Revista Electrónica de Estudios Penales y de la Seguridad
ISSN: 2531-1565

EL FIN DE LA GEOGRAFÍA: CONCEPTO, LÓGICA, PRÁCTICA Y REALIDAD JURISPRUDENCIAL PARA LA SANCIÓN DE LOS DELITOS FUNDAMENTALES

THE END OF GEOGRAPHY: CONCEPT, LOGIC, PRACTICE AND JURISPRUDENTIAL REALITY FOR THE PUNISHMENT OF CORE CRIMES

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Fecha de recepción: 25 de mayo de 2025.
Fecha de aceptación: 8 de octubre de 2025.

RESUMEN

El presente trabajo tiene como objetivo analizar e investigar la jurisdicción penal universal de forma comparativa, tanto desde la perspectiva de la jurisprudencia internacional como regional, en relación con los crímenes internacionales. El concepto, la lógica, la práctica y la realidad jurisprudencial de la jurisdicción universal constituyen un debate permanente que atañe a diferentes aspectos jurídicos. Esta diversidad se basa en el contenido del principio, la naturaleza de la obligación, la facultad, así como en las limitaciones y los problemas políticos y diplomáticos derivados de su aplicación precisa. Se observa un interés continuo en el Reino Unido, en el caso Lama de 2017, pero también en otros países como Alemania y los Países Bajos, que muestran dos formas de combatir y castigar los crímenes internacionales.

Por un lado, tenemos la labor del Comité de la Asamblea General de la ONU, que se ha ocupado del tema desde 2010. La labor de las organizaciones internacionales, concretamente la búsqueda de códigos nacionales es un proceso complejo que detecta y pone en práctica enfoques radicales para la aplicación de este criterio en el ámbito penal. La aplicación de este principio se opone a exfuncionarios extranjeros, ya que genera tensiones diplomáticas que impulsan la revisión de la normativa en esta materia, basada tanto a nivel nacional como internacional, para el castigo de crímenes internacionales. Sin embargo, queda abierta la pregunta de si el principio de jurisdicción universal es un instrumento válido para la represión de crímenes cometidos en un país distinto de aquel en el que se detiene y juzga a quienes han cometido crímenes internacionales.

ABSTRACT

The present paper aims to analyze and investigate universal criminal jurisdiction in a comparative way by both international and regional jurisprudence against international crimes. The concept, logic, practice and jurisprudential reality for universal jurisdiction is an ever-open debate that concerns different legal aspects. It is a diversity that is based on the content of the principle, the nature of the obligation, the power/faculty, as well as the limitations and political, diplomatic problems that have resulted from the precise application. The continuing interest is noted in the UK in the Lama case of 2017 but also in other countries such as Germany, the Netherlands, etc. showing two ways of fighting and punishing international crimes.

On the one hand, we have the work of the UN General Assembly Committee that has been dealing with the topic since 2010. The production work from the international organizations, namely the attempt to legislate national codes, is a difficult path that detects and pushes into practice acts of radical approaches for the application of this criterion at a criminal level. The application of this principle relates against former foreign officials as creating diplomatic tensions that push for the revision of regulations in this matter that is based at a national and international level for the punishment of international crimes. One question, however, remains open, namely whether the principle of universal jurisdiction is a valid instrument for the repression of crimes committed to a country other than that in which people who have committed international crimes are committed and tried?

PALABRAS CLAVE

Crímenes fundamentales; crímenes internacionales; jurisdicción internacional; limitaciones de la jurisdicción universal; jurisprudencia internacional; justicia penal internacional; principio de legalidad.

KEYWORDS

Core crimes; international crimes; international jurisdiction; limitations of universal jurisdiction; international jurisprudence; international criminal justice; principle of legality.

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1. INTRODUCTION.

International criminal justice of universal jurisdiction means allowing national courts to prosecute international crimes, as well as the lack of any connection with the state that is prosecuting the related crime. National judges are oriented to proceed as usual and as happens in any criminal trial, despite the difficulties that exist in practice for universal jurisdiction that reflects the development of an understanding for the international stage, interests, crimes and cultures that distinguish trials that intend in practice to lead to the end, that is, punishment. The exercise of universal jurisdiction considers a form of national jurisdiction exercised according to a sovereign right and to the rules of international law.

We are interested in reconceptualizing universal jurisdiction by explaining that it is not a form of national jurisdiction that acquires a sovereign nexus through a contested crime and its own prosecuting state. It is recognized as a form of international jurisdiction of a decentralized nature that exercises the contribution of an implementing state under international criminal law. The conceptualization implies the modus that national courts address challenges, universal jurisdiction processes that find and address issues of community, case selection, evidence, etc. In this way, universal jurisdiction follows the prosecution of extraordinary crimes by ordinary means as well. An emerging legal concept recognizes serious international crimes that are prosecuted by the national courts of a state in the absence of any connection between the prosecuting state and its own crime in dispute. International crimes such as war crimes, crimes against humanity, genocide, torture, etc. are prosecuted by courts for example in the United Kingdom regardless of whether the crime was committed in the territory of the UK and by a British citizen and/or against British citizens and interests[1].

Universal jurisdiction can be conditioned when a state has the faculty/power and the obligation to establish jurisdiction in the absence of connecting elements that respect the crime on the condition that the alleged offender is in the territory that perhaps was arrested. In this case we have the criterion of the forum deprehensionis, that is, the state of capture. In a broader interpretation, the state establishes jurisdiction even in the absence of the relevant requirement in the presence of the suspect in its territory. In this case, we can speak of a universal jurisdiction in absentia, that is, pure and absolute. In the case of pure universal jurisdiction, there is the problem of finding witnesses and evidence for the facts in numerous Syrian refugees in countries such as

1International Criminal Court Act 2001, 51, 67A and 68 (genocide, crimes against humanity and war crimes, though individual must subsequently have become UK national or resident): https://www.legislation.gov.uk/ukpga/2001/17/contents; War Crimes Act of 1991: https://www.legislation.gov.uk/ukpga/1991/13; Criminal Justice Act 1988, s 134: https://www.legislation.gov.uk/ukpga/1988/33/section/134; Geneva Conventions Act 1957: https://www.legislation.gov.uk/ukpga/Eliz2/5-6/52/contents. K.C. Randall, Universal Jurisdiction Under International Law, in Texas Law Review, 66, 1988, 787ss. A. Sammons, The Under-Theorization of Universal Jurisdiction, in Berkeley Journal of International Law, 21, 2003, pp. 112ss. M., Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, in Virginia Journal of International Law, 42, 2001, pp. 81 and 108, 151–152. C.C., Joyner, Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability, in Law and Contemporary Problems, 59 (4), 1996, pp. 153, 166, 171. D., Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, in Yale Law Journal, 100, 1991, pp. 2537, 2556–2557.

Germany. This is difficult for the state of origin of the alleged offender who refuses extradition and refuses to cooperate. The judge's action is much criticized for violating the fundamental rights of his own accused. These are practical and political complications that emerge when it is necessary to issue an international arrest warrant and make an extradition request. The risk of failure and loss of energy and resources in the event that the suspect does not arrive in the territory of the state he has established jurisdiction voluntarily made the extradition request unsuccessful.

Another important aspect concerns legality. There are few states that contain precise legislation and define international crimes.[2] Of course, respect for the principle of legality does not constitute an obstacle since the qualification of the act as an international crime is based on customary international law and the crime is provided for by the commission of crime. The principle nullo crimen, nulla poena sine lege should be respected and is necessary when the crime is committed and the alleged offender is aware of the related penalties and has committed this crime. States provide for different sanctions in the area of international crimes and/or do not provide them at all.[3] Of course, forum shopping is a reality in these cases, as well as the possibility for victims of international crimes to choose to file complaints in states that provide for a system for the rules on universal jurisdiction.[4]

2. WHAT PROBLEMS DOES INTERNATIONAL JURISDICTION CREATE AND WHAT GOALS DOES IT SEEK TO ACHIEVE?

One of the goals achieved is to pursue through international crimes the recourse to regional ordinary courts, despite the fact that universal jurisdiction offers a broad scope of international criminal law in difficult challenges and often underestimating the work of national courts. A factor that is underestimated has to do with processes that have in communes international criminal justice and not regional, i.e. national. National judges proceed as usual within a conduct of processes with universal jurisdiction that ignores the incompatibility between national and international criminal law.

Universal jurisdiction proceedings in the UK are based on concentrated challenges to a common law adversarial tradition. One case that has been based on universal jurisdiction in the UK is the case of Nepalese Colonel Kumar Lama at the Old Bailey in London. This case was based on universal jurisdiction in the UK.[5] In 2015 and

2W. Kaleck, From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008, in Michigan Journal of International Law, 30 (3), 2009, pp. 960ss.

3K. Ambos, International Core Crimes, Universal Jurisdiction and § 153f German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case (2007), in Criminal Law Forum, 18 (1), 2007, pp. 48ss. See also from the ECtHR: Nait-Laiman v. Switzerland of 21 June 2016, parr. 121-129: "(…) accepted the position expressed by Switzerland and therefore rejected the appeal of a Swiss citizen who complained about the refusal by the Swiss courts to examine his claim for compensation for torture suffered in Tunisia in 1992, when he was a Tunisian citizen (…) Swiss state's orientation is exemplary of state fears regarding the possibility of establishing extraterritorial jurisdiction for acts that also imply individual responsibility (…)".

4M. Langer, Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction, in Journal of International Criminal Justice, 13 (2), 2015, pp. 248ss.

5In particular the universal jurisdiction trials in the UK are the prosecution of Belarusian Nazi: Andrei Sawoniuk in 1999 (war crimes), Faryadi Sarwar Zardad in 2005 (torture) and Nepali Colonel Kumar Lama

2016 Colonel Lama, a Colonel in the Royal Nepal Army, was tried in the UK for torture committed against two Nepalese prisoners at Gorusinghe Barracks in 2005 during the Nepalese civil war (1996-2006). Colonel Lama was acquitted by the jury and failed to reach a verdict on another. After the trial, Mr. Justice Sweeney acquitted himself: "(…) relatively rare for so many witnesses to require interpreters and indeed for so many problems to arise in one case (…)".[6] Counsel for the accused, although he had to be satisfied with the final acquittal and the end of the trial, acknowledged that the final verdict by the jury: "(…) has run into a number of difficulties (…) the complexities arising from the fact that most evidence was in Nepal and in Nepali and that the witnesses were located in Nepal (…) British police and the CPS on evidence gathered by a human rights organisation (…) has proven to be a mistake (…)".[7]

The fact is that the DNA for universal jurisdiction processes is distinguished by important aspects as well as by national criminal processes, that are connected with national courts and communities, i.e. interests, crimes and different cultures. The fundamental concept was not yet understandable. And this is because a coherent definition of universal jurisdiction does not have an elusive nature. It was James Crawford who asserted the coherent theory of extension for a universal jurisdiction that respects crimes as a difficult undertaking.[8] This is an exercise without a positive final goal since the extended jurisdiction varies from case to case in customary international law.[9] The concept of jurisdiction in international law has to do with universal jurisdiction as a form of internal jurisdiction with forms of extraterritorial jurisdiction that is exercised by the right of the state to have the conventional law recognized from customary international law.[10]

A coherent theory of universal jurisdiction is realized as a form of jurisdiction that

in 2016 (torture). For further details see also: M. Anderson, N. Hanson, The Ticket Collector from Belarus: An Extraordinary True Story of the Holocaust and Britain's Only War Crimes Trial, Simon and Schuster, London, 2022. T. Kelly, This Side of Silence: Human Rights, Torture and the Recognition of Cruelty. University of Pennsylvania Press, Pennsylvania, 2011. O. Bowcott, Nepalese officer cleared of torturing suspected Maoist detainees, in The Guardian (7 September 2016): https://www.theguardian.com/law/2016/sep/06/nepalese-officer-col-kumar-lama-cleared-torturing-maoist-detainees

6O. Bowcott, Nepalese officer cleared of torturing suspected Maoist detainees, op. cit.,

7O. Bowcott, Nepalese officer cleared of torturing suspected Maoist detainees, op. cit.,

8J. Crawford, Brownlie's Principles of Public International Law. Oxford University Press, Oxford, 9th ed, 2019, pp. 454ss.

