

Editorial

Law Should Govern: Aspiring General Principles for Transnational Criminal Justice

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1. Introductory remarks

'Law should govern' reads Aristotle's apodictic phrase in *Politics* 3.16 – a phrase which has gone on to form a core aspect of the rule of law. Consequently, justice systems abide by the maxim that disputes are to be settled by impartial and independent courts following predefined procedures and thereby ensuring equality before the law.¹ To abide by these principles is particularly important in the field of criminal justice, because criminal proceedings affect the individual – be it the alleged wrongdoer or the supposed victim – as well as the wider society. Criminal investigations, prosecutions and subsequent trials must closely follow precise procedures, balancing the different interests at stake whilst adhering to general principles of law. This is crucial not only for the protection of the interests of the individuals involved but also necessary in order to safeguard the common interest in securing adherence to the law by government officials and thus upholding political and judicial accountability. These explanations might sound mundane to a community accustomed to the achievements of well-established national criminal justice systems based on coherent procedural rules and their efficient application.

In transnational cases, things may look quite different. Traditionally due process principles are designed to apply to criminal cases of a national dimension only. What is more, generally, different states' criminal justice systems are not linked with each other. What results from these two factors are potential protective gaps either for the alleged wrongdoer or the supposed victim. Due to the widespread ratification of various human rights treaties and their supervision by monitoring bodies and courts, certain procedural rules and fair trial guarantees do apply in the legal order of states and, furthermore, form part of an increasing consensus on international human rights law (IHRL). Despite this development and the increasingly well-accepted idea that human rights norms apply extraterritorially, we cannot state that IHRL and national law have been designed to cope with the *transnational* aspects of criminal justice, neither from the perspective of effective law enforcement nor from the perspective of ensuring human rights guarantees. We lack due process principles for *cross-border* investigations, prosecutions and subsequent trials.

Moreover, there existed – and still exist – aspects of transnational criminal justice which remain outside the formal realm of the law, since politics have always played a role in international affairs.

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1 See e.g. Art. 26 ICCPR and furthermore Art. 14 ICCPR as well as Art. 6 par. 1 ECHR.

Prominent examples are cases of suspects wanted for extradition in cases where the charges brought forward have been challenged in other countries, Edward Snowden providing a recent example. Until today, transnational criminal justice is not necessarily governed by law or, rather, by the law alone. Power struggles and discretionary administration of justice may interfere with criminal investigations and prosecutions, leading to a politically-motivated determination of proceedings or positive or negative jurisdictional conflicts. The result is that practice may give way to justice being delivered arbitrarily and in a discriminatory way.²

But law *should* govern. Especially since transnational criminal investigations and prosecutions may severely affect individuals' lives, be it those of the alleged perpetrators or the victims. A defendant may face multiple criminal trials or the possibility of an unfounded transfer of proceedings to a foreign jurisdiction or the victim remains unprotected because of inaction or a discretionary decision to close proceedings. The lack of transnational rules may also affect the state's interests, as it is unclear how to react to other states' jurisdictional claims or the exercise of jurisdiction and how to take foreign investigations or prosecutions into account. Thus, in some respects, transnational criminal investigations and prosecutions not only entail a significant burden for the accused person, they also confront various political and legislative barriers: In some cases the law lags behind reality. The law? Which applicable law? And what if conflicts of law occur?

Against this background, it is time to identify and elaborate general principles for the prosecution of transnational crimes:

Such general principles of transnational criminal justice must deal with the full range of aspects of the *ius puniendi* in a transnational setting: jurisdiction to prescribe, jurisdiction to enforce and jurisdiction to adjudicate. This raises many different questions: What are the common standards and principles of the applicability of a respective law? Does it make a difference if the transnational criminal justice is part of a regional political integration model, such as the European Union with its area of freedom, security and justice?

In this special issue of the *Utrecht Law Review*, we will concentrate on the jurisdiction to prescribe and adjudicate.

In order to do so, we will first define the notion and concept of transnational criminal justice (Section 2). Then we will scrutinize the need for general principles (Section 3), and subsequently the possibilities to actually elaborate such basic principles (Section 4).

