The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits

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Abstract
This article examines the jurisdiction of the International Criminal Court (ICC) over nationals of states not party to the ICC Statute. The article first addresses the US argument that the exercise of ICC jurisdiction over nationals of non-parties without the consent of that non-party would be contrary to international law. The author considers the principles which support the delegation of criminal jurisdiction by states to international tribunals and discusses the precedents for such delegations. It is further argued that the exercise of ICC jurisdiction over acts done pursuant to the official policy of a non-party state would not be contrary to the principle requiring consent for the exercise of jurisdiction by international tribunals. Finally, the article explores the limits to the jurisdiction of the ICC over non-party nationals. In particular, the article addresses the circumstances in which ICC parties are precluded from surrendering nationals of non-parties to the ICC.

1. Introduction
This article examines the competence of the ICC to exercise jurisdiction over nationals of states that are not parties to the Rome Statute without the consent of those states. Under the ICC Statute, the ICC has jurisdiction over nationals of non-parties in three circumstances. First, the ICC may prosecute nationals of non-parties in situations referred to the ICC Prosecutor by the UN Security Council.1 Secondly, non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a state that is a party to the ICC Statute or has otherwise accepted the

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1 Art. 13 ICCSt.
jurisdiction of the Court with respect to that crime. Thirdly, jurisdiction may be exercised over the nationals of a non-party where the non-party has consented to the exercise of jurisdiction with respect to a particular crime. In either of the first two circumstances, the consent of the state of nationality is not a prerequisite to the exercise of jurisdiction.

At least one state that is not party to the Rome Statute – the United States (US) – has vigorously objected to the possibility that the ICC may assert jurisdiction over its nationals without its consent. As a result of its opposition to the ICC, the US has sought to use a variety of legal and political tools to ensure that the ICC does not exercise jurisdiction over its nationals. This strategy has included: the enactment of legislation restricting cooperation with the ICC and with states that are parties to the ICC; the conclusion of agreements with other states prohibiting the transfer of US nationals to the ICC; and the adoption of Security Council (SC) resolutions preventing the ICC from exercising jurisdiction over those nationals of non-parties that are involved in UN authorized operations.

Section 2 of this article considers the legal objections to the exercise of ICC jurisdiction over non-party nationals. That section argues that not only are states legally entitled to delegate the criminal jurisdiction they possess over non-nationals to a treaty-based court, but that there is a significant amount of precedent for that delegation. It is also argued that the ICC will not be acting in violation of international law even in cases in which it exercises jurisdiction in respect of official acts of non-parties to the ICC Statute. Section 3 examines the limits to the jurisdiction of the ICC over non-party nationals. That section considers the legal tools by which non-parties may exclude at least some of their nationals from ICC jurisdiction. In particular, the section considers the circumstances in which officials or other nationals of non-parties that are on the territory of ICC parties will be exempt from surrender to the ICC.

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2 Art. 12(2)(a) and (3) ICCSt.
3 Ibid.
6 See Section 3(b) below.
7 SC Res. 1422 (2002) and SC Res. 1487 (2003). For discussion, see Section 3(c) below.
2. The Legal Basis of ICC Jurisdiction Over Non-Party Nationals

In addition to a number of objections to the ICC, based on policy or political concerns, the US has argued that the exercise of ICC jurisdiction over US nationals without the consent of the US would be contrary to international law. This argument, described as the ‘principal American legal objection’ to the ICC, was initially based on the view that such an assertion of jurisdiction over US nationals would be a violation of the well-established principle that a treaty may not impose obligations on non-parties without the consent of those parties. However, there is no provision in the ICC Statute that requires non-party states (as distinct from their nationals) to perform or to refrain from performing any actions. The Statute does not impose any obligations on or create any duties for non-party states. To be sure, the prosecution of non-party nationals might affect the interests of that non-party but this is not the same as saying that obligations are imposed on the non-party. Likewise, whilst the provisions of the Statute, particularly those dealing with complementarity, create incentives or pressures for non-parties to take certain action (such as the prosecution of their nationals), this is not the same as the imposition of an obligation as no legal responsibility arises from the failure to take such action. Thus, this argument of the US does not withstand scrutiny.

Those who support the US view that the exercise of jurisdiction over non-party nationals would be illegal, have turned to two alternative arguments. First, Professor Madeline Morris has argued that whilst the ICC Statute does not impose obligations on non-parties, it unlawfully seeks to abrogate the rights of non-parties by subjecting their nationals to the exercise of a jurisdiction unrecognized by international law. In particular, she argues that states do not have the power to delegate their criminal
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Secondly, Professor Morris and Professor Ruth Wedgwood have argued that the ICC will be acting unlawfully if it exercises jurisdiction over non-party nationals who have acted pursuant to the official policy of that non-party. According to this argument, a non-party state is a real party in interest in any case in which an individual is indicted for acts carried out under the authority of, and as part of, the policy of that non-party. Although the Court will only formally exercise its jurisdiction over the indicted individual and not the state, Professors Morris and Wedgwood argue that these types of cases will effectively relate to inter-state disputes. They argue that in these cases the ICC would effectively be exercising jurisdiction over the state concerned without its consent. According to them, this would breach the principle that an international tribunal cannot exercise its jurisdiction in cases in which the rights or responsibilities of a non-consenting third party form the very subject matter of the dispute.  

A. Delegation of Jurisdiction by States to the ICC

It is clear that parties to the ICC possess a territorial criminal jurisdiction over nationals of non-parties where those non-party nationals commit a crime within the territory of the ICC party. Likewise, in cases in which an alleged crime is subject to universal jurisdiction under international law, an ICC party that has custody over the perpetrator would ordinarily be entitled to prosecute him irrespective of his nationality. Consent of the state of nationality of the accused would not be required in either case for the exercise of state jurisdiction. The power of the ICC to try nationals of non-parties where they commit crimes on the territory of a party constitutes a delegation to the ICC of the criminal jurisdiction possessed by ICC parties because the Court is given the power to act only in cases where the parties could have acted
individually. The main question that arises is whether the parties to the ICC Statute have the right to delegate their criminal jurisdiction to an international tribunal without the consent of the state of nationality of the accused person. The view that such delegations of jurisdiction are unlawful rests upon two related arguments. First it is argued that delegations of criminal jurisdiction by states are generally impermissible without the consent of the state of nationality of the accused. Alternatively, it is argued, that even if delegations of judicial jurisdiction by one state to another are permissible, such a delegation to an international tribunal is unprecedented. Neither of these arguments is persuasive.

1. Delegations of Criminal Jurisdiction from One State to Another

The argument that states may not delegate their criminal jurisdiction without the consent of the state of nationality fails to properly account for the many treaties by which states delegate their criminal jurisdiction to other states.

In an interesting exchange, Professors Morris and Scharf debate whether anti-terrorism treaties – which generally require parties with custody of an alleged offender to prosecute him if they do not extradite him to a state with jurisdiction – represent examples of the creation of universal jurisdiction by treaty. Professor Scharf, and others, have asserted that because these treaties impose an obligation on the state of custody to prosecute the alleged offender, even in the absence of any link between that state and the crime or the offender, these treaties create universal jurisdiction. Scharf therefore argues that since these treaties permit prosecution of

22 See supra note 17.
23 Ibid.
25 For a discussion of the ‘extradite or prosecute’ provisions in these treaties, see Reydams, supra note 20, chapter 3.
nationals of non-parties, they constitute a precedent for the ICC with respect to the conferral of jurisdiction over nationals of non-parties. However, it is extremely doubtful whether states can by treaty confer universal jurisdiction on themselves in circumstances where there is no universal jurisdiction under customary international law. States not party to the relevant treaty would not be bound by such an extension of jurisdiction and would have grounds for objecting if such conventional jurisdiction were exercised over their nationals.

However, the debate about whether these treaties create universal jurisdiction misses the point. In the first place, the ICC Statute is not based on universal jurisdiction but is limited to jurisdiction based on the consent of either the state of territoriality or the state of nationality. Secondly, the fact that these treaties do not confer a proper universal jurisdiction does not exhaust their relevance as a precedent for the exercise of ICC jurisdiction over nationals of non-parties. A better explanation for the right of the state with custody of a person accused of crimes under the anti-terrorism treaties to prosecute is that there is a delegation of jurisdiction by the states of primary jurisdiction to the state of custody. Since there are often multiple states that potentially have jurisdiction, and because these treaties are so widely ratified, it will almost always be the case that at least one party to the treaty has primary jurisdiction over the offender. The 'extradite or prosecute' power then allows the state of custody to exercise a secondary jurisdiction by delegation from one of the states of primary jurisdiction.

In none of the treaties under discussion is the consent of the state of nationality of the offender (be it a party or a non-party) required for prosecution by a state of custody or a state with primary jurisdiction. In treaties where the state of nationality of the offender is not even listed as one of the states of primary jurisdiction, the state of custody has an obligation to notify the state of nationality of the fact that it has a national of that state in its custody. However, the obligation to notify does not extend to an obligation to refrain from prosecution where the state of nationality does not consent.

27 Scharf, supra note 12 at 99.
28 See Morris, supra note 16 at 61–66, arguing that treaties cannot in themselves create universal jurisdiction but can only contribute to a customary law process that may create such jurisdiction. R. Higgins, Problems and Process: International Law and How We Use It (Oxford: Oxford University Press, 1994), at 63–65 also expresses scepticism that these treaties create a proper universal jurisdiction. See also Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant Case, supra note 20, paras 39 and 41; United States v. Yousef & ors, 327 F 3d 56, 96 (2d Cir. 2003).
29 Art. 12 ICCSt.
30 See supra note 24.
The US is a party to many of these anti-terrorism treaties and, like other states, has initiated domestic prosecutions under these treaties, of non-party nationals, without seeking the consent of the state of nationality.\(^\text{33}\) Thus far, there have been no protests by states of nationality of accused persons regarding the exercise of jurisdiction by states of custody. This is significant evidence that no state has hitherto taken the view that states may not delegate their jurisdiction to other states without the consent of the state of nationality.