9R. O'Keefe, Universal Jurisdiction: Clarifying the Basic Concept, in Journal of International Criminal Justice, 2, 2004, 735, 745-747. L. Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives. Oxford University Press, Oxford, 2004, 4-5, 20-25. C. Ryngaert, Jurisdiction in International Law. Oxford University Press, Oxford, 2015, chapter 4.

10N. Combs, Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions. Cambridge University Press, Cambridge, 2010, pp, 292ss. A. Orie, Accusatorial v Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in Proceedings before the ICC, in A. Cassese and others (eds), The Rome Statute of the International Criminal Court: A Commentary. Oxford University Press, Oxford, 2002, pp. 1439, 1442-1456. F.J. Pakes, Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia, in P.J Van Koppen, S.D. Penrod (eds). Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems. ed. Springer, New York, 2003, 309, 315-316. M. Damaška, Presentation of Evidence and Factfinding Precision, University of Pennsylvania Law Review, 123, 1975, 1084ss.

is understood as a form of domestic jurisdiction that is dependent on state will, i.e. treaties and/or customs and a form of international jurisdiction that is connected with international crimes. National courts exercise universal jurisdiction without pursuing the sovereign right of the state. This is a varied and broad element of international criminal justice. This international function implies the need for greater understanding for the community that exercises universal jurisdiction and the interests of legitimate processes served and sized to an evidentiary framework of a broad cultural context. The continuing struggles in recent years are distinguished by accusatorial systems in universal jurisdiction processes as the challenges are distinguished in ways that address inquisitorial systems.[11] The UK courts adopt complementary rules of evidence and procedure that are different. They also hear cases that adopt the prosecution of international crimes in countries such as Germany[12] and the Netherlands that move from a national mindset of a decision-making process relative to processes that contrast with a pluralistic way[13] and ignore the developments that prosecute similar crimes by the International Criminal Court (ICC), ad hoc criminal tribunals, specialized tribunals and other national courts involved in prosecuting international crimes.[14] Universal jurisdiction processes take into account the international community, interests, crimes and different cultures involved to an impact that ignores the mindset of an international nature as well as the resources of national courts that fail to achieve the objectives of international criminal law.

11International Center for Transitional Justice, Gearing Up the Fight Against Impunity: Dedicated Investigative and Prosecutorial Capacities (Research Report, March 2022): https://www.ictj.org/sites/default/files/2022-03/ICTJ_Report_Specialized_Units_Web.pdf

12Supreme Regional Court Düsseldorf (4. Strafsenat), sentence of 26 September 1997 (2 StE 8/96), p. 3: https://www.asser.nl/upload/documents/20120611T032446-Jorgic_Urteil_26-9-1997.pdf. This is the first case, namely of Nicola Jorgić who was tried in Germany before the reform regarding the genocide in Rwanda. This is the first case of prosecution of crimes that was committed in the African territory by judges of German nationality. It is also worth mentioning the Rwabukombe case, which was connected to Germany as well as to the criterion of forum deprehensionis. A suspect who lived in the country before the formation of the commission of the crime who sited in the territory at the time of his arrest. For further analysis see also: N. Bülte, J. Grzywotz, T. Römer, L. Wolckenhaar, Monitoring the Trial of Onesphore R. Before the Oberlandesgericht Frankfurt, in German Law Journal, 16 (2), 2015, 291ss. The Federal Court of Justice in May 2015 annulled not all but part of the judgment (Federal Court of Justice (Bundesgerichtshof) of 21 May 2015 (3 StR 575/14) based in two errors of law that benefited the defendant (Federal Court of Justice, (Bundesgerichtshof), Press release no. 86/15 of 21 May 2015: https://juris.bundesgerichtshof.de/cgibin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0086/15). The case passed to the Chamber of the Higher Regional Court of Frankfurt (10 Higher Regional Court of Frankfurt (OLG Frankfurt), sentence of 18 February 2014 (5-3 StE 4/10-4-3/10). The chamber decided to life imprisonment of the defendant Rwabukombe.

13P. Roberts, Why International Criminal Evidence? In P. Roberts, M. Redmayne (eds), Innovations in Evidence and Proof: Integrating Theory, Research and Teaching. Hart Publishing, Portland, 2007, pp. 348ss.

14P. Roberts, M. Redmayne (eds), Innovations in Evidence and Proof: Integrating Theory, Research and Teaching. Hart Publishing, Portland, 2007, 348ss.

3. UNIVERSAL JURISDICTION AS A PROBLEM OF THE INTERNATIONAL COMMUNITY. OPEN ISSUES.

The jury as we have seen in the Court No. 1 of the Old Bailey of the R v. Kumar Lama case did not follow the thoughts of the prosecutor when he declared: "(…) a story that happens a long time ago to two men in a country far away (…)".[15] The foreign court had no obvious connection for the alleged crime. Therefore, the question that arises at this point focuses on the courtroom of a national court that perhaps does not concern the international community. The term universal jurisdiction is missed by the questioning of a witness who within the first ten days of the case is sworn. The judge explains that the jurisdiction of the courts is linked to a territory, that universal jurisdiction is linked to certain crimes. The courts then independently prosecute the place where such crimes occurred.

The parties involved had nothing to add in the case under examination and the judge as well as the lawyer connect the case with the jurisdiction of the court, that is with the affirmation of Art. 134 of the Criminal Justice Act 1988 which was not contrary and deserved more attention.

In everyday practice, the application of national criminal law is connected with the jurisdiction and its deeper reflection by the authorities. The problem with the ritual exercise of jurisdiction leads to the application of normal rules, such as the legal process that escapes from political conflicts of a pluralistic society.[16]These bases are poor and presuppose the presence of a universal jurisdiction. The structural distinction analyzes and evaluates the processes of universal jurisdiction through criminal processes of national inspiration and nature. It is thus emerging a relationship of international criminal law with national criminal law.[17]The criminal law has to do with the violation of public rights and duties that derived from a community presented a social aggregation. The authority of the internal criminal court considers the notion of criminal law, which addresses "public wrongs" related to members of the national community and its citizens.[18]

The process of universal jurisdiction escapes the communities involved that are different from the community taken in the normal national criminal processes. It is often an illusion that the crime of murder and genocide are essential and the same thing. It is a goal that completes an order different from a community that is violated.[19] There is

15ICC, Prosecution Opening Statement, Transcript, 7 June 2016, par. 2: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04133.PDF

16J. Shklar, Legalism: Law, Morals and Political Trials, Harvard University Press, Cambridge MA, 1964, xiii.

17R.A. Duff, Relational Reasons and the Criminal Law, in Oxford Studies in Philosophy of Law, 2, 2013, pp. 177ss.

18R.A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law. Hart Publishing, Oxford, 2007, pp. 54-55. R.A. Duff, Criminal Law and Political Community, in International Journal of Constitutional Law, 16, 2018, pp. 1251, 1255.

19District Court of Israel, judgment of 12 December 1962 in the case Attorney General of the Government of Israel v. Adolf Eichmann, para. 12: "(…) crimes under international law is universal (…)". Supreme Court of Israel, judgment of 29 May 1962 in the Attorney-General of the Government of Israel v. Adolf Eichmann case, pp. 298ss. The Supreme Court declared that: "(…) early stage (or a particularly disturbed stage) of

no precise understanding for the political community on behalf of the criminal actions based on universal jurisdiction. There are different alternatives of the international and interstate community for the victims affected and of the national community for the state that proceeds to punish.[20]

4. THE ROLE OF THE INTERNATIONAL COMMUNITY.

Universal jurisdiction allows the prosecution of crimes that have shocked the conscience of humanity.[21] Characterizing these crimes as an attack on humanity has no theoretical, rhetorical basis but a normative meaning.[22] International crimes are distinct from transnational crimes and national crimes.[23] These are crimes identifiable on the basis of the consensus of the international community that deserves an analysis of its moral aspects.[24] International criminal law within a framework and spirit of political

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any system of law (…) international law is still in a relatively undeveloped state (…) the courts must rely a great deal upon non-legislative law (…) may proceed (…) by a consideration of the larger needs of the international community (...)". H. Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil. Penguin, New York 2006, pp. 274ss. And the case: Polyukhovich v. Commonwealth, (1991) 172 CLR 501, parr. 34, 35: https://www.internationalcrimesdatabase.org/case/1172. J.A. Thomson, Is it a mess? The High Court and the war crimes case: External affairs, defence, judicial power and the australian constitution, in Western Australian Law Review, 22, 1992, pp. 200ss.

20D. Hovell, The Authority of Universal Jurisdiction, in European Journal of International Law, 29, 2018, pp. 428ss. A. Chehtman, The Philosophical Foundations of Extraterritorial Punishment. Oxford University Press, Oxford, 2011

21See the "Princeton Principles on Universal Jurisdiction" (2001) n 1 which declared in par. 223 that: "(…) the fundamental interests of the international community as a whole (…) standard grounds of jurisdiction and other connections are absent, national courts (…) may nevertheless exercise jurisdiction under international law over crimes of such exceptional, gravity that they affect the fundamental interests of the community as a whole (…) jurisdiction based solely on the nature of the crime. National courts can exercise universal jurisdiction to prosecute and punish, and thereby deter, heinous acts recognized as serious crimes under international law (…)". S. Macedo, Princeton University Program in Law & Public Affairs. In S. Macedo, The Princeton Principles on universal jurisdiction. Princeton University, New Jersey, 2001, 30ss: https://law.depaul.edu/academics/centers-institutes-initiatives/international-human-rights-law-institute/projects/documents/princeton_principles.pdf
See also Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, preamble, Art 5. For the use of this language in case law, see Demjanjuk v Petrovsky, 776 F 2d. 571 (6th Circuit, 1985) 582: https://case-law.vlex.com/vid/demjanjuk-v-petrovsky-no-891123909; Filartiga v Pena-Irala, 630 F.2d 876 (2nd Circuit, 1980) 890: https://law.justia.com/cases/federal/appellate-courts/F2/630/876/238132/; Supreme Court of Israel 336/31, Attorney General v Eichmann, 36 ILR 28 at [10]. S. Villalpando, Eichmann case, in Max Planck Encyclopedia of International Law, 2007. D. Liakopoulos, The subsumption in the international criminal case as an interpretative pick: The role of Latin American supreme courts, in Cadernos de Dereito Actual, n. 11, 2019

22R. Teitel, Humanity's Law. Oxford University Press, Oxford, 2011.

23N. Boister, Further reflections on the concept of transnational criminal law, in Transnational Legal Theory, 6, 2015, pp. 9, 15-16: "(…) international criminal law as 'a hierarchical order established by an inter- national community that came into being in the twentieth century in order to suppress actions subject to universal opprobrium or threatening the security of the international community (…)".

24H. Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil, Penguin, New York, 1994, 268-269: "(…) international crimes are distinct from offences "against fellow-nations" being rather an attack on human diversity as such, that is, on a characteristic of the "human status" without which the very words "mankind" or "humanity" would be devoid of meaning (...)". C. Schwöbel-Patel, The Core Crimes of International Criminal Law, in K. Heller and others (eds), The Oxford Handbook of International Criminal Law. Oxford University Press, Oxford, 2020, pp. 769-771. R. Cryer, International Criminal Law, in M. Evans, International Law. Oxford University Press, Oxford, 2018, pp. 747ss. W. Schabas, Atrocity Crimes, in W.

affectivity unites a broad community, namely an international community that respects the notion of shared horror. The courts prosecute these crimes and are expressed as agents in the name of a shared conscience, that describes the judicial context within the common sense of humanity, of public conscience and towards a universal law of humanity.[25] This is a relational aspect of international criminal law within terms, types of crimes that concern a common humanity with its victims. A community that has suffered unlawful crimes that its perpetrators answer to their local communities.[26] The norms and the connection of these crimes and the international community recognize that these crimes do not reduce the will of a state together with states that its interstate does not allow international crimes such as crimes against humanity, genocide, war crimes, torture, crimes that are part of the concepts of jus cogens and erga omnes respecting norms within the scope of a state consensus and recognizing an important role to the community in its varied application.[27]The duty/right to exercise universal jurisdiction comes from a general international recognition that applies norms underlying the will of individual states thus justifying the application in the name of the international community.[28]

5. THE ROLE OF THE INTERSTATE COMMUNITY.

Universal jurisdiction is based on a shared awareness of the international community, that is, on the criminal nature and conduct of the interstate community that also involves an organizational level for the exercise of jurisdiction of national courts. The interstate community is thus understood as an elaborate strategy for the interstate

Schabas (ed), The Cambridge Companion to International Criminal Law. Cambridge University Press, Cambridge, 2016, pp. 204ss.