2. The notion and concept of transnational criminal justice

The first problem to address when discussing general principles for transnational criminal justice is terminology: Whilst we have clear notions of *national* criminal law as well as of international criminal law *stricto sensu*, i.e. the international core crimes codified in the ICC Statute, including punishable violations of international humanitarian law, we have no commonly shared definition of *transnational criminal law* up to now.

Transnational crime can be defined simply by way of exclusion. Transnational crimes are offences which are not international core crimes (international criminal law *stricto sensu*). And they are not merely national offences, defined as either being committed in and having effects solely within one jurisdiction, or not having an extraterritorial link due to the foreign nationality of the victim or the offender or the vessel and only of prosecutorial interest to one state. Such a definition embraces all situations in which special

2 This may be the case when politicians interfere behind the curtains with regard to cross-border corruption charges or investigations of alleged trafficking. This becomes obvious in high-profile cases, like in the extradition proceedings against Augusto Pinochet (<<http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>>, last visited 16 September 2013) or against Julian Assange (<<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/jud-aut-sweden-v-assange-judgment.pdf>>, last visited 16 September 2013), or in the charges brought by alleged terrorists held in secret prisons or ex-prisoners of Guantánamo Bay against ex-US President Bush (see e.g. <http://assembly.coe.int/Main.asp?link=/CommitteeDocs/2006/20060124_Jdoc032006_E.htm>, last visited 16 September 2013) or during the investigation by US authorities into the 'Libor scandal'. In a rather open attempt to play politics, the Libyan authorities convicted two Swiss businessmen of visa and tax offences in apparent retaliation for the arrest of Hannibal Gaddafi, the son of the former leader of Libya, and his wife in Switzerland for allegedly having beaten two servants in a hotel in Geneva.

problems arise exactly because the conduct does not only affect one jurisdiction. The same approach is, for instance, taken in the United Nations Convention against Transnational Organized Crime 2000.³

From the definition of the phenomenon of transnational crime, however, a definition of *transnational criminal law* or *transnational criminal justice* does not flow.

The body of law which governs the investigation and prosecution of transnational offences can be defined in different ways. On the one hand, it could be defined as the sum of existing laws *applying* to transnational crime. These encompass mainly provisions on transnational offences, their constitutive elements on *actus reus* and *mens rea* and the applicable range of penalties, but also rules on jurisdiction and on mutual legal assistance in criminal matters (hereinafter: MLA rules). Such an *empirical-inductive approach* includes laws on the applicability of domestic criminal law to extraterritorial conduct (hereinafter: criminal jurisdiction rules), rules governing MLA as well as more specified rules, which one may find in so-called European criminal law, referring to the provisions on criminal law and procedure within the European Union.

Alternatively, one can take a *deductive and normative approach* and restrict the use of the term ‘transnational criminal law’ to those rules and legal instruments that have been specifically created to deal with transnational criminal matters as defined above. Under that approach, the existence of transnational criminal law presupposes that a legislature has adopted such rules. One example, in the European context, is the Schengen Implementing Convention.⁴ The so-called Schengen *acquis*⁵ includes criminal jurisdictional rules, MLA rules and cross-border law enforcement measures for enumerated offences in the common Schengen area.⁶ The Schengen states and later most EU states have committed themselves to applying those rules whenever an alleged criminal act affects more than one jurisdiction in the common Schengen area. Another example is the EU criminal law on the mutual recognition of judicial acts (hereinafter: MR) in the framework of the area of freedom, security and justice.

Both approaches traditionally adopt a state-orientated position, which does not adequately take the interests of the individual into account. It is, however, the individual who is affected by cross-border investigations and transnational investigations and who is the addressee of legal norms and must align his or her conduct in order to prevent criminal liability. This modern perception of international and transnational criminal law has shaped recent debates about the implications of certain institutions of MLA or MR, for instance when dealing with transnational evidence gathering and evidence use. Whatever approach we prefer, it is clear that transnational criminal justice no longer exclusively concerns international cooperation between states in criminal matters. The individual has become a subject instead of an object of cooperation, which includes that the individual has rights and obligations in relation to transnational criminal justice.⁷

Which approach, the deductive-normative or the empirical-inductive, is most suited to finding general principles remains to be seen and is part of this research. The international community has addressed the question only selectively, mainly concerning areas of crime which affected different jurisdictions by nature, like transnational organized crime. Whether such concepts will be useful for all areas of transnational crime is still to be determined, such as for instance the definition given in

3 GA Resolution 55/25 of 15 November 2000; the so-called Palermo Convention provides the following definition in Art. 3(2): ‘an offence is transnational in nature if (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.’

