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The Transnationalisation of
Criminal Law in the Nineteenth
and Twentieth Century. Political
Crime, Police Cooperation, Security
Regimes and Normative Orders

Edited by Karl Härter,
Tina Hannappel and Jean Conrad Tyrichter



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The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century: Political Crime, Police Cooperation, Security Regimes and Normative Orders – an Introduction

Karl Härter

The chapters in this volume are resulting from the cooperation between the research project ‘The Formation of Transnational Criminal Law Regimes in the Eighteenth and Nineteenth Century’ (Max Planck Institute for European Legal History and Cluster of Excellence ‘The Formation of Normative Orders’, Frankfurt) and its various partners, in particular the projects ‘Securing Europe, fighting its enemies. The Making of a security culture in Europe and beyond, 1815–1914’ (Beatrice de Graaf, Utrecht University) and ‘The Transformation of Normative Orders: The Transnationalization of Rule and Resistance’ (Nicole Deitelhoff and Christopher Daase, Goethe University Frankfurt). The project approaches the topic of transnational, plural normative orders from the angle of the (legal) history of crime, criminal law and criminal justice, focusing on the specific field of political crime and security in a transnational setting. The research is not directed towards a historical phenomenology of political violence, but primarily focuses on the legal responses and the security policies, conceptualised as transnational ‘criminal law regimes’.¹

¹ KARL HÄRTER, Legal Responses to Violent Political Crimes in 19th Century Central Europe, in: *Vom Majestätsverbrechen zum Terrorismus: Politische Kriminalität, Recht, Justiz und Polizei zwischen Früher Neuzeit und 20. Jahrhundert*, ed. by KARL HÄRTER and BEATRICE DE GRAAF in Zusammenarbeit mit Gerhard Sälter und Eva Wiebel, Frankfurt am Main 2012, pp. 161–178; KARL HÄRTER, Die Formierung transnationaler Strafrechtsregime: Auslieferung, Asyl und grenzübergreifende Kriminalität im Übergang von gemeinem Recht zum nationalstaatlichen Strafrecht, in: *Rechtsgeschichte* 18 (2011), pp. 36–65; *Security and Conspiracy in History, 16th to 21st Century*, ed. by CORNEL ZWIERLEIN and

Recent research has characterised the current state of transnational criminal law as unsystematic and impaired by contradictions between the needs of transboundary crime control and transnational cooperation in criminal matters on the one hand, and sovereignty, territorial integrity and civil liberties on the other hand. Most authors agree that the existing norms, procedures and practices of transnational criminal law do not form a coherent normative or even legal order.² As a fairly new juridical concept, ‘transnational criminal law’ lacks a universally accepted definition – in particular regarding its historical evolution and the distinction from international criminal law.³ The latter is commonly conceptualised as the criminal law and international statutes that the international community of states has agreed upon and that is applied in legally regulated judicial procedures by specific international tribunals; insofar it is limited to war crimes, crimes against humanity and genocide and the competent tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC).⁴ The history of international criminal law is generally traced back to the war crime trials of Nuremberg and Tokyo after World War II and the preceding legal discourses.⁵ In comparison,

BEATRICE DE GRAAF, *Historical Social Research* 38 (2013); CHRISTOPHER DAASE, Politische und rechtliche Konsequenzen der erweiterten Sicherheit, in: *Recht und Politik Globaler Sicherheit*, ed. by ANDREAS FISCHER-LESCANO and PETER MAYER, Frankfurt 2013, pp. 11–42; BEATRICE DE GRAAF, IDO DE HAAN and BRIAN VICK (eds.), *Securing Europe after Napoleon. 1815 and the New European Security Culture*, Cambridge (forthcoming).

² For a general overview see NEIL BOISTER and ROBERT J. CURRIE (eds.), *Routledge Handbook of Transnational Criminal Law*, London/New York 2015; NEIL BOISTER, *An Introduction to Transnational Criminal Law*, Oxford 2012.

³ NEIL BOISTER, The concept and nature of transnational criminal law, in: BOISTER/CURRIE, *Handbook* (n. 2), pp. 11–26.

