminal law, see Sabine Gless, 'A New Test for Mens Rea? Safeguarding Legal Certainty in a European Area of Freedom, Security and Justice' (2011) 2 *European Criminal Law Review* 114; see also Suominen (n 18).
[36]Jessup (n 16) 107.
[37]See e.g. Herlin-Karnell (n 15) 232–9; Schunke (n 15) 131–4.

### C. *The worm's-eye view of TCL*

The TCL landscape changes considerably as soon as one zooms in on a situation of alleged cross-border crime and sees it through the eyes of an alleged wrongdoer. The laws governing the investigation and prosecution of transnational offences have emerged in parallel, yet uncorrelated, systems of cooperation between states (such as UN 'suppression conventions' or within the EU or Schengen frameworks) or even cooperation between states and private actors (like the Basel Committee on Banking Supervision, BCSB ).[38] The prosecution side has driven cross-border cooperation, and the interests of defendants have rarely been taken into account equally.[39] One reason for this shortfall may be that transnational law is traditionally perceived as being addressed to states only (or other lawmakers) and not to individuals.[40] The initial focus and the current development are illustrated for instance by the Palermo Convention,[41] which merely obligates states to criminalise certain conduct, as do many of the OECD rules, while recent forms of self-regulation (like FATF and BCSB recommendations) pay attention to implementing mechanisms, yet still centre on crime control. The point of view of the individual, who must sort out the potentially differing orders set in disparate rules, is seldom taken into account.[42] Legal certainty and the right not to be subjected to arbitrary punishment, however, are judicial liberties based on human rights.[43] Yet human rights protection rarely forms a central part of newly emerging international frameworks of cross-border cooperation. Traditionally human rights

[38]For case studies see Herlin-Kamell (n 15) 146–222; Pieth and Aiolfi (n 26).

[39]Gless (n 5); Ilias Anagnostopoulos, 'Criminal Justice Cooperation in the European Union after the First Few "Steps": A Defence View' (2014) 15 *ERA Forum* 9.

[40]Anna Petrig argues, that various suppression conventions contain provisions addressing the right to consular assistance. Such provisions can according to Anna Petrig arguably be interpreted as containing international individual rights, similar to those enshrined in Vienna Convention of Consular Relations, 18 April 1961, 500 UNTS 95, Art 36(1). She refers, for example to Article 7 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (10 March 1988, 1678 UNTS 221, 27 ILM 668) as well as to Article 6 of the International Convention against the Taking of Hostages (17 December 1979, 1316 UNTS 205). See on the individual rights enshrined in the Vienna Convention e.g. Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009) 153, 168–9.

[41]Pieth (n 27) 23–32.

[42]Gless (n 35); Suominen (n 18) 6; for an account in international criminal law *stricto sensu*, see Stefanie Bock, 'The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute' (2013) 9 *Utrecht Law Review* 184.

[43]Granted for instance in the European Convention on Human Rights (ECHR), 3 September 1953, 213 UNTS 222, Arts 6 and 7: *Silver and others v United Kingdom*, App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR, 25 March 1983), [88]; *Sunday Times v United Kingdom*, App no 6538/74 (ECtHR, 26 April 1979), [48]–[49]; *EL, RL et JO v Suisse*, App no 20919/92 (ECtHR, 29 August 1997), [51]–[53]; Robert Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (De Gruyter, 2002) 744.

belong to the individual versus state context, and appropriate remedies are rather hard to achieve when a state's power crosses a border.[44]

It is, however, the individuals possibly violating the law who are most affected by TCL. If they find themselves in the position of a defendant, they may face severe consequences. If an action triggers criminal proceedings across borders, a defendant may be confronted with the claim of validity of a foreign law, he or she may be arrested with the aim of extradition and held abroad, and may be subjected to unfamiliar procedures in a language he or she does not speak or understand.[45] In a situation where different criminal laws conflict, individuals face a dilemma that – unlike conflicts of law in international private law – they cannot easily resolve. Such dilemmas can arise in quite different situations and may sometimes be rather surprising for the actors involved. For example, in the border region of Germany and Switzerland, where nationals from both countries cooperate in frontier traffic, such dealings may on occasion include the transfer of money from one country to the other. Laws against money laundering on the two sides of the border, however, differ substantially. According to Swiss law, only concealment of profits gained from the commission of a *felony* is deemed to be money laundering,[46] whereas in Germany the mere concealment of profits gained by certain *misdemeanours* may qualify as money laundering.[47] Therefore, not only cross-border commuters but also bankers and other agents who never leave their own country must prudently assess the possible legal consequences of transferring money, since the validity of German law does not end at the border. And while bankers (being part of a world-wide industry) may be obliged to act with due diligence, conflicts of laws arise on all scales. If, for instance, a group of both Swiss and German nationals participate in a music-swapping club for newly registered local songs on both sides of the border, they may quickly learn that their respective neighbouring home countries might evaluate their business model quite differently, and that while their choice of corporate residence may be important, it will not necessarily save them from (possibly harsh) legal consequences depending on the specific details of the business set-up. The music-swapping club may infringe copyright laws on one side of the border but not necessarily on the other, since Swiss law allows copyrighted music to be

[44]Interestingly enough, rather early TCL frameworks with reference to human rights intend to protect the victim's interests, which often is not primarily directed against the state but the alleged criminal individual. See Jonathan Dock, *Victims' Rights, Human Rights and Criminal Justice* (Hart Publishing, 2008).

