JURISDICTION AND STATE RESPONSIBILITY♣

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I. INTRODUCTION

There are a number of tensions in the current international legal order which reflect competing interests or paradigms. On the one hand, there is the classical conception of international law, in which the State is the exclusive actor and the international legal regime is deployed principally in defence of its interests (of present relevance, its interests in territorial sovereignty and non-intervention) and those of peaceful co-existence. On the other, developments in international law evidence a significantly more pluralistic and 'human-centric' approach to legal regulation – with increasing regard for the effective enforcement of human rights, and the protection of human security (most evident, for present purposes, in the development of criminal law enforcement regimes and their focus on 'no impunity'). But even within these 'paradigms,' there are tensions – for instance the drive for 'no impunity' in respect of a particular class of trans-national crime is necessarily qualified by an obligation to respect human rights.

These competing paradigms are, in some respects, reflected in the substantive law of jurisdiction (particularly criminal jurisdiction, so closely associated with conceptions of sovereignty), or might help to navigate between possible approaches to jurisdiction where positive law does not settle the matter. These paradigms may also have implications for the way in which the secondary rules of State responsibility do or should apply to internationally wrongful acts in respect of jurisdiction, and in turn the practice of State responsibility may support or provide evidence for the governing paradigm. While modern treatments of international law do not often address jurisdiction through the prism of State responsibility, classical texts (like F.A. Mann's General Course on the subject at the Hague Academy[1]) lead with such a discussion, and the Permanent Court of International Justice (PCIJ) was twice seized of disputes in respect of responsibility flowing from an exercise of jurisdiction.[2] Going back to basics, this chapter uses State responsibility as a useful prism through which to explore the law of criminal jurisdiction, in particular as regards the practice of State responsibility for excessive jurisdiction and the implications of the competing paradigms of international law in respect thereof.

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[1] Mann, 'The Doctrine of Jurisdiction in International Law,' (1964) 111 *Collected Courses of the Hague Academy of International Law* 1.

[2] *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)* (1924) PCIJ Series B, No. 4, and more (in)famously, *Case of the SS "Lotus" (France v. Turkey) (1927)* PCIJ Ser A, No 10.

II. PRESCRIPTIVE JURISDICTION

A. The Substantive Law of Prescriptive Jurisdiction

The international law of prescriptive jurisdiction can be understood as tracking or reflecting certain conceptions of sovereignty.[3] For instance, a positivist conception of sovereignty – whereby States have unrestricted freedom subject only to limitations which they have accepted (whether individually or collectively through a process of customary international law formation) – is reflected in certain aspects of the PCIJ's decision in the *Lotus Case*. In that case, the Court infamously held that '[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws […] to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'.[4]

On another view, sovereignty is a legal construct, the contours of which are defined by law. Ian Brownlie, for instance, defined sovereignty as 'the legal competence which states have in general'.[5] This conception of sovereignty obviously sounds in the law of jurisdiction – most notably the view that prescriptive jurisdiction is limited to heads of jurisdiction defined by law (for instance territoriality and nationality).[6]

From a purely theoretical standpoint, modern trends – including the forces of globalisation (as regards the movement of people, goods and criminality across borders), the increasing importance of human rights (for instance the principle of legality), and the ever-shrinking tolerance for impunity in respect of a certain class of crime – pull in both of these opposing 'jurisdictional' directions. One direction, in keeping with the presumptive freedom of *Lotus*, requires a broad approach to permissible exercises of prescriptive jurisdiction – giving States the regulatory space within which to (i) fully protect their interests and the interests of persons 'subject to their jurisdiction',[7] both of which are increasingly affected from abroad, and (ii) to act in defence of the interests of the international community as a whole (of particular relevance, in defence of the 'no impunity' imperative). The other direction, accounting for the increasing overlap in jurisdictional interests born of globalisation, and with a view to avoiding conflict on the one hand, and giving effect to the principle of legality on the other (in that individuals should not be subject to domestic criminal processes that they could not have foreseen), restricts the exercise of prescriptive jurisdiction to clearly identified and identifiable

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[3] See Mills, 'Rethinking Jurisdiction in International Law', (2014) 84 BYIL 187.

[4] *Lotus Case* (n 2), 18-19. While commentators have long held that this statement 'cannot claim to be good law' (Mann, 'Doctrine of Jurisdiction' (n 1), 35), Crawford suggests the statement has an 'uncertain status.' Crawford, *Brownlie's International Law* (8th ed., OUP 2012), 477. See also Guilfoyle, 'SS Lotus (France v Turkey)' *in Landmark Cases in International Law* (Hart Publishing 2017) for an alternative reading of the decision (suggesting that the *Lotus* judgment never in fact relied on the 'presumptive freedom').

[5] Brownlie, *Principles of Public International Law* (7th edn, OUP 2008), 291.

[6] Mills (n 3).

[7] 'Jurisdiction' is here used in the 'human rights obligation triggering' sense, in that it defines the scope of application of human rights treaties. For example, Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS 222, reads: The High Contracting Parties shall secure to everyone within their *jurisdiction* the rights and freedoms defined in Section I of this Convention (emphasis added).

heads of jurisdiction. Sections B and C below explore the pull and implications of these different 'jurisdictional' directions through the prism of State responsibility as applied to a case study involving contested assertions of universal jurisdiction.

B. Case Study: Universal Jurisdiction in the Terrorism Context

There are more than a dozen criminal law enforcement treaties in respect of terrorism, all of which impose jurisdictional *obligations* on States – which is to say that State parties are bound, by international treaty law, to exercise their prescriptive jurisdiction in enumerated ways.[8] In particular, these terrorism suppression conventions oblige States to criminalize (and appropriately penalize) the crimes they address, principally on the basis of customary heads of jurisdiction (like territoriality and nationality), and permit States to exercise prescriptive jurisdiction on the basis of passive personality.[9] The obligation to criminalize on the basis of nationality is, in part, to counteract the impunity that might otherwise arise from State constitutional or legislative protections which prohibit the extradition of nationals. As to passive personality, the permission granted responds to the general sense that this basis of jurisdiction is "more strongly contested than any other type of competence."[10] These criminal law enforcement conventions simply restate customary international law in respect of jurisdiction, but do so in the form of an *obligation* to exercise bases of jurisdiction which were otherwise already recognised and available as a matter of right and discretion.

These terrorism suppression conventions also oblige States to exercise *universal jurisdiction* in respect of terrorist crimes which are not otherwise considered to be subject to universal jurisdiction under customary international law.[11] On one view – which rejects the presumptive freedom of *Lotus*; strictly limits permissible exercises of prescriptive jurisdiction to accepted heads; and adopts a North Sea Continental Shelf approach to the prospects of treaty rights and obligations morphing into customary international law[12] – the terrorism suppression

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[8] See http://www.un.org/en/counterterrorism/legal-instruments.shtml for a full list of what will be referred to throughout this Chapter as 'terrorism suppression conventions.'

[9] See for example Article 5(1)(d) International Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS 205; Article 6(2)(a) International Convention on the Suppression of Terrorist Bombings, 15 December 1997, UN Doc. A/RES/52/164 (1997); Article 9(2)(a) International Convention for the Suppression of Acts of Nuclear Terrorism, UN Doc. A/59/766 (2005).

[10] Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, (1935) 29 AJIL (Supp) 623, Article 16, 579. See also *Lotus Case* (n2), diss op Loder 36, diss op Finlay 55–8, diss op Nyholm 62, and diss op Moore 91–3. As the terrorism suppression conventions all address serious crimes, the permission in respect of passive personality prescriptive jurisdiction is not creative of the right, but simply addresses any doubt as to its existence as a matter of customary international law (insofar as this basis of jurisdiction is restricted to 'serious offences' – see ICJ, *Arrest Warrant (DRC v Belgium)*, [2002] ICJ Rep 3, Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para 47; O'Keefe, *International Criminal* Law (OUP, 2015), §8.21; Ryngaert, *Jurisdiction in International Law* (2nd ed, OUP 2015), 112).

[11] See Trapp, *State Responsibility for International Terrorism* (OUP 2011), §3.2.

[12] *North Sea Continental Shelf (Germany v Denmark*), Merits, Judgment, (1969) ICJ Rep 3. In particular, the Court held, in respect of State parties to a treaty, that they are 'presumably, so far as they [are] concerned, actually acting or potentially acting in the application of the Convention. From their action no inference could be legitimately drawn as to the existence of a rule of customary international law […]'. Para 76.

conventions bilateralize universal jurisdiction.[13] An exercise of treaty based (and bilateralized) universal jurisdiction would only be permissible *as between State parties* to a particular criminal law enforcement treaty, which is to say as against the nationals of State parties or in respect of crimes committed in the territory of State parties, but would otherwise be impermissible.