4 The Schengen Agreement together with the Convention implementing the Schengen Agreement created Europe’s borderless Schengen area. There are external border controls for those travelling in and out of the area, but normally there are no internal border controls. The Convention implementing the Schengen Agreement enshrines the cross-border cooperation between the justice authorities and the police.

5 The Schengen *acquis* encompasses not only the Schengen Implementing Convention of 1990, but all laws adopted subsequently in order to make the Schengen cooperation work.

6 S. Gless, *Internationales Strafrecht – Grundriss für Studium und Praxis*, 2011, Rn. 567 et seq; A. Klip, *European Criminal Law*, 2012, pp. 341 et seq.

7 A.H.J. Swart, *Goede rechtsbedeling en internationale rechtshulp in strafzaken*, 1983; A. Eser et al., *The individual as subject of international cooperation in criminal matters*, 2002. However, there are also instances where criminal suspects are treated as mere objects of transnational criminal investigations and transnational criminal cooperation; this holds true, for instance, for some states engaging in the transfer of piracy suspects: A. Petrig, *Arrest, Detention and Transfers of Piracy Suspects: A Human Rights Analysis*, forthcoming.

the United Nations Convention against Transnational Organized Crime 2000 mentioned above,⁸ which strictly refers to the transnational aspects of the commission of the crime or to its transnational effects.

Besides the deductive-normative or the empirical-inductive approach, a third approach is conceivable: For the suspect or the victim transnational criminal justice could also mean criminal proceedings if they are transnationally active when investigating (the gathering of evidence, the arrest of persons, the freezing of assets) or prosecuting (the choice of jurisdiction) or executing sanctions (transnational confiscation, the transfer of prisoners). This means that transnational criminal justice could also refer to domestic criminal cases, but with a transnational criminal justice activity that could affect the rights and obligations of suspects, victims, etc.

A last approach could consist of models of regional integration such as the former Schengen acquis or the area of freedom, security and justice in the EU; the point of reference, however, is no longer and only the sovereign states, but common judicial areas with a proper transnational interest, such as, for instance, the criminal law protecting the single currency, the criminal enforcement of the financial market regulations or the EU criminal law approach in relation to the trafficking of human beings. The difference with national criminal justice is that proper transnational interests of a common area have been defined as deserving transnational protection and that, little by little, the EU is also recognizing that this approach might need a transnational approach to procedural safeguards and applicable human rights. However, even in the recent proposal for a regulation on the establishment of a European Public Prosecutor's Office,⁹ this need is very poorly addressed.

From this it follows that there are many definitions of transnational criminal justice, depending on the perspective and the functionality. The starting point for our analysis is the position and rights of the individual in transnational criminal justice. In which transnational situations do they risk losing rights and which general principles could remedy this? That is the point of departure for our analysis.

3. The need for general principles

Although transnational crime has gained more and more attention during the last few decades, we still lack a set of rules that comprehensively deal with transnational criminal cases. Only very specific situations, for instance *ne bis in idem* in the Schengen area, are regulated by a specific law.¹⁰

This special issue illustrates the need for general principles. The different articles it contains are mainly based on presentations delivered during the workshop 'General Principles of Transnational Criminal Law' at Basel University in June 2012 held within the framework of a similarly entitled project.¹¹

The articles cover crucial questions which arise during investigations and prosecutions of transnational crime,

- firstly, the question of jurisdiction (Luchtman, Petrig Echle, Ireland-Piper),
- secondly, the necessity for transnational procedural or rather fair trial standards (Gless, Ambos and Poschadel, Bachmaier, Ivory, Wade),
- thirdly, the question of how to determine personal guilt when different legal systems clash (Bock)
- and, fourthly, the question of doubly jeopardy (*ne bis in idem* or *res iudicata* in transnational criminal cases) (Lelieur, Vervaele).

3.1. Determination of jurisdiction

We currently do not have a coherent and comprehensive set of transnational rules on transnational criminal justice to coordinate competing jurisdictional claims.