[45]Gless (n 5).

[46]See Article 305$^{bis}$ subpara 1 Schweizerisches Strafgesetzbuch (Code pénale Suisse, SR 311.0, http://www.admin.ch/opc/de/classified-compilation/19370083/index.html; for an English translation see http://www.admin.ch/opc/en/classified-compilation/19370083/index.html).

[47]See Section 261 subpara 4 lit b Deutsches Strafgesetzbuch (StGB), www.gesetze-im-internet.de/stgb/__261.html; for an English translation see www.gesetze-im-internet.de/englisch_stgb/index.html.

downloaded for personal use,[48] yet German law criminalises it.[49] Furthermore, according to German law, the concealment of gains resulting from a possible infringement of copyright law can qualify as money laundering.[50] Therefore, certain financial transactions with regard to the 'local music sharing' may qualify as an act of money laundering only within a particular jurisdiction, but not necessarily in the state of residence of the (alleged) wrongdoer. In Europe, with its mix of states and justice systems, numerous areas of criminal law differ across borders.

Moreover, it is worth mentioning that defendants may not only be affected by TCL when committing an act with consequences across borders. Individuals in their home jurisdictions may, in certain situations, be expected to align their conduct to rules set by foreign lawmakers or international self-regulating bodies in order to avoid criminal liability.[51] For example, the Swiss Penal Code criminalises 'insufficient diligence in financial transactions' for persons who accept assets as part of their profession.[52] If they 'fail to ascertain the identity of the beneficial owner of the assets with the care that is required in the circumstances', they may be held criminally liable. However, in order to determine the level of 'care that is required' in a particular situation, Swiss judges will rely on FATF or BCSB recommendations, amongst other considerations.[53]

Therefore, TCL should not be defined from the bird's-eye view of a suppositional lawmaker alone, but must also incorporate the perspective of the affected individual.[54]

### D. *Towards a modified bird's-eye view of TCL*

In sum, TCL is not simply a field shaped by treaty obligations of multilateral crime suppression conventions, but a landscape with pitfalls and safe harbours for individuals. A useful definition of TCL must therefore not only focus on states' interests when allowing for a cross-border *ius puniendi*, but include all aspects crucial to criminal justice. When Boister (and many others) consider the crucial

[48]Christoph Gasser, 'Art. 19 URG' in Barbara K. Müller and/Reinhard Oertli (eds), *Urhebergesetz – Stämpflis Handkommentar* (Stämpfli Verlag, 2012) paras 5 et seq.
[49]Michael Heghmanns, 'Musiktauschbörsen im Internet aus strafrechtlicher Sicht' [2004] *Multimedia und Recht, Zeitschrift für Informations-, Telekommunikations- und Medienrecht* 14–18.
[50]See Section 261 subpara 4 lit b Deutsches Strafgesetzbuch; Section 106 Deutsches Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, http://www.gesetze-im-internet.de/urhg/; for an English translation see http://www.gesetze-im-internet.de/englisch_urhg/index.html).
[51]Foreign criminal law can, however, be relevant in various ways: see Böse, Meyer and Schneider (n 21) 223–9.
[52]Article 305$^{ter}$ Schweizerisches Strafgesetzbuch.
[53]Pieth (n 27).
[54]Gless and Vervaele (n 9).

points of TCL to be that 'the actions and ideas of those who clarify, normativise and apply the norms transcend territorial boundaries' and that '[t]he actions of the lawmakers are as transnational as the actions of the lawbreakers',[55] they place too much emphasis on the power of rule-making and the enforcement capability across borders within the 'suppression conventions' framework.[56] The (ostensibly) transnational consensus on the punishability agreed upon by contract among states, however, may only feign a legal order. If one zooms in on the realities from the point of view of affected individuals, TCL looks very different. From the point of view of a defendant, TCL is not yet a coherent, clear-cut legal framework but rather a patchwork of laws,[57] made up of overlapping subsystems of national *ius puniendi*.[58] A definition that relies on an approach that focuses only on crime control by international law might merely gloss over the real problems of transnational prosecution. TCL must therefore – as a first step – be defined in a way that merges the bird's-eye view with the worm's-eye view, in order to provide ground for an individual-based or rather a defendant-based approach. This new, modified bird's-eye view seeks the big picture, but rather from the perspective of the individual facing the situation of overlapping normative frameworks.



## III. A defendant-based approach to TCL: coordination scheme grounded on general principles

The basic challenge for an approach that addresses the problems of legal pluralism and conflicts of laws in TCL from the perspective of the defendant is the introduction of a coordination system – one which protects the interests affected when states exercise their *ius puniendi* across borders.

