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## Article 11 Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

### Literature:

Bourgon, S., 'Jurisdiction *ratione temporis*', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002); Cazala, J., 'Article 11 - Compétence *ratione temporis*', in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article* (Éditions A. Pedone 2012); Condorelli, L. and Villalpando, S., 'Can the Security Council Extend the ICC's Jurisdiction?', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002); Heri, C., 'Enforced Disappearance and the European Court of Human Rights' *ratione temporis* Jurisdiction: A Discussion of Temporal Elements in *Janowiec and Others v. Russia*', (2014) 12 *JICJ* 751; Rastan, R., 'Testing Cooperation: The ICC and National Authorities', (2008) 21 *LeidenJIL*. 431; *id.*, 'Jurisdiction', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015); Saland, P., International Criminal Law Principles, in: R.S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations and Results* (Kluwer Law International 1999); Sarooshi, D., *The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon 1999); *id.*, 'The Peace and Justice Paradox', in: D. McGoldrick *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004); Schabas, W., *Genocide in International Law* (CUP 2<sup>nd</sup> edition 2009); *id.*, Article 11. Jurisdiction *ratione temporis* /Compétence *ratione temporis*, in *The International Criminal Court: A Commentary on the Rome Statute* (2016); Stahn, C., Zeidy, M. and Olasolo, H. 'The International Criminal Court's Ad Hoc Jurisdiction Revisited' (2005) 99 *AJIL* 421; El Zeidy, M., 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5 *ICLRev* 83.

### Content

A.	Introduction/General remarks	1
B.	Analysis and interpretation of elements	13
I.	Paragraph 1: Entry into force of the Statute	13
1.	Continuing crimes	16
2.	Continuing crimes under human rights instruments	17
3.	Continuing crimes under the Rome Statute	21
II.	Paragraph 2: Entry into force for particular States	28

## A. Introduction/General remarks

1

Article 11 establishes the temporal threshold for the activation of the Court's jurisdiction at the date of entry into force of the Statute, which occurred on 1 July 2002. Whereas the other facets of the Court's jurisdiction - jurisdiction *ratione materiae*, *ratione personae* and *ratione loci* - may be modified or applied in the alternative, paragraph 1 of article 11 represents an absolute bar on the scope of the Court's competence.<sup>1</sup> Paragraph 2 of article 11 regulates the activation of the Court's temporal jurisdiction for States joining the ICC after its entry into force. For those signatory States that deposited the instruments necessary to bring the Statute into force, temporal threshold will apply from the date of the entry into force of the Statute itself, per article 11(1). For those States that become Parties to the Statute thereafter temporal jurisdiction will apply from the first day of the month after the 60<sup>th</sup> day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.<sup>2</sup> Nonetheless, article 11(2) recalls that an acceding State may also lodge a declaration under article 12(3) with respect to the time

<sup>1</sup> Subject-matter jurisdiction may evolve through amendment to the Statute. Personal and territorial jurisdiction can be exercised in the alternative for genocide, crimes against humanity and war crimes, are modified to be applied cumulatively for aggression, and might be applied either alternatively or cumulatively for any other category of crimes to be added to the Statute. Although the Assembly of States Parties theoretically may amend any aspect of the ICC Statute at any time, any amendment of article 11 would also require modification to articles 22 and 24 and is thus unlikely.

<sup>2</sup> See Article 126.

period during which it remained a non-Party State, thereby investing the Court with jurisdiction from an earlier time although no earlier than the restriction contained in article 11(1).

2

Article 11 should be read together with article 24 which provides that no-one will be held criminally responsible under the Statute for conduct prior to the entry into force of the Statute.<sup>3</sup> The two provisions obtain the same result: article 11 specifies procedurally the date from which the prospective exercise of temporal jurisdiction should be calculated, while article 24 encapsulates the principle of non-retroactivity itself.<sup>4</sup> Article 22(1) further enshrines the principle that no person shall be criminally responsible under the Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court (*nullum crimen sine lege*). While the latter focusses on the necessity for an appropriate statutory prohibition existing at the time the offence is committed, the reference to ‘crime within the jurisdiction of the Court’ necessarily includes the notion of the temporal restriction expressed in article 11.<sup>5</sup>

3

The drafting history for articles 11 (temporal jurisdiction), 22 (*nullum crimen sine lege*) and 24 (non-retroactivity) is closely interrelated and together provides the context for the chapter under review. The early ILC Draft Statutes did not contain a provision on temporal jurisdiction. This is because the jurisdictional scheme was linked from the outset to existing crimes under international treaties which had already entered into force. The mandate of the ILC to study the desirability and possibility of establishing a mechanism for the adjudication of international crimes first arose from the General Assembly’s adoption of the Genocide Convention, with its accompanying reference in article VI to the possibility of prosecution before an ‘international penal tribunal’. Part B of the resolution that adopted the Genocide Convention invited the ILC to consider the establishment of ‘an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international convention’.<sup>6</sup> Thus, early on the question of an international criminal court was framed as one which would serve as a procedural vehicle for the application of crimes which were codified elsewhere.<sup>7</sup> As the ILC’s work progressed on the parallel project to develop a Code of Crimes Against the Peace and Security of Mankind, it was envisaged that the future court would either apply the Code of Crimes once adopted as a treaty or otherwise exercise jurisdiction by reference to specified crimes that were prohibited under other multilateral treaties in force. This explains why, as late as 1994, the final ILC draft Statute presented to the General Assembly contained only a provision on *nullum crimen sine lege* linked to the relevant entry into force date under each treaty.<sup>8</sup> Given the existence of a relevant temporal limitation for the crimes contained in each of

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<sup>3</sup> See Pangalangan, below article 24 [mn 12 check mn later](#), who notes the notion of conduct in article 24 includes both acts and omissions. See also Saland, in: Lee (ed.), *The International Criminal Court: the Making of the Rome Statute* (1999) 196-197.

<sup>4</sup> Pangalangan, below article 24 [mn 8 check mn later](#).

<sup>5</sup> See Broomhall, below article 22 [mn 52 check mn later](#).

<sup>6</sup> A/RES/260 (III) B, 9 December 1948. The wording is based on a Sixth Committee resolution adopted on the joint proposal of The Netherlands and Iran assigning consideration of the creation of an international tribunal to the ILC, in view of intractable differences during the negotiation of the genocide convention as to the viability of establishing such a court at that time; A/C.6/248. See discussion in Schabas, *Genocide in International Law* (2009) 444-454. While the General Assembly had called for the codification of international offences as early as 1946 (see *infra* note 10), the mandate to also consider the establishment of a court as a corollary to the draft code of crimes was first posited in 1948.

<sup>7</sup> As the commentary to the ILC draft Statute recalled, one of the basic ideas underlying the jurisdictional scheme was that ‘the court should exercise jurisdiction over crimes of an international character defined by existing treaties, and that—as a corollary—the statute itself would be primarily procedural and adjectival’; A/49/10, p. 36. This same concept appears in the 1992 Report of the Working Group on the Question of an International Criminal Jurisdiction, see Report of the International Law Commission on the work of its forty-fourth session, A/47/10, reprinted in 1992 *YbILC* Vol II., pp. 67-68. As the commentary to the 1994 ILC Statute goes on to observe: ‘It is not its function to define new crimes. Nor is it the function of the statute authoritatively to codify crimes under general international law. With respect to certain of these crimes, this is the purpose of the draft Code of Crimes against the Peace and Security of Mankind ...’; *ibid.*, p. 38.