This lacuna can be explained by the fact that the purview of criminal justice has traditionally been limited to the territory of a single state, just as the concept of individual rights has been limited to a single

8 GA Resolution 55/25 of 15 November 2000.

9 COM (2013) 534 final.

10 For instance, the provisions governing *ne bis in idem*: Art. 54 Schengen Implementing Convention as well as Art. 50 of the EU Charter.

11 At this point we would like to thank the Swiss National Science Foundation (SNF), the Max Geldner-Stiftung, the Freiwillige Akademische Gesellschaft Basel – Fonds zur Förderung von Lehre und Forschung and the Faculty of Law of the University of Basel for their financial support.

national system. More recently, however, scholars and authorities have considered individuals and their obligations and rights in a cross-broader framework. Many states – particularly Western states – have begun to claim that certain rules apply universally; at the same time, they have set up rules governing transnational criminal cases and have started to investigate and prosecute crime transnationally. Prominent examples of this phenomenon are trafficking in human beings, transnational bribery, and money laundering. In order to facilitate the transnational prosecution of these and other crimes, states have established institutions (e.g. UNODC and Europol), have established mechanisms for sharing information,¹² and have even granted authority to perform acts of investigation on their territory to agents of other states. These developments have affected the traditional notion that *ius puniendi* is intrinsically linked to state sovereignty. This state-centred understanding has certainly become outdated with regard to prescriptive jurisdiction. Since modern crime often transcends national borders, national criminal laws likewise extend their applicability to acts committed abroad. But the jurisdiction to adjudicate is – even today – still largely limited to the national state. In spite of the fact that the reality of investigations and prosecutions has changed, binding general rules on transnational investigations and prosecutions are still lacking.

There are practical reasons that explain that state of affairs. As transnational criminal law is generally not yet part of the curricula of institutions, specific knowledge to solve problems of investigations and prosecutions of criminal cases affecting more than one jurisdiction have often not been part of traditional training. These rules are still difficult to access and apply, especially for a lawyer not familiar with the cross-border dimension of criminal justice.¹³ Therefore, it is necessary to find and communicate transnational soft (and hard) rules, aiming at coordinating the transnational case where it has contact points with different jurisdictions. From an academic perspective, the perception has been similar for a long time. A transnational body of general principles for transnational criminal matters has not been developed because scholars basically regarded criminal cases affecting more than one jurisdiction not as a transnational topic, but at most as a set of separate criminal cases scattered across national jurisdictions. In other words, the transnational case of one individual who committed an act that affected two or more jurisdictions is split up among all the jurisdictions that are involved. The transnational case often ends up being prosecuted as a number of national cases involving extraterritorial conduct. Each of these national cases is subject to a self-contained set of rules that derive from the respective national and international legal frameworks.

Four articles in this special issue deal with the idea that general principles governing the question of the jurisdiction to prescribe or adjudicate should be elaborated.

Firstly, in his article ‘Towards a Transnational Application of the Legality Principle in the EU’s Area of Freedom, Security and Justice?’ Michiel Luchtman adopts the thesis that with the transfer of powers from the national to the European level and the increasing horizontal intertwinement of national criminal justice systems and the resulting intensified cooperation, it is also increasingly difficult to protect EU citizens against arbitrary investigation, prosecution, conviction and punishment in Europe’s area of freedom, security and justice. EU Charter rights therefore need to be interpreted in light of their new, transnational setting. His contribution concludes with a series of recommendations for a revised European framework for choice of forum in criminal matters.

In her article ‘The Expansion of Swiss Criminal Jurisdiction in Light of International Law’ Anna Petrig demonstrates with the example of Swiss criminal law that over the last few decades a global trend of extending the reach of domestic penal power can be observed. She raises the question of whether this expansive approach towards jurisdiction, which can be observed under Swiss law but also in other states, is permissible or even encouraged or requested by international law. She concludes that some international rules push for long-arm jurisdiction while others place limits on the domestic legislature’s endeavour to

¹² For instance, ICAT Inter-Agency Coordination Group Against Trafficking in Persons.

¹³ Difficulties arise from the various layers of international and national law as well as from unclear relationships between the various legal frameworks, see for instance, W. Schomburg et al. (eds.), *Internationale Rechtshilfe in Strafsachen*, 2006, Einleitung N 2 et seq.

expand the reach of its domestic criminal law. In light of this, she proposes the idea of adopting, on an international level, general principles governing jurisdictional issues for transnational cases.

