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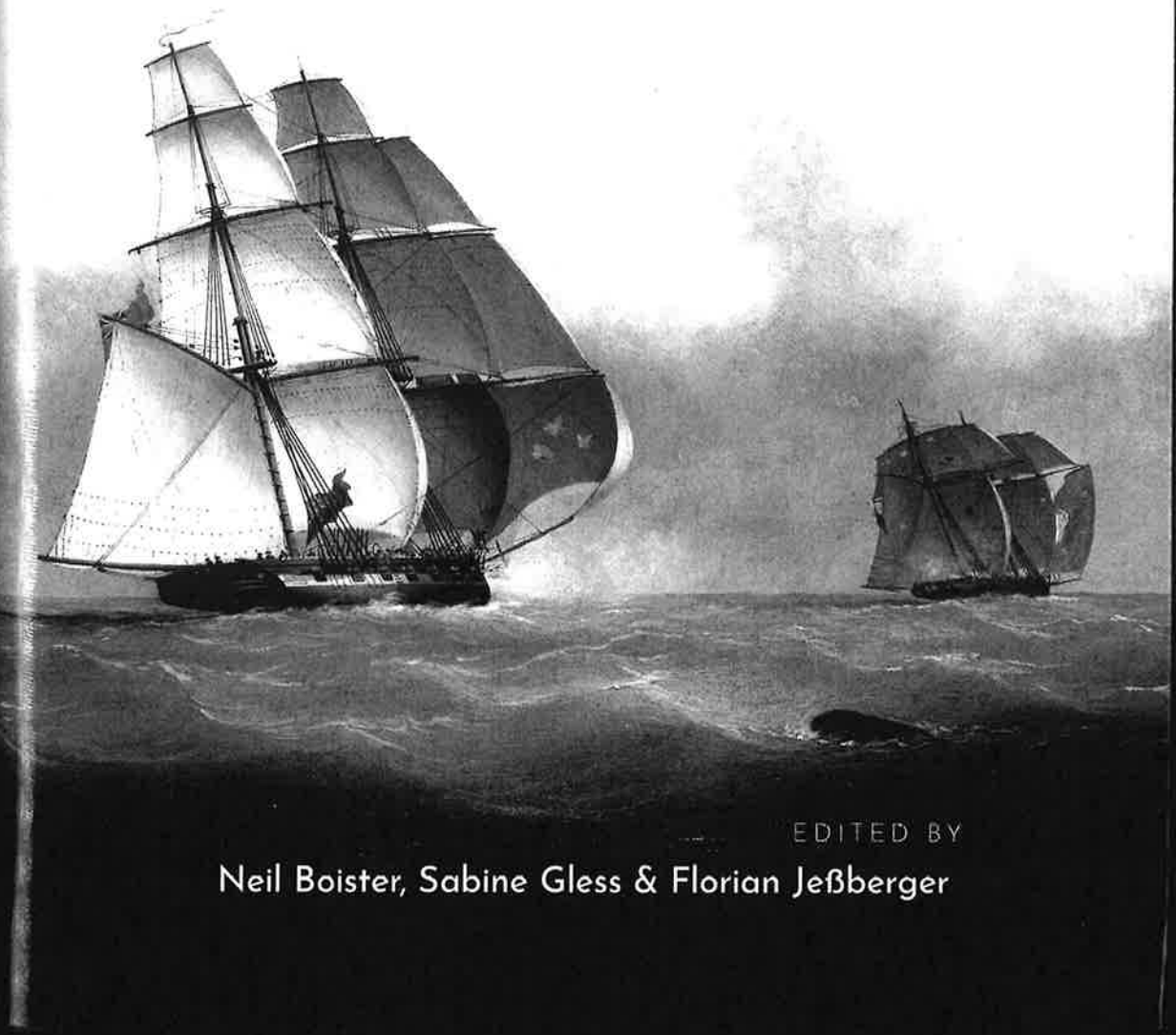
HISTORIES OF TRANSNATIONAL CRIMINAL LAW



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Foreword

In the not too distant past crime was considered a local matter—local in commission and effect—to be governed by a local response. But with the changes technology has brought to our global landscape, nothing could be further from our reality today. Grave crimes recognized as international in nature, because of the threat they pose, tragically continue to be perpetrated in many corners of the world. Moreover, many crimes once considered 'domestic' in nature now by scope, manner of perpetration or impact have become transnational. Further, individual criminals and organized groups easily traverse borders to evade detection and hide the evidence and profits of their crimes rendering local responses highly ineffective. These realities have driven a multitude of initiatives over the last few decades designed to respond to the internationalization of crime.

Looking back on these with the perspective of a practitioner, I think it fair to say some of the most important outcomes have been in the context of the evolution of a framework to address international crimes which affect us as a global community. Prominent examples are the rapid expansion and development of international criminal law including the establishment of landmark ad hoc courts and tribunals such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and, of course, the first permanent International Criminal Court.

Unquestionably, the developments have been ground-breaking and well merit the attention paid to them on both a practical and academic level. Tragically far too much of the world's population today is touched by conflicts—insurrections, wars—with horrific crimes still being committed in the context of the same. For that, advancing international criminal law is imperative.

At the same time, this highly visible progress has tended to overshadow the equally remarkable achievements in the efforts to find global solutions to combat 'common' crime which by its nature, scope or effect creates a transnational threat. Transnational crime is pervasive, touching all of us in different ways, in every corner of the world, posing a grave threat as well to the safety and security of all our communities. The progression of transnational criminal law is of equal importance in our global village.

For this reason, it is imperative that we 'shine a light' on the significant initiatives and achievements in this lesser known field of transnational criminal law. Careful reflection on where we have been and where we are now, on the progress and the challenges, is fundamental to safeguarding the gains made and ensuring future progression.

With that aim, *Histories of Transnational Criminal Law* is a seminal work presenting a comprehensive and detailed overview of the substantive fields—terrorism, organized crime, cybercrime and human trafficking, to name a few—as well as the procedural mechanisms—multilateral suppression, institution building and norm development. Due attention is also paid to the often neglected field of international cooperation in criminal matters—including extradition and law enforcement cooperation.

Each chapter provides a discrete overview of a substantive issue or procedural development that can quickly inform a practitioner or researcher with a targeted subject in mind. Collectively the text paints a compelling picture of the global initiative against transnational crime exposing both its success and failures, identifying progress and the challenges we face today and will face in future.

In the course of my career I have participated directly in development of some of the initiatives related to the fight against transnational crime and I worked at the United Nations Office on Drugs and Crime where they formed part of everyday practice. Thus I consider I have a pretty good knowledge base in the field. Yet I can assure you I was captivated by this text. It is a credit of course to the impressive group of scholars and practitioners who have contributed to it. I learnt about subjects I had never considered in the context of this field and as a whole it provided a unique overview of the important interrelated components of this rapidly developing subject area. I invite you to carry out a similar exploration of this important work so relevant in the context of international law and criminal law in our times.

Kimberly Prost
Judge, International Criminal Court

Preface

The book goes back to a conference held in October 2019 at Schloss Herrenhausen in Hannover, Germany. The chapters of this volume are edited papers presented and discussed at this conference. The conference has been made possible through generous funding and administrative support from the *Volkswagenstiftung*.

We would like to acknowledge the support of the whole team of the *Lehrstuhl Jeßberger* during the conference, in particular of Luca Hauffe. Antonia Gillhaus in Berlin as well as Claudine Abt and Lia Börlin in Basel helped with copy-editing the manuscript. Our gratitude also lies with our publishers, Merel Alstein and Jack McNichol, for their valuable support.