25International Military Tribunal, Proceedings of the Trial of the Major War Criminals, Part I, 51; ICTY, Kupreškić et al, Judgment of 14 January 2000, Trial Chamber, Case no IT-95-16-T at [527]. United States of America v Otto Ohlendorf et al (the Einsatzgruppen case), Opinion and Judgment, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (October 1946-April 1949), Vol IV(1) 496, 498. District.

Court of the Hague, Case no. 09/750009-06 and 09/750007-07, Public Prosecutor v. Joseph Mpambara, Interlocutory Decision (24 July 2007); Swiss Tribunal Militaire de Cassation, Niyonteze v. Public Prosecutor (27 April 2001). L. Reydams, Niyonteze v Public Prosecutor, in American Journal of International Law, 96 (1), 2002, pp. 232ss. Liakopoulos, D. (2024). The role of Prosecutor in the function of accusation in International Criminal Court, Eliva Press, Republic of Moldova.

26R.A. Duff, Authority and Responsibility in International Criminal Law, in S. Besson, J. Tasioulas (eds), The Philosophy of International Law. Oxford University Press, Oxford, 2010, pp. 592, 602.

27International Law Commission, Articles on Responsibility of State for Internationally Wrongful Acts, Arts 40-41 and 48(1)(b); Vienna Convention on the Law of Treaties, Art 53. D. Liakopoulos, Complicity in international law, W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020. D. Liakopoulos, Consequences of complicity in international relations, W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020.

28T. Meron, The Geneva Conventions as Customary Law, in American Journal of International Law, 81, 1987, pp. 348, 361: "(…) teleological desire to solidify the humanizing content of the humanitarian norms (…) the "legislative" character of the judicial process (…) tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law (…)". ICTY, Prosecutor v Tadić Decision on Defence Motion on Jurisdiction of 10 August 1995, Trial Chamber, Case no IT-94-1, parr. 42, 44 and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, Appeals Chamber, Case no IT-94-1 parr. 57, 59.

community that contributes to and fills gaps that apply international criminal law. It is a decentralized application form for universal legal values that establish an agreement that shares the interstate community through states that agree to attribute national courts to an international criminal justice system.[29] The exercise of universal jurisdiction requires proof of the consent of an interstate community that allows the spirit of treaties and customary international law. Universal jurisdiction is recognized and guaranteed in the treaties. A series of treaties that recognize the obligation for the exercise of universal jurisdiction by prosecuting less serious crimes such as drug trafficking, money laundering and participation in organized crime.[30] The obligation to exercise jurisdiction applies only to inter partes and does not create a right to exercise criminal jurisdiction that is contrary to third states and opposed to the limits of customary international law.[31] Instruments such as the UN Convention against Torture, the Geneva Conventions and the draft Articles for the Prevention and Punishment of Crimes against Humanity interpret the extension of an obligation to exercise universal jurisdiction that goes beyond collective jurisdiction for states parties to a treaty.[32] After the adoption of the Ljubljana-The Hague Convention of 2023 on cooperation in the investigation and prosecution of the crime of genocide, war crimes and crimes against humanity and other crimes of an international nature, it is reinvigorated and consolidated the international jurisdiction.

According to Art. 8, par. 3 of the Ljubljana-The Hague Convention states have assumed the obligation to establish jurisdiction and prosecute any perpetrator of international crimes in the territories under their jurisdiction.[33] Although all states have not ratified the treaty, they have accepted the binding obligation of Article 8, paragraph

29F. Mégret, The "Elephant in the Room in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political, in Transnational Legal Theory, 6, 2015, pp. 89, 94ss.

30C. Kreß, International Criminal Law, in Max Planck Encyclopedias of International Law, 2009, para 8. See also: Annex to Secretary-General, Survey of Multilateral Conventions which may be of Relevance for the International Law Commission on the Topic: The Obligation to Extradite or Prosecute (aut dedere aut judicare), UN Doc A/CN.4/630, 18 June 2010: https://legal.un.org/ilc/documentation/english/a_cn4_630.pdf. C.C. Jalloh, Universal Criminal Jurisdiction, Annex to the Report of the International Law Commission on the work of its Seventieth Session, UN Doc A/73/10 (2018).

31R. Higgins, Problems and Process: International Law and How We Use It, op. cit., 56-65. A. Cassese, Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction, in Journal of International Criminal Justice, 1, 2003, pp. 589, 594. M. Scharf, Application of Treaty-Based Jurisdiction to Nationals of Non-State Parties, in New England Law Review, 35, 2001, pp. 364ss.

32See also: Pinochet decision, the UK House of Lords, which is recognised: "(...) that the UK could exercise jurisdiction over alleged torture committed in Chile from 29 September 1988 (…) fact Chile only ratified the Convention Against Torture on 30 September 1988 (…)". R v Bow Street Stipendiary Magistrate and Others, Ex parte Pinochet (No 3) [1999] 2 All ER 97: https://www.uniset.ca/other/cs5/2000AC147.html; See also the case from the ICJ: Belgium v Senegal [2012] ICJ Rep 422, par. 102: "(…) only with the dates Senegal and Belgium had ratified the Convention Against Torture (1986 and 1999 respectively) and was not concerned with the date of ratification by Chad, the state of nationality and territoriality (…)". N. Roht-Arriaza, The Pinochet Precedent and Universal Jurisdiction, in New England Law Review, 35 (2), 2001, pp. 311-312.

33Ljubljana-The Hague Convention, Arts 8(3) and 14: "(…) express recognition in Art 92(3) that states may make reservations to Art 8(3), indicating that not all states will assume an obligation of this breadth (…)". B. De Oliveira Biazatti, The Ljubljana-The Hague Convention on Mutual Legal Assistance: Was the Gap Closed?, in EJIL:Talk! (12 June 2023): https://www.ejiltalk.org/the-ljubljana-the-hague-convention-on-mutual-legal-assistance-was-the-gap-closed/

to adopt the provision of their treaty by the Conference of states which demonstrates that states are entitled to assume the obligation to exercise universal jurisdiction for crimes of genocide, crimes against humanity, war crimes and other international crimes. According to the Preamble of the convention: "(…) fighting impunity for these crimes is essential for peace, stability, justice and the rule of law' and states have "primary responsibility" to prosecute alleged offenders and to take all necessary legislative and executive measures allowing them to assume that responsibility (…)".

6. THE ROLE OF VICTIMS.

The interstate community has the right to recognize universal jurisdiction for certain international crimes. Furthermore, it recognizes the international community as well as the exercise of jurisdiction for crimes of a matter of state law. According to the opinion of A. Mills: "(…) jurisdiction is no longer exclusively a right of states (…) extent a matter of individual right, that is, an obligation owed to individuals (…)".[34] Thus, the connection between universal jurisdiction and access to justice for victims is highlighted.[35] According to international human rights law, states have a legal duty to provide individuals with an effective appearance for the rights and freedoms violated according to Art. 2, par. 3 of the International Covenant on Civil and Political Rights, Art 2(3), art. 13 of the European Convention on Human Rights, Art. 35 of the American Convention on Human Rights and Art. 7 of African Charter on Human and Peoples' Rights. The relevant remedy does not include the duty to prosecute associated crimes for violations of human rights. The situation is different in relation to international crimes and the obligation to prosecute shifts from a right for states to a duty towards victims.[36]

The community of victims is interested to the recognition of international crimes.[37] In practice, universal jurisdiction describes most of the criminal proceedings based on universal jurisdiction which checks the pressure for victims and groups that support their victims.[38] The legal argument concerns and considers the right for victims of international crimes to access to justice which imposes on states the obligation to

34A. Mills, Rethinking Jurisdiction in International Law, in British Yearbook of International Law, 94, 2014, pp. 187, 229.

35F. Mégret, The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political, in Transnational Legal Theory, 6, 2015, pp. 90ss..

36A. Coco, The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9, and 11 by the International Law Commission Special Issue: Laying the Foundations for a Convention on Crimes against Humanity, in Journal of International Criminal Justice, 16, 2018, pp. 752ss. P. Gaeta, The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes, in A. Cassese (ed), Realizing Utopia: The Future of International Law. Oxford University Press, Oxford, 2012. P. Akhavan, Whither National Courts? The Rome Statute's Missing Half: Towards an Express and Enforceable Obligation for the National Repression of International Crimes, in Journal of International Criminal Justice, 8, 2010, pp. 1246ss

37UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, GA Res 60/147, 16 December 2005; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 55/89, 4 December 2000.

38L. Johns, M. Langer, M.E. Peters, Migration and the Demand for Transnational Justice, in American Political Science Review, 116, 2002, pp. 1187ss.

prosecute crimes in certain circumstances. It discusses[39] and provides the effective remedy, according to Art. 2, par. 3 of the International Covenant on Civil and Political Rights. The Human Rights Committee observes the delivery of justice for perpetrators who determine violations such as the prohibition of torture as well as crimes against humanity which constitute in itself a violation of human rights.[40] The General Assembly from 2005 has approved the Resolution 60/147 concerning the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law".[41] According to the preamble: "(…) adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large (…)".[42] Furthermore, the resolution affirms that: "(…) states have the duty to investigate, and if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for gross violations of international human rights law and international humanitarian law (…)".[43]

7. THE ROLE OF THE INTERNAL COMMUNITY FOR THE STATE THAT PROCEEDS.

The political community is interested in the process for the state that proceeds. Criminal proceedings based on universal jurisdiction are not explained in an exclusive way but with regard to the sovereign interests for the state that proceeds and acts on behalf of a public use of a national nature. The Lama case was referred to in a judgment based on the English public that did not have precise ideas. A disinterested jury perhaps did not understand what it had to do and did not know exactly what international crimes and international jurisdiction were.

However, this does not mean that the interests of the national public are irrelevant to the objectives of a justification that assumes its own jurisdiction. These are interests

39L. Johns, M. Langer, M.E. Peters, Migration and the Demand for Transnational Justice, in American Political Science Review, op. cit.,

40Human Rights Committee, General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 18.

41See also in argument: Press Release GA/L/3692 (13 October 2023): Debate Reveals Rift in Speakers' Understanding of Universal Jurisdiction Scope, Application, as Sixth Committee Takes Up Report on Principle: https://press.un.org/en/2023/gal3692.doc.htm; Press release GA/L/3662 (12 October 2022): Speakers Disagree on How, When, Where Universal Jurisdiction Should be Engaged, as Sixth Committee Takes up Report on Principle: https://press.un.org/en/2022/gal3662.doc.htm; Press release GA/L/3642 (22 October 2021): Concluding Debate on Universal Jurisdiction Principle, Sixth Committee Speakers Wrestle with Challenging Balance between State Sovereignty, Fighting Impunity: https://press.un.org/en/2021/gal3642.doc.htm. See also Secretary-General, Report on the Scope and Application of the Principle of Universal Jurisdiction, UN Doc A/70/125 (1 July 2015); and Amnesty International, Universal Jurisdiction: the UN General Assembly Should Support This Essential International Justice Tool, IOR 53/015/2010 (2010): www.amnesty.org/en/wp-content/uploads/2021/07/ior530152010en.pdf.

42GA Res 60/147: https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf

43GA Res 60/147, Art 4. UN Commission on Human Rights Res 2005/81 (21 April 2005): https://www.refworld.org/legal/resolution/unchr/2005/en/37748; Special Rapporteur Diane Orentlicher, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005, Principle 19.

that are largely of other communities that reinforce the idea of a universal jurisdiction that intends to take into account the contribution of a state applied to international criminal law.

In the process of universal jurisdiction concerning the R v. Zardad case in UK, the prosecutor, Lord Goldsmith, took the decision to act against the rule of law[44] by considering the decision to act as a prosecutor in the case in question[45] and by calling the idea of an interest in a process that applies international law. Representatives of the UK have stressed that British courts have assumed the role of guarantors in the application of law at a global level. The House of Lords within the ambit of the jurisdiction of the UN on international crimes has taken into account the long-term policy of the relative concern for the UK to take a distinctive and unilateral leading role of the global prosecutor. So, the British will take into account the rule of law[46] by calling the idea of the interest in the process and application of international law. Other representatives such as the UK have stressed and not wanting that British courts assume the role of guarantor for the application of law at a universal level, as a global policeman. State interests exercise criminal action and use and restrict universality as a character of universal jurisdiction thus requiring a connection with the state that exercises its own criminal action. In the UK the exercise of universal jurisdiction is justified within the terms of a safe haven.[47]We recall the War Crimes Act of 1991 which allowed British courts to punish Nazi war crimes as well as approving the opinion of the War Crimes Inquiry of 1988 which ultimately accused the UK as a refuge for war criminals.[48] The parliamentary debate of the UK led to the recognition of the International Criminal Court Act of 2001 which had as its objective to: "(…) provide a robust regime which will prevent the UK being, or being seen as, a safe haven for war criminals (...)"[49].