A more explicit delegation of criminal jurisdiction in the terrorism area is the EU Council Framework Decision which permits any EU member to exercise jurisdiction over acts of terrorism committed on the territory of other EU members.\(^\text{34}\) The relevant provision is not limited to nationals of the EU and would extend to acts of terrorism committed within the EU by nationals of non-EU states.

Even more explicit delegations of criminal jurisdiction are to be found in two treaties which permit parties to transfer criminal proceedings begun in one party to another party.\(^\text{35}\) Whilst Professor Morris accepts that these treaties represent an example of a delegation of criminal jurisdiction, she doubts that these treaties permit such a delegation in cases involving the nationals of non-parties absent the consent of the non-party.\(^\text{36}\) However, as Scharf has demonstrated ‘a close examination of the text of the European Convention, its legislative history, and the writings of experts on its application reveal that the Convention does in fact permit transfer of proceedings in the absence of consent of the state of nationality’.\(^\text{37}\)

The fact that the overwhelming majority of states have been prepared to delegate and to accept delegations of jurisdiction, even in cases where the state of nationality of the offender has not given its consent, is evidence that states generally take the view that such delegations of jurisdiction are lawful. In fact there are very few states (if any) that are not party to at least one treaty which involves a delegation of criminal jurisdiction to another state. States have been particularly willing to delegate jurisdiction in respect of crimes deemed to be of concern to the international


\(^{34}\) Art. 9(1), a Council Framework Decision of 13 June 2002 on Combating Terrorism, Official Journal L164, 22/06/2002. This Framework Decision was adopted under Title VI (Police and Judicial Cooperation in Criminal Matters) of the Treaty of European Union.


\(^{36}\) Morris, supra note 16, 44. It is clear that the treaties in question constitute a delegation of jurisdiction because these treaties permit the transfer of criminal proceedings even in cases in which the state to which jurisdiction is transferred would not otherwise have jurisdiction. See Art. 2(a) 1972 Convention, and Art. 4 1990 Agreement: as well as the Explanatory Report to the 1972, Part II, comment on Art. 2 – http://conventions.coe.int/Treaty/en/Reports/Html/073.htm

\(^{37}\) Scharf, supra note 12, 113.
community and where broad jurisdictional measures are needed to prevent and repress those crimes. Delegations of jurisdiction by the territorial state to the ICC fits into this mould very well because the crimes within the jurisdiction of the ICC are ‘the most serious crimes of concern to the international community as a whole’. 38

2. Delegations of Criminal Jurisdiction to International Tribunals: Principles and Precedents

If the delegation of criminal jurisdiction to other states is lawful, do such delegations become unlawful when made to an international tribunal such as the ICC? Professor Morris has argued that delegation of criminal jurisdiction (be it territorial or universal) to an international tribunal is impermissible because the consequences of the exercise of that jurisdiction are fundamentally different when carried out by an international tribunal as opposed to a national court. 39 Morris rightly points out that ‘States would have reason to be more concerned about the political impact of adjudications before an international court than before an individual State’s courts’. 40 Whilst decisions of foreign national courts in prosecutions for international crimes resulting from official acts can be dismissed by the state of nationality as a disagreement between equals, a decision by an international court would carry more weight and have greater political impact. 41 As a result of this Morris argues that ‘consent to universal jurisdiction exercised by States is not equivalent to consent to delegated universal jurisdiction exercised by an international court, [and] the customary law affirming the universal jurisdiction of States cannot be considered equivalent to customary law affirming the delegability of that jurisdiction to an international court’. 42

There are many reasons why states may not wish to have cases touching upon their interests or involving their nationals heard by an international court. Certainly, the prestige of the court and the resulting embarrassment from any adverse decisions suggesting that a policy approved by senior state officials is unlawful are high among those reasons. Nevertheless, this political embarrassment does not of itself mean that the international court has no legal competence to act. As will be demonstrated below, the fact that the decision of an international court implies that a state may have acted unlawfully does not mean that there has been a violation of the principle of consent or of the Monetary Gold doctrine. 43

There are important reasons of principle and sufficient precedents to suggest that delegations of national jurisdiction to international courts, in general, and to the ICC, in particular, are lawful. Whilst the exercise of ICC jurisdiction over non-party

38 Preamble, ICCSt.
39 Morris, supra note 16, 29–47.
40 Ibid., 30.
41 Ibid.
42 Ibid., 29.
43 See supra note 19.
nationals is based on the territorial jurisdiction of State Parties, it is significant that the majority of ICC crimes are crimes in respect of which states have universal jurisdiction when the accused is present in their territory. International law permits (or, in certain cases, requires) all states to exercise criminal jurisdiction in respect of certain crimes because those crimes are deemed to be prejudicial to the interests of the international community as a whole. States that have no link of territoriality or nationality to offences which fall within the scope of universal jurisdiction are permitted to exercise jurisdiction because effective deterrence and punishment for these offences depends on there being as broad a basis for prosecution as possible. The state exercising universal jurisdiction is in effect acting on behalf of the international community as a whole. Given all of this, it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual states – acting as agents of the community – simultaneously prevented those states from acting collectively in the prosecution of these crimes. The natural assumption, failing the existence of a specific rule to the contrary, should be that where states are acting individually to protect collective interests and values, they are not prohibited, and should rather be encouraged, to take collective action for the protection of those collective interests. Thus, the same principle permitting individual states to prosecute individuals for international crimes, on the basis of universal jurisdiction and without the consent of the state of nationality, suggests that those states should be able to act collectively to achieve the same end. This may be done by setting up an international tribunal which exercises the joint authority of those states to prosecute. In this sense, the rule permitting delegation of universal jurisdiction to international courts can be regarded as a ‘structural’ rule of international law that does not require the positive consent of states but rather is deduced from other clearly-established rules.

44 Art. 12 ICCS1. This is apart from cases in which prosecution is triggered by the UN SC under Art. 13(b).
46 Broomhall, ibid., at 107.
48 Danilenko, supra note 21, 1882.
49 See J. Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’, 53 British Yearbook of International Law (BYIL) (1983) at 75, 85–86, where he distinguishes ‘structural’ rules of international law from ‘positive’ rules. According to Crawford, ‘To establish a rule of law requires either a sufficiently general consensus on the existence of the rule as such . . . together with some agreement on key aspects of its formulation, or it requires that the rule be inducible by recognized methods of reasoning from other clearly established rules: in the latter case support for the induced rule can be taken to exist in the absence of clear indications to the contrary. Rules can thus be ‘isolated’ or ‘positive’, or they can be structural or systematic, deriving part at least of their validity from the assumption that international law is a system, not merely a set of primary norms . . . Where there is sustained disagreement over a rule, but agreement that the area is in principle subject to legal regulation, the presumption is that the ‘structural’ rule represents the law, a presumption which depends for its strength on the inferential or inductive links between that rule and other accepted rules.’
The structural rule established above is supported by pre-and post-ICC delegations of criminal jurisdiction by states to international tribunals, including the delegation of jurisdiction over nationals of states not party to the relevant treaty. International tribunals are usually set up to decide on the international law rights and responsibilities of states (or other subjects of international law). However, these tribunals are sometimes empowered to exercise the judicial jurisdiction that would otherwise be within the national jurisdiction of the relevant states. In these latter cases, there is a delegation of national jurisdiction to the international tribunal. As will be seen, there are many examples falling within this latter group of the exercise of criminal jurisdiction by international tribunals over the nationals of states not party to the relevant agreement.

(a) The Nuremberg Tribunal

It is worth examining whether the ICC would be the only international criminal tribunal with competence over nationals of states not party to the treaty creating the tribunal. Professor Scharf, and others, have argued that the Nuremberg Tribunal, established to prosecute Nazi leaders after World War II, was a collective exercise of universal jurisdiction by a treaty-based international court and constitutes a precedent for the ICC. However, others have argued that the Allied States that established the Tribunal were exercising sovereign powers in Germany at the relevant time and that the Nuremberg Tribunal was thus based on the consent of the state of nationality. Thus, although the Nuremberg Tribunal is an example of the delegation by states of criminal jurisdiction to an international tribunal, the differing arguments regarding the basis of the Tribunal’s jurisdiction mean that one cannot rely with any

50 The term ‘international tribunal’ is used to describe a tribunal that is (i) established by an international agreement or some other international instrument (such as the decision of an international organization) and (ii) usually, though not necessarily, operates in relation to more than one state.

51 In cases in which an international tribunal is determining the international law rights and responsibilities of states or an international organization it is exercising a truly international jurisdiction and not acting by delegation. In these cases, the tribunal is not acting as a substitute for, or in place of, national jurisdiction. These observations apply to tribunals such as the ICJ, the World Trade Organization (WTO) panels and Appellate Body. Similarly international or regional human rights bodies (such as the European Court of Human Rights (ECHR) or the Human Rights Committee) exercise a proper international jurisdiction as opposed to a delegated jurisdiction because they are established to consider the responsibility of the state in international law for violations of the relevant treaties. This is so despite the fact that cases are generally only considered by human rights bodies after they have been considered by national courts. Contra, G. Hafner, K. Boon, A. Rübesame, and J. Huston, ‘A Response to the American View as Presented by Ruth Wedgwood’, 10 European Journal of International Law (EJIL) (1999) 108, at 117, note 51.

52 Scharf, supra note 12, 103–106; Danilenko, supra note 21, 1881–1882; Paust, supra note 21, 3–5. Also arguing that the Nuremberg Tribunal was based on universal jurisdiction are E. Schwelb, ‘Crimes Against Humanity’, 23 BYIL (1946) 178, 208; R.K. Woetzel, The Nuremberg Trials in International Law (New York: Prager, 1962) at 87–89; Randall, supra note 26, 804–806.