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The Acquisition of Legal Status by Individuals in Transnational Criminal Proceedings in Europe

Sabine Gless

I. Introduction

Scholars of domestic criminal procedure—in addressing the legal status of a defendant in a criminal justice system—have sometimes argued that the rights and remedies given to an alleged offender indicate the overall respect that a particular legal system shows towards individual rights and the rule of law.[1] Applying this perspective to transnational criminal law leads to troubling findings: if the legal status of the individual sought for prosecution[2] by a foreign state is a benchmark for the international community's respect for individual rights, we might find that many Western jurisdictions have, until recently, been geared to prioritize state interests over the individual's.[3] It appears that the individual's legal status in transnational criminal law has significantly lagged (and, in some respects, still lags) behind his or her status in domestic criminal justice systems, though defendants, in general, are in a vulnerable position, regardless of whether they are suspected to have violated the law of the land or are sought for prosecution abroad.

Defendants in domestic criminal trials traditionally enjoy (often strong) defence rights to protect them against the state.[4] In contrast, individuals subject to extradition proceedings to stand trial abroad still do not typically benefit from

[1] Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht* (29th edn, CH Beck 2017) 10, 258; Astrid Liliana Sánchez- Mejía, *Victims' Rights in Flux: Criminal Justice Reform in Colombia* (Springer 2017) 70.

[2] This chapter does not include observations on the legal situation of victims or witnesses to a crime.

[3] Ann Powers, 'Justice Denied? The Adjudication of Extradition Applications' (2002) 37 Tex Intl LJ 277, 286; Otto Lagodny, 'Comparative Overview' in Albin Eser, Otto Lagodny and Christopher L Blakesley (eds), *The Individual as Subject of International Cooperation in Criminal Matters* (Nomos 2002) 746.

[4] Stefan Trechsel, 'Why Must Trials Be Fair?' (1997) 31 Is LR 94, 100; Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 74; RA Duff, 'Responsibility, Citizenship, and Criminal Law' in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 131.

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similarly comprehensive safeguards in transnational criminal proceedings.[5] Criminal law scholars—traditionally oriented inwardly at their domestic criminal justice system—started to sporadically point out legal shortcomings regarding the legal status of the individual at the turn of 20th century.[6] However, it took another century for a more systematic approach to emerge, which finally came to examine and determine the legal position of the individual in transnational criminal proceedings.[7]

The historical review in this chapter is rather fast-motioned and condensed, as it zooms in on two central European neighbours, Germany and Switzerland, who—since the end of the 19th century—have shared legal developments and maintained close contact, yet opted for different stances on individual rights in mutual legal assistance. The study begins after central European states established written procedures among themselves for more formalized transboundary cooperation in the 18th century,[8] highlighting the conversion of these procedures into legal institutions by certain central European states that had adopted legislation by the end of the 19th century. This would ultimately become known as mutual legal assistance (MLA) in criminal matters. As a body of law, it was merged into today's MLA legislation, which, in a broad way, determines the legal status of the individual. Beginning in the mid-19th century and occurring at divergent speeds, change in Europe took well over a century. Belgium and Switzerland were forerunners, while the German Confederation lagged behind. Even when the German Empire had been established, authorities retained the view that cooperation in criminal matters was a part of dealings between states and not law enforcement affecting the individual. From this perspective, transnational criminal law formed part of public international law—with rights and obligations granted to states only—rather than criminal law, with its formal defence rights. Overall, the individual's position remained vague and was rarely considered worthy of legal debate. In particular, in Germany the individual was depicted as an object rather than a subject in the proceedings.[9] Thus when an individual received protection, it was deemed a 'reflex' that derived from states' rights, rather than a legal entitlement of their own.[10]

[5] For Switzerland, see Daniel Schaffner, *Das Individuum im internationalen Rechtshilferecht in Strafsachen* (Helbing & Lichtenhahn 2013) *passim* (hereafter Schaffner, *Das Individuum im internationalen Rechtshilferecht)*.

[6] Josef Kohler, 'Der Savarkar-Streitfall zwischen Frankreich und England' in Walther Schücking (ed), *Das Werk vom Haag, Die gerichtlichen Entscheidungen*, vol 1 pt 3 (Dunker & Humblot 1914) 65 (hereafter Kohler, 'Der Savarkar-Streitfall zwischen Frankreich und England').

[7] See Otto Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland* (Max Planck-Institut für ausländisches und internationales Strafrecht 1987) at various places (hereafter Lagodny, *Die Rechtsstellung des Auszuliefernden*); John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 AJIL 187 (hereafter Dugard and Van den Wyngaert, 'Reconciling Extradition with Human Rights').

[8] See Härter, Chapter 1 in this book.

[9] Meinhard Schröder, 'Staats- und völkerrechtliche Fragen der Auslieferungsbewilligung' (1979) 110 Bay V Bl 231 (hereafter Schröder, 'Staats- und völkerrechtliche Fragen der Auslieferungsbewilligung').

[10] Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 743.

Only in the second half of the 20th century did the notion of legal rights exercised by the individual arise as a global issue of mutual legal assistance. At that time, the individual's position in domestic criminal justice had been consolidated and was, in many respects, strong in European states. These states shared legal reformist concepts for decades—as Pifferi illustrates in Chapter 2 of this book. Scholars engaging in those international debates exchanged ideas, not only on amelioration of domestic law, but also for transborder cooperation.[11] Yet the early ideas of 'international defence rights' were lost, and even countries that were pioneers with regard to individual rights in mutual legal assistance and were home to scholars engaged in law reform—like Switzerland with Carl Stooss—did not take up these ideas.

Overall, it was the human rights narrative that caused the paradigm shift to transform transnational cooperation, figuratively speaking, from a two-dimensional dealing (from state to state) to a three-dimensional approach, with the individual able to raise legal concerns before being extradited from one state to the other. According to this new approach, not only the states involved in MLA held a legal position (in their mere two-dimensional relationship), but the individual concerned could also assert rights—creating a new third dimension. The late 20th century debate on constitutional and human rights clearly encouraged this approach.[12] Case law acknowledged the impact of human rights with the landmark European Court of Human Rights' (ECtHR) decision in the *Soering* case.[13] The way had been paved by other Strasbourg judgments, however, emphasizing the all-pervasive power of the European Convention on Human Rights (ECHR).

Today, with EU member states cooperating closely in cross-border matters based on the principle of mutual recognition, the legal position of individuals sought for prosecution in another country is again under review as EU states are increasingly granted permission to infringe individuals' rights across borders.

II. Terminology

This chapter starts out with a broad definition of transnational criminal law, explained in the introduction to this book, as 'suppression by international law through domestic penal law of criminal activities that have (i) actual or (ii) potential transboundary effects or (iii) transboundary moral impact'. While the description often used by scholars, based on a definition introduced by Neil Boister,[14]

[11] See Pifferi, Chapter 2 in this book.

[12] See Kate Parlett, *The Individual in the International Legal System* (CUP 2011) at various places; Anne Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (CUP 2016) at various places (hereafter Peters, *Beyond Human Rights*).

[13] *Soering v the United Kingdom*, App No 14038/88, 7 July 1989.

[14] Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6 Transnational Legal Theory 9, 10–12.

recounts the state-centred way of capturing cross-border cooperation, the perspective of individuals affected by transnational prosecution is important in this chapter: it shifts attention from the bird's-eye view to the worm's-eye view.[15] This change in perspectives is necessary as, historically, little attention has been paid to the legal position of individuals affected by the implementation of international conventions aimed at the suppression of crime. In particular, this chapter focuses on individuals sought for extradition to stand trial abroad and at risk of losing legal protections provided by a particular jurisdiction.

