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CONTINUING CRIMES IN THE ROME STATUTE

*Alan Nissel**

I. INTRODUCTION

One of the most controversial negotiating points at the Rome Conference establishing the International Criminal Court (ICC) was the scope of its jurisdiction.[1] Some pressed for universal jurisdiction for all

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1. Final Act, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, at 2, U.N. Doc.A/CONF.183/C.1/L.65/Rev.1 (1998), *available at* www.un.org/law/icc/statute.final.htm. *See* WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 59 (2001); LEILA N. SADAT, THE ICC AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 185–86 (2002); Phillipe Kirsch & John T. Holmes, *Developments in International Criminal Law: The Rome Conference on an International Criminal Court*, 93 AM. J. INT'L L. 2, 4 (1999). Unless otherwise stated, all references to legal provisions will be to the Rome Statute.

of the crimes in the Rome Statute of International Criminal Court (Rome Statute);[2] this would have allowed the ICC to try nationals of any state, whether it ratified the Rome Statute or not. Others sought to restrict the jurisdiction of the ICC to nationals of states that have ratified the Rome Statute ("State Parties"); this, of course, would preclude the ICC from trying nationals of any state that has not ratified the Rome Statute. In the end, Article 12 grants the ICC jurisdiction to try nationals of a consenting state (whether ad hoc or by ratification) as well as over *anyone* involved in conduct taking place on the territory of one such consenting state. The resulting compromise has been called a form of "limited universal jurisdiction."[3]

One of the debates on jurisdiction that carried on beyond the Rome Conference was about "continuing crimes."[4] Continuing must be distinguished from non-continuing crimes. Not all crimes can be continued. A "continuing crime" describes a state of affairs where a crime has been committed and then maintained.[5] For example, a murder is completed when a victim dies.[6] The crime against humanity of enforced disappearance of persons, on the other hand, is committed when the perpetrator abducts a victim and its duration can continue for as long as the abductee

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2. Sharon Williams, *Commentary on the Article 11, Jurisdiction* rationae temporis, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL COURT: OBSERVERS NOTES, ARTICLE BY ARTICLE 323, 332–35 (Otto Triffterrer ed., 1999) [hereinafter ICC COMMENTARY].

3. Jordan S. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 7 (2000).

4. Two preliminary clarifications are in order. First, continuing crimes are sometimes incorrectly called "continuous" crimes. For the sake of precision, it is worth noting the different meanings of the two words. The Oxford English Dictionary defines "continuing" (adjective) as "abiding, lasting; persistent, persevering;" it defines "continuous" (adjective) as "extending in space without interruption of substance." OXFORD ENGLISH DICTIONARY 829, 830 (2nd ed., 1989). "Continuing" refers to more of a temporary state of affairs; whereas "continuous" describes a more permanent condition. Thus, a "continuing act" is a one that can be committed instantly, but can also be maintained. A "continuous act" is one where the temporal element is constitutive of the violation. Enslavement is an example of the former and the refusal to provide an attorney is an example of the latter. There are no "continuous crimes" in the Rome Statute. Second, this Article will not assess continuing crimes as a non-legal term (i.e., where "continuing" is merely used as an adjective of "crimes"). *See, e.g.*, Abigail D. King, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. REV. 773.

5. *See generally* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) 192 (1983); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 135 (2001); Joost Pauwelyn, *The Concept of a "Continuing Violation" of an International Obligation: Selected Problems* 66 BRIT. Y.B. INT'T L. 415 (1995) (regarding continuing violations of public international law).

6. *See* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 8(2)(c)(i)-1, 37 I.L.M. 999, 1008 (entered into force Jul. 1, 2002) [hereinafter Rome Statute].

is unaccounted for (even after death).[7] Another example is when a cowboy turns to a man and yells 'Freeze!' he performs an act having a continuing character; however, shooting his opponent dead would be a completed act.[8] This Article seeks to clarify the ways in which the continuing character of a crime affects the ICC's jurisdiction and suggests rules to assist the ICC in its adjudication.

Not surprisingly, the continuing nature of a crime has a significant impact on the jurisdiction of the ICC. In the case of enforced disappearances, for example, if one (incorrectly) analyzes the crime as an ordinary—i.e., non-continuing—one, then abductions that began prior to the entry into force of the Rome Statute are precluded from the ICC's jurisdiction.[9] But if one views the conduct after the initial abduction as not having ended, the continuing crime can fall within the ICC's jurisdiction, so long as the abductee is unaccounted for after the entry into force of the Rome Statute ("critical date").[10] Though the Rome Statute has been ratified by the minimum number of states[11] and the Elements of Crimes and Rules of Procedure and Evidence ("Elements") have already been formalized by the Assembly of State Parties,[12] both are silent on this matter.

Textually, the Rome Statute is ambiguous. Article 11 states: "[T]he Court has jurisdiction only with respect to crimes *committed* after the entry into force of this Statute."[13] But Article 24 states: "[N]o person shall be criminally responsible under this Statute for *conduct* prior to the entry into force of the Statute."[14] On a literal reading, such as the one reported by *The ICC Monitor*, by leaving out the verb "committed" after the noun "conduct," Article 24 has included continuing crimes within its

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7. Either an abduction or the refusal to acknowledge can constitute the crime. *Compare* Rome Statute, *supra* note 6, art. 7(2)(i), 37 I.L.M. at 1005 (continuing crime if no information about the abductee is provided), *with* Georg Witschel & Wiebke Rückert, *Article 7(1)(i)—Crime Against Humanity or Enforced Disappearance of Persons*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 98, 98 (Roy. S. Lee ed., 2002) [hereinafter ICC: ELEMENTS] (completed crime if the whereabouts of the abductee were revealed, element 1(a)).

8. *See* James Crawford, *Counter-measures as Interim Measures*, 5 EUR. J. INT. L. 65, 76 n.16 (1994).

9. Rome Statute, *supra* note 6, art. 11(1), 37 I.L.M. at 1010. This distinction was lost on some jurists such as Professor Sadat, as discussed below, in this section.

10. For most State Parties, July 01, 2002. *See* Rome Statute, *supra* note 6, arts. 11, 126, 27 I.L.M. at 1010, 1068. The 60th ratification needed to create the Court was received on April 11, 2002. International Criminal Court Questions and Answers, *at* http://www.icc-cpi.int/php/show.php?id=faq#1, (last visited Apr. 1 2004).

11. In satisfaction of Rome Statute, *supra* note 6, art. 126, 37 I.L.M. at 1068.

12. ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 1st sess., U.N. Doc. ICC-ASP/1/3, U.N. Sales No. E.03.V.2 (2002).

13. Rome Statute, *supra* note 6, art. 11(1), 37 I.L.M. at 1010 (emphasis added).

14. *Id.* art. 24(1), 37 I.L.M. at 1016 (emphasis added).

jurisdiction.[15] In contrast, Professor Leila Sadat structurally interprets Article 11 (precluding retroactive "crimes committed") and Article 24 (precluding retrospective "conduct" that has "occurred") to argue that the latter provision is not redundant; it is more restrictive than Article 11 in that it excludes continuing crimes from the jurisdiction of the ICC.[16] It seems that the most accurate view is that of William Schabas who concludes that "the issue of 'continuous crimes' remains undecided and it will be for the Court to determine how it should be handled."[17] Indeed, other readings of Articles 11, 22 and 24 are more plausible.[18]

In order to resolve this indeterminacy when interpreting the Rome Statute[19] and Elements, the ICC will have to balance two competing norms. On the one hand, the stated purpose of the Rome Statute is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[20] This aim would lead the ICC to interpret its jurisdiction expansively. On the other hand, the ICC will be the first permanent international criminal court to attribute responsibility to individuals, not states;[21] in doing so, Article 21 requires

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15. *Defining the Crimes*, 10 INT'L CRIMINAL CT. MONITOR 3 (1988), *available at* http://www.iccnow.org/publications.moniter/10/moniter10.199811.pdf (last visited Apr. 15, 2004).

16. SADAT, *supra* note 1, at 186 (noting that this "underscores . . . one of the political compromises required to bring the ICC into existence").

17. SCHABAS, *supra* note 1, at 59. Indeed, other readings of Articles 11, 22, and 24 are more plausible. *Compare Blake Case*, Inter-Am. Ct. H.R. (ser. C) No. 27, at 35–39, ¶¶ 29–40 (1996), *with Blake Case*, Inter-Am. Ct. H.R. (Ser. C) No. 36, at 130, ¶ 67 (1998) (comparing the status of "continuing violations").

18. *See* Raul C. Pangalangan, *Non-retroactivity* ratione personae, *in* ICC COMMENTARY, *supra* note 2, at 467, 471–72 for a different interpretation of Article 11, 22, and 24 (arguing that the Statute is neither clear on the status of omissions or continuing crimes. Conclusions about continuing crimes aside, in my view, Article 22 (*Nullum crimen sine lege*) is about excluding conduct occurring before the critical date (which may not necessarily have been criminal) whereas Article 11 (Jurisdiction *ratione temporis*) restricts the jurisdiction of the Court to crimes occurring after the critical date. Article 22 could not have repeated the word "crime" since that would have been tautological; similarly, Article 11 could not have used the word "conduct" since the Rome Statute is there speaking of jurisdiction and it would be more accurate to speak of having jurisdiction over certain crimes than of conduct.

19. Although this Article primarily discusses international law, the Court will be able to look to general principles derived from national laws; this was the most controversial source codified and distinguishes Article 21 of the Rome Statute from Article 38 of the statute establishing the International Court of Justice. ICC COMMENTARY, *supra* note 2, at 441.

20. Rome Statute, *supra* note 6, pmbl, 37 I.L.M. at 1000. The ICTY stated in *Prosecutor v. Delalic et al.*, ICTY Case No. IT-96-21-T, ¶ 170 (ICTY Trial Chamber Nov. 16, 1998): "The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation." For an analysis of ten functions of the Court, see ICC: ELEMENTS, *supra* note 7, at lvii–lxv; for more of a political perspective, see GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 6, 287 (2000).

21. *Commentaries to the Draft Articles on Responsibility of States for Intentionally Wrongful Acts*, International Law Commission, 53d Sess., art. 19 (2001), *reprinted in* Report

that the Rome Statute be strictly interpreted and in case of ambiguity, the definition shall be interpreted in favor of the accused.[22] Article 21 was the compromise following negotiations over the limits of the ICC's discretion and its inclusion in the Rome Statute is another important recognition of the international principles of legality.[23] As opposed to state responsibility, this requirement is unique to the field of individual responsibility and is analogous to the domestic principle of presumption of innocence in criminal proceedings.[24]

One of the most ambitious goals of the International Criminal Court is to balance the ideal of ending impunity with the legalistic protection of the accused from the arbitrary application of law.[25] Accordingly, the main task of this Article will be to determine when continuing crimes will fall under the jurisdiction of the International Criminal Court according to the established primary and secondary sources of international law—i.e., within the rule of law.

The next Part of this Article breaks down the two categories of jurisdiction that are raised by the temporal dimensions of continuing crimes. Generally, if the temporal dimension only has to do with "when the conduct took place" then this is a jurisdictional *ratione personae* (personal jurisdiction) issue and will not preclude retrospective judgment. However, if the temporal element of the conduct raises questions about the timing of the criminality of the conduct (i.e., when the law changed over

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of the International Law Commission on the Work of its Fifty-third Session, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, 56th Sess., Supp. No. 10, ch. IV. E.2 U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles]; *see also* Marina Spinedi, *Crimes of States: A Bibliography*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 339 (J.H.H. Weiler et al. eds., 1989); ANDRÉ DE HOOGH, OBLIGATIONS *Erga Omnes* AND INTERNATIONAL CRIMES 2 (1996); MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *Erga Omnes* 189–214 (1997).