53 Morris, supra note 12, 37–42. See also the works cited at Woetzel, ibid., 78 at note 62, and H. Kelsen, ‘The Legal Status of Germany According to the Declaration of Berlin’, 39 AJIL (1945) 518.
The contention that the allies were entitled to exercise sovereign powers in Germany after World War II (as opposed to the powers of belligerent occupiers) has been disputed by Woetzel, supra note 51, 76–85 (and the writers cited in notes 64–65 of that work). Supporters of the universal jurisdiction theory often rely on the following passage from the Nuremberg Judgment: 'The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.' 'International Military Tribunal (Nuremberg), Judgment and Sentences', 41 AJIL (1947) 172, 216. However, that paragraph is vague and there is nothing in it that excludes the possibility that the Tribunal’s jurisdiction was based on the fact that the Allied Powers were exercising sovereign rights in Germany or based on nationality or protective jurisdiction. 'The Charter and Judgment of the Nuremberg Tribunal', UN doc. A/CN.4/5 (statement of the UN Secretary-General).


Scharf, supra note 12, at 108.

SC Res. 827 (1993), and SC Res. 955 (1994), respectively establish the ICTY and the ICTR.

Under Art. 25, ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.


Although the FRY...
maintained, at the time, that it was a UN member by automatic succession to the SFRY, other states, relying on the relevant UN resolutions, disputed this. In *Prosecutor v. Milutinović, Ojdanić & Sainović* (a case against FRY nationals in relation to crimes committed in Kosovo), a Trial Chamber of the ICTY held that despite the decisions of the competent UN organs, the FRY was at all material times a UN member. Despite this decision, there are at least three reasons why the exercise of jurisdiction by the ICTY over FRY nationals provides a precedent for the exercise of jurisdiction by a court that is ultimately treaty-based over nationals of a state that was not a party to that treaty and without the consent of that state.

First, the decision in *Prosecutor v. Milutinović, Ojdanić & Sainović* that the FRY was, at the relevant time, a UN member for certain purposes is unpersuasive. Whilst some of the membership rights of a state (e.g., voting rights) may be taken from a member of the organization, a state is either a member or it is not. It cannot be a member for certain purposes but not for others. Furthermore, the Chamber’s references to the FRY ‘retaining’ membership or to the fact that the competent UN bodies did not suspend or terminate the FRY’s membership are misguided. To the extent that it was not a continuation of the SFRY, the FRY was never a member of the UN and therefore could not ‘retain’ that membership. It was the SFRY that was a member of the UN. Whilst it

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61 In the *Legality of the Use of Force* cases (*FRY v. Belgium & others*), ICJ Reports (1999) 124, 134–135, at paras 31–33 (Request for Provisional Measures), [http://www.icj-cij.org/icjwww/docket], Belgium, Canada, the Netherlands, Portugal, Spain and the UK argued that the FRY was not a UN member and not entitled to make a declaration under Art. 36(2) ICJSt. The ICJ avoided making a decision on this issue at the Provisional Measures stage of this case and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, ICJ Reports (1993) 3, 14, at paras 18–19 (Request for Provisional Measures), and ICJ Reports (1996) 595 (Preliminary Objections). At the provisional measures stage of the latter case, the ICJ was content to rely on Art. 35(2) of the Statute dealing with states not party to the Statute.

62 *Prosecutor v. Milutinović, Ojdanić and Sainović*, May 2003. The Trial Chamber, held that ‘while the FRY’s [UN’s] membership was lost for certain purposes, it was retained for others’ (para. 38) and found (para. 39) that, as regards the SC’s establishment of the Tribunal, the FRY was ‘in fact a member of the United Nations both at the time of the adoption of the Statute in 1993 and at the time of the commission of the alleged offences in 1999’. In addition, the Chamber held (para. 59) that: ‘the fact that the alleged crimes were committed in Kosovo, a part of the FRY, which, in the submission of the Defence, was not a member of the United Nations either at the time of the establishment of the Tribunal or of the commission of the offence is immaterial to its jurisdiction. What is material is that the Security Council certainly had the authority in 1991 to deal with the conflict before the break-up of the FRY, which was an original member of the United Nations. It does not lose that jurisdiction either as a result of the subsequent break-up of the former SFRY, or by the circumstances of the non-United Nations membership of one or more of the States after that break-up’.

63 Whilst it is arguable that the FRY accepted the obligation to cooperate with the ICTY in the Dayton Peace Agreements terminating the armed conflict in Bosnia and Herzegovina [see J. Jones, ‘The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia’, 7 EJIL (1996) 226], nothing in the FRY’s acceptance of those Agreements explicitly indicates its consent to jurisdiction over FRY nationals and in relation to crimes on FRY territory. In signing the Dayton General Framework Agreement, the FRY was essentially acting as guarantor in relation to the fulfillment by the warring parties in Bosnia of their obligations. Furthermore, the FRY consistently argued that the ICTY did not have jurisdiction over crimes committed in the FRY. See Press Statement of the ICTY Prosecutor Regarding the Kosovo Investigation, ICTY Doc. CC/PIS/379–E (20 January 1999).

64 *Prosecutor v. Milutinović & others*, paras 38–43.
is true that the SC and the GA did not terminate or suspend that ‘Yugoslavia’s’ membership,\textsuperscript{65} the competent UN organs did not regard the FRY to be that ‘Yugoslavia’ but a different legal person.\textsuperscript{66} As regards the FRY, there was no membership in 1992 to terminate or suspend. The only logical conclusion to be drawn from the fact that the FRY was not a continuation of the SFRY\textsuperscript{67} is that the FRY was not a member of the UN following the dissolution of the SFRY. The fact that FRY officials participated in some UN work does not change this conclusion. After all, even non-members participate in the work of the UN. In 2000, the FRY was admitted to the UN as a new member state. This can be nothing but confirmation that the FRY was not a member between 1992 and 2000.\textsuperscript{68} 

Secondly, whilst the Chamber appeared keen to base its decision on as narrow a ground as possible, there is nothing in its decision that denies the general power of the SC to establish a tribunal which operates in relation to nationals of non-UN members. On the contrary, the Tribunal’s statement that ‘a crime committed by any person, whatever his nationality, in a country that is part of the SFRY, is triable by the Tribunal’\textsuperscript{69} appears to support the competence of the SC to provide for jurisdiction over all nationalities in cases where the crime occurred on the territory of a state that was a UN member. In short, as long as there was territorial jurisdiction, questions of nationality are irrelevant. This is similar to the position with respect to the ICC.

Thirdly, and most importantly, many of the states, including the US, that supported the ICTY assertion of jurisdiction over FRY nationals,\textsuperscript{70} did not regard the FRY as a UN member,\textsuperscript{71} and were aware that the FRY did not consent to the exercise of jurisdiction.

\textsuperscript{66} \textsuperscript{Supra} note 59.
\textsuperscript{67} In its Opinion No. 8 (1992), Arbitration Commission, EC Conference on Yugoslavia, 92 ILR (1992) 199 held that the SFRY no longer existed and the FRY was a new state. In \textit{Application for Revision of the Judgment of 11 July 1996 in the Case concerning Genocide Convention Case (Yugoslavia v. Bosnia and Herzegovina)}, February 2003, para. 70, the ICJ stated that: ‘FRY’s claim to continue the international legal personality of the Former Yugoslavia was not “generally accepted” . . .’.
\textsuperscript{68} GA Res. 55/12(2000), and SC Res. 1326 (2000). In \textit{Application for Revision} case, previous note, the FRY argued that its admission to the UN as a new member in 2000 showed that it was not a UN member in 1996. The ICJ did not explicitly accept or reject this argument but simply noted that the FRY had a \textit{sui generis} position as regards the UN between 1992 and 2000. \textit{Ibid.}, para. 71.
\textsuperscript{69} \textsuperscript{Supra} note 61, at para. 58.
\textsuperscript{70} SC Res. 1160 (1998), mandating the Prosecutor to ‘begin gathering information related to the violence in Kosovo that may fall within its jurisdiction’ was unanimously adopted. In addition, in 1998, the US provided $400,000 to the ICTY in support of the investigations in Kosovo, see Briefing by the US Ambassador-at-Large for War Crimes Issues, http://www.state.gov/www/policy–remarks/1999/990409–scheffer–kosovo.html. Likewise, in June 1999, Canada, France, Switzerland and the UK entered into agreements with the ICTY to provide personnel to assist with the Kosovo investigations, See ICTY Press Release, CC/PIS/412–E (25 June1999), http://www.un.org/icty/latest/index.htm.
\textsuperscript{71} See \textsuperscript{supra} note 60. For a US statement denying that the FRY was a UN member see, Statement of the US Perm. Rep. to the UN, 23 June 2000, http://www.un.int/usa/00–079.htm.
in relation to Kosovo.72 This demonstrates that states, such as the US, accepted that a treaty-based international court could exercise jurisdiction over nationals of non-parties.