Regula Echlé's paper entitled 'The Passive Personality Principle and the General Principle of *Ne Bis In Idem*' equally deals with jurisdictional aspects of transnational cases. At the centre of her paper are the interests which a victim of a transnational crime may have in transferring a proceeding across the border. With the example of Swiss law, she considers the means by which this can be done. By virtue of the passive personality principle, a Swiss victim can move the proceeding back for a civil claim which would not have a forum in Switzerland otherwise. Further, she suggests that there is a conflict between the passive personality principle and the prohibition of double jeopardy and argues for a restrictive interpretation of the passive personality principle, and broadening the principle of *ne bis in idem*.

Finally, in her paper entitled 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' Danielle Ireland-Piper demonstrates that states can assert jurisdiction over the extraterritorial conduct of their nationals pursuant to the 'active nationality' principle in international law. However, according to the author, neither domestic nor international law currently provide adequate frameworks to ensure that such prosecutions are fair and she considers examples of fairness deficiencies in the prosecution of nationals for extraterritorial offences. She then argues that the lack of a common methodology for applying the principle *ne bis in idem* gives rise to inconsistencies, and the risk of multiple prosecutions arising from the same conduct. She further considers deficiencies in extradition and mutual legal assistance frameworks, and provides examples of constitutional guarantees being excluded from application in the case of the extraterritorial conduct of their nationals. In closing, she maintains that these procedural deficiencies have the potential to constitute an abuse of process.

3.2. Establishing a transnational standard for a 'fair trial'

We still lack transnational standards for a 'fair trial', including rules on how to deal with evidence from abroad or how to organize a defence across borders. This can be seen for instance in MLA, which was traditionally considered as an administrative matter between states, not affecting the notion of civil rights and obligations and/or criminal charges under Article 6 ECHR or Article 14 ICCPR. The approach taken by states was that each of them is responsible for criminal proceedings, but not for the cross-border administration of mutual legal assistance, even if it serves a criminal trial at the end of the day. If this 'split-up' approach is taken to its logical conclusion, there appears to be no need for general principles for transnational cases. Rather, the accumulation of different sets of laws from different jurisdictions seems to be an adequate (and sufficient) approach to deal with the investigation and prosecution of transnational offences. This is, for instance, the attitude taken by many with regard to the right to a fair trial: If a fair trial is guaranteed during criminal trials before each deciding court, the MLA process must still abide by the rules. A look at the practice, however, demonstrates that there are loopholes in MLA and that many decisions on the transnational gathering of evidence, for instance, can potentially affect the procedural safeguards of suspects.

Five articles in this special issue deal with the notion of fair trial in a transnational context.

Firstly, the article by Sabine Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle', is on the fairness of trials involving criminal cases of a transnational dimension, most notably the aspect of 'equality of arms'. She argues that the right to a fair trial has grown in importance over the past decades as criminal procedures and human rights law have aligned themselves more and more closely on the national level. A core aspect of our current European understanding of a 'fair criminal trial' is the so-called 'equality of arms', which requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In cases which affect more than one jurisdiction – either because an alleged crime causes damage in different countries, evidence is located abroad or for some other reason – the accused and his defence lawyer may be left without any such guarantee in the legal 'black hole' between the protections that are normally offered by each of the jurisdictions involved.

The reason for this is not a dramatic alteration of legal frameworks; instead, it is the small encroachments caused by transnational cooperation that matter and which can be summed up on the basis that domestic and foreign prosecution authorities have, effectively, closed the circuit between them. These authorities are now embedded in formal networks which would have for instance the possibility to forum shop, (i.e. to choose the 'best place' to prosecute). The emerging EU legal framework that has been built on mutual recognition and installing new central agencies has added to the problems faced by the defence. But the existing legal regimes designed to protect do not grant 'equality of arms' in the space between jurisdictions: national law usually provides few answers and international law, including the likes of the ECHR or the EU Charter on Fundamental rights, do not offer many solutions, either.

The article therefore argues that an aspiring 'right to a fair trial' or, rather, an entitlement to equality of arms as a general principle of transnational criminal justice that would empower the defendant and his defence to present their case under conditions that do not place the accused at a substantial disadvantage in transnational cases, would be highly beneficial and serve to fill in a missing piece in the puzzle of achieving 'a world wholly governed by law'.