Following the classic approach to public international law, crime suppression conventions regulate rights and obligations of the states. In contrast, the legal position of the individual has often been assessed on the basis of domestic legislation governing MLA, that is the legal rules determining the process by which states seek and provide assistance to other states, and thus must infringe the legal position of the individual when extraditing a person or gathering evidence for criminal proceedings. This two-level approach reflects the traditional stance that states define the legal status of individuals with domestic law.[16] However, government reservations against judicial cooperation, for instance, the political offence proviso, provided early indications as to whether individuals only benefited from a derivative of state rights or whether they held rights themselves.[17]

Central to this chapter is the perception that individual rights invoke and enforce a legal claim, regardless of whether they invoke a right at the international or national level.[18] In criminal proceedings, with historical roots dating back to canon law, individual rights often have very different origins, ambits and alignments, but today jointly establish the legal status of the individual against state power.[19] Switzerland and Germany share a common heritage with other Western jurisdictions that has seen rights—like the *nullum crimen* principle[20] or the political offence caveat—gain a constitutional or human rights link over time, without losing

[15] Sabine Gless, 'Bird's-Eye View and Worm's-Eye View: Towards a Defendant-Based Approach in Transnational Criminal Law' (2015) 6 Transnational Legal Theory 117 (hereafter Gless, 'Bird's-Eye View and Worm's-Eye View').

[16] Nguyen Quoc Dinh, Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit International Public* (8th edn, LGDJ 2009) 422–26.

[17] Alona E Evans, 'Reflections upon the Political Offense in International Practice' (1963) 57 AJIL 1. One must, however, not forget that many treaties would not carry such a caveat, but aim at the extradition of political dissidents, see Heinrich Lammasch, *Das Recht der Auslieferung wegen politischer Verbrechen* (Mainz 1884) 29–30 (hereafter Lammasch, *Das Recht der Auslieferung*) and Harrington, Chapter 20 in this book.

[18] See Peters, *Beyond Human Rights* (n 12) 472–74, 485–87.

[19] Carl-Friedrich Stuckenberg, 'Double Jeopardy and Ne Bis In Idem in Common Law and Civil Law Jurisdictions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (OUP 2019) 463–64 (hereafter Brown and others, *The Oxford Handbook of Criminal Process*).

[20] See International Covenant on Civil and Political Rights (ICCPR), art 15(1) and ECHR, art 7; see Peters, *Beyond Human Rights* (n 12).

their historical roots.[21] Yet the translation of these rights into daily court proceedings can differ widely, in particular, with regard to transnational cases.

Legal scholars quite naturally refer to the common European heritage[22]—and world-wide recognition[23]—of certain judicial rights that have come to constitute human rights, such as the right to confront an incriminating witness, the right to a fair hearing, the right to remain silent and the right to a lawyer.[24] Regardless of whether these are human rights, or a derivate thereof, they are individual rights addressed at states and the corresponding obligations of states endow the persons concerned with rights. In practice, such rights are determined by domestic procedural rules, not least because they have to be granted in line with a particular jurisdiction's criminal procedure. For this reason, capturing the legal position of the individual in a form of cross-border law enforcement is a challenge.[25] A mapping of transnational criminal law from the perspective of the individuals affected ought to reflect the overall shift in recent decades from a sovereignty-centred to individual-oriented system.[26] Looking at the overall historical development traced in this book, one sees that states did not consider transnational criminal law as a system that ought to follow certain principles protecting individuals' interests until the end of the 20th century. With the rise of human rights, awareness of a possible legal shortfall developed; but at the same time, a belief evolved that the acknowledgement of certain judicial rights in a separate human rights convention could sufficiently protect the individual. Yet individuals prosecuted across borders still miss out on certain rights.[27] It is the aim of this chapter to integrate the bird's eye view of transnational criminal law—as treaty obligations in international crime suppression conventions that determine states' rights and obligations—with the

[21] Hans Schultz, 'Aktuelle Probleme der Auslieferung: Vorläufiger Generalbericht zum vorbereitenden Kolloquium' (1969) 81 Zeitschrift für die gesamte Strafrechtswissenschaft 199, 220 (hereafter Schultz, 'Aktuelle Probleme der Auslieferung').

[22] Bettina Weisser, 'The European Convention on Human Rights and the European Court of Human Rights as Guardians of Fair Criminal Proceedings in Europe' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (OUP 2019) 90 (hereafter Weisser, 'The European Convention on Human Rights') with reference to ECHR.

[23] Ed Cape, 'Defense Rights, Duties, Norms, and Practices in Common Law and Civil Law Jurisdictions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (OUP 2019) 189, 193–97 with reference to the ICCPR (hereafter Cape, 'Defense Rights, Duties, Norms and Practices').

[24] Weisser, 'The European Convention on Human Rights' (n 22) 90; Cape, 'Defense Rights, Duties, Norms, and Practices' (n 23) 193–97; Richard Friedman, 'The Confrontation Right' in Brown and others, *The Oxford Handbook of Criminal Process* (n 19) 865, 870–71.

[25] For a European approach, see Martin Böse, 'International Law and Treaty Obligations, Mutual Legal Assistance, and EU Instruments' in Brown and others, *The Oxford Handbook of Criminal Process* (n 19) 611 (hereafter Böse, 'International Law and Treaty Obligations').

[26] Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law' (1999) 281 RdC 9, 237.

[27] Monique Mann, Ian Warren and Sally Kennedy, 'The Legal Geographies of Transnational Cyber-Prosecutions: Extradition, Human Rights and Forum Shifting' (2018) 19(2) Global Crime 108; Radha Ivory, 'Corruption Gone Wild: Transnational Criminal Law and the International Trade in Endangered Species' in Anne Peters (ed), *Studies in Global Animal law* (Springer 2020) 88–89.

worm's eye view that individuals are empowered to demand something from a state or invoke something in relation to a state regarding transnational cooperation in criminal justice.[28]

III. The Acquisition of Legal Status by Individuals

As the acquisition of legal status by individuals in transnational criminal law is rather new, the practice of including the testimony of an individual who is capable of invoking a double criminality proviso or a territoriality matter is often a challenge to traditional proceedings in MLA. This contrasts markedly with that of defendants in domestic criminal justice systems. In Germany, for instance, defendants in criminal trials gained subjective defence rights throughout the 18th and 19th centuries, with legal ideas of the Enlightenment finally replacing notions of criminal procedure that were based on canon law.[29] In addition, subjective rights emerged as a protection against feudal systems.[30] However, only in the 1950s did the general notion of individuals having 'subjective' international rights surface globally, and only during the following decades did the concept of an individual being entitled to international legal subjectivity in virtue of personhood emerge on a well-founded theoretical basis.[31]

The differences in the definition of an individual's standing in transnational cases resulted from scholarship and analysis of treaties—which focused on whether states had entered into treaties for the benefit of a 'third party' or not (*pactum in favorem tertii*).[32] Today, the European acceptance of human rights as individual entitlements beyond state power is undisputed,[33] providing individuals with a key to accessing rights that exist independent of state power.[34]

[28] Gless, 'Bird's-Eye View and Worm's-Eye View' (n 15) 117.

[29] Hinrich Rüping and Günter Jerouschek, *Grundriss der Strafrechtsgeschichte* (6th edn, CH Beck 2011) 87.

[30] Marietta Auer, 'Subjektive Rechte bei Pufendorf und Kant' (2008) 208 Archiv der civilistischen Praxis 584, 633; Christian Reus-Smit, *Individual Rights and the Making of the International System* (CUP 2013) 41–50.

[31] See Peters, *Beyond Human Rights* (n 12) 27–32 pointing out earlier scholars and courts that phrased such ideas.