By mounting cross-border cooperation on the one hand, while still holding on to separate, independent powers to prosecute on the other, individuals could find themselves caught in a diffusion of states' responsibilities.[59] Without a coordination system binding the use of the *ius puniendi* (for instance, how to implement jurisdictional principles or a general rule on *ne bis in idem* across borders) individuals may be left without protection. Boister contends in his

[55]Boister, this volume.
[56]Traditionally, textbooks on international criminal law are often organised around 'suppression conventions': see e.g. Wyngaert (n 14).
[57]Boister, this volume.
[58]See Wolfgang Schomburg, Otto Lagodny, Sabine Gless and Thomas Hackner, 'Einleitung' in Wolfgang Schomburg, Otto Lagodny, Sabine Gless and Thomas Hackner (eds), *Internationale Rechtshilfe in Strafsachen, Mutual Legal Assistance in Criminal Matters* (CH Beck, 5th edn 2012) 11 ('Vertragsgestrüpp').
[59]See for a prominent example the discussion about law enforcement on the internet: Teresa Scassa and Robert J Currie, 'New First Principles? Assessing the Internet's Challenges to Jurisdiction' (2010–11) 42 *Georgetown Journal of International Law* 1017.

paper in this volume that, as a consequence of TCL, alleged criminals become 'members of multiple normative communities, local, territorial, extraterritorial, and non-territorial in nature'.[60] What sounds like empowerment in Boister's paper may in fact turn out to be disadvantage, which is apparent when following up on the example of the music-swapping club in the Swiss–German border region: instead of gaining more protection, the entrepreneurs are exposed to greater penal power. They seem to fall through the cracks, since criminal charges could be brought against them in Switzerland or Germany, or both at the same time, and for the same act.[61] Even if Swiss authorities perceive the group to be based on Swiss territory but refuse to initiate proceedings by claiming that the deed is compliant with Swiss law, German authorities could nevertheless proceed.[62]



### A. *Balancing interests through a coordination scheme*

As explained above, public prosecution is an important element of state power, which affects individual interests in various ways and manifests itself in many respects: the jurisdiction to prescribe, the jurisdiction to adjudicate and the jurisdiction to enforce must all add up in order to exercise the *ius puniendi* effectively.[63] In exercising its penal power, a state's condemnation of criminalised conduct may not be directed at the wrongdoer alone. It can furthermore carry a message for society as a whole.[64] Criminal law is intrinsically linked to the state authority of prosecution and penal power.[65]

When states extend their *ius puniendi* across state borders, it may lead to numerous unresolved problems. For example, is it only one state or can all states prosecute and impose a punishment if they get their hands on the (alleged) wrongdoer? Today, even if states cooperate closely, there is rarely a

[60]Boister, this volume.
[61]For the question whether Schengen Implementing Convention Art 65 applies, see Andreas Eicker, *Transstaatliche Strafverfolgung – Ein Beitrag zur Europäisierung, Internationalisierung und Fortentwicklung des Grundsatzes ne bis in idem* (Centaurus Verlag Herbolzheim, 2004) 84–130.
[62]However, given the legal framework governing cross-border *ne bis in idem* between these two countries, the Swiss authorities could save the group from prosecution if they were to initiate proceedings and then formally terminate them, which would be a rather inefficient, but consistent, approach given the Westphalian rationale of non-intervention among sovereign states. See *ibid*.
[63]On the various forms of jurisdiction in the context of criminal law, see Petrig (n 8).
[64]See Markus D Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press, 2014) 4–5; Tatjana Hörnle, 'Gegenwärtige Strafbegründungstheorien: Die herkömmliche deutsche Diskussion' in Andreas von Hirsch, Ulfrid Neumann and Kurt Seelmann (eds), *Strafe – Warum?* (Nomos, 2011) 11, 21–23.
[65]Asp (n 10) 76–78.

binding legal rule[66] regarding how to pick the jurisdiction.[67] The EU Member States, for instance, form one 'legal space that include[s] actions and events that transcended boundaries'.[68] In this novel area of freedom, security and justice,[69] central agencies interact with national law enforcement authorities: the EU's Judicial Cooperation Unit (Eurojust) and the European Police Office (Europol) support national prosecution services and police forces to coordinate mutual legal assistance, provide legal and factual information, or gather evidence abroad.[70] Using their resources, the EU agencies may even seek out the 'best jurisdiction' for a given case. Naturally, from the perspective of the defence, such forum shopping constitutes an abuse of power, especially since defence lawyers have no direct access to such transboundary support services.[71] Furthermore, the principle of mutual recognition, according to which a decision taken by a judicial authority in one EU country must be recognised (and enforced) in other EU countries, may curtail individual rights accorded in a defendant's home state.[72] The European Arrest Warrant, for instance, which secures arrest and extradition throughout the EU almost automatically,[73] has substantially expanded the reach of law enforcement authorities across Europe. It establishes one 'implementing area' that is, however, based on different substantive criminal laws. Only quite recently has the EU lawmaker acknowledged that mutual recognition may lead to a 'unilateral increase of punitiveness',[74] meaning that the state with the harshest criminal laws may ask for extradition of alleged perpetrators (subject to the establishment of jurisdiction). During this piercing of the Westphalian promise of 'one jurisdiction, one law', individual rights have been sidelined. Today various legal scholars and the EU Commission all advocate respect for and inclusion of individual rights in cross-border cooperation.[75] The reasoning behind such initiatives