22. Rome Statute, *supra* 6, art. 22(2), 37 I.L.M. at 1015. Sadat suggests interpreting the definitions of the crimes with the backdrop of five basic principles: each is defined only for the purpose of the Rome Statute; it shall be interpreted as limiting rules of customary international law for purposes other than this Rome Statute; its definitions are not self-contained (a paradigmatic case is the war crime of enforced disappearances, discussed in the next part); all definitions must be read in conjunction with general principles of criminal law. The overall restrictive approach of the Rome Statute indicates that it is oriented towards the prosecution of major criminals only. *See* SADAT, *supra* note 1, at 138.

23. ICC COMMENTARY, *supra* note 2, at 436–38. In international law, the prohibition of retroactive offences (*nullum crimen sine lege*) and of retroactive punishments (*nullum poena sine lege*) are known together as the 'principle of legality.' William A. Schabas, *Perverse Effects of the* Nulla Poena *Principle: National Practice and the* Ad Hoc *Tribunals*, 11 EUR. J. INT'L L. 521, 522 (2000). It should be noted that the international treatment of the principle of legality is not the same as domestic treatments of the principle (discussed in Part V).

24. *See also* SADAT, *supra* note 1, at 180–81.

25. *Compare infra* Rome Statute, *supra* note 6, 36 I.L.M. at 999, *with id.* Part 3, 36 I.L.M. at 1015. This concept is elaborated *infra*, Section 2. Legality: from a General to an International Principle.

the time-span under consideration), it is a question of jurisdiction *ratione materiae* (subject-matter jurisdiction), which prohibits retroactive judgment. After setting the jurisdictional framework for the discussion, Part III distinguishes completed crimes[26] from continuing crimes. Conceptualizing each category of crimes will be especially useful when trying to identify a continuing crime in difficult cases such as instantaneous acts with continuing effects as well as composite crimes.

The next two Parts apply these distinctions to the different types of continuing crimes.[27] Part IV establishes that the continuing character of a crime will generally have an inclusive effect on the personal jurisdiction of the ICC subject to international principles of legality. Part V analyzes the different position of composite crimes. Whereas other continuing crimes are concerned with events that may but need not be continued, composite crimes take time to commit (e.g., as a series or a pattern such as discrimination).[28] The jurisprudence of composite crimes is conflicting over whether the ICC may consider conduct that has taken place prior to the entry into force of the Rome Statute in order to establish a crime for conduct that took place subsequent to that date. It is submitted that so long as composite crimes only raise issues of personal jurisdiction, the ICC should be able to consider prior conduct for evidentiary purposes. Finally, the Article concludes by justifying this expansive approach to the ICC's jurisdiction with the corresponding steeplechase of admissibility.

II. PRELIMINARY JURISDICTIONAL ISSUES

Judicial jurisdiction is the authority of a court to hear and decide a case.[29] Historically, international lawyers have sub-divided judicial jurisdiction into separate categories: jurisdiction *ratione personae* (personal jurisdiction), *ratione materiae* (subject-matter jurisdiction) and *ratione*

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26. Also referred to as "instantaneous" crimes. *See, e.g.*, Pauwelyn, *supra* note 5, at 418; Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2216, 2228, ¶ 35. The approach of the ILC in its Article 14 (completed vs. continuing violations) is preferable since the former description does not adequately account for the conceptual difference between the first two categories of crimes since both can be committed instantaneously. However, only continuing crimes *can* be committed for a duration of time as well.

27. I have used the categorization adopted by Brownlie and Crawford. *See* BROWNLIE, *supra* note 5, at 193–98; Crawford, *supra* note 5 (discussing acts that become illegal in Article 13, continuing acts in Article 14 and composite acts in Article 15).

28. While compose crimes could theoretically raise questions of jurisdiction *ratione materiae*, there is no record of such a situation. Accordingly, in this Article, we will discuss them as raising questions of jurisdiction *ratione personae*.

29. For judicial jurisdiction in U.S. courts, see *Pennoyer v. Neff*, 95 U.S. 714 (1878).

temporis (temporal jurisdiction).[30] Jurisdiction *ratione personae* refers to the judicial authority to require a person to turn up in court (e.g., United States nationals); jurisdiction *ratione materiae* covers subject-matter which the law allows a court to adjudicate (e.g., genocide); jurisdiction *ratione temporis* is a temporal restriction of a court's jurisdiction (e.g., during 1994).

However, analyzing jurisdiction *ratione temporis* as a distinct topic is conceptually misleading because there are two ways that timing affects a court's jurisdiction: 1) the timing of the conduct and 2) when the prohibition of that conduct took place. Shabtai Rosenne identifies this conflation in *The Law and Practice of the International Court.* Referring to the World Court, Rosenne writes: "The temporal element in the jurisdiction of the Court is therefore to be regarded as part of the problem of jurisdiction *ratione personae* or *ratione materiae* as the case may be."[31] Accordingly, we will treat the temporal dimensions of the ICC's jurisdiction in terms of how it relates to its jurisdiction *ratione personae* and *ratione materiae.*

The ICC does not have jurisdiction to penalize perpetrators for crimes committed prior to the Rome Statute's entry into force.[32] This is a jurisdictional limitation of the ICC's jurisdiction *ratione personae* and goes to the timing of the conduct of the accused. Unlike the Ad Hoc War Crime Tribunals ("Ad Hoc Tribunals"), which only had jurisdiction for committed crimes and not for future crimes, the jurisdiction of the International Criminal Court is generally only prospective.[33] This temporal

30. SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996 527 (3d ed. 1997). Other issues, e.g., *ratione loci,* do not directly concern us here; however, we can note that although some commentators argue that the territorial jurisdiction of the Court "is unlimited." Stéphane Bourgon, *Jurisdiction* Ratione Loci, *in* ANTONIO CASSESE ET AL., I THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 559, 561 (2002). This is an oversimplification and, like temporal jurisdiction, will depend on the personal jurisdiction of the Court. For a discussion on these issues in the domestic setting, see generally, GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 95–123 (3d ed. 1996).

31. ROSENNE, *supra* note 30, at 579–80. On this view, the title of Article 11 of the Rome Statute ("Jurisdiction ratione temporis") is misleading; it should say something akin to "Temporal element of jurisdiction *ratione materiae*" or should just have been placed without a title following Article 8. J. Pauwelyn draws a similar conclusion in an article analyzing the different temporal characteristics of treaties (e.g., "continuing treaties"). Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 546 (2001).

32. Rome Statute, *supra* note 6, art. 11, 37 I.L.M. at 1010.

33. If the Security Council, acting under a Chapter VII resolution, requests that the Prosecutor initiate an investigation of an act that took place before the entry into force of the Rome Statute in accordance with Articles 12(2) and 13(b), the Court's jurisdiction could theoretically extend to conduct taken place prior to the entry into force of the Rome Statute. Some argue that such an interpretation seems to fly in the face of Article 11. Bourgon, *Jurisdiction Ratione temporis, in* CASSESE, *supra* note 30, at 544. Arguably, one could understand such

restriction does not go to the authority of the prohibitions. The ICC has no retroactive jurisdiction to criminalize conduct that was not criminal before the critical date.[34] This is a limitation of the jurisdiction *ratione materiae* of the ICC and goes to the timing of the criminality of the conduct alleged. This is a principle of legality and will serve to constrain the statutory interpretation of the definitions of genocide, crimes against humanity and war crimes[35] as understood in international law at the time of the conduct in question. Indeed, the Ad Hoc Tribunals restricted their temporal jurisdiction in this matter as well.[36] Finally, we should note that it is easy to simplify such a distinction as one of substance (*ratione materiae*) and procedure (*ratione personae*).[37] However, this overly formalistic dichotomy breaks down under the burden of adjudication.[38]

The above distinction between jurisdiction *ratione personae* and *ratione materiae* is offered more for its conceptual than practical relevance. On Professor Rosenne's own account, judicial practice in international courts and tribunals has not consistently mirrored this conception.[39]

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retrospective adjudication as an example of a delegation of jurisdiction to the Court as opposed to jurisdiction stemming automatically from the Rome Statute.

34. Rome Statute, *supra* note 6, arts. 22–23, 37 I.L.M. at 1015 (discussed below).

35. Technically, and the Crime of Aggression.

36. *See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, ¶¶ 34–35, U.N. Doc. S/25704 (1993).

37. Sharon Williams writes, "retroactive substantive criminalization is not the same as the procedural legislative retrospective assumption of jurisdiction by a court over conduct that was criminal at the time that it was committed. . . Thus [it] . . . must be distinguished from the fundamental rule of *nullum crimen sine lege*." Williams, *supra* note 2, at 324.

38. In *Regina v. Finta*, the High Court of Canada decided that the recently amended Part 7(3.71) of its Criminal Code which opens up the jurisdiction of Canadian courts to war crimes was a procedural provision and requires the jury to establish separately the existence of a war crime. [1994] 1 S.C.R. 701 (Can.). The majority of the Court of Appeals of Canada said that the legislation was substantive, creating two new crimes in Canada but still requires the jury to establish separately the existence of a war crime. The Supreme Court of Canada confirmed the opinion of the majority in the Court of Appeals. The dissenting opinion in both the Court of Appeals and the Supreme Court stated that the legislation was procedural and does not require the jury to establish separately the existence of a war crime. *See* Irwin Cotler, *War Crimes Law and the Finta Case*, 6 SUP. CT. L. REV. 577, 604–06 (2d ed. 1995). Compare this outcome with that in *Polyukhovich v. Australia*, where the Australian High Court only looked at pre-existing crimes under international law. (1991) 172 C.L.R. 501 (Austl.). Similarly, the crime of genocide during the Nüremberg trials and crimes against humanity in the International Criminal Tribunal of the former Yugoslavia look like the creation of laws applied retroactively–sometimes argued as more justifiable as "victor's justice." Thus, the application of personal jurisdiction if far from a procedural, *qua* non-substantial issue (discussed in Part V). This problem has led Judge Doherty of the High Court of Canada to distinguish between jurisdictional issues that are "retroactive" and those that are "retrospective."

39. ROSENNE, *supra* note 30, at 582. For example, in the *Application of the Convention on the Prevention & Punishment of the Crime of Genocide (Bosn.-Herze. v. Yugoslavia)*, the World Court discussed jurisdiction *ratione temporis* in the context of the material jurisdictional limitations of the crime of genocide. 1996 I.C.J. 595, 617, ¶ 34 (July 11). However, in the *Prosecutor v. Tadic*, the ICTY considered jurisdiction *ratione temporis* as a question of the

Thus, generally, temporal jurisdiction questions of *ratione materiae* relate to the codification of crimes by legislation (treaty or otherwise) and may not apply retroactively to conduct that was not already criminal. Temporal jurisdictional questions of *ratione personae* will usually relate to the declaration by legislation granting a court the authority to serve as a forum for certain crimes—in the past, present or future. The overlap between these two elements of the ICC's temporal jurisdiction will be highlighted in the category of composite crimes.[40]

III. THREE CONCEPTS OF INTERNATIONAL CRIMES

Before we can determine if and when continuing crimes are within the jurisdiction of the ICC, we must compare three closely related concepts—completed, continuing and composite crimes—and suggest corresponding practical principles regarding the ICC's jurisdiction over each category of crimes.