The paper by Kai Ambos and Annika Poschadel, 'Terrorists and Fair Trial: The Right to a Fair Trial for Alleged Terrorists Detained in Guantánamo Bay', deals with the right to a fair trial in situations of armed conflict. Concretely, they inquire whether the right to a fair trial can be restricted with regard to alleged terrorists within the framework of the 'war on terror'. After briefly identifying the relevant sources of this right and its content, possible restrictions are analysed. The paper elaborates, in particular, on international humanitarian law and international human rights law, but also deals with US constitutional law. The authors conclude that the right to a fair trial fully applies to alleged terrorists irrespective of the context of their detention (armed conflict or peace) or the qualification of these terrorists (de facto or unlawful combatants) and thus amounts to a general principle of transnational criminal law.

Lorena Bachmaier's article on 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law' deals with aspects of fairness in transnational evidence gathering. According to her hypothesis, a single European area of freedom, security and justice requires new models of judicial cooperation in criminal matters to be put in place in order to combat efficiently transnational organized criminality. She further argues that this should not be done by disregarding the protection of the individual rights of the suspect and the accused, notably as regards instances of the transnational gathering of evidence, its transfer and its admissibility as evidence against the accused. She identifies general principles and rules that should be applied in European transnational criminal proceedings with regard to witness evidence. Departing from the ECHR's case law she identifies the principles regarding the hearing of a witness who resides in another Member State, the admissibility of pre-trial statements as evidence and the need to foster the use of the live video link for witness questioning.

Radha Ivory's article on 'The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases' discusses whether fair trial rights are general principles of transnational criminal law (TCL). And if so, how do they protect individuals who are affected by transnational proceedings? Posing these questions in the context of international cooperation efforts aimed at 'asset recovery', she illustrates the problems by analyzing whether State Parties to the European Convention on Human Rights (ECHR) are likely to violate the right to a fair trial in Article 6 ECHR when they directly enforce confiscation orders that are issued abroad with respect to the proceeds, objects or instrumentalities of high-value, high-level political corruption offences or substitute assets.

Finally, in her article 'General Principles of Transnationalised Criminal Justice? – Exploratory Reflections' Marianne Wade approaches the topic of the protection of the individual (suspected citizen) in the criminal process utilizing the theoretical framework of social contract theory. Here the thesis is that the transfer of powers to investigate and prosecute to transnationalised contexts undertaken by the relevant executives without seeking to temper this assignment with mechanisms to secure the rights of individuals which

counter-balance these as required by the constitutional traditions of their country can be regarded as being in breach of the social contract.

3.3. The determination of individual guilt when legal systems collide

Another problem is the determination of guilt when legal systems collide. Determining guilt, or rather criminal liability for a specific action committed by a certain person, is intrinsically linked to the particular applicable law. Prominent topics arising in everyday life are for instance linked to the Internet: The posting of certain information or images may be perfectly legal in one country, but illegal in another, either because the content triggers charges of libel or because the publication may qualify as a betrayal of secrets in one jurisdiction but be covered by whistle-blowing laws and thus be justified in others. Since we still lack general rules on how to solve competing jurisdictional claims, it is not always foreseeable for the individual which criminal law, and therefore which rules on the determination of guilt, will apply, or rather will be applied, to a certain action. Ultimately, the determination of the relevant law to prosecute a case is ultimately connected to more general questions such as knowledge of the relevant law as well as the predictability of legal decisions. These general questions are – on a large scale, like in the area of Internet use – quite new for criminal law, but have been a topic in classic international cases, and thus should be discussed in the broader frame of recent movements in public international law and international criminal law.

Stefanie Bock's article with the title 'The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute' turns on the notion of personal guilt as a basic prerequisite for criminal liability under the ICC Statute and thus under international criminal law *stricto sensu*. The idea is to overcome the limits of the respective national perspectives and to concentrate on common values which may serve as guidance in all transnational cases regardless of where and in which jurisdiction they are tried. She argues that it is only natural to look for inspiration from the international criminal law *stricto sensu* (ICL) which 'encompasses all norms that establish, exclude or otherwise regulate responsibility for crimes under international law'. Therefore she points out that ICL cannot just be based on legal tradition alone but must also be consistent with the fundamental legal principles shared by the majority of nations.