<sup>8</sup> Draft article 39 provided that an accused would not be held guilty: (a) in the case of genocide, aggression, war crimes and crimes against humanity ‘unless the act or omission in question constituted a crime under international law’; and (b) in the case of other treaty crimes ‘unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred’; *Report of the International Law Commission on its forty-sixth session*, A/49/10(1994), reprinted in 1994 *YbILC* Vol II, pp. 55-56, referring to crimes under draft article 20(a)-(e). The same approach had been adopted in article 41 of the earlier 1993 ILC draft Statute which applied *nullum crimen sine lege* by reference to crimes in force through other instruments, except that 1993 draft foresaw three categories of applicable law: ‘(a) a treaty which was in force [and applicable with respect to the accused]; (b) customary international law; or (c) national law enacted in conformity with the relevant treaty’; *Report of the International Law Commission on its forty-fifth session*, A/48/10(1993), reprinted in 1993 *YbILC* Vol II, p. 119, referring to crimes under draft articles 22 and 26. The bracketed text was contained in the draft provision and accompanying commentary in view of the difference of opinion within the Commission as to whether, for the principle of legality to apply, the State party must have domestically incorporated the relevant crime pursuant to the relevant treaty

these instruments which were external to the draft Statute, and absent codification of substantive law in the Statute itself, the Commission appears to have considered unnecessary the need to define a temporal threshold for the exercise of ICC jurisdiction. Since the entry into force of each instrument differed, it would in any event have been difficult to establish a uniform temporal bar.

4

Considerations of non-retroactivity, nonetheless, played a central role in early discussions on the *nullum crimen* principle and are often referred to interchangeably in documents from this period. The concept of non-retroactivity forms a key focus of debates in the ILC during the 1950s, with concern often expressed for the need to avoid the criticism levelled in Nuremberg and Tokyo with respect to the retroactive application of penal law.<sup>9</sup> Indeed, one of the first decisions of the General Assembly, after affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal, was to call for the codification of the relevant offences thereunder in an 'International Criminal Code'.<sup>10</sup> Thus, throughout the subsequent discussions within the United Nations surrounding the draft code and the draft statute, central focus was given to the need to ensure that any international criminal jurisdiction asserted by the future court would be done on the basis of offences clearly articulated in extant applicable law.

5

After the ILC presented its finalized text for the draft Statute in 1994, States were quick to reject in the Ad Hoc Committee the approach of applying substantive law by reference. Instead, the Committee moved to elaborate the crimes within the draft Statute itself, based largely on the same *nullum crimen* concerns: '[a]s regards the specification of crimes, the view was expressed that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused'.<sup>11</sup> With the idea of including substantive crimes came for the first time discussion on the need to establish a general temporal bar: 'Several delegations were of the view that it would be important to include in the statute the principle of the non-retroactivity of its provisions'.<sup>12</sup>

6

This basic link to the principle of non-retroactivity, considered as 'fundamental to any criminal legal system', was recalled in subsequent Preparatory Committee discussions which recognized both the need for the principle of non-retroactivity to be 'clearly spelled out in the Statute' and that 'the temporal jurisdiction of the Court should be limited to those crimes committed after the entry into force of the Statute'.<sup>13</sup> The compilation prepared by the informal working group at the 1996 sessions of the Preparatory Committee dealing with general principles of criminal law developed three proposals, under the overall heading draft 'Article A', to deal with the separate, but related concepts of *nullum crimen/nulla poena sine lege*, non-retroactivity and the temporal start-date of jurisdiction. The first essentially retained the approach of the ILC in article 39 of the 1994 draft Statute, but added that the conduct must not only have constituted a crime within the jurisdiction of the Court, but also that 'such conduct occurred after the entry into force of this Statute'.<sup>14</sup> Proposal 2 combined a temporal specification with the principle of *nullum crimen sine lege*: 'This Statute applies only to a conduct that is done after the entry into force of this Statute, and no conduct shall be punished by this Court unless it is an offence under the definition of the crimes of this Statute'.<sup>15</sup> Proposal 3, entitled 'Jurisdiction *ratione temporis*' essentially contained the three elements that found their way into the final adopted text for article 11: (i) date of entry into force of the Statute; (ii) date of entry into force for States acceding to the Statute at a later date; and (iii) declarations lodged by States to cover the period

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obligation or whether criminal responsibility could flow directly under international law from the treaty concerned.

<sup>9</sup> Question of International Criminal Jurisdiction, Report by R.J. Alfaro, Special Rapporteur, A/CN.4/15, 3 March 1950, reproduced in 1950 *YbILC* Vol II., pp. 14-16.

<sup>10</sup> A/RES/95(1), 11 December 1946: 'Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal'. The following year the General Assembly, in resolution 177(II) of 21 November 1947, tasked the ILC with the formulation of the Nuremberg principles as well as a draft code of crimes against the peace and security of mankind.

<sup>11</sup> *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, A/50/22, 6 September 1995, p. 12. For discussion on the negotiations over subject-matter jurisdiction in terms of 'core crimes' and other 'treaty crimes' see Zimmerman, in: Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), art. 5, at mn 1-7.

<sup>12</sup> ***Report of the Ad Hoc Committee, A/50/22, p. 12.***

<sup>13</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/51/22, Vol. I, 13 September 1996, pp. 43-44. The discussion linked these concepts to the *nullum crimen/nulla poena sine lege* principle.

<sup>14</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/51/22, Vol. II, 13 September 1996, p. 79.

<sup>15</sup> Preparatory Committee II 1996, p. 80.

between (i) and (ii). Specifically, proposal 3 provided: ‘The Court has jurisdiction only in respect of acts committed after the date of entry into force of this Statute’ ; ‘When a State becomes party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession’ ; and ‘A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.’<sup>16</sup> The only part of Proposal 3 that did not survive in any form into the final text is draft paragraph 2, which dealt with the possibility of temporal overlap with the mandate of pre-existing *ad hoc* tribunals established by the Security Council and the latter’s primacy: ‘The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an *ad hoc* international criminal tribunal. The Security Council may, however, decide otherwise.’<sup>17</sup>

7

When the issue was taken up anew in 1997, the Preparatory Committee largely left the proposals untouched, save for their placement. The February 1997 session reproduced *nullum crimen sine lege* as article A, based largely on article 39 of the 1994 ILC draft Statute, while non-retroactivity appeared as new article *Abis*.<sup>18</sup> The latter contained a draft paragraph 2 which retained in bracketed holding text the bulk of the 1996 Proposal 3 as described above. The August 1997 session further adopted, in bracketed optional text, an untitled article 21*ter* relating to the temporal jurisdiction: paragraph 1 contained in un-bracketed text the existing formulation of present day article 11(1).<sup>19</sup> The rest of the paragraph in bracketed text recalled the second element of the 1996 Proposal 3, but omitted any reference to the third element related to declarations.<sup>20</sup> Paragraph 2 of article 21*ter* maintained the reference to Security Council established tribunals.<sup>21</sup>

8

The draft text submitted to the Rome Conference following the inter-sessional meeting in Zutphen in January 1998 retained the formula adopted by the February 1997 Preparatory Committee in article A (*nullum crimen sine lege*), renumbered as article 15, and article *Abis* (non-retroactivity), renumbered as article 16,<sup>22</sup> while article 8, now entitled ‘Temporal jurisdiction’, replicated article 21*ter* from the August 1997 session with the accompanying explanatory note: ‘N.B. There is an interrelationship between this article and article 16[A *bis*] (Non-retroactivity).’

9

In Rome, the initial proposal of the Bureau of the Committee of the Whole was to combine the provisions on temporal jurisdiction and non-retroactivity.<sup>23</sup> The proposal, formulated in three parts, consisted of paragraph 1, corresponding to the present article 24(1); paragraph 1*bis*, corresponding to the present article 11(2); and paragraph 2, corresponding to the present article 24(2). The wording of each mirrored closely the texts as finally adopted, save for minor modification. For example, the phrase appearing in the Zutphen draft to describe the activation of temporal jurisdiction for acceding States was changed from ‘after the deposit by that State of its instrument of ratification or accession’ to the more precise wording ‘after the entry into force of this Statute for that State’, which mirrors the formulation present in article 126.

