Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law

SCHOOL OF HUMAN RIGHTS RESEARCH SERIES, Volume 19

The titles published in this series are listed at the end of this volume.

Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law

Mitsue Inazumi

INTERSENTIA Antwerpen – Oxford This Volume is an adapted version of a dissertation defended at Utrecht University on 27 October 2004.

Mitsue Inazumi

Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law

CRC prepared by: G.J. Wiarda Institute, Utrecht University Institute for Legal Studies, Boothstraat 6, 3512 BW Utrecht

ISBN 90-5095-366-2 D/2005/7849/19 NUR 828

© 2005 INTERSENTIA www.intersentia.com

Behoudens uitzondering door de wet gesteld, mag zonder schiftelijke toestemming van de rechthebbende(n) op het auteursrecht c.q. de uitgevers van deze uitgave, door de rechthebbende(n) gemachtigd namens hem (hen) op te treden, niets uit deze uitgave worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of anderszins, hetgeen ook van toepassing is op de gehele of gedeeltelijke bewerking. De uitgevers zijn met uitsluiting van ieder ander onherroepelijk door de auteur gemachtigd de door derden verschuldigde vergoedingen van copiëren, als bedoeld in artikel 17 lid 2 der Auteurswet 1912 en in het KB van 20-6-'64 (Stb. 351) ex artikel 16b der Auteurswet 1912, te doen innen door (en overeenkomstig de reglementen van) de Stichting Reprorecht te Amsterdam.

Niets uit deze uitgave mag worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of op welke andere wijze ook, zonder voorafgaande schriftelijke toestemming van de uitgevers.

No part of this book may be reproduced in any form, by print, photo copy, microfilm or any other means, without written permission from the publishers.

ACKNOWLEDGEMENT

This research forms the basis of my doctoral dissertation submitted to the Faculty of Law at Utrecht University (the Netherlands). I am greatly indebted to my supervisors Prof. G.J.H. van Hoof and Prof. Cees Flinterman, who generously provided me with the opportunity to work on my doctoral thesis and who inspired me with their valuable comments. I would also like to thank the members of the review committee and my 'highly esteemed opponents' (interlocutors) at the defence of my thesis which took place on 27 October 2004: Prof. Menno Kamminga, Prof. Andre Klip, Prof. Geert Jan Knoops, Prof. Peter Baehr, Dr. Annemarieke Beijer, Prof. Chrisje Brants, Prof. Bas de Gaay Fortman, Prof. Constantijn Kelk, Prof. Titia Loenen, Prof. Sacha Prechal, Dr. Goran Sluiter and Prof. J. Vervaele, for their challenging questions and stirring comments, and am especially grateful to the chairman, Dr. Alfred H.A. Soons, in this regard. I am grateful to my friends Ms. Chiseche Mibenge and Mrs. Maria Nybondas for assisting me and providing encouragement throughout my defence.

During the process of writing this thesis, I also benefited from the encouragement and highly intellectual advice of my friend, Dr. Goran Sluiter. I would also like to express my gratitude to my former colleagues at the Netherlands Institute of Human Rights (SIM) at Utrecht University for welcoming me like their family and offering me a great academic environment, making my stay in the Netherlands comfortable. I also very much appreciate the many efforts of my colleagues at Kanazawa University in Japan, especially my former colleague Prof. Masahiro Igarashi for giving me the time to conduct my research in the Netherlands. Special thanks are extended to the Wiarda Institute of Utrecht University:, Mr. Peter Morris, Mrs. Titia Kloos, and Mrs. Willemien Vreekamp for efficiently assisting me in finalizing my text for the book. Finally, I could never have completed my thesis without the warm support and unconditional love of my mother Kiseko and my family.