[32] Christian Dominicé, 'L'emergence de l'individu en droit international public' in Christian Dominicé, *L'ordre juridique international entre tradition et innovation* (Graduate Institute Publications 1997) 109, 123 (hereafter Dominicé, 'L'emergence de l'individu').

[33] See Peters, *Beyond Human Rights* (n 12) 430–31.

[34] For an analysis of the weaknesses of state dependent rights, ie citizenship as the 'right to rights', see Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace and Co 1951) 287–98, especially 294.

1. Pragmatic Cross-Border Cooperation

Metternich's Europe, a heyday of pragmatic cross-border cooperation between allies, seems the appropriate starting point to consider the journey of the individual. From this juncture, the individual's status evolved in Continental Europe from that of an object without legal protection, susceptible to the whims of state power and arrestable on a foreign warrant, to a legally protected defendant in transnational proceedings. At that time, allied governments cooperated across borders to assist each other's law enforcement based on so-called requisition proceedings that could include the exchange of search and arrest warrants, court records and interrogation protocols,[35] while also using pragmatic policing approaches.[36] The legal procedures were as varied as the fates of the persons affected. Among those taking advantage of the legal boundaries and the low level of border protection were individuals who fled after committing thefts and robberies, offenders running from (arbitrary) law enforcement or political dissidents seeking sanctuary. This chapter's focus is predominantly on the latter, a group whose acquisition of a legal status is suitable for investigation as their stories are often documented.

The Congress of Vienna produced authoritarian states in central Europe—such as Prussia and Austria—with few civil liberties and an internationally connected police and intelligence system.[37] Meanwhile, smaller and politically neutral states—for instance, Switzerland (which regained sovereignty in 1815) or Belgium (after its struggle for independence in 1830)—fulfilled their promise of providing a sanctuary. To this day, the age of Metternich is known for notorious surveillance of dissidents and cross-border policing with the help of spies. His various *Beobachtungs-Anstalten* (though, legally, little more than private intelligence) formed part of police services, which worked internationally and played a pivotal role in the Restoration. It enabled surveillance of liberal dissidents along with cross-border reporting, extraditions and expulsions.[38] This cooperation, however, was based more on police practice and power politics than on law.[39] Extraditions

[35] See eg Christoph Carl Stübel, *Das Criminalverfahren in den deutschen Gerichten mit besonderer Rücksicht auf das Königreich Sachsen wissenschaftlich und zum praktischen Gebrauche dargestellt*, vols 1–5 (Leipzig 1811) vol 1, 189–200, vol 3, 223–89, vol 5, 106.

[36] Hsi-Huey Liang, *The Rise of Modern Police and the European State System from Metternich to the Second World War* (CUP 1992) 18–19, 33–34.

[37] For the impact on cross-border cooperation, see Jean Conrad Tyrichter, 'The Formation of Transnational Criminal Law within the German Federation: A Normative Order?' in Karl Härter, Tina Hannappel and Jean Conrad Tyrichter (eds), *The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century* (Vittorio Klostermann 2019) 21, 21–24.

[38] Ido de Haan and Jeroen van Zanten, 'Constructing an International Conspiracy' in Beatrice de Graaf, Ido de Haan and Brian Vick (eds), *Securing Europe after Napoleon: 1815 and the New European Security Culture* (CUP 2019) 185.

[39] See Albert Billot, *Traité de l'extradition suivi d'un recueil de documents étrangers et des conventions d'extradition conclues par la France et actuellement en vigueur* (Plon 1874) 39 (hereafter Billot, *Traité de l'extradition*); Lammasch, *Das Recht der Auslieferung* (n 17) 203–06; Schultz, 'Aktuelle Probleme der Auslieferung' (n 21) 199. For details on the history of deportation and extradition before the 19th century, see Karl Härter, 'The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century' in Karl Härter, Tina Hannappel and Jean Conrad Tyrichter (eds), *The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century* (Vittorio Klostermann 2019) 1, 12 (hereafter Härter, 'The Transnationalisation of Criminal Law'). Certain remedies and notions can be traced back to the Middle Ages, when the expulsion of individuals was basically an act of political power, see eg Hugo Grotius, *De jure belli ac pacis* (first published Paris 1625) Liber II Caput XXI ('extradition chapter').

and expulsions were a practical element of police prevention of public dangers and maintenance of order that excluded the protection provided to alleged criminals in domestic proceedings.[40] The juridification of pre-modern practices—like the granting of criminal asylum by churches, cities or other privileged jurisdictions—demonstrates that the lack of rights of the individuals affected continued deep into the 19th century.[41]

As we know today, the Restoration period did not prevent modern ideas about the rule of law and liberalism from circulating Europe; certain countries—like Belgium—were able to pass legislation on refugee rights, while others—such as Switzerland—came to tolerate an influx of political dissidents.[42]

In Europe, notions of an individual's rights and remedies with respect to the government strengthened over the 19th century and became entrenched, in particular, in criminal justice, where classic state-citizen conflicts arose. In Germany, for instance, legal scholars refined Enlightenment principles, like *nullum crimen sine lege* and procedural defence rights to the level of sophistication that resulted in the widespread reputation of German criminal legal theory in the 20th century. Criminal justice, in that respect, grew into a citizen's bastion against the omnipotent state.[43] Prominent examples of such pioneering work were Ludwig Feuerbach's Penal Code of 1813 or Heinrich Zachariae's *Grundlinien des gemeinen deutschen Criminalprozesses* of 1837. By pointing out the crucial function of formal rights and clear remedies (*schützende Formen des Prozessrechts*),[44] the latter illustrated how the legal status of the individual in criminal proceedings transformed with the advent of constitutionalism.

In central Europe, these ideas on criminal justice were exchanged across borders, first between individual scholars,[45] and later between international organizations.[46]

[40] Mathieu Deflem, 'International Policing in Nineteenth-Century Europe: The Police Union of German States, 1851–1866' (1996) 6 International Criminal Justice Review 36, 39–40.

[41] See Härter, Chapter 1 in this book.

[42] Herbert Reiter, *Politisches Asyl im 19. Jahrhundert* (Duncker & Humblot 1992) 170, 216.

[43] Franz von Liszt, 'Die deterministischen Gegner der Zweckstrafe' (1893) 13 Zeitschrift für die gesamte Strafrechtswissenschaft 325, 357.

[44] Heinrich Albert Zachariae, *Handbuch des deutsches Strafprocesses*, vol 1 (Dietrich'sche Buchhandlung 1861) 145–46.

[45] Lieselotte Jelowik (ed), *Briefe deutscher Strafrechtler an Karl Josef Anton Mittermaier 1832–1866* (Vittorio Klostermann 2005); Lars Hendrik Riemer (ed), *Das Netzwerk der "Gefängnisfreunde" 1830–1872. Karl Josef Anton Mittermaiers Briefwechsel mit europäischen Strafvollzugsexperten* (Vittorio Klostermann 2005).