10

The Bureau proposal also deleted the draft paragraph on previously established *ad hoc* Tribunals. As noted above, the provision would have granted exclusive jurisdiction to such tribunals, established by the Security Council under Chapter VII of the UN Charter, where they were created prior to the entry into force of the Statute and continued to exercise temporal jurisdiction thereafter. The practical impact of the provision would have been limited to the territory of the former Yugoslavia in the light of open-ended prospective jurisdiction of the ICTY, since the temporal jurisdiction of the ICTR was already limited to events occurring during 1994. This question was not just theoretical, since after the adoption of the Rome Statute the ICTY asserted jurisdiction over events occurring first in Kosovo and later in Macedonia. The risk of competing jurisdictions may well have been limited in the light of complementarity. Although the ICTY is not a State with jurisdiction within the meaning of article 17, the ICC Prosecutor may well have reflected on the object and purpose of article 17 and article 53(1)(b), and consulted with the

<sup>16</sup> Preparatory Committee II 1996, p. 80.

<sup>17</sup> Preparatory Committee II 1996, p. 80.

<sup>18</sup> *Decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997*, A/AC.249/1997/L.5, 12 March 1997, pp. 19–20.

<sup>19</sup> The only difference is the words ‘in respect of’ as opposed to the finally adopted ‘with respect to’.

<sup>20</sup> The concept of declarations nonetheless continued to be treated in draft article 21*bis* and 22.

<sup>21</sup> *Decisions taken by the Preparatory Committee at its session held from 4 to 15 August 1997*, A/AC.249/1997/L.8/Rev.1, 14 August 1997, p. 5.

<sup>22</sup> *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, A/AC.249/1998/L.13, 4 February 1998. Paragraph 2 of article 16[A *bis*], which contained bracketed holding text from former 1996 Proposal 3, was now deleted with the explanation that the proposals were treated under other provisions, namely articles 7[21 *bis*] (Preconditions to the exercise of jurisdiction), 8[21*ter*] (Temporal jurisdiction) and 9[22] (Acceptance of the jurisdiction of the Court).

<sup>23</sup> See A/CONF.183/C.1/L.53 (6 July 1998) and A/CONF.183/C.1/L.59 (10 July 1998).

ICTY Prosecutor in the same way it is meant to consult and seek additional information from national authorities, in determining whether to proceed. With the adoption of completion strategies for the ICTY and the cut-off date for the submission of pending indictments in December 2004, this question has now become moot.

11

In the final package presented by the Bureau, it decided to separate out the provisions on temporal jurisdiction and non-retroactivity into the placement they now more appropriately occupy in Part 2 on jurisdiction, admissibility and applicable law, and Part 3 on general principles of criminal law, respectively.<sup>24</sup>

12

In relation to the operation of article 11 with other provisions of the Statute, discussions in Rome also examined the tension between the notion of ‘continuing crimes’ and the Court’s limitations *ratione temporis*. For example, during the 9<sup>th</sup> meeting of the Committee of the Whole the representative of Lebanon pointed out that draft article 8 on temporal jurisdiction ‘did not cover acts that began before but continued after the entry into force of the Statute. Care should be taken not to bar prosecution for such acts, and the words “unless the crimes continue after that date” should be added at the end of paragraph 1’.<sup>25</sup> As Per Saland, Chairman of the Working Group on General Principles of Criminal Law, observes, the impossibility of reaching consensus on the issue was ultimately resolved in Rome by keeping the construction ambiguous, thereby leaving it to the Court to settle the issue.<sup>26</sup> As discussed below, the Preparatory Commission returned to the issue in the context of the elements of the crimes of enforced disappearance,<sup>27</sup> reducing the scope for some of the ambiguity, while leaving other issues unresolved.

## B. Analysis and interpretation of elements

### I. Paragraph 1: Entry into force of the Statute

13

The temporal parameters of the Court’s jurisdiction are restricted to crimes committed after its entry into force, which occurred on 1 July 2002. This date also serves as the entry into force of the Statute with respect to the territory and nationals of those States that deposited their instruments of ratification, acceptance, approval or accession as part of the 60 needed to bring the treaty into effect.<sup>28</sup>

14

The phrase ‘jurisdiction ... with respect to crimes’ refers to the crimes listed in article 5. Although the term ‘crime’ in article 5 is distinguished from the use of ‘offence’ under article 70 of the Statute, it is axiomatic that the Court will not be faced with alleged offences against the administration of the Court that pre-date the actual investigation or prosecution of such crimes. Article 11 does not treat the Court’s temporal jurisdiction with respect to new crimes added to the Statute, which are regulated separately according to the amendment procedure in article 121. Instead, it establishes an absolute bar on the retroactive exercise of ICC jurisdiction prior to its entry into force. With respect to prospective temporal jurisdiction, the start-date for the exercise of jurisdiction over war crimes committed on the territory or by the nationals of a State Party may be postponed for an initial 7 year period pursuant to article 124.<sup>29</sup>

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Whereas the treaty-based limitations on the exercise of personal and territorial jurisdiction can be overcome by a Security Council referral, this is not the case for the Court’s temporal parameters.<sup>30</sup> Under the former, the Security Council does not amend the jurisdictional scheme of the Statute, but instead enables an extension of the existing bases of jurisdiction to the territory and/or nationals of States that would not otherwise be amenable to the Court’s reach. The ability to do so flows from the Council’s powers under Chapter VII of the UN Charter to take compulsory measures with respect to UN Member States, as well as the obligation of UN Member States to accept and carry them out.<sup>31</sup> The Council’s actions, thus, modify the obligations of the concerned UN Member State(s) towards the ICC: creating obligations where

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<sup>24</sup> The final wording of article 11 as adopted appears in the Bureau’s package proposal for Part 2; A/CONF.183/C.1/L.76/Add.2 (16 July 1998).

<sup>25</sup> A/CONF.183/C.1/SR.9, 20 Nov. 1998, para. 73.

<sup>26</sup> Saland, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (1999) 196-197, referring to the lack of agreement on the choice of a verb to go with the word ‘conduct’ in article 24 - such as ‘committed’, ‘occurred’, ‘commenced’ or ‘completed’ - was only resolved by suggesting the removal of any verb, even if stylistically it did not read well in English, enabling thereby the Court to settle the issue.

<sup>27</sup> See commentary on article 7 in this edition.

<sup>28</sup> See article 126 on entry into force provisions.

<sup>29</sup> See *infra* note 76.

<sup>30</sup> See commentary below on art. 11(2), mn 28, *et seq.*, for States that become Party to the Statute after its entry into force.

<sup>31</sup> See Articles 25 and 103, United Nations Charter.

there were none, and enabling the exercise of ICC jurisdiction which would otherwise be invalid. The ICC Statute does not create or confer the Council's power in this regard, but merely provides a procedural vehicle (article 13(b)) to enable the Court to recognize and act upon such measures, which are based on authority external to the Statute itself.<sup>32</sup> By contrast, the Council cannot alter or modify the ICC Statute, for example by amending the temporal bar contained in article 11, just as it cannot amend the subject-matter jurisdiction of the Court or the operation of any other provision. Unlike the *ad hoc* Tribunals, the ICC is not a subsidiary organ of the Council in the sense that the principal organ possesses the competence to determine the membership, structure, mandate and duration of existence of its subsidiary organ.<sup>33</sup> Since the ICC is a distinct international organization, the Security Council cannot authorize the Court to exceed the scope of its own powers under the Statute and so act *ultra vires* its own legislative framework.<sup>34</sup> For this reason, other international courts and tribunals, including the varying categories of 'hybrid' or 'internationalized' jurisdictions, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, Special Panels for Serious Crimes in East Timor or the Extraordinary African Chambers within the courts of Senegal, may continue to be set up by the international community to deal with historical allegations notwithstanding the establishment of the ICC.<sup>35</sup>

## 1. Continuing crimes

16

In terms of crimes that pre-date the Statute's entry into force, but whose occurrence continues past 1 July 2002, it may be worth distinguishing between two different categories of 'continuing crimes': (a) conduct where the *actus reus* is partly completed in the past, the effects of which continue to this day; and (b) conduct that constitutes an ongoing course of criminal activity, all of whose material elements continue to occur on a daily basis.<sup>36</sup> In the case of the former, the notion of continuing crimes is particularly helpful because of the bifurcated character of certain crimes. For example, the crime of enforced disappearance involves (i) arrest, detention or abducted (first stage), followed by (ii) refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of that individual (second stage), which together form the *actus reus*, but may be separated over extended periods of time.<sup>37</sup> The term 'continuing crimes' serves to emphasize the persisting responsibility of State authorities in these circumstances.<sup>38</sup> As described below, although footnote 24 of the elements of crimes has clarified the exercise of jurisdiction with respect to bifurcated crimes which only partly occur within the temporal jurisdiction of the Court, there appears to be much greater scope with respect to conduct that constitutes an ongoing course of criminal activity.