On the other hand, taking a more liberal view of the likelihood that treaty rights and obligations might pass into custom, and accounting for broader developments in international law (i.e. in respect of 'no impunity'), there is support for the argument that the *entitlement* to exercise universal jurisdiction in respect of terrorism is no longer restricted to purely *inter partes* criminal law enforcement frameworks. This is even the case if the *obligation* to exercise such jurisdiction is limited to State parties to the terrorism suppression conventions.

Conceiving of universal jurisdiction as bilateralized in such cases reflects in some respects the interests of States in non-intervention (vis-à-vis their nationals or crimes committed in their territories) and potentially in principle of legality concerns (insofar as individuals should not be subject to criminal processes which they could not have known they might be subject to). Alternatively, any development of treaty based universal jurisdiction into a universally applicable right would reflect the interests of the international community as a whole, in support of the increasing imperative of 'no impunity' in respect of a class of serious crimes.

A study of the practice of all States in respect of exercising universal jurisdiction over terrorist crimes subject to a criminal law enforcement treaty, when they are not party to the treaty, is beyond the scope of this short chapter. There is, however, some practice in respect of invoking responsibility for the exercise of prescriptive jurisdiction, explored below, which supports the second approach.

C. State Responsibility for Excessive Prescriptive Jurisdiction

(i) Injury

Unlike in respect of adjudicative or enforcement jurisdiction (discussed in Section III below), a mere exercise of prescriptive jurisdiction (however excessive) can be a delict without precisely identifiable injury. And there is some debate over the extent to which an excessive exercise of prescriptive jurisdiction in the criminal sphere needs to be 'actualized' (or result in injury) in order to give rise to State responsibility.[14] While damage or specific injury is not a pre-requisite for State responsibility as a matter of the general secondary rules of international

[13] See *United States v Ali*, 885 F.Supp.2d 17 (2012).

[14] States have certainly invoked responsibility for the mere (unactualized) exercise of prescriptive jurisdiction in the civil context – particularly in the sphere of economic law. The basis for such invocations of responsibility is the implicit threat of enforcement and the 'chilling effect' any such legislation may have on the business activities of multi-national corporations (for instance). This is a somewhat amorphous, yet nevertheless perceived, injury caused by the *possibility* of actualization. See Ryngaert (n 10), 40; O'Keefe, 'Domestic Courts as Agents of Development of the International Law of Jurisdiction' (2013) 16 LJIL 541, 552.

law, some commentators nevertheless assert that wrongfulness in the context of prescriptive jurisdiction hangs on protest by an 'injured State'.[15]

Indeed, in terms of practice, States very rarely (if ever) protest or invoke responsibility for a mere exercise of criminal prescriptive jurisdiction, even if that exercise of jurisdiction is not based on an accepted head of jurisdiction. Instead, it is the exercise of adjudicative or enforcement jurisdiction – predicated on an excessive exercise of prescriptive jurisdiction – which catalyzes invocations of responsibility.[16] Given that the exercise of adjudicative or enforcement jurisdiction in the jurisdiction exercising State's own territory will in itself be a lawful exercise of jurisdiction (barring issues related to abduction of the accused, as discussed in Section III below), this suggests that actualization (or injury) is indeed a necessary element of wrongfulness in respect of the predicate exercise of prescriptive jurisdiction in the criminal sphere.

In respect of this case study on prescriptive jurisdiction, and admitting that the State practice is limited, it is notable that States that are not party to relevant terrorism suppression conventions have not protested the prosecution of their nationals on the basis of universal jurisdiction by State parties thereto.[17] Accepting that such a prosecution actualizes the exercise of prescriptive jurisdiction, this practice of non-invocation might suggest that States do not in fact consider the underlying exercise of universal jurisdiction to be wrongful – supporting in some respects the view that the *obligation* to exercise universal jurisdiction imposed by certain treaty frameworks has morphed into a more generally applicable *entitlement*.[18] This is not, however, the only possible interpretation of this practice – at least not in the context of offences covered by terrorism suppression conventions and UN Security Council resolutions. To the extent that UNSCR 1373 (2001) is interpreted as at least permitting States to exercise universal jurisdiction over 'terrorist' offences,[19] and an authorisation is understood to engage Article 103

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[15] See e.g. Ryngaert (n 10), 128, in respect of universal jurisdiction; Colangelo, 'The Legal Limits of Universal Jurisdiction' (2006) 47 VJIL 149, 184. Wrongfulness, however, should not be understood as predicated on protest, in that a breach of an international obligation is objectively determined, and responsibility arises by operation of the law. See Commentary to Article 43, [2], Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the work of its fifty-third session, UN Doc. A/56/10 (2001), 31 (ARSIWA & Commentaries). These references to protest may either be understood as suggesting that injury or actualization is a necessary element of an internationally wrongful act in breach of rules governing prescriptive jurisdiction (with the absence of protest amounting to evidence in respect of *opinio juris* on the precise content of the underlying primary rule), or that the absence of protest amounts to acquiescence and a waiver of the right to invoke responsibility (see n 67). Understood in terms of a necessary element of an internationally wrongful act, the suggestion draws on a long line of authority: See e.g. Mann, 'Doctrine of Jurisdiction' (n 1), 14 (albeit accepting, at 15, that where the adoption of legislation implies the *likelihood* of enforcement, a wrongful act is committed with the adoption); Akehurst, 'Jurisdiction in International Law' (1973) 46 BYIL 145, 176. Crawford on the other hand, is less definitive: 'The consequences of the mere *passage* of legislation asserting exorbitant jurisdiction remain an open question.' Crawford, *Brownlie's International Law* (n 4), 477.

[16] See O'Keefe, 'Domestic Courts' (n 14).

[17] Ryngaert (n 10), 124-25.

[18] See further the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant Case* (n 10), [46].

[19] See the Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions (2017), at 58

of the UN Charter,[20] such permission would then trump any 'law of jurisdiction' limitations on the exercise of universal jurisdiction as against nationals of non-State parties to a terrorism suppression convention. In light of this alternative explanation, coupled with the limited extent of State practice – it remains an open question as to whether universal prescriptive jurisdiction is a matter of bilateral State relations or a generalised entitlement in respect of terrorist offences.

From a human rights perspective, there are potentially principle of legality concerns in respect of this uncertainty. If international lawyers cannot determine whether the actualization of universal jurisdiction against nationals of non-State parties to relevant criminal law enforcement treaties is lawful or not, it is hard to see how accused parties will be in a position to do so. These concerns may, of course, be balanced by the 'no impunity' imperative insofar as the crimes hereunder discussion are very serious – as discussed in Section IV below.

(ii) Circumstances Precluding Wrongfulness

The wrongfulness of an excessive exercise of jurisdiction might be precluded on the basis of one of two circumstances recognised in the ILC's Articles on State Responsibility (ARSIWA): Consent and Countermeasures.

1. Consent

A State's exercise of criminal jurisdiction in respect of a person over which it had no jurisdiction under international law might not be wrongful, if it were with the consent of the injured State. Let us again consider a terrorism prosecution based on universal jurisdiction against the national of a non-State party to the relevant terrorism suppression convention.[21] Were the State of nationality to consent to the prosecution, that exercise of universal jurisdiction would not be wrongful vis-à-vis the State of nationality.[22]

Whether consent is considered as a fully effective circumstance precluding wrongfulness in respect of this case study, however, may be dictated by the perspective one adopts on the law of jurisdiction. A classical or State-centric approach to the law of jurisdiction is characterized in terms of State entitlement and discretion, limited only by the overlapping interests of other States and the dictates of non-intervention. Viewed through this lens, the State of nationality's consent would be a fully effective circumstance precluding wrongfulness. The modern law of jurisdiction, however, is increasingly conceptualized in human-centric terms – insofar as States owe jurisdictional obligations to individuals,[23] and States' jurisdictional entitlements are

[20] See e.g. House of Lords, *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58

[21] While the practice of invoking (or indeed not invoking) State responsibility for an exercise of universal jurisdiction as against the national of a non-State party to a relevant criminal law enforcement treaty (as discussed in Section II(C)(i) above) suggests that such an exercise of jurisdiction is not considered unlawful, the practice is far too limited for the drawing of decisive conclusions. For the purposes of the present exploration, let us assume that the entitlement to exercise universal jurisdiction is bilateralized as between State parties.

[22] Article 20, ARSIWA & Commentaries.