⁴ KAI AMBOS, *Treatise on International Criminal Law. Volume I: Foundations and General Part*, Oxford 2013; CHRISTINE SCHWÖBEL (ed.), *Critical approaches to international criminal law. An introduction*, Oxford 2014; PHILIPP KASTNER (ed.), *International Criminal Law in Context*, London 2017.

⁵ GERRY SIMPSON, Linear law. The history of international criminal law, in: SCHWÖBEL, *Critical approaches* (n. 4), pp. 159–179; MORTEN BERGSMO, CHEAH WUI LING and YI PING (eds.), *Historical origins of international criminal law*, Brussels 2014; CENAP ÇAKMAK, *A Brief History of International Criminal Law and International Criminal Court*, New York 2017.

transnational criminal law forms a much broader “system that attempts to suppress harmful activity that crosses borders or threatens to do so”.⁶ It comprises various types of cross-border crime, transnationally agreed norms as well as national or local criminal law and a variety of transboundary procedures and practices that range from informal coordination to formal cooperation of more than one state “against harmful activity that affects a given state but occurs in part or whole beyond the state’s territory”.⁷ Thus, a concept of transnational criminal law that also works for historical analyses should comprise as essential elements:

- Criminal behaviour or activities which have a cross-border dimension, a foreign connection or an actual or potential transboundary effect and are criminalised in the law of at least one of the concerned states/jurisdictions.
- Transnational criminal law activities that involve more than one concerned state/jurisdiction and manifest in cross-border procedures and practises or have a transboundary element or impact.
- Norms and principles of transnational criminal law which are applied or agreed by two or more states/jurisdictions to regulate the criminalisation of cross-border crime as well as the various transboundary procedures and practises.⁸

Considering these elements, it seems reasonable to conceptualise transnational criminal law as a legal regime comprising a variety of public/governmental and non-state actors, experts and practitioners, extending to transnational as well as national levels and characterised by various judicial and administrative procedures, legal pluralism, multinormativity, legal collisions and conflicts of jurisdiction, and, most notably, by processes of transnationalisation.⁹ The latter refers to the research concept of ‘transnational history’ which – despite the

⁶ NEIL BOISTER and ROBERT J. CURRIE, Introduction, in: BOISTER/CURRIE, *Handbook* (n. 2), pp. 1–7, cit. p. 1.

⁷ BOISTER/CURRIE, Introduction (n. 6), p. 2.

⁸ BOISTER, concept and nature (n. 3), p. 13.

⁹ ARNDT SINN (ed.) *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität. Ein Rechtsvergleich zum Internationalen Strafrecht / Conflicts of jurisdiction in cross-border crime situations. A comparative law study on international criminal law*, Osnabrück 2012; THOMAS DUVE, Was ist „Multinormativität“? – Einführende Bemerkungen, in: *Rechtsgeschichte* 25 (2017), pp. 88–101.

lack of a common historical definition of ‘transnational’ – intends to analyse transfer processes and transboundary interactions not only of ‘nation states’ but also non-state actors. Although the concept aims to overcome national and state-centred interpretations, it is mainly used to analyse historical developments which commenced in the Age of Enlightenment and Revolution (the *Sattelzeit*: 1750–1850) and, thus, are associated with the formation of the nation state and ‘national’ legal systems based on a monopoly on power and legitimate force. In this regard, the transnationalisation of criminal law and the resulting structural problems can be traced back to the shift from the universal (and thus ‘international’) European *ius commune* to national criminal justice systems after the French Revolution.¹⁰ Cross-border crimes, transboundary prosecution and legal principles of transnational criminal law were already shaped in the early modern period and influenced the development of transnational criminal law regimes in the ‘long nineteenth century’ between 1789 and World War I.¹¹ However, only a few comprehensive studies deal with the history of transnational criminal law on the whole, and most often their chronological range is limited to developments since the middle of the nineteenth century with the focus on contemporary issues.¹² With regard to thematic areas, historical research has produced a rich number of more specific studies dealing with various manifestations of ‘inter- and transnational crime’, the norms and procedures of

