

# Contents

Introduction .....	9
I. The aim of the study .....	9
II. The scope of the study .....	12
III. Terminology .....	15
A. Universal jurisdiction .....	15
B. International crimes .....	15
C. "Reasonable and effective universality": the principles guiding this study .....	16
D. Other terms .....	16
IV. Structure, methodology and sources .....	16
V. Legal impediments to the exercise of criminal jurisdiction in the context of universal jurisdiction cases .....	19
A. Amnesties .....	19
B. Immunities .....	22
C. Ne bis in idem .....	33
Part I: Universal jurisdiction in international law .....	39
Chapter 1: Jurisdiction .....	41
I. Definition .....	41
II. Types of jurisdiction .....	42
A. Prescriptive, adjudicatory and enforcement jurisdiction .....	42
B. Criminal and civil jurisdiction .....	44
III. The two approaches of public international law .....	44
A. The Lotus approach .....	44
B. The modern approach .....	47
IV. Extraterritorial jurisdiction and the principles of sovereignty and non-intervention .....	48
V. Bases of criminal jurisdiction .....	51
A. Territoriality principle .....	52
B. Active nationality principle .....	55
C. Passive nationality principle .....	58
D. Protective principle .....	61
E. Universal principle .....	62
F. The representation principle .....	62
G. Other principles .....	65
Chapter 2: The universal jurisdiction doctrine .....	67

I.	The notion of universal jurisdiction .....	67
II.	Distinctions .....	69
A.	Unilateral, delegated and absolute universal jurisdiction .....	69
B.	Conditional and absolute universal jurisdiction .....	71
C.	Other distinctions.....	73
III.	Universal jurisdiction and aut dedere aut judicare/ prosequi .....	74
A.	Introductory remarks .....	74
B.	Categories of aut dedere clauses.....	75
C.	The relationship between extradition and prosecution .....	78
D.	Precedence of the “prosecute” obligation over the “extradite” obligation .....	83
IV.	Concluding remarks .....	84
	Chapter 3: Universal jurisdiction and international crimes .....	87
I.	Introductory remarks .....	87
II.	International crimes and jus cogens .....	87
A.	The notion of international crimes .....	88
B.	Jus cogens norms, obligations erga omnes and universal jurisdiction ..	98
III.	Universal jurisdiction over core crimes and torture .....	105
A.	Preliminary remarks: crimes subject to universal jurisdiction under international law .....	105
B.	Core crimes and torture .....	106
IV.	The duty to prosecute core international crimes under the universality principle .....	119
A.	Introductory remarks .....	119
B.	Jus cogens prohibitions .....	121
C.	Human rights obligations .....	123
D.	The ICC Statute .....	128
E.	The duty of states to prosecute or extradite .....	131
F.	Concluding remarks .....	133
V.	Treaty-based universal jurisdiction.....	136
	Part II: Universal jurisdiction in national law .....	141
	Chapter 1: A general overview of domestic legislation on universal jurisdiction .....	143
I.	The universality principle in domestic legislation .....	143
A.	The existence of the universality principle .....	143
B.	Restrictions to the exercise of universal jurisdiction .....	149
C.	Limited universal jurisdiction for specific situations or territories .....	158
D.	A list of crimes subject to universal jurisdiction and/or a general provision? .....	159

II.	The crimes subject to universal jurisdiction in domestic law .....	164
A.	Genocide, crimes against humanity and war crimes.....	164
B.	A general clause for treaty-based crimes.....	177
C.	Other crimes subject to universal jurisdiction .....	186
	Chapter 2: State practice.....	205
I.	A general overview.....	205
II.	A regional overview .....	208
	Part III: Conditions to exercise of universal jurisdiction.....	213
	Chapter 1: The principle of legality .....	215
I.	Introductory remarks .....	215
II.	The legality principle and the implementation of international law ...	222
A.	The principle of legality .....	222
B.	The legality principle and the need for implementation at the domestic level.....	236
III.	The absence of domestic criminalization of international crimes in universal jurisdiction cases.....	246
A.	Introductory remarks .....	246
B.	War crimes and absence or insufficient implementation provisions ...	248
C.	Crimes against humanity .....	260
D.	Genocide.....	279
E.	Torture as a discrete crime.....	302
F.	Concluding remarks of section III .....	314
IV.	Lack of domestic provisions providing universal jurisdiction .....	315
A.	Introductory remarks .....	315
B.	The absence of domestic provisions on universal jurisdiction.....	316
C.	Application of a new universal jurisdiction statute to a prior situation: jurisdictional rules as procedural rules .....	343
V.	The role of the foreign law of the territorial state and the legality principle.....	358
A.	Introductory remarks .....	358
B.	The dual criminality requirement .....	359
C.	The application of foreign criminal law .....	365
D.	Penalties and the legality principle .....	369
VI.	Concluding remarks to chapter 1 .....	370
A.	The limits to judicial activism, the legality principle and the separation of powers.....	370
B.	The need for implementation and the need for international sanctions on states .....	372



Chapter 2: The requirement of a link with the state exercising universal jurisdiction .....	375
I. Introductory remarks .....	375
II. A jurisdictional link: the debate .....	377
A. Terminology .....	377
B. The presence requirement: the debate .....	378
III. The presence requirement under international law .....	382
IV. The requirement of a link in state practice .....	387
A. The debate about the presence requirement before some national courts .....	387
B. The requirement of the residence of the suspect or the victim .....	398
V. The definition of “presence” and the timing .....	404
A. Introductory remarks .....	404
B. The debate in Switzerland .....	406
VI. Critical assessment and concluding remarks to chapter 2 .....	412
Chapter 3: Subsidiarity .....	417
I. Introductory remarks .....	417
II. Is the principle of subsidiarity a rule of international law? .....	419
A. The debate in international law .....	419
B. Conclusions arising from national legislation and case law .....	426
C. Concluding remarks .....	442
III. Issues arising from the analysis of state practice .....	444
A. The time of the subsidiarity principle .....	444
B. The same precise case or the “situation”? .....	445
C. Subsidiarity to which state? .....	447
D. What is the “standard” to test the inaction of the territorial/national state? .....	449
E. Is the forum state obliged to inform the affected states? Does a request need to be made to the territorial state? .....	459
F. Extradition issues .....	462
IV. Concluding remarks .....	467
A. The rationale for the subsidiarity principle .....	467
B. The subsidiarity principle as a legal rule rather than a “policy” .....	471
C. The content of the subsidiarity principle .....	472
V. Double-subsidiarity: Does “priority” also apply to the International Criminal Court? .....	473
Chapter 4: The initiation of universal jurisdiction proceedings .....	479
I. Introductory remarks .....	479

II.	The role of private parties in the initiation of universal jurisdiction proceedings.....	479
A.	Introductory remarks .....	479
B.	The debate.....	482
C.	The role of victims in universal jurisdiction proceedings according to international law .....	488
D.	State practice.....	490
E.	Concluding remarks.....	500
III.	The role of the prosecutor, prosecutorial discretion, and judicial intervention.....	503
A.	The debate.....	503
B.	The legality and opportunity maxims .....	504
C.	The status of the prosecutor, prosecutorial discretion and judicial review .....	507
D.	Concluding remarks and critical assessment.....	521
	General conclusions.....	525
I.	Summary .....	525
II.	The way forward.....	528
	Bibliography .....	531
	Table of Contents .....	557