44Of the 30 court appearances during his time in office it was the first and only time Lord Goldsmith appeared as lead prosecutor in a criminal trial: https://publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306we08.htm

45Guardian, Lord Goldsmith described the accused's acts as an "affront to justice": Goldsmith, Afghan Zardad jailed for 20 years, in The Guardian, (19 July 2005): https://www.theguardian.com/uk/2005/jul/18/afghanistan.world

46HL Deb vol 712 col 658 7 July 2009, Lord Bach (Parliamentary Under-Secretary of State Ministry of Justice): https://hansard.parliament.uk/Lords/2009-07-07/debates/09070751000083/CoronersAndJusticeBill

47M. Langer, Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforcer", to "No Safe Haven" Jurisdiction", in Journal of International Criminal Justice, 13, 2015, pp. 246ss. M. Takeuchi, Asian Experience with Extraterritoriality, in A. Parrish, C. Ryngaert (eds), Research Handbook on Extraterritoriality in International Law, Edward Elgar Publishers, Cheltenham, 2023, pp. 166ss.

48T. Hetherington, W. Chalmers, Report of the War Crimes Inquiry, HMSO, London, 1989, para 9.18: https://api.parliament.uk/historic-hansard/lords/1989/jul/24/war-crimes-inquiry-report; A.T. Richardson, War Crimes Act 1991, in Modern Law Review, 55, 1992, pp. 74ss.

49HL Deb vol 623 col 419 8 March 2001, Baroness Scotland of Asthal: https://hansard.parliament.uk/Lords/2001-03-08/debates/d2b371ac-caf7-43dd-a944-8c218bb845c1/InternationalCriminalCourtBillHl

8. UNIVERSAL JURISDICTION PROCESSES AND POLITICAL COMMUNITIES. THE DISCOURSE OF "SELECTION" OF CASES AND INTERESTS.

Universal jurisdiction processes do not concern only a single political community but have a multi-ethnic character. Universal jurisdiction is part of the contribution of a state that applies international criminal law. It is an interstate community that universalizes the right of access to justice for the community of victims allowing thus third states to prosecute crimes of interest to the international community. Communities conduct universal jurisdiction processes determining a fair and equitable balance between interests that conflict with litigation and case selection. This is a fair balance for universal jurisdiction interests that faces a significant struggle to affirm the selections of international criminal justice.

Political communities conduct universal jurisdiction processes and contribute legitimate interests to a decision-making process. The political communities of the prosecutor and the accused ask questions about interests that protect the process. The selection of cases on the interests of the affected communities and the objectives of a process is questionable. Universal jurisdiction accuses and masks political conflicts through a national court that makes the interests of the state complicit prosecuting thus external political communities and considering political interests of its own community.[50]

The common form highlights selectivity for criminal proceedings based on universal jurisdiction. Selective application is not wrong. Prosecution of those responsible for international crimes is, therefore, impossible.[51] The problem arises interests that consider the selective application irrelevant and illegitimate.[52] The selectivity of universal jurisdiction examines criticisms that derive from interests driving the proceedings such as the imperial problem, the problem of lawfare and diplomatic costs, etc. Criticisms are based on the interpretation of interests that drive criminal proceedings in relation to universal jurisdiction that emphasizes the need for agreeing conditions that govern the selection of cases. Criteria are proposed to regulate prosecutorial discretion for trials based on universal jurisdiction.

The criteria for the exercise of criminal jurisdiction are based on principles relating to: -territory, i.e. the place where an international crime is committed; -active nationality, i.e. the nationality of the alleged offender; -passive nationality, i.e. the nationality of the victim; -protection that in the case of threat and national security the fundamental functions of the government caused by the state have to do with an extraterritorial act.[53] These are criteria that do not always prove to be effective in

50S. Pahuja, Laws of Encounter: A Jurisdictional Account of International Law, in London Review of International Law, 1, 2013, pp. 64ss S. Dorsett, S. McVeigh, Jurisdiction, Routledge, London, New York, 2012.

51ICTY, Delalić et al, Judgment of 20 February 2001, Appeals Chamber, Case No IT-96-21-A, par. 602ss.

52R. Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, Cambridge University Press, Cambridge, 2009, pp. 192-193.

53D. Hovell, The Authority of Universal Jurisdiction, in European Journal of International Law, 29 (2), 2018, pp. 435, 441ss: "(…) the customary international law inquiry creates at least two problems in the case of universal jurisdiction. First, the exercise of universal jurisdiction (…) a default jurisdiction and, far from

prosecuting international crimes especially when they are committed by state bodies and the complicity and acquiescence of these show that the principle of jurisdiction is an adequate criterion that overcomes this type of obstacles.

It is noted that in the UK Colonel Lama has not been tried for torture. No British citizen has been tried in the courts of the UK for torture as the criminal charges are against British personnel.[54] Trying a British soldier for international crimes has not been taken seriously by the House of Lords.[55] There are no universal jurisdiction proceedings against alleged perpetrators who come from Israel, China and Egypt.[56] The government of Nepal has reacted to the arrest of Colonel Lama highlighting the relationship between power and justice. The government of Nepal has rejected the offer of RAF Chinook helicopters after Lama's arrest as a contribution to the earthquake in Nepal in April 2015.[57]

The map of nationalities of prosecutors and defendants concerns universal jurisdiction proceedings. About 75 trials are completed up to 2020 which are being conducted by 18 prosecuting states. The defendants in universal jurisdiction trials come from 13 Western European states. The research repeated a Western historical pattern

being customary, is and should be rare (…) universal jurisdiction is a mechanism intended not to promote state interests but, rather, to disrupt state machinery where state officials act contrary to certain fundamental norms (…) universal jurisdiction is generally practised against state officials, it will be met by reluctance from state officials to approve its exercise and opposition from state officials against whom it is exercised. Both these factors heighten the paradox that exists in any event in relation to the creation of custom. Any rule navigating the difficult path from "becoming" to "being" faces the paradox that customary legal rules will only be recognized where a critical mass of states are willing to engage in practice, but, until the point it achieves such widespread acceptance, such practice is unsupported by law (...)". M. Rheinstein, The Nurenberg Trial and Aggressive War, in University of Chicago Law Review, 14, 1947, pp, 318ss

54See in argument: N. Rasiah, The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice, in Journal of International Criminal Justice, 7, 2009, pp. 178ss. C. Gearty, British Torture, Then and Now: The Role of Judges, in Modern Law Review, 84, 2021, pp. 118ss. M. Townsend, How army's £20m trial failed to find the killers, in The Observer (18 March 2007): https://www.theguardian.com/uk/2007/mar/18/iraq.military. Sir Peter Gibson, The Report of the Detainee Inquiry, TSO, London, 2013: https://www.gov.uk/government/publications/report-of-the-detainee-inquiry; Sir Thayne Forbes, The Report of the Al-Sweady Inquiry Vol II HC 818-II (2014) para 5.196: https://assets.publishing.service.gov.uk/media/5a7d908840f0b64fe6c2477b/Volume_2_Al_Sweady_Inquiry.pdf; Sir William Gage, The Baha Mousa Public Inquiry Report Vol I HC 1452–I (2011) 1043-2.1045: https://assets.publishing.service.gov.uk/media/5a74e74be5274a3cb28681be/1452_i.pdf; In the Matter of Applications by Margaret McQuillan, Francis McGuigan and Mary McKenna ("Hooded Men" case) [2021] UKSC 55: https://supremecourt.uk/cases/uksc-2020-0027;

55HL Deb vol 673 col 1223 14 July 2005: https://publications.parliament.uk/pa/ld/ldvol673.htm.

56The issuing and executing of arrest warrants against the Israeli General Doron Almog, of the former Israeli Foreign Minister Tzipi Livni and of the Israeli Defense Ministers General Shaul Mofaz and Ehud Barak are rejected. The same happened with the Chinese Minister of Trade and International Trade Bo Xilai, the Director of the Egyptian Military Intelligence Services and the Lieutenant General Mahmoud Hegazy. In the case of General Augusto Pinochet, the extradition to Spain was authorized by the House of Lords. It was the former British Home Secretary Jack Straw who blocked the extradition and facilitated the repatriation to Chile, also accepting medical evidence showing the orientation towards a trial in Spain on torture charges.

57J. Sapkota, D. Brown, Nepalese army officer charged with torture, in The Times (5 January 2013): https://www.thetimes.co.uk/article/nepalese-army-officer-charged-with-torture-zb76p360qvn

that functions as a civilizing agent against forms of civilization.[58] It is understandable that universal jurisdiction as a form of international aid and/or as a civilizing mission has been developed through the rule of law that delivers an unruly space in the South.[59]

The dissenting opinion of judge Bula Bula of the International Court of Justice (ICJ) in the Democratic Republic of Congo v. Belgium case of 2002 considered universal jurisdiction as a variable geometry that selectively exercises some states to the exclusion of others.[60] International criminal justice defines international justice as a Western judicial intervention.[61] It complains of imperialism when states offer a burden-sharing system to allow victims of post-colonial governments to accept justice. In this regard, Asad Kiyani prioritised the interests of the decolonised state in the third world.[62] Universal jurisdiction proceedings provide victims with access to justice.[63] This argument takes into account the principle of equality of arms that protects officials of certain states involved in judicial proceedings.

The concern of Lord Rodger in the Al Skeini case has been interpreted by the European Court of Human Rights (ECtHR) as human rights imperialism.[64] The imperial critique misunderstands the force of criminal proceedings that rely on universal jurisdiction. Foreign states initiate criminal proceedings before the courts of the states that are willing and able to proceed. Not all universal jurisdiction proceedings justify the prosecution in a precise manner. Victims who are migrants are the main agents that determine their own initiation of universal jurisdiction claims. Related research in this

58M. Mutua, Human Rights: A Political and Cultural Critique, University of Pennsylvania Press, Philadelphia, 2002, pp. 16ss.

59D. Luban, After the Honeymoon: Reflections on the Current State of International Criminal Justice, in Journal of International Criminal Justice, 11, 2013, pp. 506, 513. J. Reynolds, S. Xavier, The Dark Corners of the World: TWAIL and International Criminal Justice, in Journal of International Criminal Justice, 14, 2016, pp. 959, 961.

60ICJ, Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3, Dissenting Opinion of Judge ad hoc Bula Bula, par. 15: "(…) reminiscent of Judge Pal's dissent at Tokyo, Judge ad hoc Bula Bula accused the Belgian government of imperial hypocrisy in attempting the prosecution of the Congolese Minister (...) the respondent State brings its peroration to a glowing close with an invocation of the democracy and human rights which purportedly guided its conduct, at the same time it reopens one of the most shameful pages in the history of decolonization (…)". D. Liakopoulos, The role of not party in the trial before the International Court of Justice. ed. Maklu, Antwerp, Portland, 2020.

61T. Krever, Dispensing Global Justice, in New Left Review, 85, 2014, pp. 67, 97. S. Moyn, Of Deserts and Promised Lands: The Dream of Global Justice, in The Nation (19 March 2012): https://www.thenation.com/article/archive/deserts-and-promised-lands-dream-global-justice/

62A. Kiyani, Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity, in Journal of International Criminal Justice, 14, 2016, pp. 939, 942ss. A. Anghie, B.S. Chimni, Third World Approaches to International Law and Individual Responsibility in International Conflicts, in Chinese Journal of International Law, 2, 2003, pp. 77, 78.

63A. Anghie, B.S. Chimni, Third World Approaches to International Law and Individual Responsibility in International Conflicts, op. cit., pp. 96ss.