[23] See Mills (n 3).

tempered by individual rights.[24] In particular, the exercise of universal jurisdiction as against the national of a non-State party to the relevant criminal law enforcement treaty may have 'principle of legality' implications – insofar as *nullum crimen sine lege* is concerned.[25] The space for such human rights arguments is undoubtedly shrinking in that crimes which are the subject of criminal law enforcement treaties receive a great deal of international attention and, in any event, cover conduct that is subject to criminal sanction in virtually all domestic legal systems.[26] But in the terrorism context, given the often strict penalties attached to crimes when they are characterised as terrorist (as distinguished from ordinary crimes), principle of legality concerns remain.[27] The law of States which are not party to relevant terrorism suppression conventions may well criminalise relevant conduct as an offence against the person or property, but its characterization as 'terrorist' would not be foreseeable to its nationals, nor would the possibility of their being subject to prosecution for 'terrorism' abroad on the basis of universal jurisdiction. And to the extent that principle of legality concerns are present, they relate to

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[24] On human rights as a source of limitation on jurisdictional entitlement, see discussion of the European Commission of Human Rights (Eur Comm HR) in *Stocké v Germany* and the European Court of Human Rights (ECtHR) in *Öcalan v Turkey*, below, n 55-58, 77-78, 84 and accompanying text

[25] See Article 15, International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); Article 7 ECHR; Article 9, American Convention on Human Rights, 1144 UNTS 123. Assuming a person commits a crime outside their State of nationality, principle of legality issues may also arise if the State in whose territory the crime is committed (in respect of which universal jurisdiction is exercised by a foreign State) is not party to a relevant criminal law enforcement treaty.

[26] See for instance, ECtHR, *Ould Dah v France* (App No 13113/03), Décision sur la Recevabilité de 17 Mars 2009, (2009) 48 ILM 871. The Court held that France's exercise of universal jurisdiction for torture, as against a Mauritanian national, did not breach the accused's rights under Article 7 of the ECHR (in respect of *nullum crimen sine lege*) because (i) the acts were subject to universal jurisdiction under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 85 UNTS 1465 (CAT), which was in force at the time of their commission, and (ii) because they were punishable in France at the time. The Court did not have regard for the fact that Mauritania was not a party to the CAT at the time of the impugned conduct (Maritania became a State party in 2004, while the relevant conduct in question occurred between 1990-91), and dismissed the relevance of the amnesty granted to the accused in Mauritania in respect of the conduct which was subject to the French universal jurisdiction prosecution. The Court's reasoning in this regard appears to be heavily conditioned by the *jus cogens* nature of the prohibition against torture, and the prohibition of torture under the African Charter on Human and Peoples' Rights, 1520 UNTS, applicable 'to the continent from which the accused originates' (author's translation), at 881. While terrorist crimes cannot be characterised as the subject of a *jus cogens* prohibition, the ECtHR's point seems to be that world-wide awareness of the criminal status of the conduct (and the gravity with which such conduct is regarded) counts against a finding that the principle of legality has been breached, even in respect of universal jurisdiction prosecutions.

[27] See for instance the Inter-American Court of Human Rights' decision on a presumption of terrorist intent in respect of offences committed using incendiary or explosive devices (which presumption is arguably in keeping with the way in which such offences are defined under the Terrorist Bombing Convention): "When defining offenses of a terrorist nature, the principle of legality requires that a necessary distinction be made between such offenses and ordinary offenses, so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalized under one or the other [regime]" *Case of Norín Catrimán et al. v. Chile* IACtHR Series C No 279 (29 May 2014), [163]. See further Human Rights Council (HRC), Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism (Martin Scheinin), Addendum, UN Doc. A/HRC/6/17/Add.1 (28 November 2007), expressing concern that the Philippines define common crimes as 'terrorist' in principle of legality terms.

rights the accused holds as against the jurisdiction exercising State. Consent of the State of nationality could not address, nor could it preclude the wrongfulness, of these breaches.[28]

2. Countermeasures

Let us again assume that, in respect of this prescriptive jurisdiction case study, the lawfulness of an exercise of universal jurisdiction as against the national of a non-State party to a relevant terrorism suppression convention is an open question (and might be characterized as excessive and unlawful). It is possible that an (otherwise wrongful) exercise of universal jurisdiction against the national of a non-party State could be characterized as a countermeasure in response to a failure by the State of nationality to meet its criminal law enforcement obligations under Security Council resolutions.[29]

In order for countermeasures to be lawful (and to benefit from wrongfulness preclusion), they need to be both necessary and proportionate.[30] The necessity of the measure is in part judged on the extent to which the measure is a response of "later (if not final) resort".[31] As a result, excessive jurisdiction should only be exercised by way of countermeasure if the prosecuting State has called on the State of nationality to comply with its Security Council imposed criminal law enforcement obligations. Indeed, this is a pre-condition for the lawful adoption of countermeasures generally, as set out in Article 52(1)(a) of ARSIWA.[32]

As to proportionality (strictly in reference to wrongfulness preclusion vis à vis the State of nationality), the matter is complicated because third party interests are implicated. Unlike a civil case against a State, in respect of which (for instance) that State's immunity is ignored by way of countermeasure in response to its own prior internationally wrongful act,[33] a criminal trial affects a 'third party' – the person subject to prosecution, distinguishable from her State of nationality even if she is an agent thereof. While as a general matter countermeasures need

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[28] The ILC highlights that the consent of State A (in respect of conduct otherwise un breach of an obligation owed to State A) cannot preclude the wrongfulness of that conduct insofar as it is also in breach of an obligation owed to State B. ILC Commentary, Article 20, [9]. The same principle applies vis à vis the wrongfulness of an obligation owed to an individual.

[29] In respect of acts of terrorism, UNSCR 1373 (2001), [2(e)], requires States to '[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts'. Any State failing to meet this obligation, binding in virtue of Article 25 of the UN Charter, would be committing an internationally wrongful act.

[30] Article 51, ARSIWA & Commentaries. See further *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [249]; *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, [85].

[31] See Crawford, 'Overview of Part Three of the Articles on State Responsibility', in Crawford, Parlett et al. eds, *The Law of International Responsibility* (OUP 2010) 932.

[32] 'Before taking countermeasures, an injured State shall: (a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two [including continued duty of performance' pursuant to Article 29 and 'cessation and non-repetition' pursuant to Article 30]'.

[33] For a discussion of how such a countermeasure may play out in the civil context, see Trapp and Mills, 'Smooth runs the water where the brook is deep: The obscured complexities of *Germany v Italy*' (2012) 1 CJICL 153.

not be 'reciprocal,' in that they need not be related to the prior breach of international law which occasions their adoption,[34] the more closely related the countermeasure is to the precipitating internationally wrongful act, the more easily proportionality can be made out.[35] Indeed, in the criminal law context, reciprocity should be an essential part of the 'proportionality' calculus. Where an individual's prosecution amounts to an excessive exercise of jurisdiction, which excess is in response to an internationally wrongful failure to prosecute that individual by her State of nationality, there is an effect on that individual's interests. These effects on third party interests are more likely to be characterized as proportionate to the State of nationality's wrongful conduct where they put the third party in the nearest position to the one she would have been in but for her State of nationality's wrongful act. In each of the cases suggested above, had the State of nationality complied with its international obligations, the third party in question would have been subject to prosecution. The foreign State's prosecution (an excessive exercise of prescriptive and adjudicative jurisdiction as against the national of a State not bound to recognise the applicability of universal jurisdiction thereto) therefore puts the prosecuted individual in as near to the same position as she would have been had her State of nationality complied with its international obligations.

This argument as to the availability of countermeasures, however, only applies in respect of wrongfulness vis à vis the State of nationality of the accused. Assuming principle of legality issues are also implicated in the prosecution (see Section on 'Consent' above), countermeasures cannot preclude the wrongfulness of a measure also in breach of obligations owed to third parties, most particularly where those obligations are in respect of fundamental human rights.[36]

III. ENFORCEMENT JURISDICTION

A. Substantive Law on Enforcement Jurisdiction

In criminal proceedings, the exercise of enforcement jurisdiction will, principally, take the form of arrest, detention, prosecution and the carrying out of any resulting sentence. A lawful exercise of enforcement jurisdiction is, subject to very limited exceptions, strictly territorial[37] – States are prohibited from exercising enforcement jurisdiction *in the territory of another State* absent the consent of the territorial State or some other permissive rule under international law.[38] The question hereunder consideration (in light of the focus on criminal jurisdiction) is the extent and content of prohibitive rules regarding enforcement jurisdiction *within the jurisdiction exercising State's* own territory – and the answer thereto depends in some respects on the perspective one adopts or the international law paradigm one operates under.

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[34] See Commentary to Part Two, ARSIWA & Commentaries, [5].

[35] Ibid.

[36] Article 50(1)(b) ARSIWA & Commentaries.

[37] *Lotus Case* (n 2), 18. While the PCIJ's position in *Lotus* on prescriptive jurisdiction was controversial from the outset, the same is not true of its pronouncement on enforcement jurisdiction, which was and remains an accurate statement of the law. See Crawford, *Brownlie's International Law* (n 4), 479.

[38] The classical example of a permissive rule under international law allowing for extra-territorial enforcement jurisdiction is the right to seize a pirate ship (however flagged) on the High Seas; see Article 105 UNCLOS.