(c) The Special Court for Sierra Leone

The Special Court for Sierra Leone,73 which was created under a treaty between the UN and Sierra Leone to prosecute persons that may have committed serious international crimes in Sierra Leone,74 provides another example of the delegation by a state of its criminal jurisdiction to a treaty-based international court. There is nothing in the Court’s Statute that limits the jurisdiction of the Court to nationals of Sierra Leone. At the time of writing, the Special Court had indicted one non-national: the Head of State of the neighbouring state of Liberia in respect of his participation in the armed conflict in Sierra Leone.75 Although Liberia has instituted proceedings before the International Court of Justice (ICJ), arguing that the indictment and arrest warrant issued against its Head of State do not respect the immunity that international law confers on heads of states,76 neither Liberia nor any other state appears to have argued that Sierra Leone is not able to delegate its criminal jurisdiction to an international court or that the Court is not entitled to exercise Sierra Leone’s territorial jurisdiction over foreign nationals.77 On the contrary, the Court has the strong support of the US and the international community,78 and some states have

76 See ICJ Press Release 2003/26 (5 August 2003). Since Sierra Leone had not, at the time of the Liberian application, given its consent to the jurisdiction of the ICJ, Liberia, invited it to consent, pursuant to Art. 38(5) ICJSt. A similar invitation, issued by Congo was accepted by France in the Certain Criminal Proceedings in France (Congo v. France) case, supra note 20.
77 Liberia’s argument that ‘[a]n arrest warrant of a Head of State issued by a foreign jurisdiction is also inconsistent with the internationally recognized principle that foreign judicial powers or authority may not be exercised on the territory of another State’ (Liberian Application) challenges the exercise of extraterritorial jurisdiction by the Special Court but does not challenge the exercise of territorial jurisdiction over non-nationals.
acted in support of the indictment of the Liberian leader.\textsuperscript{79} The Court is therefore a significant example of what the US contends that parties to the ICC cannot lawfully do.

(d) The delegation of criminal jurisdiction in other cases

Quite apart from the international criminal tribunals discussed above, there have been other delegations by states of part of their national criminal jurisdiction over non-nationals to international tribunals. The first such delegation may be found in the Rhine Navigation Convention of Mannheim, 1868. Under this Convention, the Central Commission for Navigation on the Rhine is empowered to act as a court of appeal from decisions of national courts in criminal and civil cases concerning Rhine shipping.\textsuperscript{80} Some of the cases before the Central Commission have involved nationals of states not party to the Mannheim Convention and these states have not objected to this exercise of jurisdiction over their nationals.\textsuperscript{81} The delegation of criminal jurisdiction to the Rhine Central Commission is particularly important because this was probably the very first international organization to be created.\textsuperscript{82} The fact that this organization was conferred with criminal jurisdiction indicates that, contrary to the position now espoused by the US,\textsuperscript{83} states have always considered international organizations as capable of possessing a criminal jurisdiction, including jurisdiction over non-nationals.

Another example of a delegation of criminal jurisdiction to an organ of international organization is, surprisingly, to be found in the preliminary reference procedure of the European Court of Justice (ECJ).\textsuperscript{84} Under Article 234 European Communities (EC) Treaty, questions concerning the interpretation or validity of EC law which arise in cases before national courts of EC states may (and in some cases, must) be referred to the ECJ.\textsuperscript{85} This procedure of preliminary references to the ECJ

\textsuperscript{80} Arts. 37, 45(c) and 45\textsuperscript{bis} Mannheim Convention. The parties to the treaty are Belgium, Germany, France, the Netherlands and Switzerland. See also, Rules of Procedure of the Chamber of Appeals of the Central Commission for the Navigation of the Rhine (1969). See generally, B. Meißner, ‘Rhine River’, in R. Bernhardt (ed.) Encyclopedia of Public International Law, Vol. 4 (Amsterdam: North Holland, 2000), at 237; http://ccr-zkr.org
\textsuperscript{81} Telephone conversation with Mr Bour, Registrar of the Appeals Chamber of the Central Commission (18 July 2003).
\textsuperscript{82} This organization was created by the Final Act of the Congress of Vienna (1815) and is still in existence.
\textsuperscript{83} See the Remarks of Marc Grossman, Under-Secretary of State for Political Affairs, supra note 9: ‘While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate.’
\textsuperscript{84} One may wonder whether the imposition of penalties by EC on non-EC companies for breaches of EC Competition law is a precedent for the exercise of criminal jurisdiction by international organizations over nationals of non-parties. However, the majority view is that these proceedings and penalties are administrative only and not criminal. See, L. Ortiz-Blanco, EC Competition Procedure (Oxford: Oxford University Press, 1996) 42 and 220; J. Joshua, ‘The Right to be Heard in EEC Competition Procedures’, 15 Fordham International Law Journal (1991) 16, 18–19.
\textsuperscript{85} See generally D.W.K. Anderson References to the European Court (London: Sweet and Maxwell, 1995).
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extends to criminal proceedings in which questions of EC law arise.\footnote{E.g., Criminal Proceedings against Albert Heijn BV, Case 94/83, [1984] ECR 3263; Criminal Proceedings against Kolpinghuis Nijmegen BV, Case 80/86, [1987] ECR 3969. Under Art. 35 EU Treaty [to be found in Title VI dealing with criminal cooperation], members of the EU may accept the jurisdiction of the ECJ ‘to give preliminary rulings on the validity and interpretation of framework decisions and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them’. For discussion of this provision and the impact of EU law on criminal law, see A. Arnulf, The European Union and its Court of Justice (Oxford: Oxford University Press, 1999) 71–74; S. Peers, EU Justice and Home Affairs Law (Harlow: Longman, 2000) 46–48; Chapter 8.} The preliminary reference procedure constitutes a delegation of national judicial jurisdiction to the ECJ, because the ECJ, when it acts under this procedure, plays a decisive role in deciding cases that are within the jurisdiction of the Member States.\footnote{Arnulf, \textit{ibid.}, at 50: ‘[t]he ruling given by the Court is an interlocutory one: it constitutes a step in the proceedings before the national court . . .’} Some of the criminal proceedings in which the ECJ has participated under the preliminary reference procedure have involved persons that are not nationals of EC Member States.\footnote{See Hüseyin Gözütok (C–187/01), (2003): criminal proceedings brought in Germany against a Turkish national.} No state has so far objected to this delegation of criminal jurisdiction. On the contrary, the preliminary reference procedure has been copied by other states and included in other treaties establishing a number of other international or regional courts.\footnote{For example, Arts. XII(1)c and XIV Agreement establishing the Caribbean Court of Justice, 2001 [http://www.caricom.org/ccj-index.htm]; Benelux Court of Justice established by the Treaty of the Benelux Economic Union, 1958; Arts. 32–36 Treaty Creating the Court of Justice of the Andean Community, 1996 (The Cochabamba Protocol) [http://www.comunidadandina.org/ingles/treaties/trea/ande–trie2.htm]; Art. 30 Treaty establishing the Common Market for Eastern and Southern Africa, 1994 (COMESA Court of Justice), [http://www.comesa.int].}

The Caribbean Court of Justice (CCJ), established by the member states of the Caribbean Community under a treaty, constitutes another example of the delegation of criminal jurisdiction to an international court.\footnote{Agreement Establishing the Caribbean Court of Justice, 2001 [http://www.caricom.org/ccj-index.htm].} In addition to its preliminary reference procedure, the CCJ is empowered to decide on civil and criminal appeals from the courts of the member states.\footnote{See \textit{ibid.}, Art. XXV.} In that guise, it sits as the final court of appeal of the states concerned. Since the CCJ will be exercising a jurisdiction which otherwise belongs to the member states, it may deal with cases involving nationals of non-member states including those cases where jurisdiction is exercised on the basis of universal jurisdiction.

(e) Concluding remarks on delegation of criminal jurisdiction

When taken together, the precedents discussed above are evidence of extensive practice of states delegating part of their criminal jurisdiction over non-nationals either to other states or to tribunals created by international agreements, in circumstances in which no attempt is made to obtain the consent of the state of
nationality. This practice, together with the lack of objections by states of nationality of accused persons, points to a general acceptance of the lawfulness of delegating criminal jurisdiction. This is particularly so in cases of delegation of universal jurisdiction where important principles support the rights of states to act collectively for the protection of interests of the international community as a whole.

**B. ICC Cases Dealing with Official Acts of Non-Parties**

The ICC does not have the power to formally indict states or to make rulings on state responsibility, but can only exercise its jurisdiction over individuals. However, it has been argued that the exercise of ICC jurisdiction over officials of non-parties would be unlawful in cases in which the person has acted pursuant to the officially approved policy of that state. According to this argument, the ICC will, in these types of cases, effectively be considering an inter-state dispute about the legality of the acts of the non-party state, without the consent of that state.

The application of international criminal law, either by an international court or by a foreign domestic court, necessarily runs the risk that the court will be sitting in judgment over persons who act on behalf of the state. This is because crimes against international law are often committed by persons acting on behalf of the state. In many respects, this is one of the distinguishing features of such crimes. In the case of an international armed conflict, those accused of war crimes will almost invariably be soldiers of a state army or other officials exercising state authority. The gravity and seriousness of international crimes are such that it is often only those with the machinery or apparatus of the state, or state-like bodies, that are able to commit such


93 See Art. 25(4) ICCSt.: ‘No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.’

94 See Art. 25(1) ICCSt.: ‘The Court shall have jurisdiction over natural persons pursuant to this Statute.’

95 See *supra* note 18. During the ICC Preparatory Commission, the US unsuccessfully tried to include a clause in the relationship agreement between the UN and the ICC which would have precluded the ICC from seeking or accepting the surrender of a non-party national without the consent of that non-party, if such nationals have acted under the overall direction of the non-party. See Wedgwood, *supra* note 14, 206, note 52.

devastation. Since one of the main reasons for an international criminal court is that states often fail to prosecute those who commit international crimes because of the complicity of those in power in that state, it can be easily predicted that there will be prosecutions before the ICC which will raise questions about the legality of the policies and acts of states. This will be most evident in cases in which senior state officials are indicted by the ICC, as well as in cases in which the state insists that the indicted soldier or official was acting under its authority and asserts the legality of their conduct. Nevertheless the exercise of ICC jurisdiction in such cases is consistent with international law even when such jurisdiction is asserted without the consent of the state on whose behalf the accused has acted.