## 2. Continuing crimes under human rights instruments

17

Established in 1980 by the United Nations Human Rights Commission to examine questions relevant to enforced or involuntary disappearances of persons, the Working Group on Enforced or Involuntary Disappearance has in particular helped develop the conceptual elements of the definition of enforced disappearance and the attendant notion of continuing crimes, leading to the adoption in 1992 of the United Nations Declaration on the Protection of All Persons from Enforced

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<sup>32</sup> The same considerations apply to article 16 of the Statute. See Rastan, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 157 at fn. 75.

<sup>33</sup> Sarooshi, *The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers* (1999) 130; Condorelli and Villalpando, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court* (2002) 572.

<sup>34</sup> Sarooshi, in: McGoldrick et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 106-107. The principle of attribution holds that an international organisation cannot act beyond the powers attributed to it by its constituent treaty; cf. Schermers and Blokker, *International Institutional Law: Unity within Diversity* (2011) 157; Rastan (2008) 21 *LeidenJIL* 431-444. The principle is also sometimes referred to as the 'principle of speciality'; see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, 8 July 1996, ICJ Report 1996, para. 25.

<sup>35</sup> Cazala, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour pénale internationale: Commentaire article par article* (2012) 570.

<sup>36</sup> See El Zeidy (2005) 5 *ICLRev* 83-119, 90-99. See also Williams, in: Triffterer (ed.), *Commentary* (2008), art. 11, mn 2; and Ambos, *Treatise on International Criminal Law*, Volume II (2014), p. 112, referring to the concept of 'Dauerdelikt'.

<sup>37</sup> For the crime of enforced disappearance under article 7(1)(i) of the Rome Statute, the material elements require that the perpetrator arrested, detained or abducted an individual (originating act) and subsequently refused to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of that individual (ongoing act); or in the alternative, that the perpetrator (i) refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or person, and (ii) such refusal was preceded or accompanied by that deprivation of freedom.

<sup>38</sup> See e. g. IACtHR, *Chapman Blake v. Guatemala*, Merits, IACtHR Series C No 36, *IHRL* 1419 (IACtHR 1998), [1998] IACtHR 1 (24 January 1998). See also discussion in Pangalangan, in this volume, art. 24, mn 13.

Disappearance. With regard to article 17 of the Declaration,<sup>39</sup> the Working Group stated in its General Comment of 2011: '[w]hen an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction'.<sup>40</sup> The Working Group further held that 'one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity. The crime cannot be separated and the conviction should cover the enforced disappearance as a whole'.<sup>41</sup> Nonetheless, following the entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance, the Committee on Enforced Disappearance, which was established thereunder, took the opposite approach based on the much more restrictive language of article 35 of the Convention.<sup>42</sup> In particular, article 35 limits the Committee's competence 'solely in respect of enforced disappearances which commenced after the entry into force of this Convention' or in the case of acceding States, 'enforced disappearances which commenced after the entry into force of this Convention for the State concerned'.<sup>43</sup> Accordingly, the Committee held that it will not adjudicate cases that commenced before the Convention entered into force for the State concerned.<sup>44</sup>

18

In a number of decisions on communication received pursuant to the First Optional Protocol (individual complaints mechanisms) to the ICCPR, the Human Rights Committee has declared that 'it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that date or has effects which themselves constitute a violation of the Covenant after that date'.<sup>45</sup> Thus, for example, in *Ibrahima Gueye et al. v. France*, it held that the discriminatory effects of legislation enacted prior to the Optional Protocol came into force for France constituted a present day violation of article 26 of the Covenant.<sup>46</sup> In other cases, including those of enforced disappearance, the Committee was not satisfied that the violations persisted after the relevant entry into force date based on the facts of the case at hand.<sup>47</sup>

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<sup>39</sup> Article 17(1) of the Declaration on the Protection of All Persons from Enforced Disappearance provides: 'Acts constituting enforced disappearance shall 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'; A/RES/47/133 (18 December 1992).

<sup>40</sup> Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, para. 3, reproduced in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, p. 12. The Working Group was established by the Human Rights Commission by resolution 20 (XXXVI) of 29 February 1980 and most recently renewed by Human Rights Council resolution A/HRC/RES/27/1 of 25 September 2014.

<sup>41</sup> UN Doc.A/HRC/16/48, 26 January 2011, p. 12, para. 5.

<sup>42</sup> The Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances continue to coexist side by side in view of their separate and independent mandates, although they are intended to collaborate and coordinate their activities.

<sup>43</sup> Article 35 of the International Convention for the Protection of All Persons from Enforced Disappearance provides: '1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention. 2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned'; A/61/448 (20 December 2006), UNTS Vol. 2715, entered into force 23 December 2010.

<sup>44</sup> Committee on Enforced Disappearances, *Statement on the Ratione Temporis Element in the Review of Reports Submitted by States Parties under the International Convention for the Protection of All Persons from Enforced Disappearance*, 15 November 2013, Annex IV, p. 19.

<sup>45</sup> HRC, *Ibrahima Gueye et al. v. France*, Communication No. 196/1986, 6 April 1989, para. 5.3. See also *Miguel A. Millan Sequeira v. Uruguay*, Communication No. 6/1977, UN Doc.CCPR/C/OP/1 at 52 (1984), para. 16; *Sandra Lovelace v. Canada*, Communication No. R.6/24, UN Doc.Supp.No. 40 (A/36/40) at 166 (1981), para. 7.3; *Eugeniusz Kurowski v. Poland*, Communication No. 872/1999, 11 April 2003, para. 6.4.

<sup>46</sup> *Ibrahima Gueye et al. v. France*, Communication No. 196/1986, para. 10.

<sup>47</sup> See HRC, *Norma Yurich v. Chile*, Communication No. 1078/2002, UN Doc.CCPR/C/85/D/1078/2002 (2005) and *Cifuentes Elgueta v. Chile*, Communication No. 1536/2006, UN Doc.CCPR/C/96/D/1536/2006, 28 July 2009, para. 8.5. in both cases the Committee observed that the original acts of arrest, detention or abduction, as well as the refusal to give information about the deprivation of freedom occurred before the entry into force of the Covenant for the State party, and no acts of refusal to give information appeared to continue after the entry into force of the Optional Protocol (individual complaint mechanism). It also considered as relevant the fact that upon ratifying the Optional Protocol, Chile made a declaration to the effect that the Committee's competence applied only in respect of acts occurring after the entry into force for Chile of the Optional Protocol or, in any event, acts which began after 11 March 1990.