On one view, the lawfulness of an exercise of enforcement jurisdiction, *within the jurisdiction exercising State's own territory*, is a purely factual question, not a normative one. This is to say that territorial enforcement jurisdiction is plenary, and a State may exercise that jurisdiction based purely on the physical presence of the accused. This approach views territorial enforcement jurisdiction through the lens of classical international law and from the perspective of States. States' plenary (and exclusive) control over their territories results in a territorially compartmentalized evaluation of enforcement jurisdiction – the lawfulness of an exercise of enforcement jurisdiction is evaluated purely on the basis of what side of the border it occurs on. This is, of course, not to say that there are no rules, sourced from other bodies of international law, which condition whether a State may *exercise* the territorial enforcement jurisdiction it has as a matter of right under the law of jurisdiction.[39]

The second perspective one might adopt in respect of enforcement jurisdiction is that of the physical person against whom such jurisdiction is exercised. From the perspective of an accused subject to a State's exercise of enforcement jurisdiction, factors like territoriality are significantly less (if at all) relevant – the accused's experience is of a continuous exercise of State power against them. Enforcement jurisdiction, from an individual's perspective, is evaluated holistically – from arrest through to detention, trial and sentence.

B. Case Study: Territorial enforcement jurisdiction predicated on extra-territorial abduction

The consequential nature of these different perspectives on the lawfulness of territorial enforcement jurisdiction, the one State-centric, the other human-centric, is most clearly illustrated by this second case study. Let us assume State A exercises territorial enforcement jurisdiction (in the form of a prosecution) against a person whom it has abducted from State B's territory (also referred to as the 'host State'), and that the abduction was purely for the purpose of securing the abductee/accused's presence in State A's territory for prosecution.[40] Assume further that State B did not consent to, or otherwise acquiesce in, State A's exercise of

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[39] The ECtHR, in its *Al-Adsani* Judgment, considers the law of immunities to condition the lawfulness of an exercise of enforcement jurisdiction (*Al-Adsani v. the United Kingdom* judgment ((App No 35763/97), Judgment of 21 November 2001, [48]). In its determination that Article 6 (right of access to justice) is engaged by a State's giving effect to applicable immunities, the ECtHR in effect held that the State *has lawful jurisdiction,* but that there are other rules of international law (sourced from the law on immunities) which prohibit the *exercise* of that jurisdiction in the particular case. This approach is to be distinguished from the UK House of Lords decision in *Jones v Saudi Arabia*, particularly evident in Lord Bingham's speech. In Lord Bingham's estimation, the law of jurisdiction reflects both factual and normative elements (sourced from immunities law). He held that 'the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) *a state has no jurisdiction* over another state.' UKHL, *Jones v Saudi Arabia*, [2006] UKHL 26, [14].

[40] This case study assumes an abduction by State A's agents, but Mann has argued that a subsequent exercise of territorial enforcement jurisdiction over an accused by State A, where the accused had been abducted from State B by private persons, would amount to a ratification of the abduction. In modern State responsibility terms, this might well amount to a *post facto* adoption of the abduction, rendering State A responsible for at least the wrongful exercise of extra-territorial enforcement jurisdiction, pursuant to Article 11, ARSIWA & Commentaries. See Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', in Yoram Dinstein (ed), *International Law at a Time of Perplexity* (Martinus Nijhoff, 1989) 407, 409.

enforcement jurisdiction (in the form of arrest) in its territory. For the purposes of the case study, we shall assume a lawful arrest warrant was issued by State A for the arrest of the accused. This case study does not address the wildly unlawful practice of 'rendition' engaged in by the United States whereby a person is abducted from the host State by State A (with or without the acquiescence or assistance of State B), and transferred to State C for the purposes of 'enhanced interrogation.'[41]

If we adopt the State-centric approach set out above, and break the exercise of enforcement jurisdiction down into its territorial component parts, it is clear that the abduction in State B's territory, by State A's agents, is an internationally wrongful exercise of (extra-territorial) enforcement jurisdiction in its own right,[42] as well as a breach of the UN Charter[43] and international human rights law.[44] From a purely State-centric perspective, however, there is no *continuing* internationally wrongful act in the exercise of territorial enforcement jurisdiction. Once the State agents cross the border into their own territory with the abductee in custody, the exercise of plenary territorial enforcement jurisdiction is lawful from the perspective of international law. Even the breach of human rights occasioned by the abduction, which results in part from the absence of a legal framework governing the exercise of power by State A against the abductee in State B's territory, might also be understood to cease on crossing the border if we adopt a territorially compartmentalized State-centric perspective. This is because States are entitled, as a matter of human rights law, to detain individuals within their own territory for the purposes of prosecution pursuant to, for instance, a lawfully issued arrest warrant. As a result, the prior unlawful exercise of enforcement jurisdiction (in the form of the abduction in State B's territory and amounting to a breach of both the prohibition on extra-territorial enforcement jurisdiction and human rights law) does not colour or taint the subsequent exercise of enforcement jurisdiction within State A's own territory (which is lawful purely in virtue of the accused's physical presence and the duly issued arrest warrant applicable in State A's territory).

The principle of *male captus bene detentus*, admittedly a domestic legal doctrine, clearly captures this State-centric perspective. It is premised on the territorial compartmentalization of lawful exercises of jurisdiction and *only* addresses the plenary right to exercise territorial enforcement jurisdiction from a factual perspective – in particular the fact of the accused's

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[41] On this practice, see Messineo, '"Extraordinary renditions" and state obligations to criminalize and prosecute torture in the light of the *Abu Omar* case in Italy' (2009) 7 JICL 1023.

[42] Extra-territorial abductions have long been viewed as an internationally wrongful exercise of enforcement jurisdiction. See Oppenheim, *International Law* (Hersch Lauterpacht ed, 8th edn, 1955) 295.

[43] Following Israel's abduction of Eichmann from Argentina in 1960, the UN Security Council adopted a resolution which considered that 'the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations'. UNSCR 138, 23 June 1960.

[44] The HRC, applying the ICCPR, held that the abduction of a Uruguayan national from Argentina (by Uruguayan security forces) amounted to an arbitrary arrest and detention in breach of Article 9(1) of the Covenant (applying the ICCPR extra-territorially on the basis of a personal approach to 'jurisdiction' as the trigger for human rights obligations). HRC, *Sergio Euben Lopez Burgos v. Uruguay* (29 July 1981), UN Doc A/36/40 (1981) 176, [12]-[14]. See also HRC, *Domukovsky et al v. Georgia* (29 May 1998), UN Doc CCPR/C/62/D/623/1995, [18.2]; Brief of the Government of Canada as *Amicus Curiae* in Support of Respondent (*Alvarez-Machain*), (1992) 31 ILM 921, 926. See further discussion of ECtHR (GC), *Öcalan v Turkey* (App No 46221/99), Judgment of 12 May 2005, below.

physical presence. On the basis of this doctrine, domestic courts do not 'look behind' the accused's physical presence in the jurisdiction exercising State's territory and the doctrine therefore does not (and cannot) speak to the abducting State's responsibility (or the consequences thereof) for (i) any unlawful exercise of extra-territorial enforcement jurisdiction in State B's territory[45], (ii) any breach of extradition law occasioned by the abduction (in cases where an extradition treaty between State A and State B is understood to be the exclusive means for securing the presence of an accused from State B),[46] or (iii) any breach of human rights occasioned by the accused's arrest in foreign territory in the absence of lawful authority.[47] This approach is unsurprisingly reflected in domestic court decisions which pre-date the UN Charter, the significant increase in criminal law co-operation and extradition treaties, and modern human rights law. In cases where the accused's presence in State A's territory was secured from State's B's territory through some form of extra-legal process, domestic courts in the pre-UN Charter and pre-human rights era consistently held that it is not the role of courts which have jurisdiction in virtue of territorial presence to enquire into the permissibility of the legal process by way of which arrest was effectuated in foreign territory.[48] This approach to territorial enforcement jurisdiction predicated on an abduction, however, is also reflected in some modern decisions. Most famously, in 1992 the US Supreme Court held that its courts could exercise jurisdiction over a Mexican national who was unlawfully abducted from Mexican territory (which abduction was purely for the purposes of his prosecution in the US).[49]

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[45] See n 42-43 above.

[46] See the US Supreme Court's decision in *Alvarez-Machain* (504 US 655 (1992)) on this point, in which the Court held that an extradition treaty did *not* establish an exclusive means for securing the accused's presence, and that extra-extradition methods were therefore not implicitly prohibited. See also the ECtHR decision in *Öcalan v Turkey* (n 44). The ECtHR did not consider that co-operation between States, outside an existing extradition framework, implicates Article 5 rights (ibid, [85] & [90]). Albeit from the perspective of international human rights law (rather than from the perspective of extradition law), the ECtHR implicitly accepts the US Supreme Court's determination in *Alvarez-Machain* (ibid) that the existence of an extradition treaty between two States does not necessarily 'cover the field' of transfer options which are 'prescribed by law'. The ECtHR decision on this point is limited, however, to the question of a breach of the right to liberty. The ECtHR nevertheless expressly rejects the conclusion of the US Supreme Court that abduction is an available transfer option which can ground the jurisdiction of the abducting State's courts (see n 57), and the decision is plainly a rejection of *male captus bene detentus* insofar as human rights law is concerned. To opposite effect in respect of whether extradition treaties 'cover the field' of available transfer options between the host and prosecuting States (also amounting to a rejection of the *male captus bene detentus* doctrine on different grounds), see *R v Hartley*, [1978] 2 NZLR 199, 216-217. Woodhouse J considered the extradition framework between New Zealand and Australia to be the exclusive means for securing the territorial presence of an accused and refused to exercise jurisdiction despite the accused's presence on the basis that his presence was secured extra-legally.