[66]There is soft law, however, like the Eurojust Guidelines for deciding which jurisdiction should prosecute, published in the *Eurojust Annual Report 2004* (2004), www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202004/Annual-Report-2004-EN.pdf, 92 et seq.
[67]See e.g. Böse, Meyer and Schneider (n 21).
[68]See Jessup (n 16) 2; see also Böse, Meyer and Schneider (n 21) 59 et seq.
[69]See, for example, from the criminal law point of view, Luchtman (n 8) 14–17.
[70]See e.g. Alexandra de Moor and Gert Vermeulen, 'The Europol Council Decision' (2010) 47 *Common Market Law Review* 1089, 1107.
[71]For similar problems in cases of ICC prosecutions, see Elena A Baylis, 'Outsourcing Investigations', *Legal Studies Research Paper Series*, Working Paper No 2010-20, 145.
[72]Annika Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Intersentia, 2011); Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277.
[73]André Klip, *European Criminal Law* (Intersentia, 2nd edn 2012) 294–5.
[74]See e.g. Silvia Allegrezza, 'The Interaction between the ECJ and the ECHR with Respect to the Protection of Procedural Safeguards after Lisbon' in Katalin Ligeti (ed), *Towards a Prosecutor for the European Union*, vol 1 (Hart Publishing, 2013) 905, 941–2; Klip (n 73) 305–6.

appears to be evident: if, in national systems, authorities in criminal investigations, prosecutions and subsequent trials have to abide carefully by precise procedures and respect constitutional guarantees and human rights, all the while balancing the different interests at stake, corresponding standards should apply on a supranational level of cross-border crime fighting as well as in situations of TCL. In transnational cases, the aspiration of adhering to General Principles ought to be the same, simply because the exact same individual interests are at stake. There is no valid justification for the protective gaps that appear on the side of the alleged wrongdoer or that of the supposed victim. This is the point where constitutionalism and TCL intersect, and the states that pierce through sovereignty by way of cooperation must provide a functional equivalent to protect all exposed citizens.[76]

The demand for a strict rule dictating where to bring charges is one result of such reasoning, aiming at a clear and coherent handling of transnational criminal cases with formal protection for the individuals affected.[77] Such a claim is asking for a resurgence of the bird's-eye view – that is, towards a modified bird's-eye view. Instead of looking for a set of rules aimed at 'indirect suppression by international law through domestic penal law of criminal activities that have actual or potential transboundary effects',[78] one seeks a structure for a protective coordination scheme.

In theory, different solutions seem feasible here. Each legal community involved could put forth a protection scheme of its own – one which safeguards individuals' interests within the respective national legal system. Such a 'national solution' would support an individual-based approach to TCL, but in each state separately. Such a national solution is at the extreme end of the range of possible answers and rather adheres to a worm's-eye view, since the focus is on a purely national answer (to a cross-border problem). At the other end of the spectrum of possible approaches is the postulation of a common uniform framework – one that considers individual rights in a cross-border scheme, for all states involved in cooperation in a coherent and concerted way. Choosing this approach is, as

[75]See on the part of the defendant: Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L280 of 26.10.2010, 1; Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, OJ L142 of 1.6.2012, 1; Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L294 of 6.11.2013, 1. On the part of the victim: Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L315 of 14.11.2012, 57.

[76]Gless and Vervaele (n 9) 5; Schunke (n 15) 131–4; Herlin-Karnell (n 15) 232–9.

[77]See Juliette Lelieur, '"Transnationalising" *Ne Bis in Idem*: How the Rule of *Ne Bis in Idem* Reveals the Principle of Personal Legal Certainty' (2013) 9 *Utrecht Law Review* 198, 204–5.

[78]Boister, this volume.

has been pointed out above, analogous to looking for a modified bird's-eye view striving for a protective coordination scheme safeguarding individuals' interests.

Legal scholars have considered both the national approach and the common approach. An example of the national approach would be a specific test for *mens rea* in transnational cases that each nation-state would have to establish on its own,[79] while the more recent initiatives in the EU's legal framework illustrate the possibilities of a common approach.[80] And the latter proposal indeed appears to be the better approach: where states formed close coalitions, which in turn created specific bodies for implementing TCL, such as Eurojust, the EU's Judicial Cooperation Unit or Europol, or other national bodies within the Schengen cooperation framework, scholars quickly realised that penal power marching in unison with state sovereignty is a thing of the past. The policy driving TCL must ensure that individuals' interests are included, which means that they must be accounted for at the supranational level. And in fact, this reasoning is precisely behind numerous initiatives demanding a strict rule stipulating how to decide on the forum in cases of conflict of jurisdiction or how to implement a cross-border scheme for *ne bis in idem* that is in line with an individual-based approach to overlapping jurisdictions.[81]



### B. *General principles and the common denominator*

In arguing that a new concept of TCL must include a coordination scheme for safeguarding the interests of individuals, only the notional question of structure has been answered, i.e. that it needs a common ground to protect certain interests, while the question of substance remains open.

In criminal law, state power threatens individuals with harsh consequences in situations where an individual, or the public, has been wronged by violation of a (morally substantiated) norm. The state claims a monopoly on the prosecution and possible punishment of the wrongdoer (with the promise of a criminal justice system applied fairly and equally), putting citizens on the witness stand, and taking away the entitlement of victims to proceed on their own (i.e. no 'vigilante justice').