Mitsue Inazumi Kanazawa, Ishikawa, Japan January 2005

TABLE OF CONTENTS

Ackno	Acknowledgement	
Chapt	er I	
Introd	uction	1
1	Theme of the Study	1
2	Central Question of the Study	3
3	Aim of the Study	4
4	Scope of the Study	6
4.1	Jurisdiction over which Crimes?	6
4.2	The Time Frame of the Subject of the Study	7
4.3	Other Enforcement Mechanisms for Accountability	8
4.4	Entity Responsible for Crimes	9
4.5	Which Kinds of Jurisdiction?	10
4.6	National or International Jurisdiction?	10
4.7	International Criminal, Humanitarian, Human Rights Law	
	in Correlation	11
5	Method of the Study	11
5.1	Theoretical Approach	11
5.2	Perspective of Law in Transition	12
6	Structure of the Study	13
Chapt	er II	
-	iew of the Modern Jurisdictional Regime	15
1	Introduction	15
2	Relevant Basic Norms	15
2.1	Principle of State Sovereignty	15
2.2	The Applicability of International Law to Issues of Jurisdiction	17
2.3	Interests Involved	18
2.4	Principle of Individual Criminal Responsibility	20
3	Bases of Jurisdiction Recognised under International Law	21
3.1	Territorial Jurisdiction	22
3.2	Non-Territorial Jurisdiction	23
3.2.1	Nationality Jurisdiction	24
3.2.2	Passive Personality Jurisdiction	24
3.2.3	Protective Jurisdiction	25

3.2.4	Universal Jurisdiction	25
3.2.4.1	The Definition of Universal Jurisdiction	25
3.2.4.2	Universal Jurisdiction in absentia	26
3.2.4.3	Two Aspects Differentiating Understandings of Universal Jurisdiction	28
4	History and Analysis of the Formation of the Jurisdictional Regime	30
4.1	The First Period: The Classical Jurisdictional Regime	30
4.1.1	The Laissez-faire Attitude of International Law	30
4.1.2	The Dominance of Territorial Jurisdiction	31
4.1.3	Uncertainty Tolerated under International Law	32
4.2	The Second Period: After the Second World War up to the	
	End of the 1960s	33
4.2.1	Prosecution of Crimes Committed during the World Wars	33
4.2.2	Becoming Aware of the Shortcomings of the Classical Jurisdictional	
	Regime	33
4.2.3	Failure to Establish an Effective Jurisdictional Regime after	
	the Nuremberg and Tokyo Tribunals	35
4.3	The Third Period: Expansion of National Jurisdictions in	
	the 1970s and the 1980s	37
4.3.1	Factors that Promoted the Expansion of National Jurisdiction	37
4.3.2	Expansion of National Jurisdiction	40
4.4	The Fourth Period: From the 1990s to the Present	43
4.4.1	International Criminal Jurisdiction in Action	43
4.4.2	Encouraging the Active Exercise of National Jurisdiction	44
5	Conclusion	46
Chapte	r III	
Histori	cal Development of Universal Jurisdiction	47
1	Introduction	47
1.1	Aim of this Chapter	47
1.2	A Reminder of the Different Definitions and the Nature of	
	Universal Jurisdiction	48
1.3	Overview of the Development of Universal Jurisdiction	48
2	The First Period: Universal Jurisdiction in Classical International Law	49
2.1	The Emergence of Universal Jurisdiction: Jurisdiction against Piracy	49
2.2	The Nature of Universal Jurisdiction in Classical International Law	52
2.3	Concluding Observations on the First Period	55
3	The Second Period: After the Second World War up to the End	
	of the 1960s	55
3.1	Universal Jurisdiction Concerning War Crimes	55
3.1.1	Post-WWII Trials	55
3.1.2	The 1949 Geneva Conventions	57
3.2	Universal Jurisdiction and the Genocide Convention	59
3.3	The Eichmann Trial	63