[46] Härter, 'The Transnationalisation of Criminal Law' (n 39) 1, 16–17; Diego Nunes, 'The Extradition and Political Crimes in the "International Fight Against Crimes": Western Europe and Latin America, 1833–1933' in Karl Härter, Tina Hannappel and Jean Conrad Tyrichter (eds), *The Transnationalisation*

Over time, these debates included issues in international criminal law and often resulted in reform proposals, such as the Oxford Institute of International Law's recommendations on extradition of 1880.[47]

2. Juridification of Domestic Proceedings and Cross-Border Cooperation

Germany presents an interesting example of the juridification of domestic criminal proceedings and the lack of such a process transnationally. The core ideas of constitutionalism in Germany had shaped many areas of law—such as the adoption of the so-called *Reichsjustizgesetze* in 1877, which legislated on the constitution of courts, civil procedure, bankruptcy and criminal procedure—and, most importantly, acknowledged the individual as the bearer of rights and obligations. Nonetheless, it would take Germany more than fifty years to adopt legislation on MLA in criminal matters.[48] A draft extradition law, first presented to parliament in 1892,[49] remained an object of intense scholarly[50] and legislative debate for four decades,[51] with the legislator unable to pass the law. Criminal law scholars addressing issues of transnational cooperation clearly drew a line at that time. In their thinking, the rule of law and defence rights were meant for criminal trials *in* Germany; extraditions, however, followed different rules.[52] While criminal charges in the country had to be presented in the formal way of the judiciary, extradition and deportation proceedings often lacked a legal basis and were handled as a police matter.[53]

of Criminal Law in the Nineteenth and Twentieth Century (Vittorio Klostermann 2019) 41, 59 (hereafter Nunes, 'The Extradition and Political Crimes').

[47] Ivan A Shearer, *Extradition in International Law* (Manchester UP 1971) 124 (hereafter Shearer, *Extradition in International Law*).

[48] Deutsches Auslieferungsgesetz of 23 December 1929 in Reichs-Gesetzblatt (RGBl) 1929, pt 1, 239–44.

[49] RT-Drucks 1890/92, no 627; Wolfgang Mettgenberg and Karl Doerner (eds), *Deutsches Auslieferungsgesetz* (2nd edn, F Vahlen 1953) 15 et seq.

[50] See von Liszt's report on a Codification of Extradition Law at the German Jurists' Conference in Leipzig 1880, in Franz von Liszt, 'Sind gleiche Grundsätze des internationalen Strafrechts für die europäischen Staaten anzustreben? Und eventuell welche?' (1882) 2 Zeitschrift für die gesamte Strafrechtswissenschaft 50.

[51] Stenographische Berichte über die Verhandlungen des Reichstags, 164. Sitzung 5 February 1892, vol 119, 4013 et seq <https://daten.digitale-sammlungen.de/~db/0001/bsb00018669/images/>. For a contextualization, see Jochen Oltmer, 'Protecting Refugees in the Weimar Republic' (2016) 29 Journal of Refugee Studies 318. See excerpts from the parliamentary debate, eg contributions of Dr Ludwig Marum (SPD) and Dr Eduard Ludwig Alexander (KPD) in Verhandlungen des Deutschen Reichstags, Stenographische Berichte 4. Wahlperiode 1928, 106. und 107. Sitzung 2 December 1929, vol 426, 3375–81 < https://www.reichstagsprotokolle.de/Blatt2_w4_bsb00000110_00267.html >.

[52] See Delius, 'Das Auslieferungsverfahren in Preussen, insbesondere die Mitwirkung der Gerichte bei demselben' (1891) 11 Zeitschrift für die gesamte Strafrechtswissenschaft 677, 684 (hereafter Delius, 'Das Auslieferungsverfahren in Preussen').

[53] See Franz von Liszt, *Lehrbuch des Deutschen Strafrechts* (9th edn, Guttentag 1899), who emphasizes the legal position of individuals in a domestic criminal trial 72–73, but sees no problem in an extradition without a legal basis 103.

Germany was among the latecomers, with other Continental European countries—for example, Belgium (after having gained independence) in 1833, the Netherlands in 1849, Luxembourg in 1870 and Switzerland in 1892—having already adopted extradition laws during the 19th century.[54] These laws spelled out specific reservations against extradition, for instance, the political crime caveat.[55] Belgium became known for linking rights relevant to mutual legal assistance to its constitution of 1831 and thus provided a basis for legislation that aimed to offer protection, even to the politically persecuted.[56] However, the Belgian law and its endorsement in other states did not open a pathway for all individuals to be equally vested with rights in the extradition proceeding. *Raison d'état* and specific historic developments time and again threatened to derail the individual's legal position in extradition proceedings. In the second half of the 19th century, governments in many European countries were extremely wary of anarchists and implemented measures such as the 'assassination clause', which refused political asylum to anyone who attempted to kill the monarch or his or her representatives.[57]

However, some countries remained on a liberal course. Switzerland—diminutive by nature and bordered by many neighbouring states—took a procedural approach as reflected by the law of 1892.[58] With the legal diversity inherent in federalism, it often aimed at pragmatic solutions, but stood firm on its strong commitment to remain non-monarchical, refusing to implement the assassination clause.[59] Swiss scholars at the time addressed the precarious legal situation of individuals sought for extradition,[60] pointing out that individuals were able to raise objections in Swiss courts against their extradition. The grounds for such objections were that states involved had not complied with treaty requirements[61] such as the political offence caveat or the requirement for dual criminality in extradition proceedings.[62]

[54] Shearer, *Extradition in International Law* (n 47) 8, 18; Lagodny, *Die Rechtsstellung des Auszuliefernden* (n 7) 33–37.

[55] For the link between a liberal approach and the acceptance of a 'political crime' as an exception to the duty to extradite, see Nunes, 'The Extradition and Political Crimes' (n 46) 47–62.

[56] See art 128 of Belgium's Constitution of 1831 <https://www.constituteproject.org/constitution/Belgium_2014.pdf?lang=en>; Loi du 1er octobre 1833 sur les extraditions. <http://www.ejustice.just.fgov.be/eli/loi/1833/10/01/1833100150/justel>; the law raised international interest, even centuries later, eg Heinrich Grützner, 'Staatspolitik und Kriminalpolitik im Auslieferungsrecht?' (1956) 68 Zeitschrift für die Gesamte Strafrechtswissenschaft 504.

[57] Peter Reisner, *Die Voraussetzungen der Auslieferung wegen strafbarer Handlungen nach Erlass des Auslieferungsgesetzes* (Noske 1932) 80 (hereafter Reisner, *Die Voraussetzungen der Auslieferung*); for more details on the assasination clause see Lammasch, *Das Recht der Auslieferung* (n 17) 309–12.

[58] Bundesgesetz der Schweiz betreffend die Auslieferung gegenüber dem Auslande vom 22. Januar 1892, printed in (1892) 7 Archiv des öffentlichen Rechts 565. Cantonal laws granted access to court before an extradition, see Jacques Berney, *De la procédure suivie en Suisse pour l'extradition des malfaiteurs aux pays étrangers* (C Detloff 1889) 4 (hereafter Berney, *De la procédure suivie en Suisse*).

[59] Reisner, *Die Voraussetzungen der Auslieferung* (n 57) 80.

[60] Berney, *De la procédure suivie en Suisse* (n 58) 126–27.

[61] Swiss Federal Court (Schweizer Bundesgericht) Judgment of 7 December 1877, Entscheidungen des Bundesgerichts Vol 3, no BGE 3 I 708 (1877) 708–13.

[62] Art II and VII Auslieferungsvertrag zwischen der Schweiz und Grossbritannien, Swiss Federal Gazette Bundesblatt (BBl) 1874 303.