[47] See n 44 above.

[48] See e.g. *Ex parte Susannah Scott* (1829) 9 B. & C. 446; *Ker v* Illinois, 119 US 436 (1888); *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All ER 373; *Sinclair v. H.M. Advocate*, (1890) 17 R.(J.) 38. For an early critique of this approach, on the basis that a State without jurisdiction to seize is a State without jurisdiction *tout court*, and that it is artificial to legally compartmentalize the various exercises of jurisdiction leading to and including the prosecution, see Dickinson, 'Jurisdiction Following Seizure or Arrest in Violation of International Law,' (1934) 28 AJIL 231, 236-37.

[49] *United States v Alvarez-Machain* (n 46). See also Eur Comm HR, *Stocké v Germany* (Ap.no. 11755/85), Report of the Commission, 12 October 1989, [162] (quoting the german Federal Constitutional Court as having found 'no general rule in international law according to which prosecution of a person was barred in a State to

Whether the doctrine, as applied by domestic courts, is consistent with post-Charter international law was certainly contested in the last decades of the twentieth century.[50] It was, of course, accepted that the extra-territorial exercise of enforcement jurisdiction (in the form of the abduction) was unlawful. The contested question was the lawfulness, *as a matter of international law*, of the subsequent exercise of territorial enforcement jurisdiction against the abductee. For instance, States protesting the US Supreme Court's decision in *Alvarez-Machain* tended to focus on the unlawfulness of the abduction, whether as a breach of State sovereignty or a breach of bilateral extradition treaties.[51] And Latin American States considered the question of the lawfulness of the subsequent exercise of territorial enforcement jurisdiction against an abductee to be open enough as to propose an Advisory Opinion by the International Court of Justice (ICJ) on the issue.[52]

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whose territory the person concerned had been taken in violation of the territorial sovereignty of another State.'); Cour de Cassation, *Re Argoud* (1965) 45 ILR 90 (involving a private kidnapping, but in which the Court holds, in *obiter*, that the accused has no standing to plead breaches of international law committed during his arrest). The Israel Supreme Court's decision in *Eichmann* (36 ILR 277 (1962)) is also understood in *male captus bene detentus* terms, but in fact Israel tendered an official apology for its violation of Argentinian territorial sovereignty, and Argentina waived any further rights in respect of the prosecution (see L Henkin, *International Law* (West Publishing Co., 1993), 1085). The effectiveness of Argentina's waiver does however situate this case firmly in the 'State-centric' category in respect of circumstances precluding wrongfulness as discussed in Section C(ii) below. The nature of the crimes with which Eichmann was charged also complicates the precedential value of this case, as even assuming that States should be prohibited from exercising territorial enforcement jurisdiction in the case of unlawful extra-territorial abductions, there is some support for an exception in the case of international crimes. See e.g. Mann, 'Reflections' (n 40), 414; Higgins, *Problems and Process* (OUP 1994), 72; Halberstam, 'In Defense of the Supreme Court Decision in *Alvarez-MaChain*', (1992) 86 AJIL 736, 744. See also ICTY, *Prosecutor v Dragan Nikoli*, IT-95-2, Decision on Interlocutory Appeal on Legality of Arrest, [29] - [30].

[50] See Brownlie, *Principles of Public International Law* (4th ed, OUP 1990) 317; Mann, 'Reflections' (n 40), 412-14. Henkin, *International Law: Politics, Values and Functions*, 216 Recueil des Cours 9, 305 (1989 IV); Shaw, *International Law* (2d ed, Grotius 1986), 361; Glennon, 'State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain*', (1992) 86 AJIL 736, 750; and a series of articles by Lowenfeld in AJIL: (1990) 84 AJIL 444; (1990) 84 AJIL 712; (1991) 85 AJIL 655.

[51] See e.g. Statements by American Sates to the US Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 102d Cong, 2d Sess 267 (1992), 110-114. See also Brief of the Government of Canada (*Alvarez-Machain*) (n 44), arguing that abduction is generally understood to be a breach of territorial sovereignty and extradition arrangements, and addressing the subsequent prosecution of the abductee in terms of (i) whether the host State protested and (ii) reparations owed for the breach of the host State's territorial integrity and/or extradition treaties (rather than treating the prosecution as a wrong in its own right). To similar effect, see OAS, Legal Opinion of the Inter-American Juridical Committee on the Decision of the Supreme Court of the United States of America [in *Alvarez-Machain*] (15 August, 1992), *in* (1993) 4 Criminal Law Forum 119, [9]-[11]: the Committee is clear on the internationally wrongful nature of the breach of Mexico's territorial integrity (in the form of the abduction), but does not address the lawfulness of the US's subsequent exercise of territorial enforcement jurisdiction against Alvarez-Machain on its own terms, treating the question instead as one of reparations (restitution in particular) for the breach of Mexico's territorial sovereignty. See Section III(C)(iii) below for a further discussion of remedies.

[52] See Request for an Advisory Opinion from the International Court of Justice (by way of letter from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador. Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela to the United Nations addressed to the Secretary-General, requesting that the item be placed on the Sixth Committee's agenda), UN Doc A/47/249 (17 November 1992), Annex). See further statements to the Sixth Committee on the issue, UN Doc A/C.6/48/SR.34 (1 February 1994), [3] (Brazil); [9]-[10] (Mexico). The Sixth Committee deferred its decision on requesting an Advisory Opinion from the ICJ on the matter for several years (see UN

From a human-centric approach to jurisdiction, the exercise of enforcement jurisdiction over an abductee within the jurisdiction exercising State's own territory would itself be unlawful, even though the factual trigger for the exercise of territorial jurisdiction in the form of the abductee's physical presence is met. This is because the exercise of enforcement jurisdiction over an abductee is understood in terms of the exercise of power against an individual (and evaluated holistically from arrest to territorial detention), rather than in territorially compartmentalized terms centered around State interests in territorial sovereignty and integrity. There are decisions by domestic courts (refusing to exercise territorial enforcement jurisdiction where it is predicated on an unlawful extra-territorial abduction) which in some respects support this perspective. While they rely on the discretion of Courts to protect the administration of justice, and doctrines related to the rule of law and 'clean hands',[53] the basis of the reasoning is inconsistent with the State-centric perspective: The wrongfulness of the exercise of enforcement jurisdiction (by way of which the accused's presence is secured) is not understood to be interrupted, or wiped out, by stepping over a border.[54] Instead, State power

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Doc. A/C.6/47/L.18 (23 November 1992); UN Doc. A/C.6/48/L.15 (23 November 1993); UN Doc. A/C.6/49/SR.39 (23 November 1994), [60]-[62]) before the item simply dropped off its agenda. Noting the contested nature of the issue, see further Germany's arguments before the Eur Comm HR, *Stocké v. Germany* (n 49), discussed further in n 77 and accompanying text : 'It is true that there are isolated judgments and scholarly opinions that deny the abducting state - in a case where there has been an abduction contrary to international law - the right to conduct criminal proceedings against the person who has been abducted. However, this practice is not sufficiently widespread to be considered either as an established international practice restricting State jurisdiction or as a rule requiring the termination of criminal proceedings against a person abducted in a manner contrary to international law'. As the Eur Comm HR held that the abduction was not attributable to Germany, and there was no collusion between the abductor and the German authorities, it did not decide whether the subsequent exercise of territorial enforcement jurisdiction by Germany was itself lawful.

[53] See *S. v. Ebrahim* 1991 (2) S.A. 553 ('[t]he individual must be protected from unlawful arrest and abduction, jurisdictional boundaries must not be exceeded, international legal sovereignty must be respected, the legal process must be fair towards those affected by it, and the misuse thereof must be avoided in order to protect and promote the dignity and integrity of the judicial system. This applies equally to the State. When the State is itself party to a dispute, as for example in criminal cases, it must come to court "with clean hands" as it were. When the State is itself involved in an abduction across international borders as in the instant case, its hands cannot be said to be clean.'); *United States v Toscanino*, 500 F 2d 267 (15 May, 1974), [36] (in which the Court, holding that breach of the accused's right to due process and of the host State's UN Charter and OAS Charter rights to territorial sovereignty divested US courts of jurisdiction, considered itself to be relying on its 'supervisory power over the administration of criminal justice' which power may be legitimately used to 'prevent district courts from themselves becoming "accomplices in willful disobedience of law"'). See further *R v Hartley* (n 46) (in which Woodhouse J refused to exercise territorial jurisdiction predicated on an abduction on the basis of 'the whole concept of freedom in society'); *Horseferry Road Magistrates Court Ex Parte Bennett* (No. 1), [1993] UKHL 10 (Lords Griffiths, Bridge of Harwich, Lowry and Slynn of Hadley); *State v Beahan*, 1992 (1) SACR 307 (A).