64Al Skeini and Ors v Secretary of State for Defence [2007] UKHL 26, par. 78: https://publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm: "(…) a context where Britain had invaded and occupied parts of Iraq, Lord Rodgers (…) idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd (…)":

regard states that the jurisdiction exerts pressure on migrants who are fleeing war.[65]

The principle of complementarity avoids future abuses as it requires universal jurisdiction to be exercised only by courts, thus providing a greater nexus to the crime.[66] The pursuit of legal action by the community and victims' organizations are not described as expansionist policies. Universal jurisdiction guarantees the right of victims to justice thus considering the current international criminal justice system counter hegemonic.[67]

9. LAWFARE AND UNIVERSAL JURISDICTION.

Universal jurisdiction is interpreted in various ways. Foreign national courts aim to provide neutral channels to ensure victims access to justice. The humanitarian basis is based on the principle that there is no antidote to one's own medicine chosen by mistake. The anxiety of universal jurisdiction is expressed through domestic and foreign criminal proceedings that are used and manipulated as an instrument of legal warfare against political adversaries. It is an autocratic universal jurisdiction that transforms the means of prosecuting political enemies into universal justice. Criminal proceedings are based on a universal jurisdiction that uses political projects as a mechanism for establishing individual responsibility for international crimes. An international policy of judicial procedures that distinguishes criminal politics from international crimes. The abuse of the principle by political enemies is not unfounded.[68] It is recalled in the Hamas case that non-governmental organizations such as the Palestinian Center of Human Rights were funded by the EU and the Association of Lawyers for Palestine Human Rights which is based in the UK was behind the issuing of arrest warrants in the UK against General Doron Almog (2005) and the former Israeli Foreign Minister Tzipi Livni (2009).[69]

The arrest warrants are not executed and thus the path of delegitimization, demoralization of the commanders of Israel to engage in diplomatic relations and communicate effectively with foreigners has been influenced.[70]

The problem of punishing state officials was an issue that has not been resolved to this day. The problem has to do with the lawfare, as a misconception of universal jurisdiction, as an instrument that each state has in its hands to proceed. The risk of the

65L. Johns, M. Langer, M.E. Peters, Migration and the Demand for Transnational Justice, op. cit.,
66C. Kreß, Universal Jurisdiction over International Crimes and the Institut de Droit International, in Journal of International Criminal Justice, 4, 2016, pp. 562ss.
67F. Jeßberger, L. Steinl, Strategic Litigation in International Criminal Justice, in Journal of International Criminal Justice, 20, 2022, pp. 379, 400-401.
68O. Kittrie, Lawfare: Law as a Weapon of War. Oxford University Press, Oxford, 2016, chapter 6.
69J. Hider, Hamas Using English Law to Demand Arrest of Israeli Leaders for War Crimes, in The Times (21 December 1994): https://www.thetimes.com/best-law-firms/profile-legal/article/hamas-using-english-law-to-demand-arrest-of-israeli-leaders-for-war-crimes-lw8j5gzsxrd
70O. Kittrie, Lawfare: Law as a Weapon of War, op. cit., pp. 262ss. PCHR, The Principle and Practice of Universal Jurisdiction: PCHR's Work in the Occupied Palestinian Territory (January 2010) 131: https://www.fidh.org/IMG/pdf/PCHR_Principle_and_Practice_of_UJ_PCHR_s_Work_in_the_OPT_-_Ex_Summary_January_2010_En_.pdf: "(…) PCHR signalled the cases as a victory on the basis that that 'the cases have received high profile media coverage, and additionally, several high ranking Israeli officials have had their freedom of movement curtailed in certain countries (…)".

lawfare ignores the fact that there is evidence for states that are the main initiators for criminal proceedings based on universal jurisdiction.[71] Criminal proceedings are based on universal jurisdiction and states are sensitive to mutual concerns regarding the repeal of universal jurisdiction legislation that reduces jurisdiction.[72] Criminal proceedings that are based on universal jurisdiction conduct in bad faith as in the case of human rights litigation. In such a case, the state reduces its role in selecting universal jurisdiction processes and in recognizing the role of victims. The fear of abuse for universal jurisdiction and the exercise of discretion for the state in the decision-making process on universal jurisdiction includes and takes into account the request of victims and the circumstances that the territorial state and the state of its nationality is not willing to pursue.

10. UNIVERSAL JURISDICTION AND DIPLOMATIC COST.

Universal jurisdiction as an imperative force of processes done in a fairly aggressive way leads to various suspicions due to reasonable evidence. Universal jurisdiction processes result as a gamble on the side of the state that highlights the diplomatic cost related to international crimes. A cost not only economic but above all diplomatic in terms of international relations. The application of criminal law as a compromise for international relations often causes discomfort. International negotiation[73] also leads to a diplomatic cost in universal jurisdiction proceedings. States focus on defendants who bring political benefits in proceedings and processes based on universal jurisdiction.[74] Above the cost/benefit balance, universal jurisdiction is claimed exploring a potential normative orientation. This advantage is linked with universal jurisdiction and with the right of access to justice for victims that attract application

71A. Adanan, United Kingdom Policy Toward Universal Jurisdiction Since the Post-War Period, in International Criminal Law Review, 21, 2022, pp. 1026: "(…) The United Kingdom has included universal jurisdiction provisions in the Genocide Convention and the Apartheid Convention, the Torture Convention and the application of British personnel within continuing violence suffered in Northern Ireland. The position in the ECtHR judgment and in the case of Ireland v. United Kingdom according to interrogation techniques of United Kingdom that reached the threshold of torture (…)".

72I. Sanz, China Bristling, Spain Seeks to Limit its Judges International Rights Powers, in Reuters (11 February 2014): https://www.reuters.com/article/world/china-bristling-spain-seeks-to-limit-its-judges-international-rights-powers-idUSBREA1A0M5/; G. Brown, Britain must protect foreign leaders from private arrest warrants, in The Telegraph (3 March 2010): https://www.telegraph.co.uk/news/politics/gordon-brown/7361967/Britain-must-protect-foreign-leaders-from-arrest.html; I. Black, UK to review war crimes warrants after Tzipi Livni arrest row, in The Guardian (16 December 2009): https://www.theguardian.com/world/2009/dec/15/israel-tzipi-livni-arrest-warrant; BBC News, Straw Apology on Israeli Arrest, in BBC News (22 September 2005): http://news.bbc.co.uk/2/hi/uk_news/politics/4270664.s; Guardian, Statement by Foreign Secretary David Miliband, in The Guardian, (15 December 2009): https://www.theguardian.com/politics/article/2024/may/08/david-miliband-condemns-absurd-lack-of-cooperation-between-eu-and-uk; Guardian, Belgium Moves to Limit War Crimes Law, Repair US Ties, in The Guardian, (2 August 2003): https://www.theguardian.com/world/2003/jun/24/usa.warcrimes; C. Smith, Rumsfeld Says Belgian Law Could Prompt NATO to Leave, in New York Times (12 June 2003). S. Williams, Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, in Modern Law Review, 75, 2012, pp. 369ss.

73E. Van Sliedregt, One Rule for Them. Selectivity in International Criminal Law, in Leiden Journal of International Law, 34, 2021, pp. 284ss.

74M. Langer, The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, in American Journal of International Law, 11, 105, pp. 1, 2.

within the proportionality framework for human rights[75].
Access to justice is not an absolute path.[76] Implementing this right means that the state promotes the prosecution by authorizing and undertaking the proportionality analysis as a balance of the right of communities for victims of access to justice and in any case with the impact of objectives and interests that are legitimate by the state promoting the prosecution. The definition of such a proposal as well as universal jurisdiction describe in legal terms the interstate community to universalize the right of access to justice for the communities of victims and crimes of interest for the international community that do not impact disproportionately to the interests of the state that prosecutes.

11. WHAT ARE THE CRITERIA FOR THE EXERCISE OF UNIVERSAL JURISDICTION?

Universal jurisdiction seems to have a more political and less legal nature. In practice, universal jurisdiction decisively takes into account political aspects. Orientative aspects that define in detail the communities, rights, interests involved in criminal proceedings are based on a universal jurisdiction that becomes a decision-making process within a potential legal framework. The traditional view of jurisdiction as a sovereign right derives from the free will of states that has often been exceeded.[77]

A state that decides whether or not to exercise universal jurisdiction is bound by obligations towards the international community, the interstate community and the victim communities. States within a certain degree of discretion and with respect to crimes and offenders proceed taking into account their fundamental interests including the cost and the related impact on diplomatic relations and the administration of justice. A broad discretion, that operates and exempts states from the need to defend decisions, is based on consistent criteria that achieve the principle of proportionality between

75ECtHR, Al-Adsani v. UK, (2002) 34 EHRR 273 (ECHR 2001), para. 56: "(…) s a conflicting principle of international law (e.g., state immunity), which prohibited access to a court in the relevant circumstances (…) reasoning was subtly different where the Court appeared to infer a presumption of proportionality on the basis that 'measures taken by a High Contracting Party which reflect generally recognised rules of public international (…)". see also ex multis: ECtHR, Golder v. United Kingdom, Appl. no. 4451/70, Judgment of 21 February 1971, para. 35; Neulinger and Shuruk v. Switzerland, Appl. no. 41616/07, Judgment of 6 July 2010, paras 131–133; Nada v. Switzerland, Appl. no 10593/08, Judgment of 12 September 2012, para. 169; Magyar Helsinki Bizottság v. Hungary, Appl. no. 18030/11, Judgment of 8 November 2016, para. 138. for further analysis: A. Seibert-Fohr, M.E. Villiger, Judgments of the European Convention of Human Rights. Effects and implementation, ed. Nomos, Baden-Baden, 2017. M.E.Villiger, Handbook on the European Convention on Human Rights, ed. Brill, Bruxelles, 2023

76ECtHR, Al-Dulimi and Montana Management Inc v Switzerland, Application no 5809/08, Judgment, 21 June 2016, par. 129. Davanzo Di Cozur, A. Al-Dulimi And Montana Management Inc. V Switzerland: To What Extent Does The Application Of UNSC Resolution 1483 Impact The Protection Of Individuals' Human Rights In The Pursuit Of Global Security?, In London School Of Economics Law Review, 14 April 2025: **https://blog.lselawreview.com/2025/04/14/al-dulimi-and-montana-management-inc-v-switzerland-to-what-extent-does-the-application-of-unsc-resolution-1483-impact-the-protection-of-individuals-human-rights-in-the-pursuit-of-global-sec**

77Case of SS Lotus (France v. Turkey) PCIJ Series A, No 10, 19; L. Oppenheim, International Law: A Treatise Vol I, ed. Longmans, Green and Co, London, 1905, 194, par. 143. D. Liakopoulos, The role of not party in the trial before the International Court of Justice, op. cit.,

rights and interests of the community.[78] States cooperate and determine the conditions relating to the exercise of universal jurisdiction taking into account discussions that concern political communities and legitimate interests. These are criteria that include: -international consensus given the gravity of the case; -the desire for the victim community and victim organizations to have access to justice; -the risk for crimes even alleged not being prosecuted in another way; -where the accused is located; -the administration of justice, the quantity, quality and available evidence; -vulnerability and safety for victims and witnesses; -the reputation and respect for diplomatic relations of the prosecuting state; -cost-effectiveness of those exercising criminal prosecution.

12. THE PROBLEM OF COLLECTING, SCREENING, CONTROLLING AND USING EVIDENCE.

Another problem of criminal justice based on universal jurisdiction is related to the interests that imply the processes. International crimes are distinguished by important aspects presented as well as from national crimes. International criminal law deals with crime on an institutional scale that involves foreign states that are unwilling and unable to prosecute their crimes. The impunity related to this type of crime does not exist in a simple way because the perpetrators have escaped from the authorities and hide evidence.

Within this institutional and state context, evidentiary problems are created for national courts. National courts are not accustomed to dealing with mass crime. Not to mention crimes that involve a foreign state since the exercise of criminal prosecution represents a threat to governmental and not systems. The collection and access to evidence, the impact of mass social fear, the normative importance exposes an institutional context within chains of command that involves the prosecution in the path of international crimes that are serious demonstrate processes of universal jurisdiction. Problems that arise in universal jurisdiction processes are connected with: - collection and screening of evidence; - the collective context as a mirror of the evidence collected; - the memory of a crime/crimes from the evidence; - the connection between evidence and a crime and the accused.