At the regional level, the Inter-American Court of Human Rights (IACtHR) has since the late 1980s pioneered the development of case law on the continuing nature of violations under the American Convention on Human Rights, including in cases of enforced disappearance.<sup>48</sup> As the Inter-American Court has held: ‘the Court has competence to examine human rights violations that are continuing or permanent even though the initial act violating them took place before the date on which the Court’s contentious jurisdiction was accepted, if the said violations persist after the date of acceptance, because they continue to be committed; thus, the principle of non-retroactivity is not violated’.<sup>49</sup> In the case of *Rio Negro Massacres v. Guatemala*, e.g. based on the foregoing the IACtHR held itself competent to examine alleged continuing human rights violations arising from facts occurring between 1980 to 1982, prior to the entry into force its contentious jurisdiction for Guatemala in 1987, in relation to forced disappearance; the absence of an impartial and effective investigation into the facts of the case; the adverse effects on the personal integrity of the next of kin and survivors in relation to investigation of the facts; the failure to identify those who were executed and disappeared; the ‘destruction of the community’s social fabric’, and forced displacement.<sup>50</sup> However, the Inter-American Court did not consider itself competent to rule on other allegations which occurred prior to 9 March 1987 for which no continuing violation could be established.<sup>51</sup>

20

A similar approach has been followed broadly by the European Court of Human Rights (ECtHR), although more recent cases have sought to define the outer scope of its temporal jurisdiction vis-à-vis continuing crimes. In *Cyprus v. Turkey*, in relation to alleged article 2 violations (right to life) that occurred in 1974, the ECtHR held that the ongoing failure of Turkey to discharge the procedural obligation to investigate such violations amounted to a continuing violation.<sup>52</sup> In *Veeber v. Estonia*, the ECtHR similarly stated that while the Convention is binding on each of the Contracting States only in respect of facts occurring after its entry into force in respect of that Party, it ‘recalls that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs.’<sup>53</sup> In more recent decisions, the ECtHR sought to clarify further the distinction between the substantive obligations under the Convention (e. g. right to life) and the ‘detachable’ procedural obligations that attach thereto (obligation to carry out an effective investigation) and which may persist even if the alleged act occurred prior to the relevant entry into force date, and in so doing placing conditions on their application.<sup>54</sup> In a set of principles developed in the cases of *Silih v. Slovenia* and *Janowiec and Others v. Russia*, the ECtHR held that its temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended. It developed a three-tiered test to govern its application: (i) where the death occurred before the critical date, the ECtHR’s temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date; (ii) the procedural obligation will come into effect only if there was a ‘genuine connection’ between the death as the triggering event and the entry into force of the Convention; and (iii) a connection which is not ‘genuine’ may nonetheless be sufficient to establish the ECtHR’s jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way.<sup>55</sup> Applying these principles, in the *Silih* case, the ‘genuine connection’

<sup>48</sup> See e. g. IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, Judgment, 29 July 1988, Series C No. 4, para. 155-185, *Chapman Blake v. Guatemala*, Preliminary objections, Series C No. 27 (1996), para. 39; *González Medina and family members v. Dominican Republic*, Preliminary objections, merits, reparations and costs, Judgment, 27 February 2012, Series C No. 240, para. 50.

<sup>49</sup> IACtHR, *Rio Negro Massacres v. Guatemala*, Judgment, 4 September 2012, Series C No 250, para. 37.

<sup>50</sup> *Rio Negro Massacres v. Guatemala*, Series C No 250, para. 38.

<sup>51</sup> *Rio Negro Massacres v. Guatemala*, Series C No 250, para. 39.

<sup>52</sup> See e. g. ECtHR, *Cyprus v. Turkey*, Judgment (Merits), No. 25781/94, 10 May 2001, para. 136: ‘... the Court concludes that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances’.

<sup>53</sup> See also ECtHR *Papamichalopoulos and Others v. Greece*, Judgment, No. 14556/89, 24 June 1993, paras. 40-46, and *Loizidou v. Turkey*, Judgment (Merits), No. 15318/89, 18 December 1996, para. 41.

<sup>54</sup> ECHR (GC), *Silih v. Slovenia*, Judgment (Merits and Just Satisfaction), No. 71463/01, 9 April 2009, para. 159: ‘the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty ... In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date’.

<sup>55</sup> *Janowiec and Others v. Russia*, Judgment (Merits and Just Satisfaction), Nos. 55508/07 and 29520/09, 21 October 2013, para. 141. See also *Silih v. Slovenia*, Judgment (Merits and Just Satisfaction), No. 71463/01, 9 April 2009, para. 162-163. In *Varnava and Others v. Turkey*, Judgment, Nos. 16064/90 et al., 18 September 2009, the Court further clarified the distinction between the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance: ‘A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred ... This situation is very often drawn out over time, prolonging the torment of the victim’s relatives. It cannot therefore be said that a disappearance is,

standard was satisfied since the lapse of time between the triggering event and the ratification date remained reasonably short, and a significant proportion of the investigative steps required for ensuring compliance with the procedural obligation under Article 2 were carried out after the ratification date. By contrast, in *Janowiec and Others v. Russia*, which dealt with much older violations related to the notorious Katyn massacre during WWII, the ECtHR held that the time lapse between the deaths (1940) and the ratification date (5 May 1998) was too long in absolute terms for a ‘genuine connection’ to be established between the death of the applicants’ relatives and the entry into force of the Convention in respect of Russia.<sup>56</sup> In relation to the alternative ‘convention values’ test in *Janowiec*, the ECtHR set out its understanding by holding ‘reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.’<sup>57</sup> It nonetheless held in the case at hand that although the ‘Convention values’ clause could apply to events that pre-dated Russia’s adherence to the Convention, it should not be applied to events which occurred prior to the adoption of the Convention itself, on 4 November 1950.<sup>58</sup>

### 3. Continuing crimes under the Rome Statute

21

Although the question of continuing crimes was left unresolved in Rome, it was expressly addressed by the Preparatory Commission in footnote 24 of the elements of crimes for the crime of enforced disappearance. The footnote states that both stages of the material elements of the crime need to occur after the entry into force of the Statute, as part of an attack that is within the temporal jurisdiction of the Court.<sup>59</sup> This clarification removes the scope for the Court to interpret article 7(1)(i) as permitting the type of continuing crimes approach sustained in other fora when examining the persisting responsibility of States to provide redress for disappearance that commenced prior to the relevant statutory temporal limitation clause. It might be argued that footnote 24 is highly specific to the crime of enforced disappearance and as such does not provide guidance for other crimes within the jurisdiction of the Court. The more reasonable position, in the light of the debates surrounding the adoption of footnote 24 and the matters of principle it addresses, is that it provides guidance also for how other crimes should be addressed where only one part of the material elements carries over into the temporal jurisdiction of the Court and the other part remains completed in the past.

22

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simply, an ‘instantaneous’ act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation... This is so, even where death may, eventually, be presumed.’

<sup>56</sup> *Janowiec and Others v. Russia*, Nos. 55508/07 and 29520/09, paras. 157. Recalling its findings in *Silih*, the Court also stated: ‘for a ‘genuine connection’ to be established, both criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force’ ; *ibid.*, paras. 147-148.

<sup>57</sup> *Janowiec and Others v. Russia*, Nos. 55508/07 and 29520/09, para. 150. As the Court further observed: ‘The heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order.’

<sup>58</sup> See *Janowiec and Others v. Russia*, Nos. 55508/07 and 29520/09, Joint Partly Dissenting Opinion of Judges Spielmann, Villiger and Nussberger and Partly Dissenting and Partly Concurring Opinion of Judge Wotjyczek. See discussion in Herl, ‘Enforced Disappearance and the European Court of Human Rights’ *ratione temporis* Jurisdiction: A Discussion of Temporal Elements in *Janowiec and Others v. Russia*, (2014) 12 *JICJ* 751-768.

<sup>59</sup> Elements of Crimes, article 7(1)(i). As Ambos observes, this means that the Statute excludes individual acts of enforced disappearance committed after the entry into force of the Statute, but before the collective attack; *Treatise on International Criminal Law*, Volume II (2014), p. 112. Nonetheless, since the relevant conduct must always have a nexus with the chapeau of article 7 any individual act would perforce need to occur within the context of the attack in question. See similarly *Situation in the Republic of Burundi*, Situation No. ICC-01/17, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, fn. 298 <<http://www.legal-tools.org/doc/8f2373/>> accessed 3 May 2020, where the Chamber inserts by way of explanatory text the following square brackets (emphasis in the original): “Footnotes 23 and 24 of the Elements of Crimes specify: ‘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’ and ‘This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs [i.e. the contextual elements of crimes against humanity] after the entry into force of the Statute.’”

Distinguishable from the above are cases that constitute ‘continuing crimes’ in the sense of an ongoing course of criminal activity.<sup>60</sup> In these cases, the conduct repeats itself, meaning all of the material elements of the crime recur each day and may therefore be properly described as a series of discrete acts that are completed each time they are committed. Since the acts concerned can be distinguished between those that occur prior to and those that occur after the relevant entry into force date, issues related to temporal limitations or the principle of non-retroactivity do not arise in the same way. Even if the conduct has identical parameters in terms of location, subject-matter, and participants (such as repeat acts of torture in detention committed by the same perpetrator against the same victim), those acts that occur after the relevant entry into force date will fall within the applicable temporal scope, even if it formed part of a course of conduct or ongoing criminal activity that began at an earlier date.