1. The Monetary Gold Doctrine and the Principle of Consent

In the Monetary Gold case, the ICJ held that it would not decide a case if this would involve adjudication on the rights and responsibilities of a third party not before the Court, and which had not given its consent to the proceedings.\(^{97}\) Even if one assumes that the Monetary Gold doctrine applies to all international law tribunals,\(^{98}\) it will not, in most cases,\(^{99}\) be violated by the exercise of jurisdiction by the ICC over nationals of non-parties in respect of official acts done pursuant to the policy of that non-party. The Monetary Gold doctrine does not prevent adjudication of a case simply because that case implicates the interests of non-consenting third parties or because a decision may cast doubt on the legality of actions of third-party states or imply the legal responsibility of those states. The case law of the ICJ under the Monetary Gold doctrine demonstrates that the doctrine is only properly applicable in cases where pronouncement by the court on the rights and responsibilities of the third state is a necessary prerequisite for the determination of the case before the court.\(^{100}\) This limitation of the doctrine is evident from both the cases in which the Court has applied the doctrine and those in which the doctrine was pleaded by a party but not applied by the Court. In the Monetary Gold case, the Court applied the doctrine because 'it [was] necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation'.\(^{101}\) Likewise in the East Timor Case, the Court applied the doctrine because 'in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s

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\(^{97}\) Monetary Gold case (Italy v. France, United Kingdom and United States), ICJ Reports (1954) at 19.

\(^{98}\) For this view, see Larsen/Hawaiian Kingdom Arbitration Award, 119 ILR (2001) 566, 591–592, at para. 11.17.

\(^{99}\) See below with respect to the crime of aggression.


\(^{101}\) Supra note 97, at 32.
conduct in the absence of that state’s consent’.\footnote{102} By contrast, the Court did not apply the doctrine in the \textit{Nauru Phosphates} case, where Nauru brought an action against Australia alone, but in relation to acts which were essentially carried out by Australia, the UK and New Zealand acting together. In that case, the Court held that:

\ldots the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia \ldots In the present case, a finding by the Court regarding the exercise or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other states concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claim against Australia.\footnote{103}

In cases in which the ICC is exercising jurisdiction over individuals acting pursuant to the official policy of non-parties, it will not need to rule as a prerequisite on the responsibility of that non-party. In fact, the very purpose of international criminal responsibility is to separate the responsibility of individuals from that of the state and to focus on the personal responsibility of those who order, direct, or commit those crimes.\footnote{104} Whilst state responsibility will often flow from the fact that an official of the state has committed an international crime,\footnote{105} the ICC will not be engaged in making determinations about a state’s legal responsibility, nor will it need to do so in order to convict an individual for war crimes, crimes against humanity or genocide.\footnote{106} In cases of genocide (which require an intent to destroy a group)\footnote{107} and crimes against humanity (which require a widespread or systematic attack),\footnote{108} there will usually be a need for evidence of planning and preparation by a collective body which will often, though not always, be the state.\footnote{109} Nevertheless, the definition of those crimes do not

\footnote{102} \textit{East Timor Case (Portugal v. Australia)}, ICJ Reports (1995) 90, para. 35, [also paras 28 and 33]. See also the \textit{Larsen/Hawaiian Kingdom Arbitration}, supra note 98, para. 11.23: ‘The Tribunal cannot rule on the lawfulness of the conduct of the respondent in the present case if the decision would entail or require, as \textit{a necessary foundation for the decision between the parties}, an evaluation of the lawfulness of the conduct of the United States of America, or, indeed, the conduct of any other state which is not a party to the proceedings before the Tribunal.’ [Emphasis added.]

\footnote{103} \textit{Certain Phosphate Lands in Nauru (Nauru v. Australia)}, Preliminary Objections. ICJ Reports (1992) 241, 261–262. See also \textit{Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v. United States)}, Jurisdiction and Admissibility. ICJ Reports 1984, 392, 431; \textit{Land, Island and Maritime Frontier case, (El Salvador/Honduras)}, Application for Intervention by Nicaragua. ICJ Reports (1990), 92, 122: though a decision without Nicaragua’s participation would ‘evidently affect an interest of a legal nature of Nicaragua . . . that interest would not be the ‘very subject matter of the decision’ in the way that the interests of Albania were in the case concerning \textit{Monetary Gold} . . . ’ See further, Ajibiola, supra note 100.

\footnote{104} See Dupuy, supra note 96, at 1091 et seq.

\footnote{105} Note that the state will be responsible even in cases in which the official has acted \textit{ultra vires} his/her powers. See Arts. 4 and 7 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001).

\footnote{106} Art 25(4) ICCSt.

\footnote{107} See Art. 2, Genocide Convention of 1948: Art. 6 ICCSt.

\footnote{108} See Art. 7(1) ICCSt.

\footnote{109} In \textit{Prosecutor v Nikolić}, 108 ILR, para. 36. (1995) the ICTY Trial Chamber stated that: ‘Although [crimes against humanity] need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone.’ See also Art. 7(2)(a) ICCSt.; \textit{Prosecutor v Blaškić}, 122 ILR 1,76, para. 205 (ICTY, 2000), and \textit{Prosecutor v. Akayesu} (1998), para. 580.
make the individual’s criminal responsibility dependent on the responsibility of the state.\(^{110}\) Doubtless, findings by the ICC regarding the planning, preparation, or execution of these crimes, will, in cases in which state involvement is shown, imply the responsibility of the state, and have deep political repercussions for that state. Even though these will be findings of fact only, and not decisions on the legal responsibility of the state concerned, many will regard them as conclusively establishing state responsibility. However, because the ICC will not be explicitly determining state responsibility, there is no legal impediment to it making these findings.\(^{111}\)

Depending on the definition of the crime of aggression that is ultimately adopted,\(^{112}\) the ICC may, when it begins to exercise jurisdiction over that crime, be required to find that a state has committed aggression as a prerequisite to convicting an individual for that crime. The definition contained in Article 16 of the International Law Commission’s 1996 Draft Code of Crimes requires such a finding.\(^{113}\) If this decision is left to the Court,\(^{114}\) such a finding would constitute a violation of the *Monetary Gold* doctrine where the state concerned is a non-party to the Rome Statute. However, if the decision is that of the SC, there will be no violation of the doctrine as the ICC will, in those circumstances, simply be accepting the responsibility of the state as a ‘given’ without having to determine it itself.\(^{115}\)

2. **The Act of State Doctrine (Immunity Ratione Materiae)**

Ultimately, the argument that the exercise of ICC jurisdiction is illegitimate in cases concerning official acts of non-party nationals, is based on the view that state officials ought not to be subject to criminal prosecution outside their state (and without the

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110 Contrary to Dupuy, *supra* note 96, at 1088 there is no ‘*de jure* dependence of the individual’s responsibility on that of the State’. Dupuy, himself notes that there is a separation between individual and state responsibility and that ‘none of the international texts “defining the most serious crimes affecting the whole of the international community” except for aggression ([i.e.] genocide, crimes against humanity, war crimes) define them by specific reference to the state’. *Ibid.*, at 1092.

111 Larsen/Hawaiian Kingdom Arbitration Award, supra note 98, para. 11.24: ‘It is . . . possible that the [*Monetary Gold*] principle does not apply where the finding involving an absent third party is merely a finding of fact, not entailing or requiring any legal assessment or qualification of that party’s conduct or legal position.’

112 Under Art. 5(2) ICCSt., the ICC will only be able to exercise jurisdiction with respect to aggression when a review conference defines the crime and adopts considerations relating to prosecution for that crime.

113 ILC 48th Session Report, 83. The commentary to Art. 16 states that: ‘The words “aggression committed by a State” clearly indicate that such a violation of the law by a state is a *sine qua non* condition for the possible attribution to an individual of responsibility for the crime of aggression. . . . the competent court may have to consider two closely related issues, namely, whether the conduct of the State constitutes a violation of Article 2, paragraph 4, of the Charter and whether such conduct constitutes a sufficiently serious violation of an international obligation to qualify as aggression entailing individual criminal responsibility.’ *Ibid.*, 85.

114 There has been a debate as to whether the decision concerning the commission of aggression by a state should be made by the ICC or left to the SC. See M. Arsanjani, ‘The Rome Statute of the International Criminal Court’, 93 *AJIL* (1999) 22, 29.

115 Larsen/Hawaiian Kingdom Arbitration Award, supra note 98, para. 11.24: ‘[I]f the legal finding against an absent third party could be taken as given (for example, by reason of an authoritative decision of the Security Council on the point), the [*Monetary Gold*] principle may well not apply’.
consent of that state) in respect of acts which are in reality the acts of the state. This is simply a restatement of the act of state doctrine or immunity \textit{ratione materiae} which in this area reflects the view that it is illegitimate to hold an individual responsible for acts which have been committed on behalf of the state.\footnote{For a discussion of the doctrine in the context of domestic courts exercising jurisdiction over foreign officials, see Woetzel, \textit{supra} note 52, at 68; H. Kelsen, ‘Collective and Individual Responsibility in International Law, with Particular Regard to the Punishment of War Criminals’, 22 \textit{California Law Review} (1943) 530; H. Kelsen, \textit{Peace Through Law} (New York: Garland 1973(1944)), 71 et seq. See also R. Jennings, ‘The Caroline and McLeod Cases’, 32 \textit{AJIL} (1938) 92; Memo of the US Secretary of State regarding the McLeod case in J. Moore, \textit{Digest of International Law}, Vol. II, (Washington: GPO, 1906) at para. 175. A more recent exposition of this doctrine is to be found in H. Fox, \textit{The Law of State Immunity} (Oxford: Oxford University Press, 2002), 509–515.} This doctrine, which provides immunity to both serving and former state officials, serves two purposes. First, it indicates that the individual is not to be held responsible for acts which are in effect those of the state. Secondly, it prevents states from controlling the acts of foreign states by exercising control over the official carrying out those acts.