[54] There is also support, in the private international law context, for the idea that a State's courts cannot exercise jurisdiction over an individual (which jurisdiction is grounded on the individual's presence in the jurisdiction exercising State's territory) if that individual had been fraudulently induced to enter the jurisdiction exercising State's territory. See e.g. Queen's Bench, *Colt Industries Inc. v Sarlie*, [1966] 1 WLR 440. The Court's reasoning in this case hangs on the voluntary nature of the defendant's presence – focusing attention on personal autonomy (framed in terms of procedural fairness and consent) and rejecting a purely territorial approach focused on a State's entitlement to apply its regulatory framework to persons within its territory. While such approaches have developed in the context of private dispute settlement, they nevertheless have their reflection in public international law in the form of human rights. See Eur Comm HR, *Stocké v. Germany* (n 49), [167] and discussion regarding *Öcalan v Turkey* in n 55 below.

against an individual is evaluated from beginning to end, blind to the borders across which it is exercised.

Indeed, modern human rights law might be understood as demanding a rejection of the State-centric perspective. Consider the ECtHR decision in *Öcalan v Turkey*. Öcalan was arrested by Turkish officials in Kenyan territory with the assistance of Kenyan officials. The issue before the Court was whether the arrest, which resulted from informal co-operation between Kenyan officials and Turkish officials in Kenyan territory, was extra-legal so as to amount to a breach of Öcalan's Article 5 European Convention on Human Rights ('ECHR') right to liberty.[55] The Court considers the Article 5 ECHR right to liberty to protect individuals from arbitrariness – which covers not only a right of 'liberty' but also a 'right to security of person'.[56] And the Court finds (albeit in *obiter*) that 'an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned's individual rights to security under Article 5§1'.[57] The analysis centres around whether the exercise of enforcement jurisdiction over the accused, which may well span from State B's territory to State A's territory, is 'prescribed by law,' as required for compliance with the Article 5 ECHR right to liberty. In the ECtHR's estimation, operating from a human rights perspective and with a view to the international rule of law, this cannot be the case in the event of an extra-territorial abduction in breach of the host State's sovereignty, international law[58] and the accused's right to physical integrity. Of interest, human rights law as applied in this case does not render an otherwise lawful exercise of territorial enforcement jurisdiction (which is understood in territorially compartmentalized terms) unlawful, as would for instance the law of immunities.[59] Rather, under the ECtHR's approach in *Öcalan v Turkey*, human rights law requires that the exercise of enforcement jurisdiction against an accused (and whether it is 'prescribed by law' and 'lawful') be evaluated as a whole, uninterrupted by the crossing of an otherwise jurisdictionally relevant border.

The human-centric (and holistic) approach to enforcement jurisdiction, however, is not a logically necessary result of injecting human rights law into questions about the lawfulness of enforcement jurisdiction, even if it is the approach adopted by the ECtHR in *Öcalan*. One could adopt a State-centric and territorially compartmentalized approach to the right to liberty in evaluating the lawfulness of a territorial exercise of enforcement jurisdiction against an abducted accused. Assuming a lawful warrant for the accused abductee's arrest has been issued in State A, crossing the border into State A with the accused abductee engages that territorial legal framework governing arrest – rendering the detention 'prescribed by law' within State A's territory.[60] If we focus on the human rights breach deriving from the absence of a legal framework regulating an exercise of power by State A against the abductee *in State B's territory*, and proceed from a State-centric and territorially compartmentalized approach, the

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[55] ECtHR, *Öcalan v Turkey* (n 44), [73]-[82].

[56] ECtHR, *Öcalan v Turkey* (n 44), [83].

[57] ECtHR, *Öcalan v Turkey* (n 44), [85]

[58] The interpretation of 'prescribed by law' as drawing on the broader international law framework is a common theme in the approach to human rights protection in extra-territorial cases under the ECHR. See for instance UKSC, *Serdar Monhammed v Ministry of Defence* [2017] UKSC 2.

[59] See n 39.

[60] See Germany's argument in respect of Eur Comm HR, *Stocké v. Germany* (n 49) – discussed in n 78 below and related text.

extra-territorial abduction amounts to an unlawful restriction on liberty on the basis that it was not 'prescribed by law' in State B's territory (which would be subject to a remedy, as discussed in Section III(C)(iii) below), but the *territorial exercise* of enforcement jurisdiction in State A's territory would be 'prescribed by law' on the basis of the duly issued arrest warrant and therefore lawful.

C. State Responsibility for Excessive Enforcement Jurisdiction

While the ECtHR's decision in *Öcalan* supports a human-centric approach to the exercise of territorial enforcement jurisdiction against an abducted accused, the State-centric and territorially compartmentalized approach certainly persists[61] – evidence of the incomplete (but constantly progressing) nature of relevant paradigm shifts in international law discussed in Section I. In this Section, the secondary rules of State responsibility – as applied to an exercise of territorial enforcement jurisdiction predicated on an extra-territorial abduction – are considered, with a view to further exploring the implications of a State-centric or human-centric approach to enforcement jurisdiction.

(i) The continuing character of the breach and the secondary obligation of cessation

In Article 14 ARSIWA, the ILC draws a distinction between a breach of an international obligation by an act that is continuing (Article 14(2) ARSIWA), and a breach of an international obligation by an act that does not have a continuing character even if its effects continue (Article 14(1) ARSIWA). This is a potentially important distinction insofar as a continuing breach gives rise to a secondary obligation to *cease* the wrongful act.[62]

In respect of the enforcement jurisdiction case study in Section III(B) above, if State A's exercise of territorial enforcement jurisdiction against the abductee is treated as a continuation of its unlawful exercise of extra-territorial enforcement jurisdiction in State B's territory, then the obligation of cessation would require the courts of State A to decline to proceed with the prosecution as a matter of the secondary rules of international law.

Whether a breach is considered to be continuing depends to a certain extent on whether the focus is on the *act* which constitutes the breach or on the legal framework (in particular the primary obligation) which legally qualifies the act. In respect of the case study above, a focus on the act (which is an exercise of power over an individual) suggests that an exercise of enforcement jurisdiction which begins unlawfully continues until the accused's release. A focus on the act engages the human-centric and holistic perspective. As a result, the exercise of territorial enforcement jurisdiction against an abductee would be wrongful both as a matter of the primary rules (as discussed in Section III(b) above), and as a matter of the secondary rules of State responsibility (insofar as the predicate breach of the host State's territorial

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[61] See for instance Crawford, *Brownlie's International Law* (n 4), 483. Crawford frames the right to prosecute an accused victim of State abduction as a question of domestic law rather than international law, even though in footnote 205 he acknowledges that at least the ECHR may have a bearing on the issue.

[62] Article 30, ARSIWA & Commentaries.

integrity occasioned by the abduction 'continues' even once State A's agents cross into their own territory).

A focus on the legal framework, however, introduces the possibility of characterizing the act in territorially compartmentalized terms. This is certainly the case in respect of the law of enforcement jurisdiction, and is even possible if the primary rules under consideration are human rights obligations, breach of which is occasioned by the extra-territorial abduction (as discussed in Section III(B) above). This focus would result in the subsequent exercise of territorial enforcement jurisdiction against an abductee being lawful under *both* the primary rules of international law, and in respect of the secondary rules of State responsibility (because the predicate breach would not be characterised as 'continuing').

The ILC characterises the question of whether an act is continuing or not as one that depends *both* on the primary rule and the act in question.[63] There is, therefore, little in the ILC Commentary on continuing breaches to assist in navigating between the State-centric and human-centric approaches to the exercise of territorial enforcement jurisdiction against an abductee (either as a matter of the primary or secondary rules of international law).

(ii) Circumstances Precluding Wrongfulness

Also of interest in considering the implications of the State-centric and human-centric approaches to enforcement jurisdiction are circumstances precluding wrongfulness – in particular their availability and the scope of wrongfulness preclusion. The wrongfulness of an excessive exercise of enforcement jurisdiction might be precluded on the basis of one of two circumstances recognised in the ILC's Articles on State Responsibility: Consent and Countermeasures.

1. Consent

Insofar as the case study on enforcement jurisdiction (Section III(B) above) is concerned, the extent to which consent might amount to a circumstance precluding wrongfulness[64] depends in part on when the consent is given, and in part (if consent is given after the fact), what perspective on enforcement jurisdiction one adopts.

For instance, State B's consent to State A's agents acting in a criminal law enforcement capacity in its territory, by way of which an accused is transferred from State B's territory to State A, would certainly render State A's exercise of extra-territorial enforcement jurisdiction lawful.[65] Indeed, such consent would mean that the arrest could not be qualified as an

[63] Article 14, ARSIWA & Commentaries, [3].