A completed crime is a violation of a primary international obligation[41] that does not continue in time—i.e., when an obligation targets an instantaneous event.[42] The crime may take considerable time to prepare, but it can only take an instant to commit. The Article 8(2)(c)(i)(1) war crime of murder, for example, only prohibits perpetrators from murdering so long as the victim is alive; the instant that the victim dies, the perpetrator has committed—and is no longer committing—the crime of murder. While a completed crime may have lasting effects, the physical elements of the crime do not persist in time. Such effects (e.g., death) should not be confused with an enduring state of violative behavior (e.g., loss of freedom of movement).

A continuing crime is a violation of a primary obligation targeting a potentially ongoing situation that has been committed and then

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timing of the conduct of the accused. ICTY Case No. IT-94-1-AR72, ¶ 70 (ICTY Appeals Chamber Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

40. Namely, where the temporal element will determine whether or not the conduct (taken in aggregate) is enough to consist of a crime that has taken place after the critical date.

41. Namely, an international obligation arising directly out of a violation of international customary or conventional law–as opposed to a secondary obligation which is a separate form of responsibility that is created by not discharging one's primary international responsibility. *See also* CRAWFORD, *supra* note 5, at 12–16.

42. Joost Pauwelyn's descriptive definition is more appropriate for the broader notion of state responsibility: "the breach of an international obligation by an act of a subject of international law extending in time and causing a duration or continuance in time of that breach." Pauwelyn, *supra* note 5, at 415.

maintained.[43] To commit a continuing crime, the perpetrator must be in breach of a prohibition over a period of time. Enforced disappearance of persons, for example, takes time to commit—whether the disappearance is more moments or endures for decades.[44] Thus, if a perpetrator kidnaps a victim, murders that victim secretly without revealing any information, (at least) two crimes were committed at the same time.[45] The instant the victim was murdered, the perpetrator committed the crime of murder; additionally, so long as the perpetrator does not release information about the victim's whereabouts, the former is in continuing commission of the crime of enforced disappearance of persons. Within this concept of continuing crimes, we should also discuss the timing of the criminality of the conduct in question (i.e., when did the conduct become criminal). This category includes another type of conduct that is characterized by its intertemporal element (i.e., when the law evolves during the time-span under consideration).[46] Generally, the effects of such continuing crimes will serve to expand the reach of the ICC. However, we should note that the distinction between completed and continuing crimes is not always an easy one to make;[47] as will be discussed below, even in difficult cases (e.g., legislation and other "collective acts"), the distinction between completed and continuing crimes will depend upon identifying the relevant primary norm in question.[48]

A composite crime is a violation of a single, primary obligation that occurs a number of times; it requires a plurality of acts and/or omissions

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43. Sometimes automatically and sometimes not in which case the obligation. Conceptually, we should note that continuing acts and omissions are identical. *See* Draft Articles, supra note 21, art. 14. We will refer to conduct as including both acts and omissions. The main differences will regard their primary obligations and then attribution.

44. Rome Statute, *supra* note 6, art. 7(1)(i), 37 I.L.M. at 1005.

45. Assuming, in this example, that the Rome Statute Elements of arts. 7(1)(a) and 7(1)(i) crimes have been fulfilled.

46. Generally on the intertemporal law, see Wolfram Karl, *The Time Factor in the Law of State Responsibility*, *in* UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 95 (Marina Spinedi & Bruno Simma eds., 1987).

47. For a list of cases noting the temporal character of a breach of international law, see Crawford, *supra* note 5, at 135 n.252 (Commentary to Draft Article 14: Extension in time of the breach of an international obligation).

48. Discussed below. Remarkably, in the Draft Articles, Special Rapporteur Crawford immediately sets out two successive disclaimers:

> Although the existence and duration of a breach of an international obligation depends *for the most part* on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. *Without seeking to be comprehensive in its treatment of the problem*, article 14 deals with several related questions.

Crawford, *supra* note 5, at 135 (emphasis added).

to have been committed, which, taken as a whole, constitute a separate, composite crime. As mentioned, some crimes can be categorized according to their temporal (i.e., completed or continuing) status.[49] In contrast, composite crimes are defined by their physical elements (e.g., recurring, systematic, etc.). The aggregate character of such crimes will almost always mean that it has been committed over a period of time.[50] From a jurisdictional perspective, this category of crimes has baffled academics and judges alike since composite crimes seem to touch on both a court's jurisdiction *ratione personae* and *ratione materiae*.[51] When a person is charged with responsibility for a series of occurrences only some of which have taken place after the critical date, the ICC will be faced with the dilemma of whether to consider prior conduct in order to help establish that subsequent conduct may constitute a composite crime. As will be discussed, the ICC can consider anything for evidentiary purposes of establishing a crime that continued to take occur subsequent to the critical date.[52]

IV. CONTINUING CRIMES IN THE ROME STATUTE

The text of the Rome Statute is ambiguous as to the effect that the continuing character of a crime will have on the jurisdiction of the ICC. In order to resolve this indeterminacy, this part of the Article suggests rules to assist the ICC in its adjudication of those crimes with a continuing character. For such conduct to be included within the jurisdiction of the ICC, it must first meet the conditions for a continuing crime, and

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49. For example, enforced disappearance of persons which can be either an abduction or the refusal to acknowledge can constitute the crime. It would be a continuing crime if no information about the abductee is provided. Witschel & Rückert, *supra* note 7, at 98 (element 1(a)). On the other hand, it would be a completed crime if the whereabouts of the abductee were revealed. *Id.* (element 1(b)).

50. For example, a murder will not constitute a Crime against Humanity unless it is "committed as part of a widespread or systematic attack" which may have begun prior to the critical date but has continued afterwards. Rome Statute, *supra* note 6, art. 7(1), 37 I.L.M. at 1005. It is theoretically possible for a composite crime to occur in an instant, but practically, the likelihood of such a concerted, yet ephemeral event ever occurring is low.

51. *Compare* Prosecutor v. Barayagwiza, ICTR Case No. ICTR-97-19-AR72 (ICTR Appeals Chamber Sept. 12, 2000) (Decision on the Interlocutory Appeals), *with* Prosecutor v. Nahimana, ICTR Case No. ICTR-99-52-T (ICTR Trial Chamber Dec. 3, 2003) (judgement) (regarding international criminal law). *Compare* BROWNLIE, *supra* note 5, at 197, *with* Pauwelyn, *supra* note 5, at 427 (regarding public international law).

52. This is another reason to note—but not to overstate—the importance of distinguishing between the timing of the conduct or the primary obligation in question. While the composite character of a crime only relates to the occurrence of the conduct in question, the continuing nature of a crime targets the timing of the prohibition as well. Hence, a composite crime can be a continuing one or a completed one, as the case may be.

second, it must have been criminal at the time the accused committed it (a principle of legality).

A. *Recognizing Continuing Crimes*

Before we can determine when the ICC's jurisdiction *ratione materiae* includes continuing crimes, we must first determine more precisely when a crime is "continuing." While some crimes, such as the enforced disappearance of persons, are rather easily classified as continuing crimes, some conduct, such as domestic legislation that breaches an international obligation, is not easily classified as completed or continuing. Distinguishing completed from continuing crimes may be of crucial importance to the ICC's jurisdiction, because an incorrect classification of a continuing crime as an ordinary (completed) crime will preclude the jurisdiction of the ICC when the initial act has occurred before the critical date.[53] In this section, we will see how, insofar as the continuing character of a crime raises the question of the timing of the conduct, the ICC should treated it inclusively.

1. Continuing Violations and State Responsibility

Due to the relative youth of international criminal law, most of the primary and secondary literature on continuing crimes is borrowed from the law of state responsibility.[54] Theoretically, attributing individual responsibility in international law is without prejudice to state responsibility[55] and *vice versa*.[56] However, their practical correlation is many times as obvious as it is not discussed.[57] Thus, the International Law Commission's ("ILC") Draft Articles on the Responsibility of

53. Thus, continuing violations are *not*, as some commentators believe, "violations which are committed prior to the entry into force of the Statute but which have *effects* that continue even afterwards. . ." Bourgon, *supra* note 33, at 550 (emphasis added).

54. *See also* Crawford, *supra* note 5; Pauwelyn, *supra* note 5. The correlation between these two fields is as complex as it is under-researched. *see also*, Alan Nissel, *Principles of International Responsibility: Correlating States and Individuals in International Law* (LL.D. dissertation in progress, University of Helsinki) (draft on file with author).

55. Article 25(4) of the Rome Statute states: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." Rome Statute, *supra* note 6, art. 25(4), 37 I.L.M. at 1016.

56. Article 58 of the Draft Articles states: "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." Crawford, *supra* note 5, art. 58, at 312.

57. The overlap of the different types of international responsibility will be mentioned regarding composite crimes in Part V. *See also* Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes:* Tertium Non Datur?" 13 EUR. J. INT'L L. 895 (2002) (interpreting individual responsibility expansively can result in limiting the doctrine of attribution and the scope of state responsibility. I have developed this theme more fully in my doctoral dissertation, *supra* note 54.

States for Internationally Wrongful Acts ("Draft Articles")[58] will serve as a useful guide but not as a dispositive text.[59] Draft Article 14 states, "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation." Draft Article 30 adds, "The State responsible for the international wrongful act is under an obligation to cease that act, if it is continuing."

The *Rainbow Warrior*[60] is one of the most famous examples in the international case-law concerning continuing violations. In that case, two French agents were convicted by a New Zealand High Court for assisting in the sinking of the *Rainbow Warrior*, a Greenpeace ship docked off of the coast of New Zealand (which was going to protest French nuclear testing in the Pacific Ocean). France refrained from detaining the two agents and returned them to Hao, a French Pacific island, in violation of its agreement with New Zealand. In determining France's culpability for refusing to detain the agents, an international arbitration tribunal approved the ILC's (now amalgamated) Article 14 and held: "Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach."[61]

2. The Overlap with Completed Crimes

It is not, however, always easy to distinguish between continuing and completed conduct. In order to distinguish continuing from completed acts, as a case-study, we will assess a famously unsettled jurisdictional problem in international law: is domestic legislation that breaches an international obligation a completed or a continuing violation? International courts have not answered this question consistently. In *Loizidou v. Turkey*,[62] the European Court of Human Rights ("ECHR") had to decide if Turkey's expropriation and refusal to grant Mrs. Loizidou access to her properties was a continuing violation of Protocol 1, Article 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms[63] which went into force for Turkey (in 1990) only

58. Draft Articles, *supra* note 21.

59. For a selective list of international (non-criminal) cases from 1924 to 1995, *see* Crawford, *supra* note 5, at 135 n.252.

60. Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and which Related to the Problems Arising from the *Rainbow Warrior* Affair (N.Z./Fr.), 20 R.I.A.A. 217 (1990).

61. *Id.* at 263–64, ¶ 101.

62. Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2216.

63. This Protocol states: "Protection of Property: Every natural or legal person is entitled to the peaceful enjoyment of his possessions." First Protocol to the Convention for the

after its initial occupation of Northern Cyprus (1974). The ECHR held that since Turkey continued to refuse to grant the Applicant access to her properties, it found jurisdiction for Turkey for its continuing violation from 1990 (the critical date) onwards.[64] In the end, the ECHR unanimously agreed that Turkey was in continuing breach of its treaty obligations.[65] The consensus relied on the view that Article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985 (formally expropriating Northern Cyprian properties) was *void ab initio* under international law.[66]

However, in *X v. United Kingdom*,[67] the Applicant claimed that a Parliamentary Act abolishing the rights of landowners whose property adjoined that of British Railways (depriving him of his property) contravened Protocol No. 1, Article 1. The European Commission of Human Rights (as it was then constituted) refused to recognize a continuing violation, holding that the legislation in question was a completed act. Some commentators explain this as a *de jure* and a *de facto* distinction (of expropriation)—where only the former has the temporal character of continuing conduct.[68] However, as Joost Pauwelyn notes, this explanation is insufficient since it ignored those to whom the obligation was owed; *de jure* expropriation is no less fair to the victims.[69]

Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. T.S. No. 9 (1991).