23

By way of example, Trial Chamber I in its Judgment in the *Lubanga* case observed that the crime of the conscription or enlistment of children under the age of fifteen years occurred every day that the underage children continued to be illegally recruited. As the Trial Chamber stated: ‘These offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group’.<sup>61</sup> In its confirmation decision, the Pre-Trial Chamber had similarly held: ‘the crime of enlisting and conscripting is an offence of a continuing nature - referred to by some courts as a “continuous crime” and by others as a “permanent crime”’. The crime of enlisting or conscripting children under the age of fifteen years continues to be committed as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach age fifteen’.<sup>62</sup>

24

These observations appear to lend support to the proposition that for the crime of conscription or enlistment of children the moment of first recruitment may not be the decisive factor. Although the initial act of recruitment will constitute a discrete event, arguably the essence of the probation is not merely the original moment of conscription or enlistment, but rather the child’s continuing membership in the armed group or force, for the duration of such membership while under the age of fifteen years.<sup>63</sup> In line with the reasoning in *Lubanga*, because the act of underage membership occurs every day that the child remains enlisted or conscripted, it may be said to commence and be completed on each successive day it continues to occur. In contrast to the bifurcated *actus reus* for the crime of enforce disappearance which may be separated over time, with possibly only the denial part occurring within the temporal jurisdiction of the ICC, all of material elements of the crime of conscription or enlistment of children (continuing membership of an armed group or force for the duration of such membership while under the age of fifteen years) occur each successive day.<sup>64</sup> The ICC could thus exercise jurisdiction where an underage child

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<sup>60</sup> For a similar definition see ICTR Appeals Chamber in ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Appeals Chamber, Judgment, No. ICTR-99-52-A, 28 November 2007, para. 721 (‘A continuing crime implies an ongoing criminal activity. According to Black’s Law Dictionary, a continuing crime is: ‘1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] 2. A crime (such as driving a stolen vehicle) that continues over an extended period.’’’).

<sup>61</sup> *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, No. ICC-01/04-01/06-2842, 14 March 2012, para. 618 <<https://www.legal-tools.org/doc/677866/>> accessed 7 August 2019. The term ‘continuing crimes’ is also referred to by Pre-Trial Chamber III in its article 15 authorisation decision: ‘Bearing in mind the volatile environment in Côte d’Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into ‘continuing crimes’ - those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor’s application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes). Therefore if the authorisation is granted, it will include the investigation of any ongoing and continuing crimes that may be committed after the 23 June 2011 as part of the ongoing situation’. However this appears to be a misnomer, since the Chamber here appears to be referring to the continuing nature not of specific acts, but of related crimes in general; *Situation in the Republic of Côte d’Ivoire*, Situation No. ICC-02/11, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, Pre-Trial Chamber III, ICC-02/11-14-Corr, 15 November 2011, para. 179 <<https://www.legal-tools.org/doc/e0c0eb/>> accessed 7 August 2019; on this point see Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, ICC-02/11-15, paras. 64-70 <<https://www.legal-tools.org/doc/ea2793/>> accessed 7 August 2019.

<sup>62</sup> *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para. 248 <<https://www.legal-tools.org/doc/b7ac4f/>> accessed 7 August 2019.

<sup>63</sup> Rastan, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015) 173.

<sup>64</sup> The elements provide in relevant part that: (i) ‘The perpetrator conscripted or enlisted one or more persons into [the national armed forces][an armed force or group]...’; and (ii) ‘Such person or persons were under the age of 15 years’; Elements of Crimes, article 8(2)(b)(xxvi) and article 8(2)(e)(vii).

was recruited prior to the entry into force of the Statute<sup>65</sup> and continued, post entry into force date, to be a member of such armed group or force while under the age of fifteen.<sup>66</sup> The same considerations would apply to the use of children under the age of fifteen to participate actively in hostilities where, again, this straddled the applicable temporal threshold.

The above reasoning appears to be supported by footnote 25 of the Elements, which deals with the material elements for the first stage of the crime of enforced disappearance, namely: arrest, detention and abduction. The footnote clarifies that ‘detention’ for the purpose of article 7(1)(i) includes ‘a perpetrator who maintained an existing detention’. This means that a case of enforced disappearance may fall within the temporal jurisdiction of the Court without impacting on article 11 or footnote 24, where a perpetrator detains a person prior to July 2002, continues to hold that person in detention after that date, and thereafter refuses to give information on the fate or whereabouts of the person (i. e. disappearance in custody) – since in this scenario all of the material elements of the crime (i. e. both stages of the crime of enforced disappearance) would occur after the entry into force of the Statute.

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These same considerations would hold for any other crimes all of whose material parameters continue to occur after the temporal threshold of the Court jurisdiction, even if they formed part of a course of conduct that commenced at an earlier date, without offending articles 11, 22 and 24 of the Statute. Judge Fernandez in her separate and partially dissenting opinion in *Côte d'Ivoire*, appears to follow the same approach when observing that “examples of continuing crimes under the Statute include those of enforced disappearance of persons, enslavement, imprisonment, or other severe deprivation of physical liberty, sexual slavery, enforced prostitution, persecution and the crime of apartheid.”<sup>67</sup>

The above reasoning could also apply to modes of participation with regard to acts committed after the entry into force of the Statute that were in furtherance of, to take one mode of liability as an example, an order given prior thereto. If such an order remained in effect and crimes continued to be committed as a consequence thereof, assuming the evidentiary nexus for this proposition could be satisfied, it appears reasonable to argue that an accused who gave the standing order could be held criminally responsible under the Statute for ongoing acts committed in pursuance thereof. The same logic could be applied with respect to other modes of liability under the Statute.

## 26

The above distinction between ongoing crimes that repeat themselves and crimes that were partially completed in the past also finds support in the approach taken by the ICTR Appeals Chamber in the *Nahimana et al.* case. In particular, in that case the Trial Chamber had found that the crime of direct and public incitement to commit genocide ‘is an inchoate offence that continues in time until the completion of the acts contemplated’, thereby justifying its extension beyond the express temporal restriction contained in the ICTR Statute, which limits the Tribunal’s jurisdiction to events occurring during 1994. In so doing, the Trial Chamber found that articles in the local publication *Kangura* and RTL radio broadcasts, including those occurring prior to 1994, constituted one continuing incitement to commit genocide such that the Tribunal could convict the appellants on the basis of the totality of the articles and broadcasts (i. e. including those occurring in 1993).<sup>68</sup> The Appeals Chamber reversed this finding holding that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time.<sup>69</sup> It found that even if it could be concluded that the totality of the articles and broadcasts constituted one continuing incitement to commit genocide, the appellants could only be convicted for acts of direct and public incitement to commit genocide carried out during 1994.<sup>70</sup> As such, alleged crimes occurring in before the temporal start-date of 1 January 1994 fell outside of the Tribunal’s competence, even if they were connected to or formed part of a broader ongoing crime.<sup>71</sup>

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<sup>65</sup> I.e. entry into force of the Statute within the meaning of article 11(1) or entry into force of the Statute for the State concerned within the meaning of article 11(2).

<sup>66</sup> See similarly El Zeidy (2005) 5 *ICLRev* 90-99.

<sup>67</sup> See *Situation in the Republic of Côte d'Ivoire*, Corrigendum to “Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute, para. 69, after having recalled with approval the definition of continuing crimes relied upon by the ICTR Appeals Chamber in *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, para. 721 (see above at fn.60). For a more liberal use of the term ‘continuing crimes’ to refer more generally to the notion of prospective jurisdiction to investigate crimes that occur after the submission of article 15 application, see *Situation in the Republic of Côte d'Ivoire*, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire”, ICC-02/11-14-Corr, 15 November 2011, para. 179 (defining “continuing crimes” as “those whose commission extends past the date of the application”).