3.4	Concluding Observations on the Second Period	66
4	The Third Period: The Expansion of Universal Jurisdiction in	
	the 1970s and 1980s	69
4.1	The Expansion of Universal Jurisdiction in Conventional	
	International Law since the 1970s	69
4.2	Efforts to Prescribe Universal Jurisdiction over Genocide in	
	International Law in the 1970s and 80s	71
4.2.1	The Ruhashyankiko Report in the 1970s	72
4.2.2	The Whitaker Report in the 1980s	73
4.3	Restatement (Third) of the American Foreign Relations Law	75
4.4	State Responses: The U.S. Legislation in the 1980s	77
4.5	Demjanjuk Case	78
4.6	Concluding Observations on the Third Period	81
5	The Fourth Period: The Spread of Universal Jurisdiction from	
	the 1990s to the Present	83
5.1	The Ad Hoc Tribunals and Universal Jurisdiction against	
	Crimes related to Yugoslavia and the Rwanda Crisis	83
5.2	The Pinochet Case	83
5.3	The ICC and Universal Jurisdiction	86
5.4	Greater Expectations as Regards Universal Jurisdiction and	07
5 4 1	Some Results	87
5.4.1	The Guatemalan Massacre Case	88
5.4.2	The Hissène Habré Case	90
5.4.3	The Bouterse Case	91
5.5	Universal Jurisdiction in Belgium	93
5.5.1	The Belgian Law of 1993 and 1999	93
5.5.2	The ICJ Case Concerning the Arrest Warrant of 11 April 2000	94
5.5.3	Amending the Belgian Law in 2003	96
5.6	Concluding Observations on the Fourth Period	97
6	Conclusions	99
Chapt	er IV	
	sal Jurisdiction in a Conceptual Context	101
1	Introduction	101
2	What is Universal Jurisdiction?	101
2.1	Universal Jurisdiction and Universal Jurisdiction <i>in Absentia</i>	101
2.1.1	Definitions	101
2.1.2	The Different Status under International Law	101
2.1.2	The Different Characteristics of Universal Jurisdiction	105
2.3	The Rationales for Universal Jurisdiction	106
2.3.1	Reduced Emphasis on the Second Rationale	106
2.3.2	The Effects of a Reduced Emphasis on the Second Rationale:	100
_	Primacy and Analogy	107

2.3.3	Reduced Emphasis on the First Rationale	108
2.3.4	The Relevance of Rationales	109
2.4	The Source of Universal Jurisdiction	110
2.4.1	Territorial or Other National Jurisdiction?	111
2.4.2	Acting on Behalf of the International Community	113
2.5	Universal Jurisdiction and the Jurisdiction of International	
	Criminal Courts	114
2.5.1	The Similarities in Objectives and Rationales	116
2.5.2	Schools of Thought that Consider Universal Jurisdiction and	-
	International Criminal Courts to be Theoretically Identical	117
2.5.2.1	Universal jurisdiction as the source of international criminal	
	jurisdiction?	118
2522	International criminal jurisdiction as the source of universal	110
	jurisdiction?	118
2523	Differentiating between universal jurisdiction and international	110
2.0.2.0	criminal jurisdiction	119
2.6	Universal Jurisdiction and the Principle of <i>Aut Dedere</i>	117
2.0	Aut Judicare	121
2.7	Jus Cogens, Obligatio Erga Omnes and Universal Jurisdiction	121
2.7.1	The Notion of <i>Jus Cogens</i> and Obligation <i>Erga Omnes</i>	124
2.7.1	The Correlation between Determinations of <i>Jus Cogens</i> and	124
2.1.2	Erga Omnes	125
3	The Legal Status of Universal Jurisdiction Under International Law	123
3.1	Universal Jurisdiction Under Conventional International Law	127
3.1.1	Primary Obligatory Universal Jurisdiction	127
3.1.1	A Reconfirmation of the Non-exclusive Character of Jurisdiction	128
3.1.2	The Gap between the International Obligation and Reality	129
3.1.3	No Evidence of Universal Jurisdiction <i>in Absentia</i>	130
3.1.4	Universal Jurisdiction Under Customary International Law	130
3.2.1	Is International Law a Prohibitive or Permissive Rule?	132
3.2.1	Is Universal Jurisdiction Illegal?	132
3.2.2.1		134
3.2.2.1	Universal jurisdiction exercised within the territory of the exercising State	125
2 2 2 2 2	Non-interference in the internal affairs of other States	135 136
	The Sovereign equality of States	136
3.2.2.3	The Dominance of territorial jurisdiction	130
3.2.2.4		137
	Conclusion on <i>a priori</i> illegality	
3.2.3	Permissive Universal Jurisdiction	139
3.2.4	Obligatory Universal Jurisdiction	141
3.2.4.1	Support for obligatory universal jurisdiction	141
3.2.4.2	Objections to obligatory universal jurisdiction	142
3.2.4.3	The Responsibility of States concerning universal jurisdiction	1.42
	deriving from their territorial Sovereignty	143