64. *Loizidou*, 1996-VI Eur. Ct. H.R. at 2230, ¶ 41 (confirming its case law from Papamichalopoulos v. Greece, 260 Eur. Ct. H.R. (Ser. A) 55, 69–70, ¶¶ 40, 46 (1993), and Agrotexim v. Greece, 330 Eur. Ct. H.R. (ser. A) 3, 22, ¶ 58 (1995)); *see also* Beate Rudolph, *International Decisions:* LOIZIDOU V. TURKEY *(Merits)*, 91 AM. J. INT'L L. 532, 534–36 (1997).

65. *Loizidou*, 1998-IV Eur. Ct. H.R. Judge Gölcüklü dissented on political grounds: "At the heart of the *Loizidou v. Turkey* case lies the future political status of a State that has unfortunately disappeared, a question to which all the international political bodies. . . are now seeking an answer. A question of such importance can never be reduced purely and simply to the concept of the right of property and thus settled by application of a Convention provision which was never intended to solve problems on this scale."

66. *Loizidou*, 1998-IV Eur. Ct. H.R. at 2231, paras. 43–44. In part due to Security Council Resolutions 353, 354, 357 and 358 (1974); these were Chapter VI Resolutions.

67. *X v. U.K.*, 8 Eur. Ct. H.R. 211 (1976).

68. *See* Rudolph, *supra* note 64, at 535; Crawford, *supra* note 5, at 136, ¶ 4. Generally, as was seen recently in Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2. ¶¶ 58–59 (NAFTA Ch. 11 Arb. Trib. Oct. 11, 2002), 42 ILM 85 (2003), *at* http://www.state.gov/documents/organization/14442.pdf, expropriations (as completed transfers of title) are generally completed acts.

69. Pauwelyn, *supra* note 5, at 424. For the law of the World Trade Organization, the intertemporal problem created by domestic legislation still in effect at the relevant critical date is well established. *See* Canada—Term of Patent Protection, Report of the Appellate Body, WTO Doc. WT/DS170/AB/R, ¶¶ 58–60, Sept. 18, 2000. A completed act of legislation had already occurred but then maintained, since the right to protection of certain patents subsisted after the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization

Professor Pauwelyn distinguishes continuing violations of international law by evaluating three factors: the primary obligation in question, the duration of the act and, as a matter of legal fiction, considering the violation as if it were repeated each day.[70] Based on these guidelines, Pauwelyn argues that the ECHR erred in *X v. United Kingdom*; both ECHR cases concerned continuing violations.[71] However, as Pauwelyn admits, these guidelines may dictate that all human rights violations can be seen as continuing in time. Given the significant effect that the continuing character of a breach can have on the ICC's jurisdiction, a more discerning approach is needed.

It is helpful to focus on the corresponding obligation of cessation that is triggered by each continuing breach of a primary obligation.[72] We can see generally from the case-law discussed that if returning the situation to what it was beforehand constitutes a cessation of the breach, it will be a continuing crime; however, if returning the situation to what it was prior to the crime would be a form of reparation, the crime is likely to have been a completed one.[73]

In *Loizidou*, the technical continuing violation that triggered the Protocol obligation was not the lack of adequate remuneration for the expropriation[74] but the right to nationalize the property itself. Since Turkey had no sovereign right to nationalize Northern Cyprian property, it was in continuing violation of Mrs. Loizidou's Protocol 1, Article 1 right to enjoy her property as a Cyprian. In contrast, the United Kingdom had the sovereign right to nationalize the property of X such that its continuing wrong towards X can only have been adequate remuneration for its *de facto* expropriation—a remedial and secondary rule of international law. Thus, while *Loizidou v. Turkey* was a continuing violation, *X v. United*

[hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994). *See also* European Communities—Trade Description of Sardines, WTO Doc. WT/DS231/AB/R, ¶ 212, Sept. 26, 2002 (regarding an EC Regulation on the labeling of sardines that was passed before the Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra*, vol. 27, at 22051).

70. Similarly, but not identically discussed by Pauwelyn, *supra* note 5, at 420–21, *see further infra* Part V.

71. Pauwelyn, *supra* note 5, at 424.

72. Article 30 states: "The State responsible for the internationally wrongful act is under an obligation: a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require." Crawford, *supra* note 5, at 196; *see also* Pauwelyn, *supra* note 5, at 424.

73. Pauwelyn, *supra* note 5, at 424.

74. Such takings are not inherently illegal under international law so long as they are done in a non-discriminatory manner for public purposes and with adequate compensation. *See* INTERNATIONAL LAW: CASES AND MATERIALS 778 (Lori Fisler Damrosch et al. eds., 4th ed. 2001).

Kingdom was a completed act with lasting effects.[75] Finally, we should note that while the above comparison helped to distinguish continuing from completed acts, such distinctions will be less difficult to make for most continuing crimes in the Rome Statute since they will generally be composed of more obviously physical elements than domestic legislation (which is not a simple act that can be easily traced to an individual, but a "collective act" taken by a legislature).[76]

3. Clearly Continuing Crimes

The paradigmatic continuing crime is enforced disappearance of persons which was prohibited by treaty in Article 17(1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance (1992)[77] and Article 3 of the Inter-American Convention on the Forced Disappearance of Persons (1994).[78] Neither an initial abduction nor a subsequent murder necessarily completes the crime; the continuing state of uncertainty regarding the fate of an abductee is pro-

75. We must, however, mention two caveats to this conclusion. First, it is derived from the principles set out above and not from the case-law of international courts and tribunals. Another famous contradiction in the case-law regarding completed and continuing violations concerns the famous cases: *Phosphates in Morocco* (It. v. Fr.), 1938 P.C.I.J. (ser. A/B) No. 74, at 13, para. 18 (June 14) and *De Becker*, 1958–1959 Y.B. Eur. Conv. on H.R. 214 (Eur. Comm'n on H.R.). While, as discussed below, most of the case-law has followed the more expansive approach of *De Becker*, the current state of the law is far from clear. In addition to *X v. U.K.* and *Loizidou*, two former ILC Special Rapporteurs on state responsibility, Roberto Ago and Gaetano Arangio-Ruiz, disagreed about this as well. At first, Ago argued that they were completed breaches, but Arangio-Ruiz amended the Draft Articles to include them as continuing violations. Finally, a recent WTO opinion reaffirmed Phosphates. Brazil—Measures Affecting Desiccated Coconut, WTO Doc. WT/DS22/AB/R, ¶ 32, Oct. 17, 1996.

Second, one can also distinguish the two cases from more of a political perspective. The reason why both the World Court and the ECHR have consistently refused to deem Acts of national Parliaments to be instantaneous is due the strong political dimension such a decision would involve. In *Loizidou*, the decision was based on the collective global rejection of the Constitution of the Turkish Republic of Northern Cyprus. Lacking such consensus, it was left for the international courts to determine whether or not the act of a sovereign legislating body included in their jurisdiction *ratione materiae*. This was a decision they may have felt would have undermined their legitimacy and did not feel competent to make without being explicitly called for in the relevant treaties–especially reviewing the legislation of a democratically elected Parliament such as Westminster in *X v. United Kingdom*. Indeed, this was the basis of Judge Gölcüklü's dissent in *Loizidou*. Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2216.

76. On this distinction, see George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002). *See also* Nissel, *supra* note 54 (manuscript at ch. 3).

77. "[S]hall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified." G.A. Res. 47/133, U.N. GAOR, 92d plen. mtg., U.N. Doc. A/RES/47/133 (1992).

78. "Shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined." Inter-American Convention on the Forced Disappearance of Persons, art. 3, Inter-Am. C.H.R. 352, OEA/ser.L./V/II.74, doc. 10, rev. 1 (1988), 33 I.L.M. 1429 (entered into force Mar. 28, 1996).

hibited as well. Indeed, the public outcry over the misery of the families of the abductees pressured American and other governments to set up the regional and global conventions.[79]

However, even before this prohibition was enshrined in the above two treaties, the United Nations Human Rights Committee recognized the continuing character of this crime. In *Solorzano v. Venezuela*, the Human Rights Committee held that "while claims concerning the initial detention and torture in 1977 were inadmissible, the continued detention and the alleged ill-treatment after 10 August 1978 [the critical date] should be examined on the merits."[80] Similarly, the Inter-American Court of Human Rights, in the *Blake* case (Guatemala), the Court widely interpreted Mr. Blake's disappearance as a continuing crime so long as he was unaccounted for.[81] The ECHR found Turkey to be responsible for enforced disappearance of persons as a continuing violation of the Article 2 right of protection to life[82] in *Cyprus v. Turkey*.[83] Thus, as with interstate responsibility, many human rights violations will be continuing ones so long as the conduct in question continues to be in breach of the violating state's primary human rights obligations.

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79. SADAT, *supra* note 1, at 158. For example, U2 released "Mothers of the Disappeared" on their bestselling The Joshua Tree album (1987); Sting released "They Dance Alone (Cueca Solo)" on their album "Nothing Like the Sun" (1987).

80. *Solórzano v. Venez.*, Communication No. 156/1983, U.N. Hum. Rts. Comm., Mar. 26, 1986, *in* 94 I.L.R. 400, 401 (1994).

81. *Blake* case, *supra* note 17; *see also* Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT'L L. 1, 44–45 (1999); Velásquez Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), at 147–48, para. 155 (stating explicitly: "the forced disappearance of human beings is a multiple and continuous violation"). However, in *Cantos v. Arg.*, the Inter-American Court decided that the Vienna Convention's prohibition against retroactivity and Argentina's limited acceptance of its jurisdiction made it unnecessary to consider the "theory of continuing violations." Cantos v. Arg., Inter-Am. Ct. H.R. (ser. C) No. 85 (Nov. 28, 2002), *available at* http://heiwww.unige.ch/humanrts/iachr/C/85-ing.html (last visited July 27, 2004) (confiscation of property). This decision seems to presume that there were then no continuing violations and to overrule *Blake*, but the Inter-American Court did not mention the latter case. This confusion has lead Professor Pasqualucci to conclude for the Inter-American Court (similar to Professor Schabas): "[t]hus, the future jurisprudence of continuing violations in the Inter-American system is unclear." JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 112 (2003).

82. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]. Article 2(1) states "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." *Id.* art. 2(1), at 224.

83. Cyprus v. Turk., 2001-IV Eur. Ct. H.R. at 40, ¶ 132 (2001); *see also* Frank Hoffmeister, *International Decision: Cyprus v. Turkey*, 96 AM. J. INT'L L. 445 (2002).