Swiss judges acknowledged the legal interests of individuals in mutual legal assistance, even when alleged anarchists were sought for involvement in an assassination plot,[63] while petty criminals who had eventually settled in Switzerland and faced extradition to face a potential sentence abroad that seemed excessive were also afforded protection.[64]

In contrast, the German *Reichsgericht* maintained in 1909 that, in principle, extradition took place from government to government, and the individual was a mere object to be delivered.[65] This approach, however, sparked criticism at the time among scholars with regard to the language and the lack of rights of the individual: 'Thus the delivered humans are objects, *vilis materia*, who are pushed back and forth without personal rights! … Mind the language [of the court]: The person is an object, nothing but an object! … The delivered person of course has no rights, he is a mere object.'[66] This rather technocratic approach was reflected in teaching and in extradition procedures. Authorities did not necessarily need an arrest warrant to imprison someone pending their extradition. Governments could simply revert to police detention in order to hold someone prior to delivering them abroad.[67] Although some scholarly voices maintained criticism,[68] the belief that states are the stakeholders and individuals mere objects in international law was deeply rooted. A fundamental shift in assessing the legal position of the individual only took place during the late 20th century, with the acknowledgement of human rights in Germany.[69]

IV. The Lost Idea of a 'Doctrine Cosmopolite'

The idea of the individual as a stakeholder in cross-border cooperation for criminal justice, however, had already surfaced at the end of the 19th century among international scholars. They advocated for a transformation of criminal law based on their ideas of rational criminal justice and 'social defence' as well as prevention measures tailored to individual offenders.[70] The criminological reformists aiming

[63] An alleged anarchist faced prosecution in Italy for a presumed part in killing the King, see Swiss Federal Court, Judgment of 30 March 1901, Entscheidungen des Bundesgerichts, no BGE 27 I 52 (1901).

[64] The individual had been sought by Germany for petty theft dating years back. See Swiss Federal Court, Judgment of 6 February 1894, Entscheidungen des Bundesgerichts, no BGE 20 I 52 (1894).

[65] German Reichsgericht Decision of 23 April 1909, RGSt 42 309, 310. For a broader discussion, see Dugard and Van den Wyngaert, 'Reconciling Extradition with Human Rights' (n 7) 188–90.

[66] Kohler, 'Der Savarkar-Streitfall zwischen Frankreich und England' (n 6) 130 (translation provided by author).

[67] For details, see Delius, 'Das Auslieferungsverfahren in Preussen' (n 52).

[68] Reisner, *Die Voraussetzungen der Auslieferung* (n 57) 9.

[69] For an example of the longevity of the traditional view, see Schröder, 'Staats- und völkerrechtliche Fragen der Auslieferungsbewilligung' (n 9) 231: 'Der Verfolgte ist blosses Objekt des Auslieferungsverfahrens.'

[70] See Pifferi, Chapter 2 in this book; Ignacio de la Rasilla del Moral, 'International Criminal Justice as Universal Social Defence. Quintiliano Saldaña (1878–1938)' in Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (CUP 2020) 118 (hereafter de la Rasilla del Moral, 'International Criminal Justice').

at an amelioration of domestic institutions of criminal justice at home, while also developing rational and coherent criminal legislation worldwide, included, among many other scholars from all over Europe, von Liszt from Germany and Stooss from Switzerland. The debates enabled by the International Union of Penal Law and, later, the Association Internationale de droit Pénal (AIDP) acknowledged new ideas, including support for the position of the individual in transnational criminal proceedings, with divided responsibilities among the involved states, as Pifferi shows in Chapter 2 of this book.[71] These exchanges situated the individual not only in a new approach on the domestic level, but also within transnational developments. In Switzerland, for instance, Stooss vividly advocated von Liszt's 'special preventive punishment theory' based on deterrence, rehabilitation and societal protection and, on that basis, argued that deportation was not an acceptable punishment.[72] It appears, however, that German and Swiss scholars were much more concerned with the doctrinal issues at the heart of traditional criminal law—for instance, the acknowledgement of freedom of will in penal law or the purpose of punishment—than with a true international perspective on criminal justice.[73]

It was other scholars and, in particular, Saldaña, deeply influenced by the teaching of von Liszt, who pointedly demanded a new approach of 'non-territoriality' based on a more universal idea of criminal jurisdiction, able to protect any individuals adversely affected by transnational law enforcement.[74] In the spirit of the ideas for reform, Saldaña proposed that states in their domestic legislation as well as in international treaties ought not to aim for the surrender of the individual, but for the guarantee that he or she would face a fair trial and rational and humane treatment.[75] Therefore, he demanded the replacement of 'extradition systems' with a new approach to jurisdiction and a kind of international penal guarantee that ensured alleged offenders would receive adequate treatment. In particular, he based his 'doctrine cosmopolite' on universal jurisdiction of the *iudex deprehensionis* with certain judicial guarantees, replacing traditional extradition procedures that lacked adequate legal entitlements.[76]

[71] See eg Paul Knepper, *The Invention of International Crime. A Global Issue in the Making, 1881–1914* (Palgrave Macmillan 2010) 159–87; Willem Hendrik Nagel, 'International Collaboration in the Field of Criminology' in *Le droit pénal international. Recueil d'études en hommage a Jacob Maarten Van Bemmelen* (Brill 1965) 193.

[72] Carl Stooss, 'Welche Anforderungen stellt die Kriminalpolitik an ein eidgenössisches Strafgesetzbuch' (1891) 4 Zeitschrift für Schweizer Strafrecht 245.

[73] See further intervations of Carl Stooss and Franz von Liszt, 'Die Internationale Vereinigung und ihre Zielpunkte' (1894) 14 Zeitschrift für die gesamte Strafrechtswissenschaft 611.

[74] de la Rasilla del Moral, International Criminal Justice (n 70) 123.

[75] Quintiliano Saldaña, 'La Justice Pénale Internationale' (1925) (10) RdC 228 (hereafter Saldaña, 'La Justice Pénale Internationale').

[76] See further Quintiliano Saldaña, *La Défence Sociale Universelle* (Conference donné à la Faculté de Droit de l'Université de Paris le 29 Mars 1924, Roma y La Haya) (Góngora 1926) 15–16, 21.

Disruptions caused by war, with their nationalist movements, obviously interrupted the European exchange of ideas for reform. Despite the efforts to restore academic exchange in new international organizations and to have an international approach endorsed, with World War II many ideas were, seemingly, lost. Among these was that of international penal guarantees.[77] This comes as no surprise with his thinking being contrary to the prevailing approach to the kind of instrumental transfer prevailing at that time.

V. The Paradigm Shift Empowering the Individual

After World War II, states which took part in extraditions were concerned only with the allocation of the rights and obligations of the other state party, and ignored the individuals affected.[78] In retrospect, it is interesting to note how few voiced their concern about the traditional state-centric approach of public international law, especially considering the devastation wreaked by World War I. Indeed, the idea that states had lost their legitimacy as stakeholders in international matters to the benefit of an individual's subjectivity in transnational affairs was rarely proffered.[79] But slowly, the reading of international treaties—including those on MLA—changed. After World War II, European countries embraced the idea of human rights, including judicial rights. In particular, with the adoption of the ECHR, states promised the right to a fair trial (along with the right to an interpreter, to confront or cross-examine witnesses etc) that went beyond domestic law. But again, this transnational promise aimed at compliance with a minimum standard in domestic proceedings rather than cultivating subjective rights in transnational criminal law or, in other words, the idea of human rights.[80]

1. Reading of Treaties

MLA treaties were international treaties with many purposes. They defined rights and obligations of states, but also divided powers between governments and houses of parliament when entering into obligations with other states. The least likely motivation, in most jurisdictions, was to empower the individual. The lack of recognition for subjective rights in cross-border cooperation corresponded with

[77] See further de la Rasilla del Moral, 'International Criminal Justice' (n 70) 124–28.

[78] For Switzerland, see Schultz, 'Aktuelle Probleme der Auslieferung' (n 21) 199.

[79] See, however, Jean Spiropoulos, 'L'individu et le droit international' (1929) 30 RdC 191, 197 or Nicolas Politis, *Les nouvelles tendances du droit international* (Hachette 1927) 55–93, 76.