13. THE PROBLEM OF GATHERING EVIDENCE CONNECTED WITH A PUNISHABLE CRIME AND THE ROLE OF THE ACCUSED.

To get to the gathering of evidence we need an important mechanism that should organize and work on it. Prosecutors, police, investigations are a team that intervenes in the processes of universal jurisdiction for international crimes. The processes provide the courts of third states and not in the territory where the crime was committed and/or the collection of their own evidence and/or the refusal by the authorities for the territorial state to investigate, investigate and prosecute. Private and public investigators, prosecutors of the state that is proceeding may encounter difficulties and hostility trying to access their territory where the crime was committed.

78ECtHR, Jorgić v. Germany of 12 July 2007, parr. 67-68. G. Letsas, Two Concepts of the Margin of Appreciation, in Oxford Journal of Legal Studies, 26, 2006, pp. 706ss. See criticism of the proportionality analysis by the ECtHR in Naït Liman v Switzerland, Application no 51357/07, Judgment, 15 March 2018

Denying direct access to a crime scene, to victims, witnesses, to their own evidence as well as to officials of a foreign state is a reality that is part of universal jurisdiction.[79]

National courts exercise universal jurisdiction by finding unusual reliance on evidence gathered by non-governmental organizations intervening in cases of civil emergencies. They also involve the commission of international crimes and contribute to the process of gathering evidence for trials that rely on universal jurisdiction. Initiating a universal jurisdiction case is a process of interdependence between state authorities and non-governmental organizations involving victims with a burden to initiate complaints and provide information for suspects, the nature of their allegations, names of witnesses who are at the place they will be tried or abroad. It is recalled in the Lama trial that the collection of the case file to get to the UK was quite difficult because it was in the hands of the Advocacy Forum, a non-governmental organization based in Nepal.

Non-governmental organizations are often not very practical. They list human rights violations for medical, humanitarian and advocacy purposes but not all the times lead to the collection of evidence for criminal purposes. There is not always precise evidence on proceedings which leads to their inadmissibility as they are used to inadequate procedures. Therefore, non-governmental organizations are sometimes forced to use inadequate procedures. Non-governmental organizations are forced to present evidence in criminal proceedings that is based on confidentiality interferring with relationships that cultivate the community and individuals in a trusting, reserved, precise manner. Non-governmental organizations respond to external facts that interfere with the perception of their objectivity and neutrality. In the Lama case, entrusting non-governmental organizations with evidence that was used in the trial of Colonel Lama was proven to be a mistake.[80]

Professionals working within non-governmental organizations, such as the advocacy forum, have built a case file in the Lama case.[81] Through cross-examination the advocacy forum collects witness statements and interviews that are often destroyed due to the civil war in the case under examination. The information log reveals witness statements. Staff and trainees of the advocacy forum note substantial alterations and amendments in witness statements in emails. The judge has cross-examined witnesses of the advocacy forum. This is a special safeguard for the examination of evidence provided by the advocacy forum noting the dangers of special procedures that result in injustice. Non-governmental organizations increase criminal accountability in atrocity contexts by developing varied, precise, rigorous methodologies for their evidence collection.[82] The complexity of evidence collection and prosecution of international

79Case of SS Lotus n 83, op. cit., For further discussion see also: T. Cochrane, The Presumption Against Extraterritoriality, Mutual Legal Assistance and the Future of Law Enforcement Cross-Border Evidence Collection, in Modern Law Review, 85, 2021, pp. 528ss.

80O. Bowcott, Nepalese officer cleared of torturing suspected Maoist detainees, in The Guardian (7 September 2016): https://www.theguardian.com/law/2016/sep/06/nepalese-officer-col-kumar-lama-cleared-torturing-maoist-detainees

81I. Massagé, M. Sharma, Regina v Lama: Lessons Learned in Preparing a Universal Jurisdiction Case, in Journal of Human Rights Practice, 10 (2), 2018, pp. 1, 13.

82Y. Han, Should German Courts Prosecute Syrian International Crimes? Revisiting the "Dual Foundation Thesis, in Ethics & International Affairs, 36 (1), 2022, pp. 42ss.

crimes is a reality for the prosecution of a trial.[83] Already in 2022, within the scope of the prosecutor of the International Criminal Court (ICC) and in cooperation with Eurojust, guidelines for the work of non-governmental organizations for international crimes were developed.[84]

The guidelines recognized the separation of roles between non-governmental organizations and private investigators and prosecutors. Two different workers and two different groups in the same job. They minimized the number of interviews for victim witnesses who avoid inappropriate interrogation practices in several accounts. Guidelines that recommended that non-governmental organizations limit collection, i.e. to refrain from detailed collection of potentially vulnerable witnesses.

14. THE PROBLEM OF REMEMBERING AND COLLECTING SUBSTANTIAL EVIDENCE OF MEMORIES AGAINST THOSE WHO HAVE COMMITTED INTERNATIONAL CRIMES.

It has proven difficult from an evidentiary point of view to collect evidence before a universal jurisdiction process since the collection of evidence in many circumstances was a traumatic social position that led to chaos. The alleged perpetrators have the ability to deny access to material evidence. This is evidence that provides to universal jurisdiction processes in the form of witness depositions. This puts the collection of evidence to a recomposition that was fallible from a human point of view.

Fear of retaliation affects the reliability of testimonial evidence in this context. International criminal law deals with mass crime. State judicial authorities do not have the capacity to protect victims and their families as witnesses in their home states. The former ICTY judge Patricia Wald has commented on her relationship with victims. Anonymous phone calls, intimidation, threats passed on by word of mouth, third party intermediaries verified testimony in The Hague.[85]

We recall within this framework, the newspaper Gorkha Patra as an expression of the government in Nepal which published the identities of victims in the Lama case who were involved in the trial.[86] A witness faced with the fear of losing his job stopped his testimony against a high-ranking officer from the Nepalese army. The personal and social trauma of the witness has been linked with the reliability of evidence in international criminal trials. Psychiatrists, clinical psychologists have studied trauma as interference to typical memory paths that influence the victim's ability to produce in a

83H. Van Der Wilt, "Sadder but Wiser"?: NGOs and Universal Jurisdiction for International Crimes, in Journal of International Criminal Justice, 13, 2015, pp. 238ss.
84ICC, Guidelines for civil society organizations: Documenting international crimes and human rights violations for accountability purposes, ICC, (21 September 2022): https://www.icc-cpi.int/news/documenting-international-crimes-and-human-rights-violations-accountability-purposes
85P. Wald, Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal, in Yale Human Rights and Development Law Journal, 5, 2002, pp. 217, 220.
86M. Sharma, Torture in Non-International Armed Conflict and the Challenge of Universal Jurisdiction: The Unsuccessful Trial of Colonel Kumar Lama, in S. Linton, T. McCormack, S. Sivakumaran (eds), Asia-Pacific Perspectives on International Humanitarian Law. Cambridge University Press, Cambridge, 2019, pp. 624, 638.

precise, coherent, chronological manner his own events.[87] International criminal courts have addressed the issue of trauma on the witness' memory trying to balance the assessment of the credibility of his evidence.[88]

The relevant jurisprudence from the former Yugoslavia and from Rwanda was very precise and detailed also on these topics.[89] ICTY distinguished between an event that was made and peripheral details.[90] The judges were focused on some fundamental characteristics from the point of view of testimonies[91] trying to accept that a witness forgets many times and confuses details but the result of trauma does not necessarily challenge the testimony that is given in relation to central facts relating to crimes and against the accused in a trial. The judges recognized the need to ensure the reliability of the evidentiary evidence based on the fact that after the time of the events took place witnesses suffered trauma.[92]

The appeal chamber of the ICTY has many times stated that the first instance chamber was rigorous in the assessment of identifying evidence.[93] In the ICC, judge Van Den Wyngaert stated that: "(…) cogent reasons that convincingly explain why a witness' memory is faulty (…) nevertheless considered reliable in relation to the other part (…)".[94] In complex cases the evidence was provided by psychologists because of the trauma on the witness' memory was often assessed differently by the judges.[95] In the Lama case the court refused to address the trauma of the witness. Many times, the expression: "I

87J. Herlihy, S. Turner, Should discrepant accounts given by asylum seekers be taken as proof of deceit, in Torture, 16, 2006, pp. 82ss. A. Topiwala, S. Fazel, Memory and Trauma, in M. Bergsmo, W. Ling Cheah (eds), Old Evidence and Core International Crimes, ed. TOAEP, Beijing, 2012. E. Smith, Victim Testimony at the ICC: Trauma, Memory and Witness Credibility, in R. Jasini and Gregory Townsend (eds), Advancing the Impact of Victim Participation at the ICC: Bridging the Gap between Research and Practice, ESRC, (30 November 2020): https://www.law.ox.ac.uk/sites/default/files/migrated/iccba-oxford-publication_30_november_2020_pdf

88ICC, Prosecutor v Bemba, Judgment of 21 March 2016, Trial Chamber III, Case No ICC-01/05-01/08, par. 230: "(…) bearing in mind the overall context of the case and the specific circumstances of the individual witness, the Chamber has taken into account that (...) witnesses who suffered trauma may have had particular difficulty in providing a coherent, complete, and logical account (…)". ICC, Prosecutor v Thomas Lubanga Dyilo, Judgment of 14 March 2012, Trial Chamber I, Case No ICC-01/04-01/06, par. 103. ICC, Prosecutor v Germain Katanga, Judgment of 7 March 2014, Trial Chamber II, Case No ICC-01/04-01/07, par. 83. ICC, Prosecutor v Mathieu Ngudjolo, Judgment of 18 December 2012, Trial Chamber II, Case No ICC-01/04-02/12, par. 49. ICC, Prosecutor v Bosco Ntaganda, Judgment of 8 July 2019, Trial Chamber IV, Case No ICC-01/04-02/06, parr. 79-80.

89R. Cryer, A Message from Elsewhere: Witnesses before International Criminal Tribunals, in P. Roberts, M. Redmayne (eds), Innovations in Evidence and Proof: Integrating Theory, Research and Teaching. Hart Publishing, Portland, 2007, pp. 381, 395-399.

90ICTY, Prosecutor v Kunarac, Kovac and Vukovic, Judgment of 22 February 2001, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, parr. 564-565.

91ICTY, Prosecutor v Delalic, Mucic, Delic and Landžo, Judgment of 20 February 2001, Appeals Chamber, Case No IT-96-21-A, par. 485.

92Prosecutor v Germain Katanga, op. cit.,

93ICTY, Prosecutor v Kunarac, Kovac and Vukovic, Judgment of 12 June 2002, Appeals Chamber, Case No IT-96-23-T & IT-96-23/1-T, par. 324.

94Prosecutor v Germain Katanga, op. cit., Opinion of Judge Van den Wyngaert, parr. 152-153.

95ICC, Prosecutor v Bosco Ntaganda, Judgment of 8 July 2019, Trial Chamber IV, Case No ICC- 01/04-02/06, par. 79; ICC, Prosecutor v Thomas Lubanga Dyilo, Judgment of 14 March 2012, Trial Chamber I, Case No ICC-01/04-01/06, par. 105.

do not remember" of the witness was heard in the courtroom as a key of the prosecution that treated as a source for the prosecutor, the defense, jury and judge. The witness could not remember what was behind the various testimonies on the same events and facts but with different stories even from previous witness statements. In this case, the judge judged this type of witness as idiosyncratic and did not allow any more cross-examination in the defense since the witness responded that he did not remember many facts that happened more than eleven years ago. For some it was a traumatic stress disorder on memory.[96] In this argument the English jurisprudence is taken into consideration, evidence on memory of witnesses that violate the competence of the jury.[97] The judge had instructed the jury regarding the fear that comes from a trauma connected with the reliability of a testimony of the victim witness. He has also emphasized that the victim witness had slept little and that she was attacked in the barracks by armed police while she was going to the barracks of the defendant. An alleged torture in the forest that was distracted by noises coming from the same forest.[98]

The prosecutor could make a closing statement asking the jury to rely on life experience considering inconsistencies and gaps in the victim's testimony. The main question is: what are the effects of torture?.[99] National courts have exercised universal jurisdiction thus addressing the effect and fear of trauma in a fair way without disproportionate and compromising the rights of vulnerable victims. The effect of individual and collective psychological responses such as trauma for mass atrocities leaves no experience for jurors.[100] Research has shown that memory is very complex. False memory from true memory is difficult to distinguish even for experts.[101] National

96Authors' notes, 30 June 2016 (legal arguments) and 1 July 2016 (judge's decision).