4. In the Rome Statute

While the crime of enforced disappearance of persons was not included in the statutes of the Ad Hoc Tribunals, the Rome Statute includes it as a Crime against Humanity under Article 7(1)(i).[84]

Applying the above jurisprudence to the Rome Statute, if the accused continues even to withhold information on the whereabouts of relevant persons this would be included within the jurisdiction *ratione personae* of the ICC even if the initial abduction preceded the relevant critical date and the perpetrator is not a national of a state that was otherwise bound by one of the two relevant treaties mentioned above.[85] The Elements of Crimes states: "This crime falls under the jurisdiction of the Court only if the attack . . . occurs *after* the entry into force of the Statute."[86] This footnote in the Elements has led Leila Sadat to conclude that continuing violations of Article 7(1)(i) were specifically excluded from the jurisdiction of the ICC.[87]

However, while the attack needs to continue past the critical date, it *could* have commenced beforehand. As we saw from the law of international responsibility for continuing violations of both inter-state and human rights obligations, so long as the violating state is in breach of a continuing obligation, that state remains in violation. Accordingly, the composite "attack" referred to in the Elements is not necessarily the initial attack itself (either on the victim in particular or, if there are many victims, on someone else); the continuing incarceration of victims in breach of Article 7(1)(i) is a continuing attack on the individual liberty of the victim in question. Thus, the ICC may include enforced disappearance of persons that continue past the critical date within its judicial jurisdiction. In contrast, if the only violation of Article 7(1)(i) after the critical date is the continued withholding of information on the whereabouts of the victim,[88] this is not an "attack" such that the continuing crime would be precluded from the jurisdiction of the ICC.[89] Finally, it

84. For an overview of the history of the complex negotiations over this crime, see Witschel & Rückert, *supra* note 7, at 99–100. They argue that the result of the negotiations was to include the "second stage" of the crime (i.e., refusing information) as a separate branch of the *actus reus* of enforced disappearances; Michael Scharf also argues that the Court can prosecute enforced disappearances. Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64(1) LAW & CONTEMP. PROBS. 67, 79–80 (2001).

85. *See* G.A. Res. 47/133, *supra* note 77; Inter-American Convention on the Forced Disappearance of Persons, *supra* note 78.

86. Witschel & Rückert, *supra* note 7, at 98 n.24 (emphasis added).

87. SADAT, *supra* note 1, at 158.

88. *See* Witschel & Rückert, *supra* note 7, at 98 (element 1(b)).

89. *See id.* at 98 n.24. However, as mentioned above, the Court is not bound *stricto sensu* by the Elements and may interpret the obligation more broadly.

should be noted enforced disappearance of persons is but one of the Rome Statute's continuing crimes;[90] so long as the crime in question has been clearly criminalized by critical date, the same conclusion will apply to other continuing crimes in the Rome Statute.[91]

B. *Continuing Conduct becoming Criminal*

Since the ICC has the authority to judge only the crimes within its jurisdiction *ratione materiae*,[92] the question arises whether continuing conduct that (while wrongful) was not criminal before the critical date can still be adjudicated. We have already demonstrated that the ICC will have jurisdiction over crimes that continue past the critical date. We will now qualify that rule by the international principles of legality. In addition to meeting the conditions for a continuing crime, for conduct to be included within the jurisdiction *ratione materiae* of the ICC, it must have been criminal *at the time* the accused committed it.[93] This Part of the Article analyzes international principles of legality in order to determine when continuing conduct has become criminal, such that it falls within the material jurisdiction of the ICC. As will be discussed below, the most important international principle of legality, *nullum crimen sine lege* (no crime without law), is common to virtually all sophisticated legal systems.[94]

1. Conduct becoming Unlawful under the Law of State Responsibility

Regarding continuing violations of international law, Ian Brownlie wrote: "If the conduct continues after the title of illegality has been imposed, then after *the date* when the new obligation came into operation, *by treaty or otherwise*, the conduct constitutes an unlawful act or state of affairs."[95] This principle is mirrored by Draft Article 13 of the ILC's Articles on State Responsibility which states: "An act of a State does not

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90. See *id.* app. for an exhaustive list.

91. See *id.* for a complete list of continuing crimes included in the Rome Statute.

92. *See* Rome Statute, *supra* note 6, arts. 5–8, 37 I.L.M. at 1003–09.

93. Professor Brownlie's categorization of "Acts becoming Illegal" as *ratione temporis* is less accurate than characterizing such continuing acts as a temporal sub-category of *ratione materiae*., BROWNLIE, *supra* note 27, at 183. Draft Article 13 states the basic principle that the breach must occur at a time when state is bound by the obligation. Crawford, *supra* note 5; *see also Island of Palmas* case (Neth. v. United States), 2(II) R.I.A.A. 829, 845 (1949) ("[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.").

94. Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* CASSESE, *supra* note 29, at 733, 740.

95. BROWNLIE, *supra* note 5, at 193 (emphasis added).

constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[96]

The decision of Umpire Bates of the United States-Great Britain Mixed Commission[97] is a good illustration of this intertemporal problem.[98] Over dozens of years, British authorities had seized numerous American ships and freed the slaves that belonged to American nationals that were aboard.[99] The Governments referred the to the Mixed Arbitration Commission who had the task of determining whether, at the time each incident took place, slavery was "contrary to the law of nations." Umpire Bates held that the incidents during the 1830s to 1840s, when the slave trade—"however odious and contrary to the principles of justice and humanity"[100]—was considered lawful under the law of nations, amounted to a breach on the part of the British authorities.[101] But the later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[102] Thus, the arbitration tribunal was not determining the timing of the wrongfulness of the acts—slavery was always wrong—but the (formal) illegality of the acts.[103]

In the landmark *De Becker* case, the European Commission of Human Rights, for the first time, established that some violations could be continuing ones and that this will expand the jurisdiction of a court. The ECHR had to determine if a provision in the Belgian Penal Code (restricting the career choices of certain formerly convicted criminals) violated Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").[104]

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96. *Supra* note 5; this principle is based on the Vienna Convention on the Law of Treaties, art. 28, 1155 U.N.T.S. 331, 339 (entered into force, Jan. 27, 1980) (Non-retroactivity of treaties). Article 28 states: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place *or any situation which ceased to exist* before the date of the entry into force of the treaty with respect to that party." *Id.* (emphasis added).

97. An example of this intertemporal problem is the case of South Africa and the crime of apartheid. JOHN BASSETT MOORE, IV HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 4372–75 (1898).

98. With regards to state responsibility, Special Rapporteur Crawford describes the intertemporal problems as "the special problem determining whether and when there has been a breach of a (sic) an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful." Crawford, *supra* note 5, at 124, ¶ 3.

99. MOORE, *supra* note 97, at 4372–75; *see* Crawford, *supra* note 5, at 131, ¶ 2.

100. MOORE, *supra* note 97, at 4377.

101. *See, e.g.*, Case of the "Enterprise," *in* MOORE, *supra* note 97, at 4349; Case of the "Creole," *in* MOORE, *supra* note 97, at 4375.

102. *See, e.g.*, Case of the "Lawrence," *in* MOORE, *supra* note 97, at 2824.

103. The Umpire specifically states how wrong slavery is. MOORE, *supra* note 97, 4377.

104. "Freedom of expression: (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

It declared that the Applicant was "in a continuing situation in respect of which he claims to be the victim of a violation of the right to freedom of expression . . . and that the Application, insofar as it concerns this continuing situation extending after 14th June, 1955, is consequently not inadmissible *ratione temporis*."[105] This is not to say that "jurisdiction *ratione temporis* does not apply to continuous crimes,"[106] only that such incidents are not automatically excluded from the ICC's jurisdiction because they began before the critical date. The intertemporal problem, however, is more acute in international criminal law, which assigns individual criminal responsibility for conduct that can be attributed to a plurality of people. The Article 7(1)(j) crime against humanity of apartheid, for example, is necessarily committed by a plurality of people. One of the Elements of the Crime is that "The conduct was committed in the context of an *institutionalized* regime of *systematic* oppression and domination by one racial *group* over any other racial group or groups."[107] For normative and practical reasons, it will be difficult to assign blame in a precise manner for a crime that is committed by a group of perpetrators but is only within the ICC's jurisdiction from the critical date onwards. To take an extreme example, if 99% of the apartheid was committed before the critical date, and only a relatively minor act was committed afterwards, how much responsibility should the ICC assign to that last (relatively minor) perpetrator? In such a hypothetical, the ICC must seriously weigh the principle of non-retroactivity before holding that last perpetrator accountable for the collective actions of the apartheid group.[108]

2. Legality: from a General to an International Principle

Nullum crimen sine lege is a principle of legality[109] that protects those accused from the arbitrary application of laws; it is the corollary to the rule of law.[110] As Susan Lamb writes, the principle is based upon four core values: written law, legal certainty, prohibition on analogy and non-retroactivity; it serves to prevent the criminalization of acts, though

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without interference by public authority and regardless of frontiers." ECHR, *supra* note 82, art. 10, 213 U.N.T.S. at 230.

105. De Becker case, 2 Y.B. EUR. CONV. ON H.R. at 244 (Eur. Comm'n on H.R.).

106. *See, e.g.*, Pasqualucci, *supra* note 81, at 44 (erroneously making this argument).

107. Rome Statute, *supra* note 6, art. 7(1)(j), 37 I.L.M. at 1005 (emphasis added).

108. *See also* Fletcher, *supra* note 76; Nissel, *supra* note 54.

109. Schabas, *supra* note 23, at 522. Some say that it is part of the *noyau dur* of human rights (discussed below).

110. Where one makes choices relying upon an *apparent* sense of the law, and still finds oneself tried and convicted, the law has been applied *ex post facto*. *See* Andrew Ashworth, PRINCIPLES OF CRIMINAL LAW 67–74 (1991).

repugnant, in a random manner.[111] That is, this principle of legality requires that the accused could reasonably have been expected to appreciate the consequences for the conduct in question at that time.[112] Even a new peremptory norm of international law could not incur retroactive punishment.[113] It may be helpful to think of the legality problem as one of a conflict of humanitarian and of human rights laws. On the one hand, the laws of war require responsibility for the commission of crimes; on the other hand, every (accused) person has a fundamental right that precludes arbitrary punishment.[114] As mentioned above,[115] although both courts will be interpreting similar (or identical) primary sources of international law, the International Criminal Court will distinguish itself from the International Court of Justice, *inter alia*, by balancing the two competing principles of ending impunity and ensuring legality. International criminal law has concerned itself exclusively with individual responsibility.[116]

Historically, the introduction of *nullum crimen sine lege* into international law was a gradual process.[117] Although at first it was only dealt with indirectly, the ad hoc War Crimes Tribunal in Nüremberg was careful to point out that the London Agreement (1945) codifying the rules of

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111. Lamb, *supra* note 94, at 734; *see also* Mauro Catenacci, *Nullum Crimen Sine Lege*, *in* THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 159 (Flavia Lattanzi ed., 1988).

112. This understanding of *nullum crimen sine lege* has been confirmed in international case-law and commentary; see *Prosecutor v. Delalic et al.*, ICTY Case No. IT-96-21-T, ¶ 313 (ICTY Trial Chamber Nov. 16, 1998); ICC COMMENTARY, *supra* note 2, at 467–68. In addition to foreseeability, another formulation of the basis for the principle of legality is more akin to a natural or universal law approach: "Stated simply, war crimes and crimes against humanity contravened commonly accepted and understood norms or were violations of the general principles of law recognized by the community of nations. In order to maintain... that war crimes legislation violates the rule against retrospective legislation, one's position must be that the killing of unarmed non-combatant Jewish civilians in occupied enemy territory was not a crime under international law nor was it the criminal according to the general principles of law recognized by the community of nations at the time of the commission... This is an unacceptable argument. These crimes were contemplated and recognized, if not spelled out, in the treaties and conventions referred to and represent certain types of conduct that has never been tolerated or approved by the community of civilized nations." [1994] 1 S.C.R. 701, 441 (Can.).

113. Crawford, *supra* note 5, at 132, ¶ 5.

114. For more on this "contradiction," see Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240–41 (2000).

115. *Infra* Introduction.

116. Regarding crimes of state and the notorious Article 19 of Special Rapporteur Roberto Ago of the ILC, see generally, Spinedi, *supra* note 21.