In order to establish a shared coordination system, one must therefore find a strong common denominator which represents the essence of the relevant rules in criminal law and criminal procedure protecting individual interests in modern states. Put differently, one must strive to identify the general principles that determine the relevant rules in national law, which will eventually be capable of

[79]Gless (n 35); Suominen (n 18).
[80]See Schunke (n 15) 69–117; Gless (n 5); Ilias Anagnostopoulos, 'The Right of Access to a Lawyer in Europe: A Long Road Ahead?' (2014) *European Criminal Law Journal* 3.
[81]See e.g. John Vervaele, '*Ne Bis in Idem*: Towards a Transnational Constitutional Principle in the EU' (2013) 9 *Utrecht Law Review* 211, 217–27.

generating adequate rules for TCL, even if those rules amount to little more than a coordination system. A tradition of determining such aspirational principles, however, is lacking, as is consensus on a method for identifying general principles in international legal frameworks. Therefore, in searching for a strong common denominator as a base for a coordination system, one can either turn to basic ideas from legal philosophy or examine existing practice.

(i) *Drawing inspiration from legal philosophy*

A promising approach in legal philosophy is to differentiate between general principles and mere rules; this approach was used even before Ronald Dworkin refined it.[82] His theory distinguishes axioms from working mechanisms and has been used and adjusted by scholars in manifold fields,[83] including international criminal law.[84] Whilst this approach has met with some criticism,[85] it has been accepted as a structure for establishing principles and rules in international law. For instance, when applying Article 38 of the ICC Statute, one of the most prominent examples of a reference to 'general principles', the statutory rule uses the term 'general principles of law recognized by civilized nations'.[86] It does not, however, provide further explanation for identifying the content or implications. While the question of how to identify and justify general principles is contentious,[87] it is clear that a body of TCL must be based on a common denominator of elementary regulations for criminal law and criminal procedure, and that at the same time one must try to avoid a web of principles, which – at a high level of abstraction – cannot gain substance and will thus only feign a collective foundation.[88]

According to Dworkin, the necessary difference between legal principles and legal rules can be achieved logically in the following way:

[82]Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 22–28.
[83]See, for a discussion of rules and standards in US constitutional law, Kathleen M Sullivan, 'Foreword: The Justices of Rules and Standards' (1992) 106 *Harvard Law Review* 22, 56–59.
[84]See e.g. Lelieur (n 77) 202.
[85]With regard to the fact that a differentiation between principles and rules is difficult – and maybe sometimes impossible, see Carl-Friedrich Stuckenberg, 'Rechtsfindung und Rechtsfortbildung im Völkerstrafrecht' (2007) 154 *Goltdammer's Archiv für Strafrecht* 80, 94; see further Alain Pellet, 'Article 38' in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd edn 2012) 731, 834.
[86]'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. *the general principles of law* recognized by civilized nations; … '
[87]See Pellet (n 85) 1–3, 250–69; M Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 *Michigan Journal of International Law* 768, 770–2.
[88]See Stuckenberg (n 85) 94.

> Both sets of standards point to particular decisions about legal obligation in particular circumstances but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted or it is not, in which case it contributes nothing to the decision.[89]

In contrast, principles operate differently: 'Even those [principles] which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met'.[90] The distinction between principles and rules reveals a solution to the problems resulting from legal pluralism in the situation of cross-border prosecution. In cases of conflicting laws, one can search for, or rather establish, the underlying principle, which sets the overarching directive, but does not automatically determine the legal consequences following from it. Such an approach relies on a deductive method, which eventually ascertains a (prevailing) rule by way of a principle.

Going down that road, one can exemplify this abstract reasoning using our aforementioned case of the music-swapping nationals who want to conduct business across borders, and who eventually run into trouble because of the conflicting laws on the two sides of the border. According to the Dworkinian model, the two colliding rules can be resolved by retreating to an underlying principle, which here is legal certainty: 'If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves'.[91] Thus, one has to retreat to general principle when the national rules of *ne bis in idem* applied to a case – given the facts – lead to clear, but conflicting, legal obligations. For instance, such is the case when the national rule on one side of the border inhibits prosecution, whereas a different rule on the other side of the border compels prosecution of the same conduct. In such cases, it must be determined which rule will serve (a common understanding of) justice best and should therefore be applied; neither the defendant nor the prosecutor nor the victim has a right to the best of all possible worlds. Responding to individuals' interest in clarity, one must use the underlying principles in order to establish a system that will lead to legal certainty.[92] However, as Dworkin has correctly pointed out, the legal consequences flowing therefrom are not automatically spelled out. The question remains: How can the underlying principles be translated into a system that determines the relevant rules in a certain case and will allow for a working mechanism of the *ne bis in idem* principle? Or, to phrase the question more abstractly: How can the underlying

[89] Dworkin (n 82) 24.
[90] *Ibid*, 25.
[91] *Ibid*, 26–27.
[92] See, for a classic application, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1688–94; for an application in TCL, see Lelieur (n 77) 203–4.

principles be 'transnationalised' in order to establish rules that 'transnationalise' the protection of individuals affected by TCL?[93]

Returning to our bird's-eye/worm's-eye divide, with separating national rules implementing *ne bis in idem* from their traditional foundations and adapting the safeguard for the transnational level, one rather takes a modified bird's-eye view.[94] Eventually, a transnationalised *ne bis in idem* would be different from its national counterparts, because it must provide legal certainty for the individual in a system where different countries have different criminal codes. Thus, it must not only prevent double prosecution or double jeopardy, but also prevent *parallel* prosecutions, and determine the rules that serve justice best in all situations where one national lawmaker decides not to criminalise a certain type of conduct while other lawmakers decide differently.



