

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER NATIONALS OF NON-STATES PARTIES

This book provides a systematic and comprehensive analysis of the ICC's jurisdiction over nationals of non-States Parties. It is within the context of developments at the Court in recent years that this work addresses the overarching question: On what legal basis is the ICC authorised to exercise jurisdiction over nationals of non-States Parties? Engaging with ICC jurisprudence and building upon arguments developed in legal scholarship, this book explores the theory of delegated jurisdiction and critically examines the idea that the Court might alternatively be exercising jurisdiction inherent to the international community. It argues that delegation of territorial jurisdiction and implied consent by virtue of UN membership provide a legal basis to allow the ICC to exercise jurisdiction over nationals of non-States Parties in almost all situations envisaged by the Rome Statute.

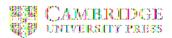
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MONIQUE CORMIER

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FOREWORD

Many of the past and present controversies surrounding the International Criminal Court proceed in some way from its jurisdiction over nationals of States not party to the Rome Statute, its constituent instrument. Preliminary examinations, investigations and cases involving alleged crimes by nationals of Israel, Myanmar, Russia, Sudan and the US have embroiled the Court in hotly disputed legal proceedings and exposed it to scathing and sometimes scandalous political attacks. In some of these instances, criticism of the Court has by no means been confined to non-States Parties.

To some, the ICC's jurisdiction over third-party nationals is the original sin from which other legal transgressions flow. To others, this same jurisdiction is but one legitimate incarnation of the 'jus puniendi of the international community'. To others still, the Court's jurisdiction over nationals of non-States Parties is no lesser or greater than the respective jurisdictions over crimes on their territories enjoyed by States Parties to the Rome Statute or is justified in its exercise in situations referred to the Court by the Security Council by a non-State Party's consent as a member of the United Nations, by way of Article 25 of the UN Charter. What is instead potentially problematic to these last is the overlay of the ICC's jurisdiction over third-party nationals with other international legal issues, such as the immunities of State officials from foreign criminal jurisdiction.

In *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, Monique Cormier, with a view to a cogent rationalisation of the ICC's competence with respect to allegations of crimes by nationals of States not party to the Rome Statute, subjects to scrutiny these different schools of thought and the many and varied international legal questions thrown up one way or another by this competence. The result, the product of deep and broad study of the primary and secondary sources, is a rich, expansive and at times provocative study with implications for many points of law currently before or likely to come before the



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Court. It deserves to be read, and will amply reward reading, by anyone interested in international criminal law, the law of international organisations, the law of treaties or international legal understandings of sovereignty.

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This book is a reviewed and updated version of my doctoral dissertation completed at the University of Melbourne, so the first vote of thanks must go to my PhD supervisors. Tim McCormack was an enthusiastic supporter of this project from the beginning and always willing to share his experience and insights on the situations before the International Criminal Court (ICC). Alison Duxbury was a dedicated supervisor and a supportive mentor and I particularly appreciated her expertise on international institutional law. I am also grateful for Alison's ongoing support during the preparation of my book manuscript. Thank you to Rain Liivoja, whose willingness to engage with the technicalities of international criminal jurisdiction assisted me greatly. The guidance, encouragement and good humour of my three supervisors sustained me throughout my candidature.

I am indebted to Roger O'Keefe and Roger Clark for examining my thesis and providing detailed and thoughtful comments that became a blueprint for revising and updating the text for publication. The reports from the anonymous Cambridge University Press reviewers were similarly invaluable.

The jurisdiction of the ICC over nationals of non-States Parties first caught my attention back in 2005 as an undergraduate at the University of Adelaide. I wrote my LLB Honours thesis on this topic under the dedicated supervision of Judith Gardam, unaware that I would still be preoccupied with this issue fifteen years later! I would also like to thank Gerry Simpson for introducing me to academia and encouraging me to pursue a PhD.

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Röling, BVA and CF Rüter (eds), The Tokyo Judgment: The International Military
Tribunal for the Far East (IMTFE) 29 April 1946–2 November 1948 (APA –
University Press, 1977) 178–179

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icrc.org/eng/assets/files/other/issues_raised_with_regard_to_the_icc_statute.pdf 74

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ABBREVIATIONS

DRC Democratic Republic of the Congo FRY Federal Republic of Yugoslavia ICC International Criminal Court ICJ International Court of Justice

ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for Yugoslavia

ILC International Law Commission

ISAF International Security Assistance Force NATO North Atlantic Treaty Organization NGO non-governmental organisation

PCIJ Permanent Court of International Justice
PLO Palestinian Liberation Organization
SCSL Special Court for Sierra Leone

SFRY Socialist Federal Republic of Yugoslavia

SOFA Status of Forces Agreement SOMA Status of Mission Agreement

UK United Kingdom UN United Nations

UNMIL United Nations Mission in Liberia

US United States

VCLT Vienna Convention on the Law of Treaties

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