In the \textit{Arrest Warrant Case}, the ICJ appeared to suggest that this type of immunity would bar the prosecution of a former state official even for international crimes committed in office.\footnote{\textit{Supra} note 20, para. 61. In listing the exceptions to the immunities of foreign ministers, the ICJ stated that a court of one state may try a former Minister for Foreign Affairs of another state in respect of acts committed in a private capacity whilst in office. This suggests that all acts done in an official capacity are immune. Given that the Court said this in a case dealing with allegations of international crimes, it appeared to be endorsing immunity \textit{ratione materiae} even in cases of international crimes.} However, this suggestion arises only implicitly from what the Court said (and did not say), and was at best an \textit{obiter dictum} given that the Court decided the case on the basis of personal immunity of a serving Foreign Minister.

Despite what the ICJ suggested, it seems sufficiently established in the decisions of international and national courts that immunity \textit{ratione materiae} does not apply to international crimes. Writers and courts have reached this conclusion in different ways. Some have argued that immunity must yield in the face of the \textit{jus cogens} prohibitions of a number of international crimes.\footnote{See, for example, paras 7 and 28, respectively, of the dissenting opinion of Judges Al-Khasawneh and Van den Wyngaert in the \textit{Arrest Warrant Case}, \textit{supra} note 20.} Others maintain that the commission of international crimes cannot be regarded as acts within the function of a state official and within the scope of acts covered by immunity \textit{ratione materiae}.\footnote{See R. v. Bow Street Stipendiary Magistrate and others, \textit{ex parte Pinochet} (No. 3), [1999] 2 All ER 97, 113 and 163 (HL) (per Lords Browne-Wilkinson and Hutton). See S. Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the \textit{Congo v. Belgium Case}’, 13 \textit{EJIL} (2002) 877, 890; A. Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’, 10 \textit{EJIL} (1999), 237, 260–261.}

In the view of this writer, neither of these reasons is persuasive. The best explanation for the absence of immunity \textit{ratione materiae}, in cases concerning international crimes, is that the reasons for the immunity, as set out above, do not
apply in the case of international crimes.\textsuperscript{120} To apply that immunity to international crimes would be to reject the principle\textsuperscript{121} that the official position of an individual does not exempt him from individual responsibility for international crimes.\textsuperscript{122} As the Nuremberg Tribunal stated:

\begin{quote}
[i]the principle of international law which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.\textsuperscript{123}
\end{quote}

Secondly the development of the principle of universal jurisdiction in relation to the enforcement of international criminal law removes the other reason for the immunity. There is a necessary conflict between the rule providing immunity \textit{ratione materiae} and the principle of universal jurisdiction over certain crimes. The two principles cannot coexist, and it is immunity \textit{ratione materiae} that must yield because universal jurisdiction developed later in time, and expressly contemplates prosecution of state officials (since most international crimes are committed by states).\textsuperscript{124} In the \textit{Eichmann}\textsuperscript{125} and \textit{Pinochet} cases,\textsuperscript{126} national courts effectively held that the very existence of crimes against international law and of universal jurisdiction to prosecute those crimes has the consequence that there can be no immunity from prosecution based on the fact that the acts were official acts of another state. To the extent that a crime within the jurisdiction of the ICC has not yet been subjected to universal jurisdiction under customary international law,\textsuperscript{127} officials of foreign states continue to possess immunity \textit{ratione materiae} from the jurisdiction of foreign states.

\begin{footnotes}
\item[121] This principle is included in the statutes of a number of international criminal tribunals. See Art. 7, London Agreement for the International Military Tribunal at Nuremberg (1945); Art. 6, Charter of the International Military Tribunal for the Far East (1946); Art. 7(2) ICTYS\textsuperscript{e}; Art. 6(2) ICTR\textsuperscript{e}; Art. 27(1) ICC\textsuperscript{e}; and Art. 6(2), Statute of the Special Court for Sierra Leone (2002).
\item[123] \textit{In re Goering and others}, 13 ILR (1946), 203, 221
\item[124] See Akande, \textit{supra} note 120.
\item[125] \textit{Attorney General of Israel v. Eichmann}, 36 ILR 1, 44–48 (District Court, 1961), 308–311 (Supreme Court).
\item[126] \textit{R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet (No.1)}, [1998] 4 All ER 897 (HL); \textit{R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet (No.3)}, [1999] 2 All ER 97 (HL). For reference to other similar cases, see Cassese, \textit{supra} note 122, 866–867.
\item[127] It is doubtful that all the crimes in the ICC Statute are crimes of universal jurisdiction under customary international law. See \textit{supra} note 20.
\end{footnotes}
In conclusion, the exercise of jurisdiction by the ICC over nationals of non-parties in cases concerning acts committed in an official capacity, is not new or different from what has gone on before. Neither the Monetary Gold nor Act of State doctrines, or any other principle of international law, requires abstention from prosecution in these sorts of cases simply because the official acts of a third state are called into question.

3. The Limitations on ICC Jurisdiction over Nationals of Non-Parties

Despite the fact that the ICC has jurisdiction over nationals of non-parties when those nationals are accused of committing crimes on the territory of consenting states, the ICC Statute limits the exercise of this jurisdiction in specific circumstances. The following sections consider those provisions in the Statute that limit the jurisdiction of the ICC over nationals of non-parties.

A. Immunity of State Officials

As demonstrated above, it is now generally established that the official capacity of an individual does not exempt that person from substantive criminal responsibility in relation to crimes prohibited by international law. Thus, even senior state officials may be held criminally liable for crimes under international law. This principle is reflected in Article 27(1) ICCSt. Additionally, Article 27(2) ICCSt. provides that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over a person.

When read on its own, Article 27 suggests that state officials may never rely on the immunity provided by international law to avoid the jurisdiction of the ICC. However, the effect of Article 27 is limited by Article 98(1), which provides that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Thus whilst the ICC may generally exercise its competence over state officials, its ability to secure the arrest and surrender of state officials from other states is limited by the immunities international law accords to the state official when abroad. Article 98(1) is particularly important for states that are not party to the ICC Statute because it prevents parties to the Statute from arresting and surrendering officials or diplomats of non-parties to the ICC, where those officials or diplomats have immunity in

128 See Section 2(B)2 above
129 ‘This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.’
international law. In fact, some ICC parties and authors have even suggested that this provision operates only to prevent the surrender of officials of non-parties and may not be relied upon by parties to the Statute where their officials are in the territory of another party.\textsuperscript{130}

What then are the circumstances in which arrest and surrender of the official or diplomat of a foreign state to the ICC would be a violation of the immunities granted by international law? Whilst state officials, particularly senior officials such as heads of state and heads of governments, are generally immune from the jurisdiction of foreign states,\textsuperscript{131} does that immunity exist even in relation to cases concerning allegation of international crimes within the jurisdiction of the ICC?

In answering these questions, it has come to be accepted that a distinction must be made between those immunities which attach to a particular office and which are possessed only as long as the official is in office (immunity \textit{ratione personae}), and the immunity which attaches as a result of the fact that a person is exercising official functions (immunity \textit{ratione materiae}). Since the latter type of immunity attaches to the official act, it benefits all state officials, whether serving or out of office, in relation to the exercise of their official functions.\textsuperscript{132} By contrast, immunity \textit{ratione personae} is limited to a small group of senior state officials such as a head of state, head of government, foreign minister, as well as diplomats.\textsuperscript{133} This type of immunity is practically absolute in criminal cases.\textsuperscript{134} It prevents other states from arresting and prosecuting this limited group of senior officials in relation to official and private acts, whether done whilst in office or before entry to office.\textsuperscript{135} However, this immunity exists only for as long as the person is in office. The breadth of the immunity is justified on the ground that it would be too great an interference with states and the conduct of international relations for these senior officials to be subject to the jurisdiction of foreign states whilst they are in office.\textsuperscript{136} It is for this reason that immunity \textit{ratione personae} continues to subsist even when it is alleged that the senior state official or serving diplomat has committed an international crime.\textsuperscript{137} This principle has been

\begin{itemize}
\item\textsuperscript{131} See generally, Fox, \textit{supra} note 116, Chapters 10 and 12.
\item\textsuperscript{132} Immunity \textit{ratione materiae} is discussed in Section 2(B)2 above.
\item\textsuperscript{134} \textit{Arrest Warrant Case, supra} note 20, para. 54; Fox, \textit{supra} note 116 at 441.
\item\textsuperscript{135} \textit{Arrest Warrant Case, at para. 54–55.}
\item\textsuperscript{136} \textit{Ibid.,} at para. 53; Fox, \textit{supra} note 116, at 427.
\end{itemize}
confirmed by the ICJ and by several senior national courts in recent years. In the 

Arrest Warrant Case, the ICJ stated that:

It has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

Therefore, the ICC may not request ICC parties to arrest and surrender those senior state officials of non-parties possessing immunity ratione personae.

However, as discussed above, there is no immunity ratione materiae in relation to acts which constitute international crimes and in respect of which there is universal jurisdiction. Thus the ICC may request the arrest and surrender of serving state officials that are not entitled to immunity ratione personae, and former officials where the crime they are alleged to have committed is one of universal jurisdiction.

B. Article 98(2) Agreements

In addition to those non-party nationals that possess immunity under customary international law, certain treaties may prevent the surrender to the ICC of some non-party nationals present on the territory of ICC parties. Under Article 98(2) ICCSt.:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

This provision allows parties, on whose territory a person wanted by the ICC is present, to fulfil their obligations under international agreements preventing the transfer of such persons to the ICC. However, Article 98(2) cannot be interpreted in such a way as to allow any state party to avoid its obligations of cooperation with the ICC, by simply concluding broad agreements in which the ICC party agrees not to transfer nationals of other states to the ICC. Such an interpretation would be inconsistent with the object and purpose of the ICC Statute and is, in any case, inconsistent with the wording of Article 98(2).