¹⁰ GRAF-PETER CALLIESS, Eine Einleitung, in: *Transnationales Recht – Stand und Perspektiven*, ed. by GRAF-PETER CALLIESS, Tübingen 2014, pp. 1–36, here p. 11; FLORIAN JEßBERGER, Transnationales Strafrecht, Internationales Strafrecht, Transnationale Strafrechtsgeltung – eine Orientierung, in: CALLIESS, *Transnationales Recht*, pp. 527–538. On the concept of ‘transnational history’ see HANS-ULRICH WEHLER, Transnationale Geschichte – der neue Königsweg historischer Forschung, in: *Transnationale Geschichte. Themen, Tendenzen und Theorien*, ed. by GUNILLA BUDDE, SEBASTIAN CONRAD and OLIVER JANZ, Göttingen 2006, pp. 161–174, here p. 173; JÜRGEN OSTERHAMMEL, Transnationale Gesellschaftsgeschichte: Erweiterung oder Alternative?, in: *Geschichte und Gesellschaft* 27 (2001), pp. 464–479.

¹¹ Cf. KARL HÄRTER, Security and Cross-Border Political Crime. The Formation of Transnational Security Regimes in 18th and 19th Century Europe, in: *Historical Research / Historische Sozialforschung* 38 / 1 (2013), pp. 96–106.

¹² Cf. for example FLORIAN JEßBERGER, *Der transnationale Geltungsbereich des deutschen Strafrechts. Grundlagen und Grenzen der Geltung des deutschen Strafrechts für Taten mit Auslandsberührung*, Tübingen 2011.

mutual assistance, extradition and asylum, transnational police cooperation and international discourses and organisations. Based on this state of research, the chapters to this volume provide exemplary case studies to these essential areas of transnational criminal law:

Jean Conrad Tyrichter scrutinises the development of the transnational criminal law regime of the German Confederation (1815–1866), a supranational association with the prime purpose to maintain security. It responded to cross-border political dissidence with a broad variety of laws, treaties, acts, juridical-political discourses and administrative practices that gradually formed a normative-federal framework but no coherent normative order of criminal law. Political crimes and the ‘international fight against crime’ constitute the angle from which Diego Nunes observes the development of the crucial norms and principles of extradition in transnational treaties and judicial discourses between 1789 and 1933. They initially privileged political offenders/refugees but used the narrative of ‘international anarchism and crime’ to create exceptions from the exception through new legal principles. Tina Hannappel explores the ambiguous function of extradition and expulsion as instruments of transnational security regimes that responded to the cross-border threat of anarchist violence in the late nineteenth century. She demonstrates that in the case of political subversives and anarchists expulsion was increasingly used as a form of ‘disguised extradition’, whereas formal extradition was based on the depoliticisation of political offenders. Taking a critical approach, Holger Marcks deconstructs the threat of ‘international anarchist terrorism’ as a justification narrative that was used to generally blame anarchist ideology for politically motivated assassinations, to criminalise political dissent and to shape the norms and practices of the respective transnational criminal law regimes. This is validated in the study of Wouter Klem who demonstrates through the example of the Dutch police how transnational police cooperation intensified against the backdrop of the anarchist narrative and developed as an important area of an emerging transnational security culture/regime. The chapter of Jens Jäger is widening the perspectives on the transnationalisation of police cooperation between 1880 and 1923. This was also triggered by the narrative of the ‘international criminals’ and the concomitant international discourse and led to a standardisation of police techni-

ques and, finally, to the establishment of the first international police agency in 1923. The importance of international discourses for the transnationalisation of criminal law is further explored by Richard Bach Jensen who analyses the legal concept of the social crime. It developed since the end of the nineteenth century in response to the transboundary danger of anarchism that was said to threaten the order and security of every nation. However, the transnationalisation of criminal law did not only result in an increase of laws, narratives, practices and agencies responding to threats of various cross-border crimes, but also in discourses that aimed to limit criminal prosecution as Sylvia Kesper-Biermann demonstrates for the transnational anti-torture regime. It emerged at the turn of the eighteenth century, favoured human security over international security, used human dignity and emotions as justification narratives, and, finally, manifested in international law with the United Nations Convention Against Torture.