117. In order to trace the emergence of *nullum crimen sine lege*, one must distinguish between two issues: whether or not Nazi defendants at Nüremberg were charged with offences recognized as crimes by international law at the time and secondly, the absence of the principle of legality itself until its formal emergence as a general principle of international law in the Rome Statute.

general international law already proscribed the conduct in question.[118] The principle of *nullum crimen sine lege* was subsequently enshrined in Article 11(2) of the Universal Declaration of Human Rights of 1948,[119] Article 15 of the International Covenant on Civil and Political Rights (1966),[120] Article 99 of the Third Geneva Convention (1949)[121] and Article 6(2)(C) of Additional Protocol II (1977),[122] Article 7 of the European Convention (1950),[123] Article 9 of the American Convention on Human Rights (1969)[124] and Article 7(2) of the African Charter of Human and People's Rights (1981).[125]

The first time that this principle of legality became an international criminal one was upon the UN establishment of the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[126] In 1993, the Secretary-General of the United Nations stated that the "application of the principle *nullum crimen sine lege* requires that the international

118. Lamb, *supra* note 94, at 735–41, 735–36. While many commentators accept this line of reasoning, Lamb finds the Tribunal's justification unsatisfactory. *See also* H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 65–67 (1944).

119. "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Universal Declaration of Human Rights, G.A. Res. 217III, U.N. GAOR, 3d Sess., Supp. No. 13, art. 11(2), U.N. Doc A/810 (1948).

120. "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 15, S. TREATY DOC. No. 95-2 (1978), 999 U.N.T.S. 171, 177 (entered into force Mar. 23, 1976).

121. "No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel." Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, art. 99, 6 U.S.T. 3316, 3392, 75 U.N.T.S. 135, 210 (entered into force Oct. 21, 1950)

122. "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed. . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, art. 6(2)(c), 16 I.L.M. 1442, 1445 (1977).

123. "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." ECHR, *supra* note 82, art. 7, 213 U.N.T.S. at 228–29.

124. "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed." American Convention on Human Rights, Nov. 22, 1969, art. 9, 1144 U.N.T.S. 123, 148 (entered into force July 18, 1978).

125. "No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed." African Charter on Human and People's Rights, June 21, 1981, art. 7(2), OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58, 60 (1982) (entered into force Oct. 21, 1986).

126. Formed by United Nations Security Council Resolutions 808 and 827. S.C. Res. 808, U.N. SCOR, 3175st mtg., U.N. Doc. S/Res/808 (1993); S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/Res/827 (1993).

tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law."[127] This is not just a political principle enunciated by a diplomat; it has been relied upon frequently by the Ad Hoc Tribunals. In *Prosecutor v. Tadic*, for example, the ICTY declared that the crimes within its jurisdiction—even when committed during non-international armed conflicts—are violations of common Article 3 of the Geneva Conventions[128] and do not offend the principle of *nullum crimen sine lege* since "common Article 3 is beyond doubt part of customary international law."[129]

The principle of *nullum crimen sine lege* was formally codified in international criminal law for the first time by the Rome Statute. In doing so, the Rome Statute unpacked various requirements of the international principles of legality through a web of provisions in Articles 11, 21–24.[130] One commentator has stated that the principle of *nullum crimen sine lege* will be the greatest restriction on the ICC's discretion.[131] Additionally, and contrary to the ILC's draft Statute for the International Criminal Court, the Rome Statute (at least partially) codifies the crimes that are within the ICC's jurisdiction *ratione materiae*.

When the ILC published its draft Statute, James Crawford, then the *Special Rapporteur* on the topic of the International Criminal Court, stated that "*nullum crimen sine lege* must be complied with, yet it cannot be said that international law contains anything resembling a complete, or even a sufficient, body of rules of criminal liability."[132] Instead of defining the crimes within the ICC's jurisdiction, the ILC's Draft Article 39 loosely required that an accused would not be held guilty unless the act

127. This included the Hague and four Geneva Conventions, the Charter of the International Military Tribunal (1945) as well as the genocide Convention (1948), see *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, ¶¶ 34, 35, UN Doc. S/25704 (1993). Indeed, Morris and Scharf claim that the ICTY Statute, based on customary international law, satisfied the principle of legality at the time of its establishment. AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 39–42, 124–32 (Virginia Morris and Michael P. Scharf eds., 1995); *see also* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 359–360 (1987).

128. "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions. . . ." Prosecutor v. Tadic, ICTY Case No. ICTY-94-1-T, ¶ 72 (ICTY Trial Chamber Aug. 10, 1995) (Decision on the Defense Motion on Jurisdiction).

129. *Tadic*, ICTY Case No. ICTY-94-1-T, ¶ 72; *see also*, Prosecutor v. Delalic et al., ICTY Case No. IT-96-21-T, ¶ 293 (ICTY Trial Chamber Nov. 16, 1998).

130. *See* SADAT, *supra* note 1, at 183–187, ICC COMMENTARY, *supra* note 2, at 467–68.

131. Margaret McAuliffe deGuzman, *Article 21: Applicable Law in* ICC COMMENTARY, *supra* note 2, at 436.

132. James Crawford, *Current Development: The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404, 407 (1995).

or omission in question constituted a crime under international law at the time it occurred.[133] However, from the time the Preparatory Commission met in 1996, they viewed the Rome Statute establishing the International Criminal Court as a fundamental source for identifying crimes under the jurisdiction of the ICC.[134] The question to be decided was only whether or not customary law (*qua* non-conventional international law) would be (nominally) excluded from this process. Mainly as a nod to the principle of legality (but also as an inviting wink to the United States),[135] the Rome Statute codified the relevant crimes for the purposes of the ICC.[136] Where gaps in the reach of the crimes exist, there is a *renvoi* provision in Article 21(1)—both to general international law and, failing that, general principles of criminal law.[137] Still, since this intertemporal aspect of continuing crimes concerns the jurisdiction *ratione materiae* of the ICC, the international principle of legality will weigh heavily on the ICC.[138]

3. New Crimes

In general, even if the Rome Statute criminalizes certain conduct for the first time (Articles 5–8), this change in international criminal law would only take effect from the critical date onwards. The Rome Statute, for example, expands upon the list of offenses considered Crimes

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133. "An accused shall not be held guilty: (a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law; (b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused; at the time the act or omission occurred." Draft Statute for an International Criminal Court, *in* Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Provisional Agenda Item 140, art. 39, at 20, UN Doc. A/49/355 (1997).

134. Lamb, *supra* note 94, at 748–49.

135. Phillippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, *in* CASSESE, *supra* note 30, at 74–77.

136. The Rome Statute repeats the phrase "for the purposes of this statute" in Articles 6, 7 (twice) and 8 so as to say that although the Rome Statute will be regarded as a codification of international criminal law, this was not the primary intention of the drafters whose concern was the clarity of the crimes for adjudication by the International Criminal Court. Rome Statute, *supra* note 6, arts. 6–8, 37 I.L.M. at 1004–09.

137. A concession to the United States which was concerned with the principle of legality specifically. Kirsch & Robinson, *supra* note 135; *see also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 123–26 (2nd ed. 1999). Bassiouni makes three generalizations about several legal traditions' principle of legality: all prohibit *ex post facto* criminal laws but the retroactivity is not an absolute rule in its application; while the principle of *nullum crimen sine lege* in some cases prohibits reliance on judicial analogy, even in those cases there are still some exceptions; the principle of *nulla poena sine lege* (no penalties without law) is the one that is applied with the greatest diversity–that is, once a crime is established, its scope is disputed.

138. This is in accordance with Article 22. Even if it is claimed that the conduct concerned is a violation of *jus cogens,* as contemplated by Articles 64 and 71(2) of the Vienna Convention on the Law of Treaties, this does not entail any retrospective assumption of responsibility. Crawford, *supra* note 5, at 132, ¶ 5.

Against Humanity that are enumerated in the statutes of the Ad Hoc Tribunals to include "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."[139] A perpetrator of one of those crimes who is a national of a state that never criminalized such conduct beforehand can nonetheless be responsible for them from the moment the treaty enters into force onwards. This conclusion satisfies the international law requirements[140] since it relies on the text of the Rome Statute to explicitly criminalize the conduct in question from the specific (i.e., critical) date onwards.

This, however, would not be the case where the Rome Statute did not obviously criminalize the continuing conduct under scrutiny. Due to the continuously developing character of customary international and future interpretations of the Rome Statute, in cases where this could be relevant, the intertemporal rule may operate to the benefit of those accused.[141] For example, one of the secondary sources that the ICC may refer to under Article 21 is customary international law.[142] However, for a customary crime to be within the jurisdiction of the ICC and not violate the principle of *nullum crimen sine lege*, the act which was previously not criminal must have become criminalized from a clear point in time onwards (i.e., the magic moment). This is a high threshold indeed for customary international law.[143]

The steeplechase was overcome in the Tribunals at Nürenberg and the Ad Hoc Tribunals without much controversy. Firstly, this was because the international principles of legality were nascent and secondly, the crimes that were being prosecuted were egregious enough to warrant the international establishment of the Ad Hoc Tribunals in the first place.

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139. Rome Statute, *supra* 6, art. 7(1)(g), 37 I.L.M. at 1004; *see* Scharf, *supra* note 84, 89 for a complete list.

140. *See* BROWNLIE, *supra* note 5, at 193; Crawford, *supra* note 5, at 131.

141. This has long been recognized in general international law. Articles 64 and 71 of the Vienna Convention on the Law of Treaties deal with the consequences of the existence or emergence of a peremptory norm. *See also* Crawford, *supra* note 5, at 134, ¶ 9.

142. While it is clear that custom is included in Article 21, it appears that the reason why 'custom' was not explicitly mentioned was because the concept of gradually evolving custom was considered too imprecise for the purposes of international criminal law, *see* deGuzman, *supra* note 2, at 442.

143. To the author's knowledge, there has not been a single case where a previously legal act has become criminal solely by customary international law. *See also Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I (Proceedings of the Preparatory Committee during March–April and August 1996)*, U.N. GAOR, 51st Sess., Supp. No. 22, U.N. Doc. A/51/22 (1996), *cited in* M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 385, 414 (1998). The drafters of the Rome Statute were determined not to rely upon customary international law and due to the principles of legality clarified the definitions of the relevant crimes.

Moreover, insofar as the Ad Hoc Tribunals are concerned, Chapter VII Resolutions of the United Nations Security Council explicitly authorized these Tribunals.[144] However, exceptionally, even in the Ad Hoc Tribunals, the customary international law in question was insufficiently clear and the ICTY had to resort to municipal law as well. In the *Delalic* case, for example, the ICTY had to place "particular emphasis" on a provision of the former Socialist Federal Republic of Yugoslavia's Criminal Code which was adopted prior to the conduct in question in order to satisfy the principle of *nullum crimen sine lege*.[145] In sum, the changing nature of customary law will not necessarily preclude criminality as a result of the intertemporal rule. It will be for the ICC to decide if there was sufficient foreseeability—based on the relevant international standards of legality—to criminalize the relevant conduct in each case.

C. *Non-Jurisdictional Effect*

It should be noted that in addition to expanding the reach of a court to include conduct that has not necessarily begun (but has continued) after the critical date, the continuing character of a violation can have the effect of aggravating a violation of international law.[146] In *Cyprus v. Turkey*, the ECHR had to adjudicate the continuing violation of, *inter alia*, Article 8 of the European Convention.[147] This was the third such application by Cyprus (since 1974). Far from dismissing the Application for being redundant (as the Respondent contended), the European Court declared: "The continuation of these situations since the adoption of the Commission's Report on the previous applications is an aggravating factor."[148] In *Rainbow Warrior*, the international arbitration tribunal declared that "this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable

144. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/Res/827 (1993); S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/Res/955 (1994).