<sup>68</sup> ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Trial Chamber, Judgment, No. ICTR-99-52-T, 3 December 2003, para. 1017.

<sup>69</sup> ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Appeals Chamber, Judgment, No. ICTR-99-52-A, 28 November 2007, para. 723.

<sup>70</sup> *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, paras. 724-725.

<sup>71</sup> *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, para. 723.

Finally, setting aside the question of continuing crimes, international courts and tribunals have accepted the admission of evidence which pre-dates the applicable temporal jurisdiction for contextual purposes. In the above *Nahimana* case, for example, the Appeals Chamber held that a Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at clarifying a given context; establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994; or demonstrating a deliberate pattern of conduct.<sup>72</sup> Thus, in relation to the case at hand, the Appeals Chamber opined that ‘the 1993 broadcasts could explain how the RTLM listeners perceived the 1994 broadcasts and the impact these broadcasts may have had. Similarly, the pre-1994 Kangura issues were not necessarily inadmissible, since they could be relevant and have probative value in certain respects’.<sup>73</sup> A similar approach was taken by Pre-Trial Chamber II in its confirmation decision in the *Bemba* case in relation to Prosecution submissions that the Court could infer the accused’s *mens rea* by referring to prior behaviour of his troops in the Central African Republic (CAR) in 2001 and in the Democratic Republic of the Congo (DRC) in 2002, prior to the 2002 intervention in the CAR which formed the subject matter of the case.<sup>74</sup> Both events fell outside of the temporal scope of the case, while the former fell outside of the temporal scope of the Statute altogether.<sup>75</sup>

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It is less clear if the authorization decision adopted by Pre-Trial Chamber III in the Bangladesh/Myanmar situation alters the above discussion. In that decision the Chamber, when demarcating the temporal scope of the situation, but without prior discussion, elaboration or citation, observed:

Regarding alleged crimes that have a continuous nature, the Prosecutor may extend her investigation even when such crimes commenced before 1 June 2010 (or the date of entry into force of the Statute for any other relevant State Party) in so far as the crimes continued after this date.<sup>76</sup>

Since 1 June 2010 represents the entry into force of the Statute for Bangladesh, pursuant to article 11, the decision does not clarify whether this statement stands for the proposition that: (1) the Court enjoys retroactive jurisdiction encompassing crimes that pre-date the Court’s ordinary temporal jurisdiction under article 11, as long as such crimes are sufficiently linked to those occurring after the entry into force date of the Statute for the relevant State(s); (2) that the Court’s jurisdiction extends to crimes that were ongoing at the time the Statute entered into force for the relevant State(s), within the sense of an ongoing course of criminal activity, but this means that criminal liability can only arise for conduct (even if ongoing) that occurs after the relevant entry into force date, and does not stand for the proposition that the Court may assert retroactive criminal jurisdiction (see above mns. 22-26); and/or (3) the Court may examine evidence with respect to antecedent conduct, in particular for contextual purposes, when determining criminal

<sup>72</sup> *Prosecutor v. Nahimana et al*, No. ICTR-99-52-A, paras. 310, 315, citing *inter alia* to *Prosecutor v. Aloys Simba*, Appeals Chamber, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, No. ICTR-01-76-AR72.2, 29 July 2004, p. 4; *Prosecutor v. Aloys Ntabakuze*, Appeals Chamber, Decision on the Interlocutory Appeal against the Decision of 13 April 2000 of Trial Chamber III, No. ICTR-97-34-A, 13 November 2000, p. 5; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Appeals Chamber, Decision on the Interlocutory Appeal, No. ICTR-99-52-A, 5 September 2000, p. 6, and Separate Opinion of Judge Shahabuddeen, paras. 21, 26 and 32. See also Stahn, Zeidy & Olasolo, ‘The International Criminal Court’s Ad Hoc Jurisdiction Revisited’ (2005) 99 *AJIL* at 429-431.

<sup>73</sup> *Prosecutor v. Nahimana et al*, No. ICTR-99-52-A, para. 725. See also *Prosecutor v. Nsengiyumva*, Decision on the Defence Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment, No. ICTR-96-12-I, 13 April 2000, paras. 27–33 (with respect to the evidence concerning the charge of conspiracy). See also Bourgon, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 550–551, who observes that evidence of preparatory and planning for genocide that pre-dates the Court’s temporal jurisdiction may be relevant to establishing the *mens rea* of the accused, citing in support the Separate Opinion of Judge Shahabuddeen in ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Appeals Chamber, Decision on the Interlocutory Appeal, No. ICTR-99-52-A, 5 September 2000, para. 11. See a *contrario* Joint Separate Opinion of Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia, *ibid.*

<sup>74</sup> ICC, *Prosecutor v. Bemba, Situation in the Central African Republic*, Pre-Trial Chamber II, Situation No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 373.

<sup>75</sup> Although the Chamber ultimately disagreed both with the Prosecutor’s assertion that Bemba’s *mens rea* under article 30 could be generally inferred from alleged past behaviour of his troops as well as the correspondence of the facts at hand, it did nonetheless consider itself competent to examine the earlier incidents for the purpose of its determination in the case at hand; *Prosecutor v. Bemba*, ICC-01/05-01/08-424, para. 377.

<sup>76</sup> *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, 14 November 2019, para.132.

responsibility for crimes that occur within its temporal jurisdiction (see above mn.27). Given the highly controversial and novel extension that would have been created by proposition 1, such a view would have necessarily required a far more detailed discussion, as takes place elsewhere in the decision for example with respect to the notion of objective-subjective territoriality (which itself had been the subject of an earlier jurisdictional ruling). The comparatively perfunctory nature of the statement suggests that it should instead be understood in the manner of past (albeit limited) practice before the Court. Indeed, although the above passage does not carry any citation, the next paragraph, which captures a different point (that the Court also retains prospective jurisdiction with respect to alleged crimes occurring after the issuance of the authorisation decision and that are sufficiently linked to the situation), cites to an amici submission that had argued that the Pre-Trial Chamber should “make clear that the scope of that investigation includes sufficiently linked crimes that have not been identified in the Request. These include crimes committed before 9 October 2016 but which began *or continued* after Bangladesh became a state party to the Rome Statute (the “Statute”) on 1 June 2010.”<sup>77</sup> This suggests that the Pre-Trial Chamber had in mind proposition (2) and/or possibly (3), but likely not (1).

## II. Paragraph 2: Entry into force for particular States

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For States that become Parties after 1 July 2002, paragraph 2 of article 11 stipulates that the temporal jurisdiction of the Court will apply from the entry into force of the Statute for that State. As provided in article 126, this will occur on the first day of the month after the 60<sup>th</sup> day following the deposit of by that State of its instruments of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. Nonetheless, the State concerned may have already expressed its consent to the exercise of the Court’s jurisdiction by lodging a declaration pursuant to article 12(3) of the Statute. In such case, the temporal jurisdiction of the Court may have already been activated, possibly with open-ended formulation, meaning that there will be a seamless transition from the temporal jurisdiction exercised in accordance with article 12(3), while the State remained a non-Party State, and that exercised pursuant to the treaty accession provisions of article 126.<sup>78</sup> It is also possible that the transition between temporal jurisdiction exercised pursuant to a declaration and as a State Party is not seamless, meaning a declaration may have been lodged for a confined time period in the past, resulting in a gap. Although temporal jurisdiction will not be contiguous in this instance, it will still represent an exception to the rule set out in article 126(2) insofar as the Court will have the possibility to exercise jurisdiction with respect to an earlier period. Finally, where a new State Party has not previously lodged a declaration it may do so at the time of accession to the Statute or anytime thereafter.<sup>79</sup> It is also possible that a State on becoming a Party to the Statute or at any time thereafter lodges a declaration pursuant to article 12(3). Thus, article 11(2) provides that the conditions on the start of the Court’s temporal jurisdiction, which are linked to entry into force of the Statute for that State, apply ‘unless that State has made a declaration under article 12, paragraph 3.’