Although these case studies cover different empirical research topics, they are interconnected through the use of general concepts of ‘transnational regimes’, ‘security regimes/cultures’, ‘normative orders’, and ‘justification narratives’ which are fruitful analytical tools to observe the transnationalisation of criminal law in the nineteenth and twentieth centuries, in particular regarding: the concepts/narratives of transnational crime, the norms, principles, procedures and practices of transnational criminal law, and transnational discourses and organisations.¹³

¹³ For a general survey of these concepts, see ISABELLA LÖHR, *Transnationale Geschichte und internationale Rechtsregime*, in: *Connections. A Journal for Historians and Area Specialists*, 07.07.2005, online: <http://www.connections.clioonline.net/article/id/artikel-633%20accessed%20%3e> (access June 20 2018); GUNTHER TEUBNER, *Verfassungen ohne Staat? Zur Konstitutionalisierung transnationaler Regimes*, in: *Recht ohne Staat: Zur Normativität nichtstaatlicher Rechtsetzung*, ed. by KLAUS GÜNTHER and STEFAN KADELBACH, Frankfurt am Main 2011, pp. 49–100; REINHARD WESEL, *Internationale Regime und Organisationen*, Konstanz 2012; CHRISTOPHER DAASE, PHILIPP OFFERMANN and VALENTIN RAUER (eds.), *Sicherheitskultur. Soziale und politische Praktiken der Gefahrenabwehr*, Frankfurt am Main 2012; ZWIERLEIN/DE GRAAF, *Security and Conspiracy in History* (n. 1); ANDREAS FAHRMEIR (ed.), *Rechtfertigungsnarrative. Zur Begründung normativer Ordnung durch Erzählungen*, Frankfurt am Main/New York 2013.

Transnational crime

'International crime', 'transnational organised crime' and various forms of cross-border crime as well as the 'transnational governance of violence and crime' are the subjects of several relevant monographs and collected volumes that most often focus on current developments.¹⁴ In historical perspective, they discuss the 'invention' of the respective concepts and labels of internationally mobile and organised criminals in the nineteenth century or the various manifestations, as, for instance, piracy, smuggling, drug and human trafficking and other borderline crimes, political violence, terrorism and the like.¹⁵ Although this covers many historical manifestations of cross-border crime, contemporary developments in 'international crime' clearly dominate and a comprehensive legal-historical concept of 'transnational crime' is still missing. As briefly outlined, a broad variety of deviant conduct that involves a transboundary dimension could be labelled as 'transnational crime', from illegal border crossing, migration and abduction, over various forms of smuggling and illegal trafficking (drugs, arms, slaves, women) to desertion, treason, conspiracy and assassination. However, as the chapters to this volume demonstrate, not only cross-border criminal activity constitutes a transnational crime, also criminals or criminal groups were perceived as a transboundary criminal threat, committing crimes in foreign countries, escaping to other states/jurisdictions and forming an international milieu or network that operated transnationally.¹⁶ The

¹⁴ For an overview on 'international crime' see BENEDICT S. ALPER and JERRY F. BOREN, *Crime: International agenda. Concern and action in the prevention of crime and treatment of offenders, 1846–1972*, Lexington, Mass. 1972; MANGAI NATARAJAN (ed.), *International Crime and Justice*, Cambridge 2011; PHILIP L. REICHEL and JAY S. ALBANESE (eds.), *The Handbook of Transnational Crime and Justice*, 2. ed. Los Angeles et al. 2014; IRYNA MARCHUK, *The Fundamental Concept of Crime in International Criminal Law. A Comparative Law Analysis*, Berlin et al. 2014; GERBEN BRUINSMAN (ed.), *Histories of Transnational Crime*, New York 2015.