[64] Article 20, ARSIWA & Commentaries.

[65] See Article 20, ARSIWA & Commentaries, [8]. See further Harvard Draft Convention on Jurisdiction (n 10), Commentary to Article 16, 631.

'abduction' at all, and would instead be qualified as an alternative to extradition arrangements (even if informal) consented to by State B's executive.[66]

State B's consent, however, might be given after the fact, which is to say – following the unlawful abduction of an accused in State B's territory (in breach of its territorial integrity) – State B might nevertheless consent to (or acquiesce in) the prosecution of the abductee by State A.[67] For instance, the Harvard Draft Convention on Jurisdiction with Respect to Crime proposed that '[i]n exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention *without first obtaining the consent of the State or States whose rights have been violated by such measures*.'[68] The Draft, penned in 1935, very evidently does not address abduction as a breach of the abductee's human rights, instead treating the matter purely on the inter-State plane.[69] Its starting point is the breach of territorial integrity occasioned by the abduction[70] and it vacillates between treating the subsequent exercise of territorial enforcement jurisdiction against an abductee as (i) a *lex ferenda* wrong (based on policy considerations of not supporting the predicate breach of territorial integrity)[71] and (ii) prohibited on the basis that *there is no territorial enforcement jurisdiction at all* because '[t]he court is an arm of the nation and its jurisdiction can rise no higher, by virtue of process served within the territory, than the jurisdiction of the nation which it represents.'[72] This latter approach supports a human-centric perspective – insofar as this perspective requires that an exercise of enforcement jurisdiction be evaluated holistically (with initial extra-territorial unlawfulness colouring the exercise of enforcement jurisdiction in its entirety) rather than in territorially compartmentalized terms.

Of particular interest, in 1935, the injured State's consent would have 'covered the field' of 'jurisdiction related' wrongfulness – whether the exercise of territorial enforcement jurisdiction

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[66] See ECtHR, *Öcalan v Turkey* (n 44), which accepts that such consent may amount to an irregular but nevertheless lawful surrender of the accused to the jurisdiction exercising State (insofar as human rights law is concerned).

[67] In its Commentary, the ILC frames after the fact consent as a waiver or acquiescence, leading to a loss of right to invoke responsibility. See Articles 20 & 45, ARSIWA & Commentaries, [45]. Whether we view the consent hereunder consideration as 'after the fact' (and therefore a waiver of the right to invoke responsibility and to a remedy) or as a circumstance precluding wrongfulness, however, depends on the perspective one adopts in respect of enforcement jurisdiction. Where a human-centric (and holistic) perspective is adopted, such that both the extra-territorial *and* territorial exercise of enforcement jurisdiction is characterised as wrongful, consent to prosecution is a circumstance precluding wrongfulness in respect of the wrongful exercise of territorial enforcement jurisdiction. If we adopt a State-centric and territorially compartmentalized perspective, so that only the exercise of extra-territorial enforcement jurisdiction in State B's territory is wrongful, consent or acquiescence in the subsequent prosecution is by way of waiver of certain secondary rights to a remedy (in the form of restitution) – as discussed further in Section II(C)(iii) below.

[68] Harvard Draft Convention on Jurisdiction (n 10), Article 16 (emphasis added).

[69] To similar effect, writing before the human rights revolution, F.A. Mann suggests that consent, whether given in advance *or after the fact*, fully addresses the international wrong committed. See Mann, 'Reflections' (n 40), 410.

[70] Harvard Draft Convention on Jurisdiction (n 10), Commentary to Article 16, 624.

[71] Ibid, 623-24.

[72] Harvard Draft Convention on Jurisdiction (n 10), Commentary to Article 16, 631. See also ibid, 624-25,630. See also the work of the Rapporteur on the Harvard Draft Convention on Jurisdiction, in his private capacity, to precisely the same effect. Dickinson (n 48).

(predicated on the prior wrongful exercise of extra-territorial enforcement jurisdiction in the form of an abduction) is characterized as wrongful on a *lex ferenda* basis for policy reasons or *ab initio* resulting from a holistic approach to enforcement jurisdiction. But once we inject a robust appreciation of human rights into the legal calculus, and assuming we accept for present purposes the Harvard Draft's suggestion of a holistic approach to enforcement jurisdiction, consent to prosecution by the host State from whose territory the accused is abducted could not preclude the wrongfulness of the breach of an obligation which is owed to the abductee[73]– even if it could still preclude the wrongfulness of the breach vis à vis the host State.

If, however, the exercise of territorial enforcement jurisdiction is approached from a State-centric perspective, and evaluated in territorially compartmentalized terms, consent does not address the wrongfulness of the exercise of territorial enforcement jurisdiction – in that it is not wrongful (vis à vis the host State or the abductee). Consent is relevant purely in reference to waiving restitution as the appropriate remedy for the predicate breach of territorial sovereignty of the host State (in the form of the abduction), on the basis of which the abductee's presence is secured.[74]

2. Countermeasures

Countermeasures are, of course, not an available circumstance precluding wrongfulness in respect of breaches of Article 2(4) of the UN Charter, or in respect of the breach of fundamental human rights[75] – and abducting individuals from abroad is most certainly both of those. To the extent that we adopt a holistic perspective, such that the exercise of territorial enforcement jurisdiction is wrongful (in that it is a *continuation* of the predicate unlawful exercise of extra-territorial enforcement jurisdiction in the form of the abduction – a breach of both Article 2(4) and fundamental human rights), countermeasures are simply not an available circumstance precluding wrongfulness. To the extent that we adopt a State-centric (and territorially compartmentalized) perspective on enforcement jurisdiction, the subsequent exercise of territorial enforcement jurisdiction, in the form of the prosecution of the abducted accused, is not unlawful and, therefore, not in need of wrongfulness preclusion.

(iii) Remedies

What are the appropriate remedies in respect of responsibility for internationally wrongful acts related to the prosecution of a person abducted from foreign territory? The State practice in respect of appropriate remedies is not entirely consistent, and what demands are made of jurisdiction exercising States will, of course, in some measure reflect the relationship between

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[73] See n 28.

[74] See, e.g., Brief of the Government of Canada (*Alvarez-Machain*) (n 44), summarising the practice of at least Western States. The conclusion of such summary is that the territorial enforcement jurisdiction against an abductee can proceed or not, based purely on the consent (or acquiescence) of the State from whose territory the accused is abducted. Non-prosecution and return of the abductee is framed in terms of reparations (in particular restitution) owed to the host State.

[75] Article 50, ARSIWA & Commentaries.

the abducting and host States. Having said that, the remedies calculus very evidently reflects the different perspectives on enforcement jurisdiction explored in Section II(B) above.

To the extent that the prior and wrongful exercise of extra-territorial enforcement jurisdiction in the form of the abduction is approached from an inter-State (and territorially compartmentalized) perspective, the subsequent exercise of territorial enforcement jurisdiction against the abductee is not in fact wrongful as a matter of international law. This is assuming an arrest warrant has been issued for the abductee's arrest in the jurisdiction exercising State's territory (see discussion in Section III(B) above).[76] The remedies for responsibility resulting from the breach of the host State's territorial integrity, or the breach of extradition arrangements between the abducting and host State, will be entirely at the disposal of the host State – not the individual abductee. This was precisely the argument put forward by Germany before the European Commission on Human Rights, in respect of the *Stocké v Germany* case.[77] Germany contested its involvement in and responsibility for the abduction of Mr Stocké from France to Germany, but nevertheless argued that '*even assuming such a responsibility*, the applicant was lawfully arrested in the Federal Republic of Germany within the meaning of Article 5 para. 1 (c) of the [European] Convention [on Human Rights]. His arrest was effected on the basis of a valid warrant of arrest. The applicant could not himself claim any violation of international law, and in particular of extradition treaties.'[78] And some decades before, in respect of an abduction from Germany to France, the French Cour de Cassation (Criminal Chamber) (4 June 1964) accepted precisely this argument.[79] By way of reparation for the abducting State's breach of the host State's territorial integrity or the exclusivity of its extradition arrangements with the host State, it is accepted that restitution – in the form of the return of the abductee – is appropriate.[80] For instance, in respect of the recent abduction of a Vietnamese refugee from

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[76] The fact that the exercise of territorial enforcement jurisdiction is not wrongful from the perspective of international law does not, of course, mean that domestic courts are bound to proceed with the prosecution. As seen above, domestic courts will often refuse to proceed with a prosecution predicated on an unlawful abduction in order to protect the integrity of the administration of justice. See n 53 and associated discussion.

[77] Stocké was fraudulently induced to return to Germany by a private party. The inducement was characterised in terms of an abduction, and he faced criminal prosecution for prior crimes as a result of his physical presence in German territory. At issue before the Commission was whether the private party was acting on behalf of Germany. Eur Comm HR, *Stocké v. Germany* (n 49), [89]-[91]. The Commission held that the private party was not acting as an agent of Germany, but nevertheless considered the legal implications of attribution, as discussed below.