3.4. Establishing a rule for transnational double jeopardy

The practical need for general principles arises from the need to deal with conduct which may trigger criminal investigations and prosecutions in various jurisdictions. Practitioners confronted with such cases need directives. Up until now, there have been few rules of general applicability, and judges and lawyers consequently had to take a case-by-case approach in dealing with transnational criminal cases. Only the establishment of binding general principles will secure a coherent handling of transnational criminal cases and will provide formal protection for important safeguards, such as equality before the law and the prevention of arbitrariness. General rules could also guide the selection of the forum where several states exercise their jurisdiction.

We expect the salient point to be jurisdiction. Today, if conduct affects different jurisdictions and triggers different national investigations and prosecutions, as a general rule, each state exercises its own right to investigate, prosecute and possibly to punish. Thus, from the perspective of states, the situation of parallel investigations and prosecutions appears to be a natural consequence of their powers: As long as the right to punish lies with each state, each state may execute this right. However, the individual who faces parallel prosecutions, each of which follows different substantive and procedural laws, may well become the object of an arbitrary sum of state actions, often unaccounted for in quantity and quality. The danger of arbitrariness intensifies when states – as they have done lately – broaden their power to prosecute beyond territorial jurisdiction and further develop their cross-border cooperation and thus may engage in forum shopping. On the other hand, victims may suffer from split prosecutions or a lack of prosecution as a result of negative conflicts of jurisdiction.

States have realized that building up a closer coordination of cross-border crime control requires a coordination structure and they have thus introduced rules addressing the consequences of parallel investigations and prosecutions. These rules have, however, been framed with regard to the interests

of law enforcement. They focus on the national competence to investigate and prosecute.¹⁴ These rules rarely take the individual's interests into account. For example, they do not contemplate the exclusion of evidence gathered through an illegal investigation measure abroad.¹⁵ Nor do these rules devote much attention to defence rights. This one-sided approach becomes more problematic as cross-border cooperation in criminal matters broadens and intensifies.

The last two articles in this special issue focus on the feasibility of and the possible foundation for establishing a prohibition of double jeopardy, which applies in a transnational dimension.

Juliette Lelieur's article "Transnationalising" *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty' starts with the observation that talk of the 'transnational *ne bis in idem* principle' has become commonplace. As a consequence, scholars refer to the principle of 'transnational *ne bis in idem*' in their quest to search for general principles of transnational criminal law. The author argues that it is however doubtful that *ne bis in idem* qualifies as a principle of law. Rather, it should be regarded as a rule of criminal procedure, traditionally based on the principle of *res judicata*. Giving the rule of *ne bis in idem* a transnational dimension therefore requires either transnationalising the principle of *res judicata*, or giving the rule of *ne bis in idem* a new foundation, which could be found in human rights law.

John Vervaele argues in his article '*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?' that when citizens and companies globalize, i.e. increasingly use their rights to free movement, to free settlement, to offer services and goods, etc., then enforcement systems, including the criminal justice system, have to follow. They are obliged to go abroad for the gathering of evidence, for detention and extradition or the surrender of suspects, for the confiscation of assets, for dealing with conflicts of jurisdiction and the choice of allocating criminal investigation and adjudication. Globalizing criminal justice systems does increase the risk of double prosecution and double punishment. Thus the question arises: Do (legal) persons have the (fundamental) right not to be prosecuted or punished twice for the same facts in a globalizing and integrating world? The article analyses whether the (legal) person can derive a right to transnational protection in the area of freedom, security and justice from the different sources of *ne bis in idem* obligations, in domestic law, in public international law (human rights law and mutual legal assistance) and in EU law.

4. The concept of general principles

The articles of this special issue demonstrate the need for general principles in various areas of transnational criminal justice. This triggers the next question: Are there such basic principles which, taken together, might form a comprehensive body of rules for transnational cases, that is, a coherent framework for transnational criminal law that could guarantee transnational criminal justice? Are there general principles which may be used to supplement existing rules guiding investigations and prosecutions of transnational criminal cases? Such general principles should be geared towards achieving justice in all cases of transnational criminal investigation and prosecution.