97In R v Pendleton (2002) 1 WLR 72: https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/pendle-1.htm; Lord Hobhouse affirmed that: "(...) the courts should be cautious about admitting evidence from psychologists, however eminent, as to the credibility of witnesses (…) the truth of verbal evidence, save in a very small number of exceptional circumstances, is a matter for the jury (…)". See also in argument the next cases: R v Bernard V [2003] EWCA Crim 3917: https://www.qebholliswhiteman.co.uk/cms/documents/ELA_Memory_Seminar_Presentation.pdf; R v JH; R v TG (deceased): https://vlex.co.uk/vid/r-v-x-childhood-793648469 [2006] 1 Cr App R 195: https://gcnchambers.co.uk/criminal-law-update-series-1-issue-14/; [2005] EWCA Crim 1828: https://www.casemine.com/judgement/uk/5b46f2042c94e0775e7f05bf; T. Benton, and others, Eyewitness memory is still not common sense: Comparing jurors, judges and law enforcement to eyewitness experts, in Applied Cognitive Psychology: The Official Journal of the Society for Applied Research in Memory and Cognition, 20, 2006, pp. 117ss.

98Authors' notes, 25 July 2016.

99R. Helm, Evaluating Witness Testimony: Juror knowledge, false memory, and the utility of evidence-based directions, in International Journal of Evidence and Proof, 25, 2021, pp. 264, 265.

100Crown Prosecution Service, Annex A: Tackling Rape Myths and Stereotypes, in Rape and Sexual Offences-Overview and Index of 2021 Updated Guidance (Legal Guidance, Sexual Offences, 21 May 2021): https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes; Crown Prosecution Service, Psychological Evidence Toolkit-A Guide for Crown Prosecutors, in Legal Guidance, (11 September 2019): https://www.cps.gov.uk/legal-guidance/psychological-evidence-toolkit-guide-crown-prosecutors. See also in argument: D. Bögner, J. Herlihy, C.R. Brewin, 'Impact of Sexual Violence on Disclosure During Home Office Interviews, in British Journal of Psychiatry, 191, 2007, pp. 77ss.

101S.M. Berthold, G. Gray, Post-Traumatic Stress Reactions and Secondary Trauma Effects at Tribunals: The ECCC Example, in B. Van Schaack, D. Reicherter, Y. Chang (eds), Cambodia's Hidden Scars: Trauma

justice has worked to understand and address the impact on private trauma and memory in specific contexts in individual cases of rape and sexual violence of a historical nature and beyond. Law and case law from international criminal tribunals provide precise guidance to national courts in assessing position, needs for rights, and past trauma of vulnerable witnesses.

15. THE PROBLEM OF COLLECTIVE GUILT AS AN ELEMENT OF INTERNATIONAL CRIMINAL JUSTICE.

Prosecuting international crimes is not an easy matter. The recognition of international law extends as an abstract entity for the state that implied individual criminal responsibility in the plurality of individual officials that constitute it. Crimes of aggression, genocide, crimes against humanity, war crimes are covered by individual criminal responsibility committed by groups against individuals or as members of groups.[102] Criminal proceedings of international inspiration and nature are intended as representation of a broader criminality as is recalled in the Nuremberg case that contained the main divisions of Nazi administration and was the harbinger of the birth of international criminal law.

International criminal law based on a systemic criminality allows and paradoxically gives rise to a national prosecution of international crimes. Collective guilt for national criminal justice is very difficult and complex since the attention is exclusively directed to the accused individual. The liberal vision for criminal justice and individual agency is a matter that entrusts anonymity to the collective will. Such a liberal perspective creates problems to the structural heart of international criminal justice. Individual agency is important to cover the role of the individual within a state institutional system. The collective element as a point of international criminal law differs from national criminal law that deals in a general way with exceptional criminal acts of a social normality. International criminal law deals with acts that authorize criminal normality. It focuses on the guilt of the individual that ignores the systematic, collective nature of crimes thus allowing the individual to march ahead the criminality of the system.[103]

National systems were focused on a single accused case. Instead, in cases of universal jurisdiction it is possible that investigations begin in a collective context that leads back to a single accused. Jurisdictions such as of Sweden, France[104], Switzerland,

Psychology in the Wake of the Khmer Rouge (Phnom Penh: Documentation Center of Cambodia, 2011, pp. 92. L.F. Sparr, J. D. Bremner, Post-Traumatic Stress Disorder and Memory: Prescient Medicolegal Testimony at the International War Crimes Tribunals? in Journal of the American Academy of Psychiatry and the Law, 33, 2005, pp. 722.

102G. Fletcher, Romantics at War: Glory and Guilt in the Age of Terrorism, Princeton University Press, Princeton, 2002, chapter: 3.

103D. Hirsh, The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination, in Social and Legal Studies, 10, 2001, pp. 530ss. M. Koskenniemi, Between Impunity and Show Trials, in Max Planck Yearbook of United Nations Law, 6, 2002, pp. 1, 14: "(…) international criminal trials 'serve as an alibi for the population at large to relieve itself from responsibility (…)".

104M. Ghyoot, W. Mahmoud Elfarss, Universal Jurisdiction: Arguments for a More Universal Double Criminality Requirement in France, in Opinio Juris (21 July 2023):

the Netherlands, Germany[105] have explicitly initiated structural investigations between national prosecutors who open investigations within specific structures in order to identify perpetrators of international crimes.[106] The ICC practice has allowed investigations to be conducted under situations of single accused that focus on a conflict, a territory and a precise time frame.

Selecting a single defendant in a universal jurisdiction trial dealing with mass crime situations often seems causal and artificial. In universal jurisdiction cases the choice of defendant depends on the alleged perpetrator traveling and obtaining residence in a country willing to exercise universal jurisdiction. Victim organizations face challenges of monitoring travel plans and movements of defendants preparing case files according to the trips they make. In this regard, non-governmental organizations collect information, evidence on a broad criminal base immediately after war and atrocities which entail the need for connection with physical acts and relevant documentary atrocities thus inserting figures of narrative and facts occurred.

In the Lama case the trial of potential defendants was linked to the UK and to a work of inserting the narrative as described by the advocacy forum thus exploiting the defense during questioning. The jury and judge highlight why they are not based on the

https://opiniojuris.org/2023/07/21/universal-jurisdiction-arguments-for-amore-universal-double-criminality-requirement-in-france/

105See also: Art. 153f of the Strafprozessordnung in the version in force from 1 January 2022, based on the law of 5 October 2021 (BGBl. I S. 4607). Prosecuting crimes committed abroad and by a foreigner did not imply the participation of the prosecutor since the foreigner was not present in his own territory and his presence was not foreseen. The accused was German, of active nationality. The possibility of proceeding with criminal manner exists only in the case that was open for the crime that a proceeding before an international court and a state connected to the crime is based on the criterion of territoriality and passive personality. Prosecuting the perpetrator of the crime exists in German territory, as a justification for the extension of the criminal action and the existence of a proceeding before a foreign international court. In this spirit it is also recalled art. 2 of the same article that excludes the crime of aggression referring to crimes provided by VStGB in the matter of crimes against humanity, genocide, war crimes, as well as minor crimes. And Art. 153c, lett. 1, para. 1 and 2 is affirmed that: "(…) - there is no suspicion against a German; -the offence has not been committed against a German; - no suspect is in Germany and his stay in Germany is not planned and-the offence is being prosecuted before an international tribunal or by a state on whose territory the offence was committed, of which a citizen is suspected of the offense or of which a citizen has been the victim of the offense (…)". It is noted that the discretionary power of the public prosecutor is limited in matters of genocide for crimes against war and immunity even in the absence of requirements such as active or passive nationality and in the presence of its own territory. The public prosecutor has the right not to initiate a criminal prosecution and conditional on the crime prosecuted in another place. The jurisdiction of a foreign international and/or national court that is connected to the crime based on criteria of territoriality, passive and active nationality. The obligation to prosecute foreign offenders and in the absence of a connection in another type of jurisdiction is also defined by the gestufte Zuständigkeitspriorität as a hierarchy of jurisdictions at levels that allows the jurisdiction of states that have a strict connection according to the principles of the ICC. This is the basis of art. 153F and the national connection open to the absence of a presence of the suspect in a territory which are practical and calculable considerations. In this way, procedures are taken into consideration that have no prospect of success in achieving stable and pre-established objectives. K. Ambos, International Core Crimes, Universal Jurisdiction and §153F German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case, op. cit.,

106W. Kaleck, P. Kroker, Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?, in Journal of International Criminal Justice, 16, 2018, pp. 166ss.

testimony of the key witness as well as why they do not mention the defendant in the opening statements immediately after an alleged torture. The judge in the Lama trial was busy eliminating evidence related to a collective enterprise for fear of obscuring the innocence of an individual defendant. The observations of the trial were difficult to ignore them and pull the individual not to admit other evidence of testimony in the systematic practice of torture in Nepal and in the Royal Nepal Army at the time.

The deliberate testimonies of Manfred Nowak as well as of the former UN Special Rapporteur on Torture are declared inadmissible before the judge who warns the jury that the evidence has limited relevance. In the UN report of 2006, the Special Rapporteur highlighted a systematic practice in Nepal according to methods of torture, that were described in a report, that reflected a conduct complained of the main witnesses. On the contrary, international criminal courts recognized a margin of admissibility for circumstantial evidence recognizing that such evidence was necessary for eyewitnesses and conclusive documents, relating to the alleged facts.[107] The model rules of procedure and admissibility of evidence in the ICTY provided for evidence of consistent conduct that was relevant to serious violations admissible in the interests of justice.[108] Reasonable doubt was applied independently of the evidence that was directly assessed. Circumstantial evidence was the only reasonable evidence that ultimately was present[109].

16. THE CONNECTION PROBLEM.

In a way that is distinct from national criminal law, international criminal law has not tended to focus on individuals who committed acts of physical violence against victims. International criminal law was an attempt to reach political systems in accordance with the commission of international criminal atrocities. High-ranking defendants were not the main protagonists in the statements and testimonies of witnesses. The memories of testimonies were often those of lower-ranking individuals and defendants who committed physical acts of atrocities. Even if questioned, it is unlikely that they were involved in the violence that accompanies most international crimes, that is, those who specifically planned and directed the atrocities. The nature of international crimes includes and has developed distinctive modalities that recognize the individual as an element of authority, institution, government of a society represented in the spirit of Art. 25 and 28 ICC.

Command responsibility allows for the criminal prosecution of commanders who failed to prevent and punish crimes committed by forces under their effective command and control. Co-perpetrator modalities allow for the criminal prosecution of individuals who contributed to the commission of a crime by a group of people acting towards a

107ICTY, Prosecutor v Milan Martić, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence of 19 January 2006, Trial Chamber I, Case no IT-95-11, par. 10. See also ICTY, Prosecutor v Delalić, op. cit.,

108ICTY, Rules of Procedure and Evidence, Rule 93. See also ICTY, Prosecutor v Krnojelac, Judgment of 15 March 2002, Trial Chamber II, Case no IT-97-25, par. 67.

109ICTY, Prosecutor v Stakić, Appeals Judgment of 22 March 2006, Appeals Chamber, Case no IT- 97-24-A, 219-220. ICTR, Prosecutor v Ntagerura, Appeals Judgment of 7 July 2006 Appeals Chamber, Case no ICTR-99-46-A, 304-306.

common goal. This is a modality that transparently places accountability on individuals of higher rank. In this way, greater attention is given to evidence that directly implicates the accused in acts of physical violence such as evidence of an official position in the context of international crimes committed.

The criminal enterprise is very complex and at the same time simple. It connects with the evidence to an appropriate context. The continuous trials as well as those not followed, according to the universal jurisdiction in criminal contexts of a national nature, find a modality of international criminal responsibility that is not always available. The defense attorney relates to the jury in the Lama trial since there is no court not to admit individual responsibility.[110] The responsibility of command demonstrates the existence of a direct order from the defendant who commits torture. Evidence of direct orders are those that obtain war, mass atrocity. And the victim at the time of an alleged torture reduces the question of vocal identification for the defendant, who places himself in his own scene. Identifying with vocal mode the relative statement for the jury is ultimately part of the judge's instructions. And it is the judge who always instructs the jury in the synthesis, in the experience of the evidence that is treated with caution and identifies the dangerous end of the victim witness of a voice identification expert who did not record his voice.[111] The defendant's role in the chain of command did not significantly consider his own guilt. The defendant's role in the chain of command responsibility uses his innocence. In a closing statement the defense attorney asks the jury to imagine and control soldiers, who are part of their context in a civil war also explaining that the colonel had other things on his mind and could not focus on a prisoner with precision. International criminal law, as well as Colonel Lama's inability to focus on the crime of torture by his subordinates was the basis for conviction in a national context, in a position of command, that used his own reason for his exoneration as the primary reason.