3.2.5Universal Jurisdiction in absentia1443.2.5.1Support for universal jurisdiction in absentia1453.2.5.2Opposition to universal jurisdiction in absentia1463.3Conclusion Concerning the Legality of Universal Jurisdiction1484The Status of Universal Jurisdiction over Genocide1484.1Does the Genocide Convention Prescribe Universal Jurisdiction?1494.2Universal Jurisdiction over Genocide under Customary International Law1504.2.1Article 6 of the Genocide Convention and Customary Law1504.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdictional Conflicts1571Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1503.3The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623.1The Facts163
3.2.5.2 Opposition to universal jurisdiction in absentia 146 3.3 Conclusion Concerning the Legality of Universal Jurisdiction 148 4 The Status of Universal Jurisdiction over Genocide 148 4.1 Does the Genocide Convention Prescribe Universal Jurisdiction? 149 4.2 Universal Jurisdiction over Genocide under Customary International Law 150 4.2.1 Article 6 of the Genocide Convention and Customary Law 150 4.2.2 The Second Period (Post-WWII to the 1960s) 151 4.2.3 The Third Period (the 1970s and the 1980s) 153 4.2.4 The Fourth Period (the 1990s to the present) 154 4.3 Conclusion on Universal Jurisdiction over Genocide 156 Chapter V Guiding Rules by which to Solve Jurisdictional Conflicts 157 1 Introduction 157 2. Concurrent Jurisdictional Regime 157 2.1 The Multiplicity of National and International Jurisdictional Regimes 158 2.3 Problem Inherent in a Concurrent Jurisdictional Regime 158 2.3.1 Negative Conflicts 150 2.3.2 Positive Conflict
3.3Conclusion Concerning the Legality of Universal Jurisdiction1484The Status of Universal Jurisdiction over Genocide1484.1Does the Genocide Convention Prescribe Universal Jurisdiction?1494.2Universal Jurisdiction over Genocide under Customary International Law1504.2.1Article 6 of the Genocide Convention and Customary Law1504.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute163
4The Status of Universal Jurisdiction over Genocide1484.1Does the Genocide Convention Prescribe Universal Jurisdiction?1494.2Universal Jurisdiction over Genocide under Customary International Law1504.2.1Article 6 of the Genocide Convention and Customary Law1504.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
4.1Does the Genocide Convention Prescribe Universal Jurisdiction?1494.2Universal Jurisdiction over Genocide under Customary International Law1504.2.1Article 6 of the Genocide Convention and Customary Law1504.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1571Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
4.2Universal Jurisdiction over Genocide under Customary International Law1504.2.1Article 6 of the Genocide Convention and Customary Law1504.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
International Law1504.2.1Article 6 of the Genocide Convention and Customary Law1504.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute163
4.2.1Article 6 of the Genocide Convention and Customary Law1504.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute163
4.2.2The Second Period (Post-WWII to the 1960s)1514.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
4.2.3The Third Period (the 1970s and the 1980s)1534.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute163
4.2.4The Fourth Period (the 1990s to the present)1544.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1571Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
4.3Conclusion on Universal Jurisdiction over Genocide156Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1571Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
Chapter VGuiding Rules by which to Solve Jurisdictional Conflicts1571Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
Guiding Rules by which to Solve Jurisdictional Conflicts1571Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
Guiding Rules by which to Solve Jurisdictional Conflicts1571Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
1Introduction1572Concurrent Jurisdictional Regime1572.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.1The Multiplicity of National and International Jurisdictions1572.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.2The Objective and the Advantage of Concurrent Jurisdictional Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
Regimes1582.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.3Problem Inherent in a Concurrent Jurisdictional Regime1582.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.3.1Negative Conflicts1592.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.3.2Positive Conflicts1602.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.4The Need for Rules Concerning Jurisdiction1612.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
2.5The Applicability of International Law to Jurisdictional Problems1623The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
3The Lockerbie Case as an Example of a Jurisdictional Dispute1633.1The Facts163
3.1 The Facts 163
3.2 Analysis of the Jurisdictional Aspect 163
3.2.1 Libyan Jurisdiction over the Case 163
3.2.2 The Jurisdiction of the U.S. and the U.K. over the Case 164
3.3 Mutual Distrust of Conducting a Trial in a Fair and Impartial Manner 165
3.4 Different Forums to Settle the Dispute 166
3.5 Final Solution: The Special Trial in the Netherlands 167
3.6 Implications of the Lockerbie Case 168
4 General Observations on Rules Governing the Concurrence
of National Jurisdictions 169
4.1 A Prerequisite: Legality 169
4.2 Difficulty in Finding Rules Concerning the Venue of a Trial 171
4.3 Obligation Under Conventional Law 172
4.4 Customary International Law 172
5 Looking for Evidence of Guiding Rules 173
5.1 Extradition Law 173