¹⁵ PAUL KNEPPER, *The Invention of International Crime. A Global Issue in the Making, 1881–1914*, London 2010; PAUL KNEPPER, Future Agendas for the Study of International Crime, in: *Crime, Histoire & Sociétés / Crime, History & Societies* (2017), vol. 21 n. 2, pp. 135–142; BRADLEY MILLER, *Borderline crime. Fugitive criminals and the challenge of the border, 1819–1914*, Toronto 2016.

¹⁶ See, for example, ADAM EDWARDS and PETER GILL (eds.), *Transnational Organised Crime. Perspectives on global security*, London/New York 2003; REGINE

two dimensions of transnational crime – cross-border crime and international criminal – influenced the narratives and practices of transnational criminal law activities, in particular concerning police operations and extradition.

From this angle, political offences with a transboundary dimension obtained a specific role for the formation of transnational regimes, in particular with regard to policing, extradition and asylum – and thus constitute an important topic in this volume. Although the actual number of political crimes might have been lower than the number of other cross-border crimes, research has occasionally studied political offences in a transnational perspective, albeit with a focus on the phenomenology of political violence, anarchism and ‘terrorism’ and hardly analysing in depth the legal interdependencies between political crime and transnational criminal law.¹⁷ Hence, the chapters to this volume conceptualise ‘political crime’ not only from the angle of national penal law, but in the framework of transnational criminal law regimes as a specific security threat, label and narrative, constructed, shaped or used in transnational discourses, norms and practices. Since the French Revolution, the transnational activities of oppositional groups rapidly increased and were perceived or labelled as criminal, seditious and dissident or as legitimate protest and resistance, depending on the respective political system. Hence, political dissent and violence constituted a specific and important field of transboundary crime that generated specific transnational responses, practices and legal principles that concern political asylum, extradition or cross-border police cooperation, which the chapters of Jean Conrad Tyrichter, Diego Nunes, Tina Hannappel, Wouter Klem and Richard Bach Jensen observe with regard to the formation of transnational criminal law regimes and international legal discourses. As a result, they demonstrate that the ambiguity of political crime impedes a global legal definition of transnational

SCHÖNENBERG (ed.), *Transnational Organized Crime. Analyses of a Global Challenge to Democracy*, Bielefeld 2013; REICHEL/ALBANESE, *Handbook of Transnational Crime and Justice* (n. 14).

¹⁷ See BARTON L. INGRAHAM, *Political Crime in Europe. A Comparative Study of France, Germany, and England*, Berkeley et al. 1979; JEFFREY IAN ROSS, *The dynamics of political crime*, Thousand Oaks, Calif. 2003; JEFFREY IAN ROSS, *An Introduction to Political Crime*, Bristol 2012.

crime and underline the need to comprehend ‘transnational crime’ as a historical discursive concept that was also based on the contemporary perception of security threats such as ‘conspiracy’ and ‘anarchism’.¹⁸ In addition, the contribution of Holger Marks thoroughly deconstructs ‘anarchism and assassination’ as a justification narrative which was shaped by contemporary juridical-political security discourses and influenced the perception of transboundary political violence and, therefore, the conceptualisation of transnational criminal law.

As a result, the concept of transnational crime cannot be limited to criminal conduct but has to include the historically variable labels and concepts of the transnational operating criminals, groups or networks. Since the early modern period, specific groups or ‘criminal milieus’ were perceived and labelled to operate in a cross-border mode, ranging from vagrants, mobile robber gangs and *internationale Gauner* (international crooks) to organised criminal groups and terrorist networks.¹⁹ The ‘transnational nature’ of criminals and the related labels, narratives and images are essential elements in the historical processes of the transnationalisation of criminal law. This particularly concerns political dissent with a transboundary dimension to which national criminal law systems could respond very differently. In the most extreme case it could be criminalised as a serious political crime or ‘terrorism’, whereas a neighbouring state could regard these activities as a legitimate opposition or protest and

¹⁸ See, for instance, ZWIERLEIN/DE GRAAF, *Security and Conspiracy* (n. 1); RICHARD BACH JENSEN, The International Anti-Anarchist Conference of 1898 and the Origins of Interpol, in: *Journal of Contemporary History* 16 (1981), pp. 323–347; RICHARD BACH JENSEN, The International Campaign Against Anarchist Terrorism, 1880–1930s, in: *Terrorism and Political Violence* 21 (2009), pp. 89–109; RICHARD BACH JENSEN, *The Battle against Anarchist Terrorism. An International History, 1878–1934*, Cambridge 2014.

