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

MONIQUE CORMIER

University of New England
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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 Court.
FOREWORD

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.

Roger O'Keefe

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Bocconi University, Milan
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.

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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.

A number of colleagues read various versions of the manuscript, in whole or in part, and for that I would like to thank Cameron Moore and Samuli Haataja for their thoughts on specific chapters. Particular thanks must go to Carrie McDougall for her generous and detailed feedback on an earlier draft and to Rhys Ryan for his excellent research assistance.

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The University of New England School of Law has been my academic home for the past three years and I would like to acknowledge the School and my UNE colleagues for their support while I finalised the manuscript.

I have presented aspects of this research at various conferences and workshops over a number of years and wish to express my appreciation broadly to the participants at the Australian International Criminal Law workshops; the Australian and New Zealand Society of International Law conferences; the 2015 American Society of International Law ICL Workshop; and the Harvard Law School Visiting Researchers Colloquium in 2016.

I am fortunate to be part of a supportive scholarly community of Melbourne PhD alumni and would like to thank Anna Hood, Madelaine Chiam, Simon McKenzie, Kobi Leins, Cait Storr and Sophie Rigney for their camaraderie, inspiration and good advice.

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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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