5.2	The Third Restatement	176
5.3	The Princeton Principles	177
5.4	The Brussels Principles	178
6	Compilation of Guiding Rules	178
6.1	The Nexus Rule	179
6.1.1	Preference for Territorial Jurisdiction	179
6.1.2	Nationality Jurisdiction	181
6.1.3	Exceptions to the Nexus Rule	182
6.1.4	The Nexus Rule and Responsibility	183
6.2	Weighing of Interests	185
6.3	Comparing the Gravity of the Crime	186
6.4	The Date of Initiating the Proceedings	186
6.5	Fairness and Impartiality of a Trial	186
6.5.1	Emphasis on Fairness and Impartiality	
6.5.2	The Influence of the Fair Trial Requirement on International	187
	Criminal Courts	189
6.5.3	The Content of the Criterion	189
6.5.3.1	The Human Rights Aspect	193
6.5.3.2	The Institutional Guarantee	194
6.6	Summarising of the Guiding Rules	195
7	Tentative Conclusions	
Chapte	r VI	
-	ffects Relating to the Application of the Guiding Rules	197
1	Introduction	197
2	Application of the Guiding Rules to Non-Territorial Jurisdiction	197
2.1	Arguments Against the Exercise of Non-territorial Jurisdiction	198
2.1.1	Legality	198
2.1.2	Causing Instability and Damaging Peace within a State	198
2.1.3	Danger of Causing New Disputes	199
2.1.4	Arbitrary Prosecution	200
2.1.5	Possibility of Undermining the Suspect's Rights	200
2.1.6	Problems with the Gathering of Evidence	200

2.1.6 Problems with the Gathering of Evidence 2.1.7 Lack of Specialized Institutions 2.2 Evaluating Non-territorial Jurisdiction in Accordance with the Guiding Rules

	Guiding Rules	201
2.2.1	Legality	202
2.2.2	Particular Rules in Conventions	202
2.2.3	The Nexus Rule	203
2.2.4	Weighing and Comparing the Interests	204
2.2.5	Fairness, Impartiality, and the Observance of Human Rights	207
2.2.6	Other Criteria	209
2.2.7	General Assessment	209