[80] Schaffner, *Das Individuum im internationalen Rechtshilferecht* (n 5) 83–85; with reference to Stephan Breitenmoser and Gunter E Wilms, 'Human Rights v. Extradition: The Soering Case' (1990) 11 Mich J Intl L 845, 846 (hereafter Breitenmoser and Wilms, 'Human Rights v. Extradition').

the prevailing theory of international law in the 19th century that saw states as the sole beneficiaries of international treaties and acknowledged a 'third party' right only in case of a *pactum in favorem tertii*.[81] Thus, even where international treaties established a political offence caveat or required double criminality as a precondition for extradition, the individual could not invoke it, unless domestic law assigned the right.[82]

That is the very reason why the Belgian approach caused a sensation, even though it was in line with earlier ideas, like provisions adopted after the French Revolution.[83] Around the middle of the 19th century, France embraced Belgium's notion of granting rights to individuals sought for extradition and concluded international treaties to reflect this.[84] With a significant player on the international stage like France accepting it, the idea gained importance.

At the beginning of the 20th century, manifold MLA treaties connected European countries. Underpinned by domestic legislation, it is difficult to determine what their respective obligations were regarding rights related to foreign policy, the internal legislative powers and the authority to infringe individual rights. Each nation seemingly developed its own unique understanding.[85] But there is sufficient evidence for a general claim to be made that extradition treaties never in fact granted rights to individuals.[86]

German courts strongly rebuked the legal status of the individual in cross-border cooperation, arguing that any protection granted was merely a derivative of a state right to refuse cooperation with a foreign state.[87] As late as the second half of the 20th century, some scholars still reaffirmed the notion that: '[t]he individual affected [was] merely the object of extradition proceedings'.[88] But such opinions actually corresponded with the legal situation: the Act on International Cooperation in Criminal Matters (AICCM),[89] adopted in the 1980s, maintained the traditional

[81] Dominicé, 'L'émergence de l'individu' (n 32) 109, 123.

[82] For a more detailed account, see Robert Kolb, 'The Protection of the Individual in Times of War and Peace' in Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (OUP 2012) 317, 318–19.

[83] Schultz, 'Aktuelle Probleme der Auslieferung' (n 21) 220.

[84] See Billot, *Traité de l'extradition* (n 39) 471; Reisner, *Die Voraussetzungen der Auslieferung* (n 57) 9; Lagodny, *Die Rechtsstellung des Auszuliefernden* (n 7) 37–40.

[85] For Germany, see Lagodny, *Die Rechtsstellung des Auszuliefernden* (n 7) 29–62; for Switzerland, Schaffner, *Das Individuum im internationalen Rechtshilferecht* (n 5) 43–70.

[86] Haro F van Panhuys, 'Le traité d'extradition en tant que source de droits pour les individus' in Jacob Maarten van Bemmelen (ed), *Le droit pénal international: recueil d'études en hommage à Jacob Maarten van Bemmelen* (EJ Brill 1965) 57, 58 et seq; John G Kester, 'Some Myths of United States Extradition Law' (1988) 76 Geo LJ 1441, 1465 et seq; Michael P Shea, 'Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering' (1992) 17 Yale J Intl L 85, 86 (hereafter Shea, 'Expanding Judicial Scrutiny').

[87] Federal Court, Bundesgerichtshof in Strafsachen (BGH, Decision of 16 January 1963, BGHSt 18 218, 220 (1963)).

[88] Schröder, 'Staats- und völkerrechtliche Fragen der Auslieferungsbewilligung' (n 9) 231.

[89] Act on International Cooperation in Criminal Matters of 23 December 1982 (Gesetz über die Internationale Rechtshilfe in Strafsachen) <https://www.gesetze-im-internet.de/englisch_irg/index.html>.

idea that MLA was primarily to secure government interests in state dealings—what was later called a 'two-dimensional system'.[90]

2. The Turn towards Human Rights

The 20th century, with its general turn towards human rights, fundamentally changed the understanding of the legal status of the individual. This development can be understood as a derivative of a modern perception of the individual in public international law.[91] The new approach probably resulted from the participation of criminal law scholars in an international debate and a 'cross- fertilization of courts'.[92]

The latter culminated with the ECtHR decision in *Soering v United Kingdom*,[93] a landmark case for the establishment of the legal status of the individual in extradition proceedings in Europe. The Strasbourg court ruled that extradition from a European country to the United States to face charges of capital murder violated article 3 of the ECHR, which protected against inhuman and degrading treatment. The ECHR's acknowledgement that a person wanted for extradition may invoke article 3 of the ECHR to fight extradition (in the requested state) on the grounds that punishment in the requesting state infringes human rights is seen as an implicit rejection of the traditional concept that mutual legal assistance is a purely intergovernmental law granting rights only to states.[94] Certain lawyers and government officials were surprised by the *Soering* decision, although they could have seen it coming with the ECtHR's encouragement for an expansive reading of article 6 of the ECHR:

> the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.[95]

[90] Nadeschda Wilkitzki, *Entstehung des Gesetzes über die Internationale Rechtshilfe in Strafsachen (IRG)* (De Gruyter 2010) 241–44.

[91] See Breitenmoser and Wilms, 'Human Rights v. Extradition' (n 80) 879.

[92] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harv Intl LJ 191, 193.

[93] *Soering v United Kingdom*, App no 14028/88, 7 July 1989.

[94] See Breitenmoser and Wilms, 'Human Rights v. Extradition' (n 80) 879; but subsequent case law does not grant a straightforward entitlement of all persons affected by cross-border law enforcement, nor do scholars agree on the shape of particular entitlements. See eg *Sanchez-Reisse v Switzerland*, App no 9862/82, 21 October 1986, para 47; *Mamatkulov and Askarov v Turkey*, App no 46827/99 and 46951/99, 4 February 2005, para 82; *Buijen v Germany*, App no 27804/05, 1 April 2010, para 42; *Gallardo Sanchez v Italy*, App no 11620/07, 24 March 2015, paras 39 et seq.

[95] *Artico v Italy*, App no 6694/74, 13 May 1980, para 33.

This understanding almost inevitably led to acknowledgement of certain individual rights in transnational criminal law. It was underscored by the court's view that the ECHR, unlike other international treaties, creates an objective obligation to enforce the established individual rights for anyone within the jurisdiction of the contracting states and to prevent a breach at all levels.[96]

When the Strasbourg court decided *Soering*, many scholars simply embraced the judgment,[97] creating the 'three-dimensional approach'. In 1987, German scholar, Otto Lagodny, published a monograph on the legal position of individuals wanted for extradition (*Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland*), which contrasted the traditional doctrine with a new vision: a three-dimensional legal assistance procedure, with the individual vested with rights and remedies.[98]

Thus the individual involved in a transnational criminal case developed into a subject and not the object of negotiation between two states; the individual came to hold a legal position vis-à-vis both the requesting and the requested state.[99]

Others remained more cautious. Some pointed to legal hurdles like the *ordre public* reservation,[100] the invocation of which must be reserved for states, or insisted that criminal proceedings and mutual legal assistance are 'two different things' and individuals sought for extradition could not claim the legal status of a defendant.[101] Some criticized the turn to humanitarianism and claimed that the acknowledgement and application of individual rights in MLA would lead to an unwanted 'extraterritorial export' of domestic constitutional rights.[102]

Nevertheless, it is now generally accepted that, in Germany, MLA caveats protect the individual, for instance, where the death penalty might be threatened or where political persecution may eventuate.[103]

[96] *Ireland v United Kingdom*, App no 5310/71, 18 January 1978, para 239.

[97] Christine van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 ICLQ 757; Otto Lagodny, 'Human Rights in the Field of Extradition' (1991) 62 RiDP 45; Shea, 'Expanding Judicial Scrutiny' (n 86) 85; Sharon A Williams, 'Human Rights Safeguards and International Cooperation: Striking the Balance' (1992) 3 Crim LF 191.