(ii) *Drawing inspiration from practice*

Apart from drawing inspiration from legal philosophy, a glance at what happens in practice could also help identify general principles for TCL. Cooperation among states in the field of criminal law and the fragmentation of any legal system necessitates the identification of common principles in various situations.[95] Quite often such principles are needed as a fill-in;[96] for example, the 'general principles' referred to in Article 21(1) of the ICC Statute[97] serve as a subsidiary source filling in normative gaps.[98] The approach is empirical, and the task is to generate rules via a comparative process. In analysing national law, one must identify relevant regularities in the vast amount of regulations so as to define a new rule (relevant to international criminal law), while also sorting through irrelevant inconsistencies.[99] This task of establishing a valid 'substratum' and deducing a

[93]See Lelieur (n 77) 203–7.
[94]*Ibid*, 204–7; Vervaele (n 81) 219–26.
[95]See Stuckenberg (n 85) 93–94.
[96]See Bassiouni (n 87) 774.
[97]'The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.'
[98]See e.g. Kai Ambos, *Treatise on International Criminal Law, Volume 1: Foundations and General Part* (Oxford University Press, 2013) 76.
[99]Jean-Marie Henckaerts, 'Study on Customary Rules of International Humanitarian Law: Purpose, Coverage and Methodology' (1999) 835 *International Review of the Red Cross*, https://www.icrc.org/eng/resources/documents/misc/57jq3k.htm; Stuckenberg (n 85) 93–96. For more information on comparative approaches for establishing general principles, see HC Gutteridge, 'Comparative Law and the Law of Nations' in William E

concrete rule therefrom is, as many scholars have pointed out, practically impossible, especially with regard to the vast amount of (and the differences between) legal systems of countries that are signatories to the ICC Statute.[100] Thus, the clear option is to turn to an evaluative process, weighing the laws in light of the objective of prosecuting core crimes. The empirical approach is modified by a normative element.[101] Again, if one wants to fit these approaches within the frame of bird's-eye view versus worm's-eye view, the empirical approach rather mirrors the worm's-eye view, or rather the worm's-eye view in adding up all the different rules governing the fate of individuals affected, whereas a more evaluative approach corresponds with the proposed modified bird's-eye view – recovering an overall picture of what is needed for a coordination system that actually safeguards individual interests. However, if a finding of general principles of TCL detaches itself too much from any empirical basis in the comparative process, it runs into problems with regard to legitimacy.[102] This struggle is apparent in the case law of all supranational courts intending to find general principles: they either resort to a more empirical approach or to a deductive testing. In the first case they look for a common denominator in national laws. In the second case they place the emphasis on a certain objective to be reached.

In European criminal law, for instance, the European Court of Justice (ECJ) has to find general principles of procedure defining rights of defence when European organs and agencies take part in investigations without a procedural code at hand. Here too, the ECJ first looks for a common denominator, namely the 'common traditions of the constitutions of the EU Member States', and – if the result lacks persuasiveness as such – points to European peculiarities often by reference to the case law of the European Court of Human Rights (ECtHR).[103]

The ECtHR has ventured down this path before by combining a comparative method with its two techniques of interpretation, namely the 'living instrument' doctrine and the 'practical and effective' doctrine.[104] In so doing, the Court first



Butler (ed), *International Law in Comparative Perspective* (Sijthoff & Noordhoff, 1980) 13 ff; Bassiouni (n 87) 785–7, 813–16; Hermann Mosler, 'General Principles of International Law' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 2 (Max Planck Institute for Comparative Public Law and International Law, 1985) 89 ff, 97–103.

[100] See Claus Kress, 'Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts' (1999) 111 *Zeitschrift für die gesamte Strafrechtswissenschaft* 597, 608–13; Stuckenberg (n 85) 93–94.

[101] See e.g. *Prosecutor v Erdemovic* (Judgement) ICTY IT-96-22-A (7 October 1997), Separate and Dissenting Opinion of Judge Stephen, [25]: 'the prevailing number of nations within each of the main families of laws'.

[102] Stuckenberg (n 85).

[103] See e.g. Klip (n 73) 153–4.