[78] Emphasis added. Eur Comm HR, *Stocké v. Germany* (n 49), [159]. The Commission did not address this argument, having held that 'collusion between German authorities and [the kidnapper] in returning the applicant against his will from France has not been established.' Ibid, [203].

[79] The French Cour de Cassation held that 'even accepting that Argoud had been abducted on the territory of the Federal Republic of Germany in violation of the rights of that country and of its sovereignty, it would be for the Government of the injured State alone to complain and demand reparation. The accused has no capacity to plead a contravention of the rules of public international law and could not claim to find in them a personal basis for immunity from judicial proceedings.' *In re Argoud* (n 49).

[80] For instance, the Canadian Government, in its *amicus* brief to the US Supreme Court in respect of the *Alvarez-Machain* case (n 49), argued that 'the understanding in international law [is] that abducted persons must be returned to a nation when it protests the infringement of its sovereignty.' Brief of the Government of Canada (*Alvarez-Machain*) (n 44), 924. See also OAS, Legal Opinion of the Inter-American Juridical Committee (n 50), [10]-[12]), in which it was held that, 'in upholding the jurisdiction of United States courts to try […] Alvarez Machain, forcibly abducted from [Mexico], the United States is ignoring its obligation to return him to the country from whose jurisdiction he was abducted.'

German territory (allegedly) by Vietnamese agents, Germany first demanded the return of the abducted accused, focusing exclusively on the breach of its own rights in respect of the abduction.[81] Germany later commuted its demand for reparation to one regarding an apology and guarantees of non-repetition.[82] Together, Germany's approach to reparations reflects a State-centric perspective, one which views the exercise of extra-territorial enforcement jurisdiction purely from the perspective of its own territorial sovereignty and rights. Such demands for restitution have to be carefully distinguished from any suggestion that the exercise of territorial enforcement jurisdiction is itself wrongful and should not proceed on that basis. They are to the same effect, but the demand for restitution of the abductee (or for an apology and guarantees of non-repetition), in response to the predicate breach of the host State's territorial sovereignty or the exclusivity of extradition arrangements between the abducting and host State, views enforcement jurisdiction from the perspective of the State and the law of State responsibility.

As far as the abductee is concerned, even accepting the State-centric perspective, there is still a breach of human rights law that calls for a remedy. This breach is in the form of the abduction in foreign territory (even if wrongfulness ceases once the abducting State agents cross into their own territory with the abductee in custody),[83] and human rights monitoring bodies are clear that the remedy for the human rights breach lies with the abductee. For instance, in *Stocké v Germany*, the European Commission of Human Rights held that '[a]n arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve State responsibility vis-à-vis the other State, but also affects [the abductee's] individual right to security under Article 5 para. 1 [ECHR]. The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention.'[84] As to appropriate remedies, the Inter-American Commission on Human Rights has held that restitution is appropriate in cases of extra-territorial abduction. In its *Lopez* decision, the Commission held that Uruguay was under an obligation to release the abductee and to give him permission to leave Uruguay.[85] The XVth International Congress of Penal Law (Rio de Janeiro, 1994) has similarly proposed that the victim of an abduction should have the right to be brought into the position which existed prior to the breach.[86] The Congress proposed that such abductions should be recognized as a bar to exercising territorial enforcement jurisdiction – but relied principally on the secondary rules of State responsibility and the right to a remedy to support the proposed bar (as distinguished from arguing that the exercise of territorial enforcement jurisdiction was wrong in its own right).

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[81] Statement by Federal Foreign Office Spokesperson on German-Vietnamese relations, available at https://www.auswaertiges-amt.de/en/Newsroom/170802-vnm/291756.

[82] See Nussberger and Langmack, 'A Cold War like Thriller in Summer – Icy Times Between Vietnam and Germany', EJIL:Talk!, February 20, 2018.

[83] See n 44 and accompanying text.

[84] Eur Comm HR, *Stocké v. Germany* (n 49), [167].

[85] See HRC, *Lopez Burgos v. Uruguay* (n 44), 183, [13]-[14].

[86] International Congress of Penal Law (Rio de Janeiro, 4 – 10 September 1994), Section IV (The regionalization of international criminal law and the protection of human rights in international cooperative procedures in criminal matters), [19].

The human-centric (and holistic) perspective on enforcement jurisdiction would, of course, be to the same effect, but release of the abductee would be on the basis that the territorial exercise of enforcement jurisdiction is itself unlawful, rather than by way of remedy for the predicate unlawful exercise of extra-territorial enforcement jurisdiction (in breach of the abductee's human rights and the host State's territorial integrity or rights under an extradition treaty with the abducting State).

IV. CONCLUSIONS

International law has very evidently moved far past its Westphalian origins. Modern international law addresses an ever-broadening range of interests, including those of the natural persons who are its ultimate subjects and those of the international community as a whole – both conceptualised in part through the lens of the rule of law and respect for the physical integrity and dignity of natural persons. These interests are of course reflected in the increasing pervasiveness of human rights discourse and in the growing body of international law which aims to ensure that State actors and non-State actors alike are held criminally responsible for threatening community values which protect international law's 'core' constituency.

These shifts in international law very evidently affect even the most 'classic' of international law subject areas – in the case at hand, jurisdiction. Nevertheless, the international legal system is still one in transition, and the 'paradigm shift' from a State centric to human-centric system is far from complete. This is evidenced in a number of different ways in respect of the law on jurisdiction. In particular, a system primarily concerned with human dignity and security might recognise universal jurisdiction in respect of very serious trans-national crimes which threaten the rule of law and international peace and security. Conceptions of prescriptive jurisdiction based on a particular understanding of a State's relationship to its nationals, which preclude other States with capacity and opportunity from enforcing important community norms, may appear strangely outdated in this modern context of mass-migration. This of course assuming that states engaging in universal jurisdiction prosecutions are doing so in good faith and with a view to enforcing fundamental norms – an assumption which is admittedly challenging in an era of 'fake news' and increasing reprisals against political opponents. The exploration of prescriptive jurisdiction above, viewed through the prism of State responsibility, in some respects reflects the difficulties inherent in a system in flux – one moving towards a universalist approach to 'no impunity' for a certain class of crimes, but which has not quite shed its bilateralist treaty origins (resulting in principle of legality concerns which would not remain in the case of a *clear* recognition of universal jurisdiction in this regard).

Insofar as enforcement jurisdiction is concerned, the international law on jurisdiction is again caught between two paradigms, although the writing may well be on the wall. Cases of territorial enforcement jurisdiction predicated on an unlawful extra-territorial abduction can – without conceptual incoherence – be viewed through either a State-centric or human-centric lens, to entirely different positive law effect (both in terms of the primary rules and secondary

rules of State responsibility). The momentum of shifts in international law, however, should favour a human-centric approach – at least insofar as common crimes which do not threaten broader community values are concerned. The European Court of Human Rights has certainly suggested this will be its approach, even if States continue to address abductions from their own State-centric vantage point. This is of course not to accept 'impunity', particularly as victims' rights to access to justice also need to be accounted for. It is to say, however, that States must secure the territorial presence of an accused through legal means, including extradition or formal co-operation with the State in whose territory the accused is residing.

In respect of international crimes which threaten broader community values, the difficulty is not uniquely a question of deciding between a State-centric or human-centric paradigm (although it is also that), but is also a question of balancing the competing values of the international community as a whole. For instance, in its *Prosecutor v Dragan Nikoli* decision, the ICTY looks to balance respect for human rights of the accused and the territorial sovereignty of the State from whose territory the accused is abducted against the international community's interest in the prosecution of individuals charged with serious international crimes. The Tribunal held that jurisdiction should only be set aside in the case of egregious violations of the accused's rights (and that abduction was not considered, in the circumstances of an international tribunal, to be an egregious breach).[87] This decision was of course taken by a tribunal created precisely for the purposes of ensuring there is no impunity for international crimes committed in the former Yugoslavia, and it is therefore perhaps not surprising that these institutional blinkers resulted in prioritising one set of community values over others. It might just as well have argued that weak respect for the rule of law, territorial sovereignty and human security were the context within which the international crimes at issue were committed – and that prioritising 'no impunity' over these other important community values might in fact contribute in the future to the very conditions which rendered the ICTY necessary in the first place. It remains to be seen how States and international tribunals will balance these interests in future, perfecting (or not) a human-centric approach to enforcement jurisdiction, but it is clear that in the modern era of international law this balance must also take into account the systemic consequences of failing to prioritise human rights, including those of persons who have committed international crimes.

[87] ICTY, *Prosecutor v Dragan Nikoli* (n 49), [29] – [30]. See also ECtHR (GC), *Öcalan v Turkey* (n 44), [88], in respect of the need to balance the 'demands of the general interest of the community [in prosecution] and the requirements of the protection of the individual's fundamental rights.'