201

3	How should Universal Jurisdiction be Exercised?	209
3.1	Why the Exercise of Universal Jurisdiction is Desirable	209
3.2	Some Problems in Exercising Universal Jurisdiction	210
3.2.1	The Lack of Willingness on the Part of States	211
3.2.2	The Absence or Inadequacy of National Legislation	213
3.2.3	Problems of Impartiality	215
3.3	When is Universal Jurisdiction Appropriate?	217
3.3.1	Supplemental Universal Jurisdiction	217
3.3.2	Consideration Criteria in Deciding whether or not to Exercise	217
5.5.2	Universal Jurisdiction	219
4	The Controversial Nature of Evaluating Appropriateness of	21)
7	Jurisdiction with Reference to the Guiding Rules	221
5	•	221
5.1	Some Peripheral Effects of the Guiding Rules	223
	Change in the Function of Extradition	
5.1.1	The Classical Function of Extradition	223
5.1.2	New Features	224
5.1.3	The Significance of the Power to Decide	226
5.1.4	The Rule of Non-Inquiry	228
5.1.5	Prospects for the New Function of Extradition	230
5.2	Effect on the Principle of Ne bis in Idem	230
6	Conclusion	232
Chante		
Chapte		223
Conclu	ision	233
Conclu 1	i sion Introduction	233
Conclu 1 2	Introduction Overview of the Study	233 233
Conclu 1 2 3	sion Introduction Overview of the Study Propositions	233
Conclu 1 2	sion Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited	233 233 236
Conclu 1 2 3 3.1	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance	233 233
Conclu 1 2 3	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the	233 233 236
Conclu 1 2 3 3.1	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human	233 233 236 236
Conclu 1 2 3 3.1 3.2	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations	233 233 236
Conclu 1 2 3 3.1	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts,	 233 233 236 236 237
Conclu 1 2 3 3.1 3.2 3.3	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts	233 233 236 236
Conclu 1 2 3 3.1 3.2	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of	 233 233 236 236 237
Conclu 1 2 3 3.1 3.2 3.3	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of	 233 233 236 236 237 238
Conclu 1 2 3 3.1 3.2 3.3 3.4	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of jurisdiction	 233 233 236 236 237
Conclu 1 2 3 3.1 3.2 3.3	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of jurisdiction In discussing universal jurisdiction, the following distinctions	 233 233 236 236 236 237 238 239
Conclu 1 2 3 3.1 3.2 3.3 3.4	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of jurisdiction In discussing universal jurisdiction, the following distinctions should be made for the purpose of precision	 233 233 236 236 237 238
Conclu 1 2 3 3.1 3.2 3.3 3.4	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of jurisdiction In discussing universal jurisdiction, the following distinctions	 233 233 236 236 236 237 238 239
Conclu 1 2 3 3.1 3.2 3.3 3.4 3.5	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of jurisdiction In discussing universal jurisdiction, the following distinctions should be made for the purpose of precision	 233 233 236 236 236 237 238 239 239
Conclu 1 2 3 3.1 3.2 3.3 3.4 3.5 3.5.1	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of jurisdiction In discussing universal jurisdiction, the following distinctions should be made for the purpose of precision Universal Jurisdiction and International Criminal Jurisdiction	 233 233 236 236 237 238 239 239 239 239
Conclu 1 2 3 3.1 3.2 3.3 3.4 3.5 3.5.1 3.5.2	Introduction Overview of the Study Propositions Gross and serious human rights violations are strictly prohibited under any circumstance It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations Notwithstanding the existence of various international criminal courts, the primary forum for prosecution is still the national courts The modern jurisdictional regime is formulated as a concurrency of various bases of jurisdiction, enhanced by the expansion of jurisdiction In discussing universal jurisdiction, the following distinctions should be made for the purpose of precision Universal Jurisdiction and International Criminal Jurisdiction Universal Jurisdiction and Universal Jurisdiction <i>in Absentia</i>	 233 233 236 236 237 238 239 239 239 239

3.6	National jurisdictions, even universal jurisdiction <i>in absentia</i> , are not prohibited under international law unless stated otherwise or unless	
	their exercise would be in breach of other rules of international law	241
3.7	It is possible that international law concerning obligatory universal	
5.7	jurisdiction may develop in the near future since law and practice	
	relating to universal jurisdiction are still in transition	242
3.8	The principle of State sovereignty should prompt a State where a	
	suspect is present to be under a moral and legal obligation to	
	exercise its jurisdiction	243
3.9	Jurisdictional conflicts should be resolved in a peaceful manner	
	in accordance with the UN Charter and other rules under	
	international law	243
3.10	The venue of a trial may be decided by taking into consideration	
	the legality of the particular jurisdictions in question as well as	
	the appropriateness of exercising them	244
3.11	The Prosecution and punishment of individuals must take place in	
	a fair and impartial trial	245
3.12	States should fulfil their obligation under treaties and conventions	
	on gross human rights violations that they have ratified	245
3.13	Future conventions on gross human rights violations and other	
	serious crimes should allow for multiple bases of jurisdiction	
	(including universal jurisdiction) in order to dispense with safe	
	havens for criminals	245
3.14	The international community should assist States to accomplish	
	a fair and impartial exercise of territorial jurisdiction	246
4	Reappraisal of Territorial Jurisdiction	246
4.1	Status of Territorial Jurisdiction within the Modern Jurisdictional	• • •
	Regime	246
4.1.1	The Traditional Preference for and the Problems Involved in the	246
4 1 2	Exercise of Territorial Jurisdiction	246
4.1.2	Reliance on Non-Territorial or International Jurisdiction	247
4.2	The Role of Territorial Jurisdiction and the Importance of	248
F	Assisting its Exercise	248 252
5	Is the Role of Non-Territorial Jurisdiction Auxiliary?	252
Nederla	andse samenvatting	255
Selecte	d Bibliography	263
About	the Author	269