[104] Sabine Gless and Jeannine Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?' (2014) 1(1) *Bergen Journal of Criminal Law and Criminal Justice* 36, 42–44.

establishes the validity of a principle, then points out a particular need, and then defines a new rule accordingly.[105]

Comparing the two European Courts, the practice of the ECJ appears to be more far-reaching. Not only does it rely on arguments drawn from history and from the objective of 'contextual harmonisation', it furthermore establishes 'general principles of law' in a creative manner, primarily by appraising the objectives of EU law.[106] The aspiration for new common ground corresponds with the consolidation of the policy framework at the EU level.[107] The need for a more aspirational approach when identifying the general principles can also be seen in international criminal law *stricto sensu*, which – as explained above – is bound to find general principles as a subsidiary source filling in (significant) normative gaps.[108] Obviously, one cannot adhere to a single method of sustaining international criminal law *stricto sensu* with general principles; rather, one must use a combination of techniques – including empirical and normative-deductive methods.[109]



(iii) *General principles and rules for TCL*

A more empirical approach would involve collecting the relevant regulations that are valid in the different areas of TCL, such as rules on the applicability of domestic criminal law to extraterritorial conduct, rules governing mutual legal assistance in criminal matters, rules of European criminal law, and rules in the various national and international legal frameworks.[110] Subsequently, one would have to compare and identify relevant convergences, patterns, etc., as well as any discrepancies, using a comparative-inductive method. Going down this road, one could, for instance, compare all EU Member States' laws on criminal jurisdiction, as well as rules established by EU institutions, like the Eurojust guidelines on jurisdiction,[111] in order to develop a prevailing pattern for settling jurisdictional

[105] *Ibid*, 44–45.
[106] Klip (n 73) 152–6.
[107] For discussion on a corresponding EU policy, see contributions in Mireille Delmas-Marty (ed), *What Kind of Criminal Policy for Europe?* (Kluwer, 1996); Asp (n 10) 70–76.
[108] For an illustration of the reasoning in the case against Dražen Erdemović (referred to at n 101), see 'Case Information Sheet: "Pilica Farm" (IT-96-22) Dražen Erdemović', International Criminal Tribunal for the former Yugoslavia, http://www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf, where the judges needed to define the requirements for duress as the defendant claimed that he had participated in the massacre at Srbrenica only because he was pressured to do so (under threat of death/at gunpoint). For a discussion see Kress (n 100).
[109] See Ambos (n 98) 78; Martino Mona, 'Strafrechtsvergleichung und Comparative Justice: Zum Verhältnis zwischen Rechtsvergleichung, Grundlagenforschung und Rechtsphilosophie' in Susanne Beck, Christoph Burchard and Bijan Fateh-Moghadam (eds), *Strafrechtsvergleichung als Problem und Lösung* (Nomos, 2011) 103–19.
[110] Gless (n 22) 290–1.
[111] Eurojust Guidelines for deciding which jurisdiction should prosecute: see Eurojust (n 66).

conflicts.[112] Ultimately, general principles could be inferred from similar sets of empirical findings. Such an approach is to a certain extent similar to the establishment of rules of customary international law.[113] By counting and comparing existing concrete and individual rules, one tries to establish a generally valid abstract principle. However, an approach which puts the empirical moment at the top will encounter certain difficulties. First, it must present a certain number of similar laws and practices in order to establish a pattern; second, this line-up must be evaluated. In comparative law, one must assess the spirit behind the rules – that is, search for the '*opinio iuris*'. Otherwise the finding will be too 'formal' and the basis of validity will lie primarily with the number of similar laws found in different criminal justice systems.

In contrast, one could also deduct basic principles *from the objective* of an individual-based approach to TCL: the achievement of justice by cross-border law enforcement while balancing the different interests involved, notably those of the individuals affected. Such an approach may, but will not necessarily, identify existing principles, in addition to locating principles that *ought* to be valid for transnational criminal cases. Thus, the determination of principles is more aspirational than deductive. Some general principles of TCL might not even have a counterpart in national law, as was explained with the transnationalisation of *ne bis in idem.*[114] In other words, this approach establishes 'aspirational' rules rather than merely reflecting the *lex lata*.[115] This method leans towards an approach used in comparative law, when scholars resort to a 'functional comparison' or to what is called '*wertende Rechtsvergleichung*' by combining the empirical method with an appraisal. The process involves looking at certain situations and comparing legal solutions provided by different national laws from a fixed point of comparison – the so-called *tertium comparationis* – which, in this context, could be a balanced resolution for the situation of a positive conflict of jurisdiction when an internet-based music-swapping service conducts business across borders. Such a method is widely used[116] – for instance, by scholars of EU law when drafting proposals on how to determine jurisdiction.[117] An approach that does not solely focus on the number of laws and cases, but also gives weight to 'good practice' and the '*opinio iuris*', leads to a formal-material basis of validity. A normative teleological approach,

[112]See Böse, Meyer and Schneider (n 21) 19.
[113]See Henckaerts (n 99); Kress (n 100) 608–13.
[114]See for similar approach in International Criminal Law Cassese's, *International Criminal Law* (Oxford University Press, 3rd edn., 2013) 9–15.
[115]Gless and Vervaele (n 9) 5.
[116]See Ambos (n 98) 78–79.
[117]Luchtman (n 8) 26–32; Arndt Sinn, *Jursidiktionskonflikte bei grenzüberschreitender Kriminalität, Conflicts of Jurisdiction in Cross-Border Crime Situations* (Universitätsverlag Osnabrück, 2012) 597–615; Frank Zimmermann, *Strafgewaltkonflikte in der Europäischen Union. Ein Regelungsvorschlag zur Wahrung materieller und prozessualer strafrechtlicher Garantien sowie staatlicher Strafinteressen* (Nomos, 2014) 369–454; Böse, Meyer and Schneider (n 21) 435–43.

which deducts principles *from the objective* of transnational criminal law, is justified only by the objective – i.e. the achievement of justice by cross-border law enforcement while balancing the different interests involved, in light of human rights norms. This is a purely material basis of validity, which, in turn, runs the risk that the result may only appeal to the eye of the beholder.