145. Prosecutor v. Delalic et al., ICTY Case No. IT-96-21-T, ¶¶ 311–13 (ICTY Trial Chamber Nov. 16, 1998).

146. Cyprus v. Turk., App. No. 8007/77, 72 Eur. Comm'n H.R. Dec. & Rep. 5 (1983). As was the case with the *Rainbow Warrior*, 20 R.I.A.A. 217, 263–64, ¶ 101. One can speculate that the continuing nature of a crime could be a factor in the Prosecutor's decision on the admissibility of an alleged crime, pursuant to Article 17(1)(d). However, extra-legal considerations are outside the narrow scope of this Article. *See also* John R.W.D. Jones, *The Office of the Prosecutor*, *in* CASSESE, *supra* note 30, at 269–74; THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT (Louise Arbour et al., eds., 2000)

147. "Everyone has the right to respect for his private and family life, his home and his correspondence." ECHR, *supra* note 82, art. 8, 213 U.N.T.S. at 230.

148. Cyprus v. Turk., 72 Eur. Comm'n H.R. Dec. & Rep. at 6.

bearing on the establishment of the reparation which is adequate for a violation presenting these two features."[149]

The Ad Hoc Tribunals have interpreted the continuing character of criminal conduct similarly. In *Prosecutor v. Kunarac*, the ICTY found that with regards to the war crime of enslavement the "duration is not an element of the crime, but a factor in the proof of the elements of the crime. The longer the period of enslavement, the more serious the offence."[150] In a dissenting opinion in *Prosecutor v. Bagilishema*, Judge Güney of the International Criminal Tribunal for Rwanda ("ICTR")[151] stated that "the culpable negligence connected with the setting up of the roadblock becomes continued and aggravated if the Accused knows or has reason to know that crimes were committed after it was set up."[152]

To recapitulate, the continuing character of a crime will generally have an inclusive effect, serving to expand the jurisdictional reach of the ICC.[153] When determining whether a violation of international law was a continuing one, we examined the different approaches discussed in primary and secondary literature. As continuing crime is a violation of a primary obligation targeting a potentially ongoing situation that has been committed and then continued; and, as a general rule, maintaining a continuing crime will expand the jurisdiction of the ICC subject to the principle of *nullum crimen sine lege*. Further difficulties arise in the next category of continuing crimes, where the conduct in question sometimes requires a court to consider activity preceding the entry into force of the Rome Statute in order to adjudicate upon conduct occurring after the critical date.

V. COMPOSITE CRIMES

Further difficulties arise with composite crimes. Because this category of crimes concerns those obligations that target a series or a pattern

149. Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and which Related to the Problems Arising from the *Rainbow Warrior* Affair (N.Z./Fr.), 20 R.I.A.A. 217, 263–64, ¶ 101.

150. Prosecutor v. Kunarac et al., ICTY Case No. IT-96-23-8, IT-96-23/1-A, ¶¶ 356, 382 (ICTY Appeals Chamber June 12, 2002) (Judgement).

151. Formed by United Nations Security Council Resolution 955. S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994).

152. Prosecutor v. Bagilishema, ICTR Case No. ICTR-95-1A-T, ¶ 15 (ICTR Trial Chamber June 7, 2001) (Mehmet Guney separate and dissenting opinion), *available at* www.ictr.org.

153. As discussed below regarding the jurisprudence of the European Court of Human Rights: Pauwelyn writes that "under Article 26, the impact of having established a continuing violation can only have positive effects for the applicant." Pauwelyn, *supra* note 5, at 435.

of acts, it is especially prone to the intertemporal problem. In order to meet the physical requirements of the composite crime of apartheid, for example, the Prosecutor of the ICC must establish the existence of an institutionalized regime of systematic oppression.[154] Similarly, for the (ordinary) crime of murder to constitute the (composite) crime of genocide, the perpetrator's conduct must have taken "place in the context of a manifest pattern of similar conduct."[155] Foreseeably, due to the inherently prolonged dimension of such crimes, the ICC will be faced with a case consisting of acts that have taken place both before and after the entry into force of the Rome Statute. We must now consider to what extent, if any, the ICC will be able to consider those acts preceding the critical date without violating the international principles of legality.

A. *Categorical Importance of Composite Crimes*

Ian Brownlie has criticized that although "reference to 'composite acts' . . . has a useful role in exposition of the problems of applying the legal principles and the formulations found in treaties to certain sets of facts . . . the appearance of new, apparently defined, legal categories is of doubtful value."[156] This view is inaccurate for at least two reasons. Conceptually, the temporal dimension—the systematic or repetitious requirement for establishing such a practice—forms an integral part of the content of the obligation concerned.[157] Symbolically, the importance of composite crimes in humanitarian law justifies special treatment.[158] For example, it is the systematic character of genocide—the pattern—that is fundamental to the heinous nature of that crime. Indeed, composite crimes are distinguishable by their being shaped by or dependent upon the particularly hostile environment in which they are committed.[159] Moreover, in practice, courts have had considerable difficulty in applying the relevant laws of composite crimes. While there is no doubt that composite crimes are included within the jurisdiction *ratione materiae*

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154. Rome Statute, *supra* 6, art. 7(1)(j), 37 I.L.M. at 1005. Article 7(2)(h) defines the crime as "inhumane acts. . . committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." *Id.* art. 7(2)(h), 37 I.L.M. at 1005

155. The element of crime for Article 6(a)(4) is that "[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." *Elements of Crimes Adopted by the Assembly of States Parties*, Assembly of States Parties to the International Criminal Court, 1st Sess., art. 6(a)(4) at 113, U.N. Doc. ICC-ASP/1/3 (2002).

156. BROWNLIE, *supra* note 5, at 197.

157. Pauwelyn, *supra* note 5, at 426.

158. Crawford, *supra* note 5, at 141–44.

159. Prosecutor v. Kunarac et al., ICTY Case No. IT-96-23-8, IT-96-23/1-A, ¶ 58 (ICTY Appeals Chamber June 12, 2002) (Judgement).

of the ICC, by categorizing these crimes distinctly, one is more attuned to the additional, temporal element that must be analyzed. Without such a categorization, as will be seen, it is easy to misunderstand the complex jurisdictional questions at issue. Both composite and ordinary (non-continuing) crimes may require considerable evidence for their existence to be proven; however, the former is distinguished by a primary obligation that targets a plurality of events.

A pattern of violations in itself does not constitute a composite violation unless the pattern establishes a breach of a composite primary obligation. In *Ir. v. U.K.*, the Applicant requested the European Court of Human Rights to declare that the United Kingdom was not just in violation but to find a "practice" of breaching Article 3 of the European Convention.[160] However, the ECHR refused to recognize such a practice distinctly since the European Convention did not proscribe a composite practice of torture as distinct from the Article 3 prohibition of torture.[161] Similarly, in the Rome Statute, unjustified discrimination can be distinguished from the prohibition of apartheid (which requires a pattern of unjustified discrimination). One act of discrimination is not in essence a composite breach since the sequences of events are not elements of the violation of the prohibition of discrimination but evidence of a violation.[162]

B. *Can the ICC Consider Events before the Critical Date?*

The critical jurisdictional question that composite crimes will raise for the ICC is whether or not it may admit conduct that has taken place prior to the critical date in order to establish the composite crime. While the ICTR initially took a restrictive approach,[163] most international courts and jurists have taken a more inclusive view with regards to state responsibility. In Article 15 of the Draft Articles on State Responsibility states:

> The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful,

160. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." ECHR, *supra* note 82, art. 3, 213 U.N.T.S. at 224. More recently, in *Avena & other Mexican Nationals*, the International Court of Justice, did not find that there was evidence of a pattern of "regular and continuing" (procedural) violations by the United States of precluding consular access to Mexican nationals. (Mex. v. United States) ¶¶ 145–50 (I.C.J. Mar. 31, 2004), *available at* http://www.icj-cij.org.

161. Ir. v. U.K., 64 Eur. Ct. H.R. (Ser. A) No. 25 at 64, ¶ 159. (1978).

162. Crawford, *supra* note 5, at 143, ¶ 6. In contrast, Brownlie and Pauwelyn consider simple discrimination to be a composite act as well since it requires a series of events to be established. Pauwelyn focuses on the temporal element which is inherent in the violation while Brownlie, as discussed below, doubts the utility of this category altogether. BROWNLIE, *supra* note 5, at 197 and Pauwelyn, *supra* note 5, at 427

163. The issue was not raised in the ICTY.

> occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> In such a case, the breach *extends over the entire period* starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.[164]

Guided by the interpretive principle of *effet utile* (effectiveness), the ILC codified the category expansively since some of the most serious wrongful acts in international law are defined in terms of their composite character.[165]

Both the International Court of Justice and the European Court of Human Rights have treated composite violations of international law by concentrating on the corresponding obligation in question. The World Court focused on the jurisdiction *ratione materiae*, finding, for example, that since genocide was clearly criminal prior to the conduct in question, the intertemporal rule does not apply.[166] As mentioned above, in *Ir. v. U.K.*, the ECHR did not find a practice of violating Article 3 since the European Convention did not independently prohibit such a practice. Such a finding would have also affected the personal jurisdiction of the ECHR over the conduct of the United Kingdom since the time limits regarding the European Convention requirement of exhausting local remedies need not have been satisfied in each case of alleged torture.[167]

There are not many examples of treatment of the intertemporal problem in international criminal case-law since the Ad Hoc Tribunals had statutes that were drafted to cover specific conduct retrospectively. However, Article 7 of the Statute of the ICTR states: "The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December

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164. Crawford, *supra* note 5, art. 15, at 141 (emphasis added).

165. "If this were not so, the effectiveness of the prohibition would thereby be undermined." *Id.* at 144, ¶ 10.

166. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn.-Herz. v. Yugoslavia), 1996 I.C.J. 595, 617, ¶ 34; *see also* Oil Platforms (Iran v. United States), 1998 I.C.J. 190 (Mar. 10) (counter-claim) (which focuses on a general situation rather than specific instances). We have already mentioned that this view may criticized as confusing an international wrongs with crimes, as well as defended on the basis of the underdeveloped principle of legality fifty years ago.

167. *See* Pauwelyn, *supra* note 5, at 428. Article 26 of the European Convention states: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken." ECHR, *supra* note 82, art. 26, 213 U.N.T.S. at 238.

1994."[168] Although relative to Articles 11 and 24 of the Rome Statute this jurisdictional limitation is even more vague, the only point that it raised in the ICTR concerned the establishment of genocide in *Nahimana v. Prosecutor*.[169] At first, the ICTR interpreted its jurisdiction restrictively in *Nahimana*. It held that no facts pre-dating or post-dating 1994 could be used to support a count in the indictment; however, alleged facts which took place during those times can be used to establish an "historical context" for an indictment.[170] Later, however, in its final judgment, the Trial Chamber of the ICTR changed its mind and stated: "[S]uch material would then fall within the temporal jurisdiction established by its Statute."[171] Separately, an ICTR Appeals Chamber has ordered the withdrawal of all reference to facts predating 1994 from specific counts of indictment.[172] This decision suggests that the ICTR did not treat genocide as a categorically distinct (i.e., composite) crime.

C. *Clarifying the Confusion*

There are two ways to analyze these diverging: by reference to the authority of the ICTR (jurisdiction) or to the protection of the accused (legality).[173] If the intertemporal problem with composite crimes is merely a matter of personal jurisdiction then it would seem that the relevant question is simply one of when the conduct took place. Since Article 7 of the ICTR Statute precludes conduct prior to 1994, the ICTR did not consider evidence from the time before it had the appropriate jurisdiction.