Article 98(2) has assumed particular importance because the US has embarked on a programme of concluding agreements under which other states agree not to transfer US nationals to the ICC without the consent of the US. It is likely that other non-parties will also take the view that the negotiation of these agreements would be

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138 See the Ghaddafi Case, Arrêt no. 1414, 125 ILR (France, Cour de Cassation, 2001); Pinochet Case (No. 3), supra note 116, 126–127, 149, 179, 189 (England House of Lords, per Lords Goff, Hope, Millett, and Phillips); Castro Case (Spain, Audiencia Nacional, 1999), cited by Cassese, supra note 47, 272 at note 20; Re Sharon and Yaron, (Belgium, Cour de Cassation, 2003).
139 Arrest Warrant Case, supra note 20, para. 58.
140 Section 2(B)2 above.
141 Reports indicate that by July 2003, 51 states (including parties to the ICCSt.) have concluded such agreements with the US. See http://www.iccnow.org/documents/otherissuesimpunityagreeem.html.
helpful in preventing the ICC from exercising jurisdiction over their nationals.\footnote{142 Under Section 1(4), Annex A, Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (2002): 'The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation.' The composition of ISAF has included both States Parties and non-parties to the ICC Statute. [http://www.operations.mod.uk/fingal/orbat.htm] Subsequent to the conclusion of the agreement, Afghanistan became a party to ICC Statute.} The success of this strategy depends on the interpretation to be given to Article 98(2) and the legal position of states that may find themselves under conflicting obligations to the ICC (the obligation to surrender a national of a non-party) and to a non-party (the obligation not to surrender).

From the point of view of non-parties, the first question concerning Article 98 ICC Statute is whether those states and their nationals may benefit from its provisions. One view is that only agreements between ICC parties are protected by Article 98(2).\footnote{143 See, ‘Effective Functioning of the International Criminal Court Undermined by Bilateral Agreements as Proposed by the U.S.’, Internal Opinion of the EC Commission Legal Service, 23 Human Rights Law Journal (2002) 158 (hereafter ‘EC Commission Opinion’); Human Rights Watch, ‘United States Efforts to Undermine the International Criminal Court: Impunity Agreements’, 4 Sept. 2002, [http://www.iccnow.org/documents/otherissuesimpunityagreem.html].} Those taking this view argue that to interpret Article 98(2) as extending to agreements with non-parties would result in impunity in cases where the non-party decides not to prosecute. It is then argued that such an interpretation must be rejected since one of the purposes of the Statute is the prevention of impunity. According to this view, Article 98(2) is only a ‘routing device’, allowing the ICC party on whose territory a national of another ICC party is found to comply with its treaty obligations to the latter ICC party but leaving the Court free to request surrender from the latter state.

This argument is unpersuasive. There is nothing in the wording or drafting history of Article 98(2) that limits it to agreements between parties to the Statute. The intent behind the provision is to avoid a situation in which parties are subject to competing international obligations. If the intent had been to avoid inconsistent obligations only amongst parties to the ICC Statute, Article 98(2) would hardly have been necessary. Without Article 98(2), the provisions of the Statute would have prevailed over any prior inconsistent obligations between the parties.\footnote{144 See Art. 30(3) and (4) Vienna Convention on the Law of Treaties, 1969.} Furthermore, the Statute could have made any subsequent agreements concerning transfers between state parties subject to its provisions. It must therefore be concluded that Article 98 was designed with the position of non-parties in mind. Indeed, given that Article 98(1) benefits only non-parties, the better view would seem to be that Article 98(2) must also be interpreted as applying only to agreements for the benefit of non-parties’.\footnote{145 See Akande, supra note 120; S. Wirth, supra note 130, 455–456.}

However, Article 98(2) does not extend to all agreements by which states concur not to surrender the nationals of other states to the ICC. Article 98(2) uses the term ‘sending state’ and envisages a situation in which it is a state that has sent or
transferred a person to another state on an official mission or for some other purpose. This is evident not only from the ordinary meaning of the term but from the fact that the term was derived from Status of Forces Agreements (SOFAs), which define the legal position of troops and related personnel of one state which are placed in another state.\textsuperscript{146} Thus, the term ‘sending state’ cannot be intended to cover any person on the territory of another state on private business.\textsuperscript{147} Therefore, the US agreements as currently worded are not consistent with Article 98(2).\textsuperscript{148}

Despite the fact that Article 98(2) appears to have been drafted specifically with SOFAs in mind, doubts have been expressed as to whether existing SOFAs such as the NATO SOFA fall within the scope of that provision.\textsuperscript{149} This is because there are no provisions in these agreements which expressly preclude the surrender of personnel of a sending state to a third state or an international court, or require the consent of the sending state for such transfers. However, in view of the intention behind Article 98(2) to cover these agreements, existing SOFAs should be interpreted to come within that provision to the extent possible. Moreover, there are provisions within the NATO SOFA which may be viewed as implicitly precluding surrender of personnel stationed abroad to an international court where the sending state has exclusive or primary concurrent jurisdiction over a crime.\textsuperscript{150} These include provisions (such as Article VII(5) NATO SOFA) which require the receiving state to assist in arrest and surrender to the sending state where the latter has exclusive or primary concurrent jurisdiction. Likewise, Article VII(3)(c) implies that even in cases where the sending state has primary concurrent jurisdiction and has chosen not to exercise it, the receiving state requires the consent of the sending state in order to take action against a member of the sending state’s personnel. Article 98(2) will therefore apply to these circumstances.\textsuperscript{151} However, where the receiving state has exclusive jurisdiction,\textsuperscript{152} it is free to prosecute or to transfer to the ICC.

\textsuperscript{146} For the NATO SOFA, see http://www.nato.int/docu/basictxt/b510619a.htm
\textsuperscript{148} Art. 2 of these agreements prevent the direct or indirect transfer of ‘Persons of one party present in the territory of the other’ to the ICC without the consent of the other party. ‘Person’ is defined as referring to ‘current or former government officials, employees (including contractors), or military personnel or nationals of one Party’. For the text of these agreements, see supra note 141; and Murphy, ‘Contemporary Practice of the United States’, 97 \textit{AJIL} (2003), 201–202.
\textsuperscript{149} See Amnesty Int. Memo, supra note 147, Section II; Paust, supra note 21, 10 et seq.
\textsuperscript{150} Under Art. VII(2)(a), the sending state has exclusive jurisdiction if an offence is punishable under its law but not under the law of the receiving state. The sending state has primary concurrent jurisdiction in relation to ‘(i) offences solely against the property or security of that state, or offences solely against the person or property of another member of the force or civilian component of that state or of a dependent; and (ii) offences arising out of any act or omission done in the performance of official duty.’ Art. VII(3)(a).
\textsuperscript{151} See Paust, supra note 21, 14.
\textsuperscript{152} Under Art. VII(2)a, NATO SOFA the receiving state has exclusive jurisdiction where the offence is punishable under its law but not under the law of the sending state.
Even though the drafters of Article 98(2) ICCSt. were primarily concerned with SOFAs, the wording of that provision is such that it cannot be confined to those types of agreements.\textsuperscript{153} It should be noted that there is no restriction in that provision of the purposes for which a person may be sent by one state to another. Therefore, that provision must also be interpreted\textsuperscript{154} as extending to extradition agreements which provide that a person who has been extradited from one state to another may not be reextradited to a third state without the consent of the first state.\textsuperscript{155} Arguably, the provision also covers those treaties dealing with the immunity of diplomats and of special missions sent by one state to another.\textsuperscript{156} Although these treaties may not have been intended to be within the scope of Article 98(2), but rather within the scope of Article 98(1), the wording of Article 98(2) clearly and unambiguously extends to these treaties. Whether a consideration of these treaties under Article 98(2) adds anything to the protection obtained under Article 98(1) is another matter.

Whilst it has been argued that Article 98(2) only covers pre-existing agreements,\textsuperscript{157} there is nothing in that provision to suggest that it does not extend to agreements concluded after the establishment of the ICC.\textsuperscript{158} Furthermore, the subsequent practice of a substantial number of ICC parties has been to at least consider the conclusion of new Article 98(2) agreements.\textsuperscript{159}

In summary, both existing and new agreements requiring the consent of a state that has sent or transferred a national or official to another state will restrict the right of the ICC to obtain custody of non-party nationals from the territory of ICC parties. Since the ICC does not have the right to require the non-party to transfer the suspect to the ICC, agreements in keeping with Article 98(2) ICCSt. will have some impact on the jurisdiction of the ICC over nationals of non-parties. However, when properly interpreted, that provision cannot be used to create a blanket exemption for nationals of non-parties.