[98] Lagodny, *Die Rechtsstellung des Auszuliefernden* (n 7) 1, 9, 98, 259.

[99] Albin Eser, 'Common Goals and Different Ways in International Criminal Law: Reflections from a European Perspective' (1990) 31 Harv Intl LJ 117, 125.

[100] Böse, 'International Law and Treaty Obligations' (n 25) 613.

[101] Ferdinand von Maritz, *Internationale Rechtshilfe in Strafsachen. Beiträge zur positiven Theorie des Völkerrechts der Gegenwart*, vol 1 (H Haessel 1888) 451: 'durch Auslieferung wird man nicht bestraft; vielmehr ist es ein Mittel, um die rechtlichen Interessen des Auslandes zu realisieren'.

[102] Theodor Vogler, 'Grundrechte und grenzüberschreitende Sachverhalte. Besprechung des gleichnamigen Buches von Rainer Hoffmann' (1996) 143 Goltdammer's Archiv 569, 575–76, upheld in BVerfG NJW 1979, 1285.

[103] Wolfgang Schomburg, 'Die Rolle des Individuums in der Internationalen Kooperation in Strafsachen' [1998] Strafverteidiger 153.

3. Roll-Back to Be Feared?

Today, the legal status of the individual appears to be established, even beyond state reproach: international law aims to prevent states from exposing individuals to situations that would result in the violation of certain fundamental rights.[104] However, protection of the legal status of the individual is not spread evenly to all areas of transnational criminal law: while interest has centred on extradition,[105] individual rights in other areas—like evidence and information sharing among states—remain less protected. Furthermore, the individual's legal status is not immune to roll-backs. Extrajudicial renditions for interrogation purposes[106] and the establishment of 'black site' prisons where inmates are subjected to torture, provide recent examples.[107] The future will present novel challenges, for instance, with regard to automated data sharing and profiling.[108]

The individual's legal status in European cross-border cooperation has come under scrutiny with the EU's adoption of the principle of mutual recognition. As a consequence, extraditions have developed legally from the 'external' handing over of a person to another state for an 'internal' procedure (leading to a person standing trial in another EU state) on the presumption that criminal justice works under comparable conditions throughout the EU.[109] The European Arrest Warrant provides a prominent illustration of this with 'extradition' reworded to 'surrender' and traditional reservations protecting individual interests in extradition proceedings erased.[110] However, European courts seem to have learned their lesson, with domestic courts as well as the European Court of Justice cautiously implementing a human rights standard in the system of mutual recognitions of judicial decisions

[104] For a detailed comparative overview, see Albin Eser, Otto Lagodny and Christopher L Blakesley (eds), *The Individual as Subject of International Cooperation in Criminal Matters* (Nomos 2002). The consensus has had an impact on international criminal law too, see eg *Prosecutor v Anto Furundzija*, Case no IT-95-17/1-T, 10 December 1998, paras 143–57.

[105] John Quigley, 'The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law' (1990) 15 NCJ Intl L & Comm Reg 401.

[106] Council of Europe (CoE) Parliamentary Assembly, Committee on Legal Affairs and Human Rights (Rapporteur: Dick Marty), Information Memorandum II, AS/Jur (2006) 03 rev, 22 January 2006; Memorandum from the CoE Commissioner for Human Rights (Thomas Hammarberg), Advancing Accountability in Respect of the CIA Black Site in Romania, CommDH (2012) 38, 30 March 2012.

[107] See *Al Nashiri v Poland*, App no 28761/11, 24 July 2014; *Husayn (Abu Zubaydah) v Poland*, App no 7511/13, 24 July 2014.

[108] Paul de Hert and Serge Gutwirth, 'Interoperability of Police Databases Within the EU: An Accountable Political Choice?' (2006) 20 Intl Rev L Comp & Tech 21, 30.

[109] Böse, 'International Law and Treaty Obligations' (n 25) 613–14.

[110] Böse, 'International Law and Treaty Obligations' (n 25) 615–16; for a policy evaluation, see Karin Landgren, 'Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests' (1999) New Issues in Refugee Research, UNHCR Working Paper No 10, 31–42. See also Steve Peers, 'Proposed Framework Decision on European Arrest Warrants' Statewatch post 11/9/2001 analyses no 3, 8–10 <http://www.statewatch.org/analyses/no-3-ewarrant.pdf>.

established among EU states,[111] with individuals permitted to raise alleged violations even when domestic law did not explicitly entitle them to do so.[112]

VI. Conclusion

Today, the individual's legal status seems firmly embedded in legal practice and theory. It has been a long journey for fugitives, foreigners and emigres, with protections by European countries having been introduced at divergent speeds across the Continent. Ultimately, with transnational criminal law being considered more a system than a compilation of special treaties (driven by diplomacy and transnational concessions), along with the rise of human rights and a new reading of treaties that reflected the generally increasing status of the individual under international law, domestic legislators adopted corresponding laws. Eventually, it seems that the significance of human rights has settled the legal status of the individual in transnational criminal law, not only in Europe, but globally.[113]

Why did it take so long for the individual to acquire a legal status in transnational criminal proceedings? There is no mono-causal answer to this question. Many factors have had an impact: the traditional understanding of criminal law as a local matter which prevented transnational criminal law from gradually building up as a legal system, along with the disruptions to the international debate among criminal law scholars who were unsuccessful in materializing the idea of international penal guarantees that had surfaced at the beginning of the 20th century. Only after a general turn towards human rights did scholars and courts use this line of argument to underpin individual rights in transnational criminal law at the end of the 20th century.

Perhaps individual rights would have been established earlier if fear of cross-border prosecution and extradition had concerned the population evenly. In civil law jurisdictions, citizens did not have to fear extradition; most individuals sought for prosecution abroad were, by definition, the 'other'. This demarcation and insularity—that failed to go behind the 'veil of ignorance'—reduced human beings

[111] Martin Böse, 'The European Arrest Warrant and the Independence of Public Prosecutors: OG & PI, PF, JR & YC' (2020) 57 CML Rev 1259; Valsamis Mitsilegas, 'The European Union and the Rights of Individuals in Criminal Proceedings' in Brown and others, *The Oxford Handbook of Criminal Process* (n 18) 131–34.

[112] See *Aranyosi und Căldăraru* [2016] ECLI:EU:C:2016:198; *Bob-Dogi* [2016] ECLI:EU:C:2016:385; *Poplawski* [2017] ECLI:EU:C:2017:503; *Ardic* [2017] ECLI:EU:C:2017:1026; *Piotrowski* [2018] ECLI:EU:C:2018:27; *LM (Deficiencies in the system of justice)* [2018] ECLI:EU:C:2018:586.

[113] See *Cox v Kanada*, Human Rights Committee Meeting 31 October 1994, CCPR/C/52/D/539/1993, No 539/1993, para 16.1: '[I]f a State party to the [UNO-Pakt II] takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the [UNO-Pakt II] will be violated in another jurisdiction, the State party itself may be in violation of the [UNO-Pakt II]'; *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, para 77.

affected by cross-border cooperation to a sort of non-citizen and left individua sought for prosecution in another jurisdiction outside the 19th century proce of juridification that shaped the legal status of individuals in domestic crimir proceedings. It could act as a reminder of the fundamental principle that captur the legal status of the individual in transnational criminal law today: the ultima normative source of all law—criminal as well as international—is not authori nationality or sovereignty, but humanity.[114]

[114] Saldaña, 'La Justice Pénale Internationale' (n 75) 228–42; Anne Peters, 'Membership in the Gl Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionaliza of International Law* (OUP 2009) 153, 155, 157: 're-introduction of the individual'.