4.1. The form and notion of general principles – First approaches

According to our understanding, general principles are not negotiated ad hoc on a case-by-case basis but are agreed upon in advance and are meant to apply to all conceivable situations, i.e. they are of a general and abstract nature. Such general principles can be identified in two ways, that is, by induction and by deduction.¹⁶

14 See the Schengen rules on cross-border hot pursuit and observation; Art. 40 and 41 Schengen Implementing Convention.

15 For more details see: S. Gless, 'Grenzüberschreitende Beweissammlung', forthcoming in 2104 *Zeitschrift für die Gesamte Strafrechtswissenschaft*, no. 4.

16 For a historical review of different methods, see: A. Carty, 'Doctrine versus State Practice', in B. Fassbender & A. Peters (eds.), *The History of International Law*, 2012, pp. 972-996.

4.1.1. The inductive-comparative approach

One approach for establishing general principles consists of collecting principles that are recognized in all areas of international criminal law (such as criminal jurisdictional rules, general requirements for criminal liability, rules governing access to judicial review). When establishing customary international law, two components are relevant: practice and *opinio iuris*. In customary law, however, principles are not deduced from rules, but from practice, specifically where rules are lacking. By comparing existing concrete and individual practices, one can establish a generally valid rule, which is, however, subject to a common *opinio iuris*. In using such a method, one must subsequently identify commonalities, patterns etc. using a comparative-inductive method. To provide an example: the commitment to a fair trial and equality of arms as a crucial part thereof. Ultimately, it will be possible to infer general principles from such findings. Or to put it differently: One could add up numbers of comparable rules (which have the same function, even if labelled differently) as well as cases decided on the basis of analogous reasoning and infer general principles from them. Such an approach, however, is only feasible with the reservation that the mere fact of a certain quantity of rules is not yet proof of *opinio iuris*; i.e. it does not in itself prove that the principle in question is general and has a legitimate basis.¹⁷ Such an inductive-comparative approach could possibly be sharpened with regard to establishing the *opinio iuris* by strengthening the weight of specific cases against less important decisions, aligning it more with the process undergone to establish international customary law rules.¹⁸

4.1.2. The teleological-deductive approach

Another approach consists of deducing basic principles *from the objective* of transnational criminal law: namely, the achievement of justice by means of cross-border law enforcement. Justice requires balancing the interests of the individuals involved, notably the human rights of defendants.¹⁹ The teleological-deductive approach may be helpful in identifying existing principles. But that approach could also identify principles that *ought* to be valid for transnational criminal matters. In other words, it combines an identification and creation process based on a normative approach. The ultimate goal is to find 'aspirational' rules *de lege ferenda*, rather than merely reflecting the *lex lata*.²⁰ This method is similar to the 'functional comparison' approach in comparative law, which collects existing laws of various jurisdictions and assesses them using a specific point of comparison, the so-called *tertium comparationis*.²¹ For our purposes, one *tertium comparationis* should be the selection of principles that could govern transnational investigations, prosecutions and adjudication.

4.2. A final word

If law should govern, transnational criminal justice needs a set of rules that comprehensively deal with transnational criminal cases. General Principles can help to build the necessary structure for a transnational criminal law which meets the indispensable requirements of criminal justice, always keeping in mind that criminal proceedings affect the individual as well as the wider society, and that all interests at stake must be balanced whilst adhering to general principles of law. This is why we aspire to have general principles that will eventually be of assistance in developing a law to deal with individual interests in a future transnational criminal justice. ¶

17 See for instance J.-M. Henckaerts, 'Study on customary international humanitarian law. A contribution to the understanding and respect for the rule of law in armed conflict', 2005 *International Review of the Red Cross* 87, p. 175, pp. 178 et seq. with further references to ICJ judgments as well as the ICRC Study on customary international humanitarian law: a contribution to the understanding of and respect for the rule of law in armed conflict.

18 A. Carty, 'Doctrin versus State Practice', in B. Fassbender & A. Peters (eds.), *The History of International Law*, 2012, pp. 979-984.

19 See for instance: L. May, *Global Justice and due process*, 2011.

20 See also: L. May, *Global Justice and due process*, 2011, pp. 76 et seq.

21 K. Zweigert & K. Siehr, 'Jhering's Influence on the Development of Comparative Legal Method', 1971 *The American Journal of Comparative Law* 19, no. 2, pp. 219 et seq.