Both methods lead to core aspects of criminal law shared in modern societies, such as the principle that only competent authorities may hand down a verdict, that guilt must be established before criminal punishment, that each accused person has a right to a fair trial, and that one should not be punished twice for the same act.[118] Therefore, the two methods should be used in parallel, which can help reduce the risk of one-sided conclusions. The deduction of general principles by a judge may appear a risky operation as such an evaluation always reflects partly what is in the eye of the beholder. Such a threat may be balanced by a comparative overview of national principles, the concrete meaning and implications of which, however, will always differ somewhat in each national system.

### C. *A defendant-based approach – backed by general principles*

In order to safeguard the interests worthy of protection that are affected by transnational criminal justice, we need more than a common scheme of coordination in transnational cases; the system must be based on a transnationally accepted set of general principles necessary to determine the relevant rules.

This finding may look mundane to some, but the debate surrounding TCL has a long way to go before it resolves the perception of transnational prosecution shaped by the tradition of Westphalian state order.[119] Transnational cases, in which one individual allegedly commits an act that affects different jurisdictions, have only recently been recognised as *one* form of transnational criminal proceeding conducted across borders by different states ('*international arbeitsteilige Strafverfolgung*').[120] For many years, even scholars of international criminal law saw these cases as a variety of co-existing national cases with little connection to and coordination with each other. The notional divide between the jurisdictions involved justified the situation of transnational cases being governed by different sets of self-contained rules, which derived from the respective national legal frameworks instead of a coherent transnational set of rules. Case studies,[121] however, suggest that if one examines the specific principles of

[118]See contributions in (2013) 9 (4) *Utrecht Law Review*, special issue, *Law Should Govern: Aspiring General Principles for Transnational Criminal Justice.*

[119]For a 19th-century opinion, see Julius Friedrich Heinrich Abegg, *Ueber die Bestrafung der im Ausland begangenen Verbrechen* (Franz Seraph Storno, 1819); Karl Binding, *Handbuch des Strafrechts* (Duncker & Humblot, 1885, reprint Scientia, 1991) 372–5.

[120]Schomburg *et al* (n 58) 22–30.

[121]*Soering v UK*, App no 14038/88 (ECtHR, 7 July 1989); *Stokjovic v France and Belgium*, App no 25303/08 (ECtHR, 27 October 2011).

criminal law as seriously as is necessary, cooperating states will be obliged to share the burden of protecting the interests of affected individuals. Such a shared burden mechanism must be based on general principles, which determine the rules that effectively transform traditional features of criminal law into TCL. Such general principles do not have a mere descriptive capacity, but must function as 'aspirational rules'. Therefore, in the future, one's aspiration must be to look for a set of principles aimed at protecting the interests of individuals and translating them into rules that compensate those whose interests are at stake when prosecution crosses borders, instead of identifying those sets of rules aimed at 'indirect suppression by international law through domestic penal law of criminal activities that have actual or potential transboundary effects'.[122] A theory for TCL must take the time-tested principles of criminal law and criminal procedure, which protect the individual, into account. The rationale is simple: when criminal prosecution carries harsh consequences for affected individuals, it must be bound by special safeguards and may be held to the different, sometimes even higher, standards resulting from the general principles governing rule-making in TCL.



## IV. Conclusion

Having considered both the bird's-eye view and the worm's-eye view of TCL, a common pattern emerges. It centres on the need to take individuals' interests into account, or, as Boister himself explains in this volume: 'legality and the protection of human rights must be recognised as a governing framework. Any system of extraterritorial enactment and enforcement of criminal laws immediately runs into problems of legality … in imposing criminal proscriptions on individuals in other states who may have no warning of the criminality of their actions.'[123] Even though Boister gives some authority to the interests of individuals, such considerations are not immediately visible from the bird's-eye view of TCL. They remain hidden among other contentions, but they emerge as a pattern if one takes a worm's-eye view, working up to a new bird's-eye view that beholds an individual-based approach of TCL; the new perspective marks a continuum rather than a divide.

If we bear in mind the individual's perspective, two features will sit at the core of future debates on TCL. First, TCL requires a broad definition, one which places the necessary value on the individuals' interests affected. An individual-based approach to TCL must include a shared cooperation scheme so as to transform general principles of criminal law and criminal procedure from national frameworks into principles at the relevant transnational level, and thus safeguard the interests of the affected individuals. Secondly, legal frameworks of transnationally

[122] Boister, this volume.
[123] *Ibid*, with reference to the Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217 A(III), Art 11(2).

accepted basic rules protecting the interests of defendants must accompany the enhancement of legal frameworks of transnational crime control that transcend national jurisdictions. Only if this is achieved will Boister's vision for TCL come true, and alleged criminals will genuinely become 'members of multiple normative communities, local, territorial, extraterritorial, and non-territorial in nature'.[124]



[124]Boister, this volume.