Article 11, paragraph 2, uses the same restraining formulation as article 11, paragraph 1, when regulating that the Court may exercise its jurisdiction ‘only with respect to’ crimes committed after the relevant start date. Nonetheless, the logic contained in the phrase ‘the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State’ does not mean that the Court is barred from exercising jurisdiction over that State’s nationals who commit crimes on the territory of another State Party (or a State that has lodged a declaration). Pursuant to articles 12(2) and 12(3), the ordinary regime for the exercise of ICC jurisdiction on the basis of the territoriality principle will apply: the phrase ‘[i]f a State becomes a Party to this Statute’ does not endow new States Parties with the right of an opt-out over the earlier exercise of ICC jurisdiction with respect to its nationals. For the same reason, the phrase does not mean that the Security Council cannot provide jurisdiction with respect to the territory or nationals of that State for the time period before it became a State

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<sup>77</sup> *Situation in Bangladesh/ Myanmar*, Legal Representatives of Victims, Representations of Victims from Tula Toli, 23 October 2019, ICC-01/19-19, para 2; cited in *ibid.*, at para 133.

<sup>78</sup> See e. g. the open-ended article 12(3) declaration lodged on 18 April 2003 by Côte d’Ivoire accepting the exercise of jurisdiction for crimes committed in its territory since 19 September 2002; ICC, *Situation in the Republic of Cote d’Ivoire*, Pre-Trial Chamber III, Situation No. ICC-02/11, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire’, ICC-02/11-14-Corr, 15 November 2011, para. 10. By letter of 3 May 2011 Côte d’Ivoire re-affirmed the continuing validity of 18 April 2003 declaration; *ibid.*, para 11. Côte d’Ivoire subsequently deposited its instrument of ratification on 15 February 2013.

<sup>79</sup> See e. g. declaration lodged in February 2004 by Uganda extending the exercise of the temporal jurisdiction by the Court back to 1 July 2002; *Prosecutor v. Kony et al.*, *Situation in Uganda*, Pre-Trial Chamber II, Situation No. ICC-02/04-01/05, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, ICC-02/04-01/05-282, 14 March 2008, para. 78. As Uganda deposited its instrument of ratification on 14 June 2002, the Statute entered into force for Uganda on 1 September 2002.

Party. It merely serves to describe, without prejudice to either articles 12 or 13, the relevant start date of the Court's temporal jurisdiction for that State.<sup>80</sup>

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Where the ICC exercises jurisdiction on the basis of active personality in relation to alleged crimes committed on the territory of a non-Party State by the nationals of several States Parties, the temporal start date for the exercise of jurisdiction may create uneven results. For example, assuming such nationals are deployed as part of a multinational coalition, the entry into force provisions might result in temporal jurisdiction applying for the nationals of some States Parties from 1 July 2002 in accordance with article 11(1), while for other States Parties temporal jurisdiction might apply from a later date in accordance with article 11(2).<sup>81</sup> To reduce the impact of any such discrepancy on the distribution of alleged crimes attributed within the situation, the Court could prompt the State Party concerned to consider remedying any temporal limitation in line with the process envisaged in Rule 44(1), whereby '[t]he Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3'.

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As for the outer limit of the Court's temporal jurisdiction where a State Party withdraws from the Statute, the Court will cease to have jurisdiction with respect to crimes committed after the withdrawal comes into effect pursuant to article 127(1) of the Statute.<sup>82</sup> Nonetheless, as Pre-Trial Chamber III in the Burundi situation clarified, article 127 does not otherwise displace the ordinary operation of Court's jurisdictional scheme for the time period during which that State remained a Party to the Statute. As the Chamber observed:

'The Chamber finds that the jurisdiction of the Court prior to the entry into effect of a withdrawal must be determined in light of article 127(1), second sentence, of the Statute. This provision stipulates that a withdrawal takes "effect one year after the date of receipt of the notification". On this basis, a withdrawing State remains, for all intents and purposes, a State Party in the period between the communication of the notification of withdrawal and the end of the ensuing one-year interval. Therefore, by ratifying the Statute, a State Party accepts, in accordance with article 12(1) and (2) of the Statute, the jurisdiction of the Court over all article 5 crimes committed either by its nationals or on its territory for a period starting at the moment of the entry into force of the Statute for that State and running up to at least one year after a possible withdrawal, in accordance with article 127(1) of the Statute. This acceptance of the jurisdiction of the Court remains unaffected by a withdrawal of the State Party from the Statute. Therefore, the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017. As a consequence, the exercise of the Court's jurisdiction, i.e. the investigation and prosecution of crimes committed up to and including 26 October 2017, is, as such, not subject to any time limit.'<sup>83</sup>

This important clarification makes sense in the light of the separate functions of article 127, regulating the scope of any continuing duties of a withdrawing State under the terms of the treaty, and article 12, with respect of the precondition for the Court's exercise of jurisdiction. Thus, while a State Party might, subject to the exceptions set out in article 127(2), no longer owe certain

<sup>80</sup> In this sense, article 11(2) operates differently to article 124, which does provide an express right for State Parties to *opt-out* of the Court's jurisdictional regime over war crimes, even if committed by that State Party's nationals on the territory of another State, since the provision articulates an express exception to the operation of article 12, stating: 'Notwithstanding article 12, paragraph 1 and 2 ...'. Although the provision refers only to the first two paragraphs of article 12, its application must logically extend also to jurisdiction exercised pursuant to article 12(3), since the latter refers itself back to article 12(2). For discussion see Zimmerman, in: Triffterer (ed.), *Commentary* (2008) art. 124, mn 5-7, who notes that two possible readings on the restrictive scope of such a notification.

<sup>81</sup> See Rastan, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015) 170.

<sup>82</sup> As discussed above at mn. 29, this does not mean that the Court is thereby barred from exercising jurisdiction over the nationals of the former State Party for crimes allegedly committed on the territory of another State Party. Nor does it mean that the Prosecutor is unable to extend his or her investigations to crimes that are of 'continuous nature' and therefore continue after the withdrawal comes into effect; see ICC, *Situation in the Republic of Burundi*, Situation No. ICC-01/17, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, para. 192. The latter scenario might involve, e.g., the collection of evidence post-dating withdrawal on the continued refusal by the authorities to acknowledge the deprivation of a person's freedom or to give information on the fate of a missing person in relation to a case of enforced disappearance which occurred prior to withdrawal coming into effect.

<sup>83</sup> ICC, *Situation in the Republic of Burundi*, Situation No. ICC-01/17, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, para. 24.

treaty-based obligations after its withdrawal from the Statute has come into effect, withdrawal cannot retroactively invalidate the persistence of the Court's jurisdictional competence with respect to conduct committed during the time period when it was a party to the Statute, which is neither time barred nor subject to any statute of limitation. It remains to be seen if other Chambers adopt a different interpretation. Notably, while not a judicial decision, following the Philippines' notice of withdrawal, the Court issued a press release recalling the Burundi decision and stating that "the ICC retains its jurisdiction over crimes committed during the time in which the State was party to the Statute and may exercise this jurisdiction over these crimes even after the withdrawal becomes effective". The Prosecutor has issued similar statements with respect to the Philippines.<sup>84</sup>

Finally, it should be noted that article 11 governs the exercise of temporal jurisdiction for the Statute as a whole; it does not regulate the exercise of temporal jurisdiction with respect to amendments to the Statute for new crimes, which are treated in article 121. Thus, for example, an entirely separate jurisdictional regime has been created thereunder for the crime of aggression, including both for the entry into force of the amendment as well as for its exercise with respect to particular States.<sup>85</sup>

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<sup>84</sup> See *Report on Preliminary Examination Activities 2018*, ICC-OTP, 5 December 2018, para. 46, stating: "The Court retains jurisdiction with respect to alleged crimes that have occurred on the territory of the Philippines during the period when it was a State Party to the Statute".

<sup>85</sup> See Zimmerman 'Article 15bis' and 'Article 15ter'. See also [Zimmerman/Geiß], Article 8(2)(e)(xiii)-(xv).