\textsuperscript{153} For the view that the provision applies to SOFAs only, see Amnesty Int. Memo, \textit{supra} note 147, Section II; EC Commission Opinion, \textit{supra} note 143.
\textsuperscript{154} See S. Wirth, \textit{supra} note 130, 455.
\textsuperscript{156} E.g., the Vienna Convention on Diplomatic Relations, 1961; the Vienna Convention on Consular Relations 1963, and the Convention on Special Missions, 1969.
\textsuperscript{157} See Amnesty Int. Memo, \textit{supra} note 147, Section II. The NGO Coalition for the International Criminal Court (CICC) has taken the slightly different position that Art. 98(2) applies to existing SOFAs or new or renewed SOFAs containing standard provisions ‘because the standard provisions of such agreements were clearly contemplated within the scope of Art. 98 and do not fundamentally change from one agreement to another.’ ‘Bilateral Agreements Proposed by US Government’, 23 August 2002, para. 3, [http://www.iccnow.org/documents/otherissuesimpunityagreem.html].
\textsuperscript{158} See Zappalà, \textit{supra} note 147, 122–123.
\textsuperscript{159} \textit{Supra} notes 136 and 137. See also the EU’s guidelines on new Art. 98(2) agreements, EU General Affairs Council, ‘Conclusions on the ICC’, 30 Sept. 2002, EU doc. 12134/02, at 9. [http://europa.eu.int/comm/external-relations/human–rights/gac.htm#hr300902]. All members of the EU are ICC parties. Zappalà, \textit{supra} note 147, at 127, suggests that not all members of the EU take the view that new agreements are covered by Art. 98(2).
Finally, it is important to point out that even if an agreement between a non-party and an ICC party requiring the consent of the non-party for the transfer of its nationals to the ICC does not come within the scope of Article 98(2), it will nevertheless be a valid agreement in international law which is binding on the parties. In such a situation, the ICC party that has entered into an agreement not covered by Article 98(2) will have inconsistent obligations to the ICC and to the non-party. Under international law neither of those obligations has any priority. Where the ICC party chooses to surrender a national of the non-party to the ICC in breach of its treaty obligations, it will bear responsibility in international law for that breach. That responsibility will not be precluded by the fact that the breach was required by the party’s obligations under the ICC Statute. Therefore, the agreements being entered into by the US with ICC parties will constitute a source of pressure for such parties not to surrender US nationals to the ICC even though those agreements are not consistent with Article 98(2).

C. Security Council Requests for Deferral

Under Article 16 ICCSt., the ICC Prosecutor may not commence or proceed with an investigation or prosecution, if the SC, acting under Chapter VII of the UN Charter, has requested a deferral. Such a deferral of investigation or prosecution lasts for 12 months but may be renewed by the SC. This provision was inserted as a means of providing limited political control over the work of the Prosecutor. Whilst it was not accepted that the SC should have general political control, it was conceded that there may be circumstances where the exercise of jurisdiction by the Court would interfere with the resolution of an ongoing conflict by the SC. In those limited circumstances, the ICC parties have accepted that the SC, acting under Chapter VII, may demand that the requirements of peace and security are to take precedence over the immediate demands of justice.

Given that ICC parties have accepted obligations under the Statute and non-parties have not, it is more likely that the SC will exercise its powers under Article 16 in relation to non-parties. At the time of writing, the only SC requests for deferral of ICC prosecution relates to officials and personnel of non-parties taking part in operations established or authorized by the UN. The immunity from ICC jurisdiction granted

160 See Arsanjani, supra note 114, 26–27.
162 SC Res. 1422 (2002), renewed in SC Res. 1487 (2003). These resolutions were demanded by the US as a condition for the renewal of existing UN peacekeeping missions or the approval of any new missions. For analysis of these resolutions, see Stahn, ‘The Ambiguities of Security Council Resolution 1422 (2002),’ 14 EJIL (2003) 85; Zappalà, supra note 147, 114. SC Res. 1497, para. 7 (2003) establishing a Multinational Force in Liberia decides that officials and personnel from a contributing state not party to the ICCSt. are to be subject to the exclusive jurisdiction of that contributing state. This resolution not only grants immunity from ICC prosecution but also excludes prosecutions by third states. Although the provision is not explicitly limited to a one-year period, the ICC prosecutor will not be bound by that provision after a year, unless the SC explicitly renews it.
by SC Res. 1422 and SC Res. 1487 would appear to apply equally to peacekeeping and peace enforcement operations authorized by the UN.

Although SC Res. 1422 and SC Res.1487 have the unfortunate consequence of creating an immunity from ICC prosecution for some non-party nationals, they may encourage states contemplating military action to seek authorization from the SC since this is the only way of benefiting from the immunity established. Since it is ultimately the ICC that will determine whether the immunity conferred by these resolutions exists, the ICC must first of all determine whether the operation the accused person was involved in was authorised by the UN or not. Thus, if Iraq had been a party to the ICC Statute at the time of the armed conflict in 2003, and if there had been any attempts to subject to ICC prosecution any personnel of a non-party state that was part of the invading coalition (e.g., a US national), the ICC would have had to determine whether the use of force against Iraq was indeed authorized by the UN as was claimed by the coalition.163

D. Complementarity

Under the complementarity provisions of the ICC Statute, the ICC may not exercise jurisdiction over nationals of non-parties in cases in which a state is willing to or has, genuinely and in good faith, investigated or prosecuted a person in relation to the same crime.164 The jurisdiction of the Court is therefore supplementary to national jurisdictions and is not to be exercised where those national jurisdictions are functioning properly.

For present purposes, it is important to emphasize that the complementarity principle requires the ICC to defer to the exercise of national jurisdiction by non-parties to the same extent that it requires deferral to the jurisdiction of parties.165 This follows from the fact that Article 17(1)(a) and (b) ICCSt. refer to the primacy of the ‘State which has jurisdiction’ as opposed to a ‘State party with jurisdiction’. Furthermore, Article 18(1) provides that in cases where a situation has been referred to the Prosecutor and there is a reasonable basis to investigate, the Prosecutor is to notify ‘all State Parties and those States which . . . would normally exercise jurisdiction over the crimes concerned’. If any of those states inform the ICC that it is exercising or has exercised its jurisdiction over the person, the Prosecutor is required to defer to that state’s investigation unless the Pre-Trial Chamber decides to authorize

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an investigation.\textsuperscript{166} Finally, Article 20 ICCSt. does not permit trial by the ICC of a person who has been tried ‘by another court’.

Articles 18 and 19 ICCSt. provide non-parties that have jurisdiction over a case with ample procedural rights to challenge the exercise of jurisdiction by the ICC.\textsuperscript{167} Whilst such a challenge can only be made if the state is exercising or has exercised its jurisdiction, Article 19 does not limit the challenges that may be made to those concerning admissibility, but includes the right to challenge jurisdiction. Thus, non-parties may argue that the crime does not come within the temporal jurisdiction of the Court,\textsuperscript{168} or that none of the states required for the exercise of jurisdiction by the Court has accepted that jurisdiction.\textsuperscript{169} These states may submit written observations to the Pre-Trial Chamber when that body considers a preliminary request from the Prosecute to investigate a case under Article 18.\textsuperscript{170} Non-parties may also challenge the exercise of jurisdiction by the ICC when the case is before the Trial Chamber,\textsuperscript{171} and may appeal a decision of the Pre-Trial Chamber or the Trial Chamber to the Appeals Chamber.\textsuperscript{172}

\textbf{E. Extradition Agreements with State Parties}

Another limitation on the competence of the ICC to exercise jurisdiction over nationals of non-parties arises in cases in which such nationals are present in the territory of a State Party which has an obligation to extradite them to the non-party. Under Article 89 ICCSt., parties to the Statute have an obligation to arrest and surrender persons on their territory to the ICC when the ICC requests their surrender. However, it is possible that a person, in respect of whom there is a request for surrender by the ICC, is also wanted by a state for prosecution (either for the same offence or for another), and that state submits a request for extradition to the State Party with custody. In cases where the competing request for extradition comes from a non-party, the State Party with custody is only obliged to give priority to the ICC surrender request where it does not have an international obligation to extradite the person to the non-party.\textsuperscript{173} Where there is a treaty requiring the extradition of the accused to the non-party, the State Party with custody has the right to choose whether to surrender the person to the Court or the non-party.\textsuperscript{174} In making that choice, the state of custody is required to consider a number of factors set out by the

\textsuperscript{166} Art. 18(2) ICCSt.
\textsuperscript{167} See Hafner, \textit{supra} note 165.
\textsuperscript{168} Art. 11 ICCSt. restricts the jurisdiction of the Court to crimes committed after the entry into force of the Statute.
\textsuperscript{169} Art. 12 ICCSt.
\textsuperscript{170} Rules 54–56 ICC RPE.
\textsuperscript{171} Art. 19 ICCSt.
\textsuperscript{172} Arts. 18(4),19(6) and 82 ICCSt.
\textsuperscript{173} Art. 90(4) ICCSt.
\textsuperscript{174} Art. 90(6) ICCSt.
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4. Conclusion

Since it is unlikely that the ICC Statute will be universally ratified in the foreseeable future, questions concerning the relationship between the ICC and non-parties will remain important. These questions will become heightened in those cases in which the ICC exercises it jurisdiction over nationals of non-parties. Whilst this exercise of jurisdiction may be politically unacceptable to non-parties such as the US, this article has demonstrated that there is no legal basis for questioning the right of parties to the ICC to create an international court endowed with the criminal jurisdiction ordinarily possessed by the parties. Not only is this delegation of jurisdiction to the ICC lawful, but it is also a desirable way of preventing the impunity from prosecution which characterized the twentieth century. Whilst it can be debated whether the establishment of the ICC would deter those who commit the worst crimes, it is probably the case that continued refusals to prosecute these persons encourage them and others to commit crimes. Once the decision was taken to establish an international tribunal, it would have been intolerable for that tribunal to possess jurisdiction in relation to crimes committed on the territory of a State Party by nationals of parties but to exclude crimes committed in the same territory by non-party nationals. Not only would this have created a case of inequality as regards persons similarly positioned, it would have constituted a limitation on the right of the state of territoriality to deal with crimes committed on its territory as it sees fit. As has been seen, international law has long recognized the rights of states to delegate their criminal jurisdiction to other states, or to international courts, even in cases concerning nationals of other states. The exemption of non-party nationals from the jurisdiction of the ICC would have

175 Art. 90(6) ICCSt.
constituted a retrograde step. Despite the fact that the ICC Statute provides for jurisdiction over non-party nationals, the drafters were careful to ensure that the parties to the Statute are in a position to respect the international obligations they owe to non-parties regarding the non-surrender of the nationals of those non-parties.