Another way to understand the restrictive *Nahimana* decision is from the perspective of legality. Arguably, the emerging field of international criminal law with its increasing focus on principles of legality has precluded conduct prior to the critical date from establishing the existence of a composite crime. International criminal law is clearly distinct from state responsibility in that the former must place a higher threshold on the principle of *nullum crimen sine lege*. This principle does not just go to the knowledge or expected knowledge of the perpetrator, but, as a "procedural" matter, to the *timing* of the conduct. Such a principle of

168. Statute of the International Criminal Tribunal for Rwanda, *in* S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994).

169. Prosecutor v. Barayagwiza, ICTR Case No. ICTR-97-19-AR72 (ICTR Appeals Chamber Sept. 12, 2000) (Decision on the Interlocutory Appeals).

170. *Id.*; Bourgon, *supra* note 33, at 544, 550; *see also* Erin Daly, *Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda*, 34 NYU J. INT'L L & POL. 355, 356 (2002).

171. Prosecutor v. Nahimana, ICTR Case No. ICTR-99-52-T, ¶ 103 (ICTR Trial Chamber Dec. 3, 2003).

172. *Id.*; Bourgon, *supra* note 33, at 550.

173. A treaty has yet to be signed that deals with composite crimes as such.

legality would dictate that no act shall be deemed criminal if at the time it was committed it was not within the jurisdictional reach of the institution criminalizing the act. While the above analysis may justify the first *Nahimana* decision, most likely, the main issue was jurisdiction. Interestingly, the ICTR did not mention the principles of legality in its decision.[174]

Both of the above explanations are insufficient by being oversimplified. Regarding personal jurisdiction, there are two issues: the elements as well as evidence of the crime.[175] An individual act or omission (element) can constitute genocide so long as conducted in the context of a manifest pattern of similar conduct (evidence). Accordingly, the ICTR could have interpreted Article 7 of its Statute as precluding responsibility for conduct occurring prior to the critical date and still looked at pre-1994 behavior as evidence of acts of genocide that transpired during 1994. Moreover, the nature of composite crimes is such that by disallowing earlier conduct as evidence, a court is not only precluding responsibility for conduct prior to the critical date but for conduct taken place afterwards—since composite acts such as genocide require a pattern to be proven. This point is well established in the law of state responsibility. In his commentary on Draft Article 13, Special Rapporteur Crawford explains: "[T]he principle of the intertemporal law [does not] mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant."[176]

The claim on the development of the requirements of *nullum crimen sine lege* is also exaggerated under current international law.[177] On its own, the principle should only require that no conduct be penalized if at that time the conduct was not obviously criminal. As mentioned above, the principle is based on the rule of law[178] which does not require the foreseeability of a forum (i.e., jurisdiction and enforcement), just the foreseeability of criminality (i.e., legality). Thus, where a pattern of acts committed before and after the critical date make up a composite crime when considered together, the ICC should be able to consider those

174. This uncertainty is another reminder of not overly formalizing jurisdictional questions into substance and procedure or substantive and personal jurisdiction. These categories are helpful and many times probative, but not dispositive of many jurisdictional questions.

175. *See also* Peter Krug, *The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation*, 94 AM. J. INT'L L. 317, 322–28 (2000). "[M]ost evidence relevant to the elements of the defense will be admitted by the courts as having 'probative value.'" *Id.* at 324.

176. Crawford, *supra* note 5, at 134, ¶ 9.

177. *See* David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L. J. 231, 276 (2002).

178. ICC COMMENTARY, *supra* note 2, at 734.

earlier events as a matter of evidence. Finally, whether or not one considers the timing of the conduct as an element or as evidence of a composite crime, in terms of its legality, the whole act has already been criminalized.

Indeed, in *Prosecutor v. Musema*, the ICTR allowed the Prosecutor to present pre-1994 evidence in order to establish the *mens rea* needed for genocide.[179] Thus, the ICTR jurisprudence allows pre-1994 evidence of intent but not of conduct. Stéphani Bourgon reconciles this apparent inconsistency by virtue of the special intent, *dolus specialis*, required for genocide.[180] This explanation, however, disregards the special, composite character of the *actus reus* of genocide. Both aspects—physical and mental—of the crime have relatively high thresholds.[181] This was recognized by the ICTR in *Akayesu*: "The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."[182] It is submitted that this distinction, however, is not based on principled understanding of the elements of genocide—*qua* a composite crime.[183]

D. *Categorical Importance Revisited*

In this light, it appears that categorizing prohibitions such as composite crimes makes symbolic as well as practical sense. It is worth recalling that Leila Sadat was not attuned to this categorical distinction when she interpreted the Elements of Crimes to state that continuing crimes fell outside the jurisdiction of the ICC.[184] Enforced disappearances

179. Prosecutor v. Musema, ICTR Case No. ICTR-96-13-A, ¶ 164 (ICTR Trial Chamber Jan. 27, 2000) (Judgment and Sentence).

180. Bourgon, *supra* note 33, at 550–51; *see also* Prosecutor v. Akayesu, ICTR Case No. ICTR-96-4-T (ICTR Trial Chamber Sept. 2, 1998) (Judgement).

181. *See generally* Nersessian, *supra* note 177.

182. *Akayesu*, ICTR Case No. ICTR-96-4-T, ¶ 505.

183. One related caveat is in order: particularly with regard to composite violations of international obligations, we must briefly note the overlap between individual and state responsibility. As Professor Spinedi has noted, we can see this conflation clearly when it comes to the doctrine of attribution. Since composite crimes always require a plurality of conduct, attributing for them to individuals will be more controversial than for states. Spinedi, *supra* note 57. We suggested above that the Court will be able to admit evidence predating the entry into force of the Rome Statute for the sake of establishing the composite element of the crime so long as it does not attribute responsibility for the time over which it has no jurisdiction. However, while the Court has the authority to consider act taking place before the critical date, it ought to use this discretion bearing in mind that the composite character of an obligation targets governments more than it does individuals.

184. SADAT, *supra* note 1, at 186.

are continuing crimes (that have to be committed as part of a widespread and systematic attack) but not composite crimes. With this temporal problem in mind, the Preparatory Commission drafted the text of the Elements inclusively.[185] After the examination of the conflicting case-law, one can better appreciate the importance of categorizing composite acts separately, especially with regards to the attribution of individual (criminal) responsibility.[186] Thus, whether the ICC prefers the expansive or the restrictive approach, conceptualizing certain crimes by their composite character better serves the rule of law. It was submitted that the ICC ought to consider all relevant conduct for evidentiary—though not sentencing—purposes; yet, the ICC should use this discretion with special caution if it is faced with a problem of *nullum crimen sine lege*.[187]

VI. CONCLUSION

Crimes committed before the entry into force of the Rome Statute but maintained afterwards will generally be included within the ICC's jurisdiction. Where the continuing conduct in question was criminalized by the Rome Statute, the ICC will have jurisdiction over them so long as this does not violate international principles of legality such as *nullum crimen sine lege*. Thus, where the continuing crime has an intertemporal element, the ICC can rely on conduct taking place prior to the critical date. For composite crimes, this will mean that the ICC can consider any conduct for evidentiary purposes of establishing a crime that took place subsequent to the critical date. These are the general rules regarding the temporal dimension of the ICC's jurisdiction.

However, the uniqueness of the International Criminal Court and the desirability of wide acceptance may cause it to decide otherwise. This would be a category mistake (that the ECHR,[188] ICTR[189] and Inter-American Court have already made[190]). *Nullum crimen sine lege* operates to constrain the principle of ending impunity and in balancing these two

185. Indeed, the preceding footnote states: "Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose" Rome Statute, *supra* note 6, art. 7(1)(i), Elements of Crime, n.23, 37 I.L.M. at 1005. Furthermore, the phrase was written in the present tense. *See also* Prosecutor v. Kunarac et al., ICTY Case No. IT-96-23-8, IT-96-23/1-A, ¶¶ 82–101 (ICTY Appeals Chamber June 12, 2002) (Judgement).

186. As mentioned above, in addition to the ICTR many commentators have made this categorical mistake as well. Bourgon, *supra* note 33.

187. As a matter of policy, such cases may be more suitably resolved on the state level, see Nissel, *supra* note 57.

188. *See supra* note 75.

189. *See supra* note 169.

190. *See supra* note 81.

interests, the ICC will have a dual role.[191] Yet, by considering when the temporal element of the case in question raises issues of conduct or of criminality—as the ILC has already done in its *Responsibility of States for Internationally Wrongful Acts*—the ICC will ultimately strengthen the principle of *nullum crimen sine lege* with the consistency of its interpretations of the Rome Statute's provisions on jurisdiction and admissibility.

For the first time in international criminal law, the Rome Statute distinguishes between jurisdiction (Articles 11–14) and admissibility (Article 17). This Article dealt with the latter, i.e., the legal parameters of the ICC's operations. As William Schabas writes, whereas admissibility suggests a degree of discretion, "the rules of jurisdiction are strict and brook no exception."[192] Thus, the threshold of admissibility involves more active judgment (e.g., whether the case is of sufficient gravity) and is the part of the international criminal process where extra-legal considerations would not be inappropriate.[193] The *Nahimana* decision not to consider pre-1994 conduct was more of a discretionary matter and, as such, more suitable to the admissibility issue. Since a court's jurisdiction goes to its own legitimacy,[194] the ICTR may have decided to prioritize its status over the effectiveness of ending impunity. Namely, since its statute did not provide for the additional steeplechase of admissibility, the ICTR had not choice but to engineer the terms of its personal jurisdiction.[195]

The International Criminal Court will be constantly balancing its role as the protector of the accused and the ender of impunity. With the popularity of the Rome Conference, it is not surprising that the Rome Statute was drafted as vaguely as it was.[196] The problem of continuing

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191. Leila Sadat stated: "In the ICC Statute, it [legality principle] has a similarly dualistic role, serving as both a constitutional directive to the Court's various organs regarding their respective roles, as well as shielding the accused from retroactive prosecution or punishment." SADAT, *supra* note 1, at 183.

192. SCHABAS, *supra* note 1, at 55.

193. *See also* Crawford, *supra* note 130, at 414; Meron, *supra* note 114, at 260 ("The thresholds of applicability and the qualification of conflict [*qua* issues of admissibility] pose some of the most difficult and controversial questions regarding international humanitarian law.").

194. *See* Prosecutor v. Tadic, ICTY Case No. ICTY-94-1-T, ¶ 72 (ICTY Appeals Chamber Oct. 2, 1995).

195. E.g., docket concerns, see: David Bamford, *Rwanda Sets up Genocide Courts*, BBC NEWS, Nov. 25, 2002, *at* http://news.bbc.co.uk/2/hi/africa/2510971.stm. This view was supported by the former Chief Prosecutor, Richard Goldstone, who told the author that Article 7 of the ICTR Statute had no significant effect on the cases that he had decided to prosecute. Interview with Richard Goldstone, Chief Prosecutor, ICTY and ICTR, in New York City, NY. (Oct. 16, 2002).

196. This is the nature of international agreements; *see also* MARTTI KOSKENNIEMI, THE SOURCES OF INTERNATIONAL LAW xiii–xvi (2000).

crimes was intensely negotiated[197] and, for the political necessity of consent, the agreed upon text purposely left out any mention of the concept. However, while the text is open for the ICC to interpret, the international legal issues, once properly conceptualized, are less unclear.

197. *See* I. Introduction.