¹⁹ KARL HÄRTER, Cultural diversity, deviance, public law and criminal justice in the Holy Roman Empire of the German Nation, in: *Law Addressing Diversity. Pre-Modern Europe and India in Comparison (12th to 18th Centuries)*, ed. by THOMAS ERTL and GIJS KRUIJZER, Berlin/Boston 2017, pp. 56–94; KARL HÄRTER, Grenzübergreifende Kriminalität von Vaganten und Räuberbanden, interterritoriale Strafverfolgung und Landessicherheit im Alten Reich (1648–1806), in: *Historische Kriminalitätsforschung in landesgeschichtlicher Perspektive. Fallstudien aus Bayern und seinen Nachbarländern 1500–1800 [...]*, ed. by WOLFGANG WÜST unter Mitarbeit von Martina Heller, Erlangen 2017, pp. 19–46.

grant political asylum for refugees who were prosecuted as criminals in their native country.²⁰

The absence of a generally agreed transnational criminal law and the differing national laws not only produced collisions or impeded transnational activities, but also generated a demand for a more concurrent transnational definition of crime. This was achieved through an increasing number of extradition treaties which followed the principles of reciprocity, speciality and identical norms, as outlined in the chapters of Diego Nunes and Tina Hannappel. In the long run, this facilitated a more uniform transnationalisation of criminal law and culminated in international legal discourses that strived to conceptualise specific international crimes such as the 'social crime'. Richard Bach Jensen scrutinises the development of the latter and shows how the 'social crime' evolved as a legal response to transboundary political violence, but was superseded by 'international terrorism' as the most dangerous international crime (or the narrative thereof). However, although the basic idea of transboundary political violence as a common threat to all societies and states still influences transnational crime control and policing, up to 9/11 it was not possible to establish an internationally accepted legal concept of 'international crime' that comprises political crimes or 'terrorism'.²¹

²⁰ See for contemporary developments: CHRISTOPHER DAASE and NICOLE DEITELHOFF, Reconstructing Global Rule by Analyzing Resistance, *Internationale Dissidenz Working Paper 1/2014*, online: <http://dissidenz.net/wp-content/uploads/2013/03/wp1-2014-daase-deitelhoff-en.pdf> (access June 20 2018); JANUSZ BIENE, DANIEL KAISER and HOLGER MARCKS, Widerstand im Spiegel von Herrschaft. Eine relationale Typologie terroristischer Gewalt, *Internationale Dissidenz Working Paper 2/2014*, online: http://dissidenz.net/wp-content/uploads/2013/03/wp2-2014-biene-kaiser-marcks_korr.pdf (access June 20 2018). For the historical perspective see KARL HÄRTER, Asyl, Auslieferung und politisches Verbrechen in Europa während der „Sattelzeit“: Modernität und Kontinuität im Strafrechtssystem, in: *Dimensionen der Moderne. Festschrift für Christof Dipper*, ed. by UTE SCHNEIDER and LUTZ RAPHAEL, Frankfurt am Main etc. 2008, pp. 481–502; DANIEL BRÜCKENHAUS, *Policing transnational protest. Liberal imperialism and the surveillance of anticolonialists in Europe, 1905–1945*, New York 2017.

²¹ On the current discussion of 'terrorism' as 'international crime' see, for instance, GERBEN BRUINSMA, Criminology and Transnational Crime, in: BRUINSMA, *Histories of Transnational Crime* (n. 14), pp. 1–40, here pp. 34 s.; VINCENZO RUGGIERO, Political Violence: A Criminological Analysis, in: NATARAJAN, *International Crime and Justice* (n. 14), pp. 26–32; GRAEME R.