17. PROBLEMS OF TRANSLATION, DISSEMINATION OF DOCUMENTS, USE OF LANGUAGE DURING BEFORE AND AFTER A TRIAL.

In a trial both at national and international level documents and acts in a foreign language have an importance for the path of the trial. It is noted that cultural and linguistic difficulties are often arguments that are taken into consideration especially in a trial based on universal jurisdiction. The differences and difficulties in the initial statement of public prosecutor is often a linguistic gap. The universal jurisdiction trials, as we have seen in the Lama case, have a precise demonstration that concerns the difficulties that arise from the neglect of such differences. The challenges exclude the universal jurisdiction proceedings, that occurs in the trial, that involves foreign elements

110C. Del Ponte, Investigation and Prosecution of Large-Scale Crimes at the International Level, in Journal of International Criminal Justice, 4, 2006, pp. 539, 546: "(…) cooperation of insiders (…) access to contemporaneous records, notes, videos, minutes of meetings, orders, diaries, intercepts and photographs (…) the importance of 'records of governmental assembly meetings, crisis staff meetings, war presidencies, decisions, reports of the police department, newspaper articles, speeches and television interviews have all been significant in identifying the responsible leaders and the roles played (…)".

111R v Flynn and St John [2008] 2 Cr App R 20:https://www.casemine.com/judgement/uk/5b46f20c2c94e0775e7f14e2; [2008] EWCA Crim 970. https://vlex.co.uk/vid/r-v-kris-ronald-793046701

and cultures.

Universal jurisdiction processes by their very nature include proceedings against foreign nationals, that are conducted outside the territory where the alleged crime was committed. Prosecutors, judges, lawyers, defense attorneys are unfamiliar with relevant factors where they come from, places of crime, distances, language, political, historical context relevant to the process. In universal jurisdiction processes the translation problem is not univocal. The multiplicity of the community involved in these processes the problem that includes events of foreign participants as well as the way that certain individuals and foreign communities are part of an organized orchestra under the directions of judge in a courtroom. The exercise of universal jurisdiction presents a contribution to the national court involved. In universal jurisdiction processes the national court is not limited to a national audience but is based on the interests of international community, interstate community and the communities of victims. The accusatorial system in processes that involve political communities have a heterogeneous basis. The adversarial processes structure a competition between the prosecutor and the defense, that many times are not necessarily involved in their own case.[112] Accountability to communities, evidence, external cultures, interests leaves little room for accountability to them.[113]The linguistic, cultural, social distance between the parties judges ascertain the facts and communities of the victims that creates difficulties thus achieving objectives for the processes of a universal jurisdiction.

The adversarial courtroom at a trial is conducted in a language that is often foreign. Adversarial trials are based on a competitive process between two powerful and intolerant parties based on question-and-answer discourses in a foreign language.[114] However, it is the lawyers who do not facilitate interpretation since they use a technical and precise vocabulary.[115] At an adversarial court the lawyers are exclusively responsible by offering a margin of maneuver whenever they want familiar with linguistic distortions inadvertently and as a strategy to bring the truth into the courtroom.[116]

The court interpreter is one of the actors in universal jurisdiction processes.[117] The interpreter's role is not recognized in a general way but recognizes the lesser evil

112S. Aboueldahab, F.J. Langmack, Universal Jurisdiction Cases in Germany: A Closer Look at the Poster Child of International Criminal Justice, in Minnesota Journal of International Law, 31, 2022, pp. 2ss.
113D. Luban, Twenty Theses on Adversarial Ethics, in H. Stacy, M. Lavarch (eds), Beyond the Adversarial System, Federation Press, Sydney, 1999, pp. 134, 140.
114M. Feeley, The Adversary System, in R. Janosik (ed), Encylopedia of the American Judicial System, Scribner, New York, 1987, pp. 754ss.
115B. Danet, Language in the Legal Process, in Law and Society Review, 14, 1980, 446ss.
116T. Babington Macaulay (ed), The Works of Lord Macaulay vol 6, Longmans Ltd, London, 1897, pp. 136, 163: "(…) can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false (…)". M. Frankel, The Search for the Truth: An Umpireal View, in University of Pennsylvania Law Review, 123, 1975, pp. 1031ss. S. Berk-Seligson, The Bilingual Courtroom: Court Interpreters in the Judicial Process, University of Chicago Press, Chicago, 2002, pp. 22ss.
117Former ICTY judge Patricia Wald affirmed that: "(...) no judge in [an international] tribunal who does not acknowledge that he or she is totally at the mercy of the translator in the courtroom (…)". P. Wald, Running the Trial of the Century, in Cardozo Law Review, 27, 2006, 1559, 1570-1571.

tolerated and welcomed to arrive at a final verdict.[118] The carelessness many times and the importance of an interpretation in this type of case is important for the final result. It is reflected in the Lama trial that we noticed twenty witnesses from Nepal, who are presented in the courtroom with only one interpreter. The interpreter was the only one available and as a consequence he asked for a fee higher than the normal daily fee of a court interpreter. The court was getting what it paid for. The errors in translation were easily noticed because in this case they were covered by the witness instead of leading him to a correct interpretation in a technical way, which shows that his meaning was not conveyed adequately to the style of interpretation and to the quality of the interpreter.[119]

At many points in the Lama case the victim witness was uncontrollable, presenting some empathy in the courtroom, as the tone of the interpreter and the translation from the testimony were devoid of emotion and unexpected.[120] The first trial was halted based on concerns over interpretation issues.[121] The second trial had little success in finding additional interpreters. The court was set up with four interpreters to handle the examination of a judicial interpretation that was relevant during the break between the first and second trials. On the fourth day of the trial the defense attorney expressed concern, that things were moving very slowly and with continuous errors in interpretation. Speeches were varied and inaccurate many times especially during the examination of witnesses and cross examination demanding that words be translated precisely and accurately. Voice identification and the need for one's own precise language was crucial. The witness was wearing a blindfold. At the time of the alleged torture the issue was whether the witness correctly identified the voice of the accused at the time of his torture. There was relative confusion during the examination and the witness used the word soft to describe the voice he heard and the correct word was: polite. This was a major error which occurred when the interpreter used words such as colonel instead of sir thus translating a testimony according to what he heard from the soldiers that: "the colonel is about to arrive" at the site of the alleged torture. The judicial interpretation of the trial reflected that the Lama trial was not unusual for difficulties regarding the interpretation and statements of one's own testimonies. The quality of a linguistic interpretation is always a point of discussion at an international criminal court which highlights that national courts are right to adopt relevant practices for these types of hearings.

Interpretation in international criminal proceedings should be simultaneous thus preserving a translated speech with international courtrooms equipped with dedicated booths and simultaneous interpretation equipment, computer terminals that display an online transcript of an internet-connected proceeding allowing online references. International criminal courts have developed codes of ethics for interpreters,[122] that set

118S. Hale, J. Gibbons, Varying Realities: Patterned Changes in the Interpreter's Representation of Courtroom and External Realities, in Applied Linguistics, 20, 1999, pp. 203, 207.
119S. Berk-Seligson, The Bilingual Courtroom: Court Interpreters in the Judicial Process, op. cit.
120Authors' notes, 9 March 2015; Authors' notes, 10 June 2016.
121Authors' notes, 16 March 2015.
122ICC Rules of Procedure and Evidence, Rule 68. K. Qc, The Move from Oral Evidence to Written Evidence, in Journal of International Criminal Justice, 2, 2004, pp. 498. M.A. Fairlie, The Abiding Problem

out the relevant requirements for interpreting and translating in the judicial setting.[123]International criminal courts have increased provisions for the admission of evidence in written and/or pre-recorded form through live oral testimony, evidence that is intended to prove a different issue from the record and the conduct of the accused.[124] Access to written testimony is thus permitted to reduce costs, delays, and the possibility of linguistic errors providing evidence.

18. (FOLLOWS): THE PROBLEM OF DIFFERENT CULTURE.

Language problems in documents, translations, etc. are related to judging facts, investigators assessing their own context. An accusatorial system faces challenges of a task that judges and performs a foreign cultural context. In accusatorial systems and arbitrators is prohibited the independent information of evidence based on a cultural context. Its main role is to fill the political, cultural and social gaps entrusted to expert witnesses, who tend to present evidence in a detailed way of a more academic style than a courtroom. In accusatorial processes the legitimate role of the lawyer is often confused by the doubts created and the instruction of new evidence, that is admitted to be part of the old. The jury in the Lama case easily and quickly came to conclusions regarding the declaration of a state of emergency.[125]

The use of the term terrorist has been used many times by the opposition forces. The defense lawyer asked what kind of organization they used and the answer was: "(…) like Al Qaeda (…)". The defense lawyer through expert testimony connected with relatives, who were in the English courtroom. The Royal Nepal Army as an ally in the war has become the terror to the Maoists of Nepal, an existential threat to all. In the English common law system juries as well as judges ascertained facts that aggravated the problem of cultural disconnection with criminal proceedings and as a consequence to universal jurisdiction.[126]

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of Witness Statements in International Criminal Trials, in New York University International Journal of Law and Politics, 50, 2017, pp. 78ss

123L. Stern, What Can Domestic Courts Learn from International Courts and Tribunals about Good Practice in Interpreting?: From the Australian War Crimes Prosecutions to the International Criminal Court, in T & I Review, 2, 2012, pp. 8ss. J. Karton, Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony, in Vanderbilt Journal of Transnational Law, 41, 2008, pp. 2ss. International criminal tribunals have developed helpful guidelines regarding interpretation: International Criminal Court, Regulations of the Registry (as amended 1 August 2018) at https://www.icc-cpi.int/sites/default/files/Publications/Regulations-of-the-Registry.pdf

124United Nations, Code of Ethics for Interpreters and Translators Employed by the Mechanism for International Criminal Tribunals (Mechanism for International Criminal Tribunals, MICT/20, (2 November 2017)): https://www.irmct.org/sites/default/files/documents/171102-mict-20-code-of-ethics-for-interpreters-translators.pdf

125R. Donia, Encountering the Past: History at the Yugoslav War Crimes Tribunal, in The Journal of the International Institute, 11, 2004: https://quod.lib.umich.edu/j/jii/4750978.0011.201/encountering-the-past-history-at-the-yugoslav-war-crimes?rgn=main;view=fulltext

126M. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process. Yale University Press, New Haven CT, 1986, pp. 18ss: "(…) the inquisitorial system's preference for professional judge-led decision-making and the adversarial system's more community-based decision-making by a body of nonprofessional decision-makers (…) applying undifferentiated community standards (…)".

The jury builds a link between law and community that is applied to juries designed to encompass society in a transversal and representative way, as a fair and honest choice.[127] The location of the trial is important to the jury.[128]The jury system has used rules of law comparable to contemporary common sense.[129] The standard of juries evaluating evidence shows the knowledge of an experience that makes decisions in everyday life.[130]

Judge from the beginning of the Lama trial stated that the role of the jury was to bring its experience to the courtroom. An experience based on a civil war. The significant moments of the trial and the evidence are at risk of being understood in a context of errors. The jurors moved uneasily and exchanged glances at each other when the victim testified and explained why he was arrested, how and what he committed in his victims. A further problem was that the witnesses use the Nepalese calendar and not the Gregorian calendar to describe the facts.[131]

The judge with strict directions to the jury tried to show his credibility for the victim witnesses. They have sought compensation in the Kapilvastu District Court. A case of fraudulent compensation for torture cases. In November 2007 the victim witness received compensation of about 470 pounds based on a judgment accusing him of torture offences. The judge informed the jury in the English courtroom, that the judgment was obtained by fraud. A provision that was based and created to false impressions. The victim witness who lied on oath to the district court of Nepal stated that he was only in the barracks in June 2006 instead he was in June of 2005. The deadline provided by the law of Nepal that required the applicants to file their claims was 35 days after their release. The judge and jury do not take into account this time frame because in April 2006 a political change had occurred in Nepal with the King reinstating Parliament and handing over power to the government.[132] This provided the victims with an opportunity to lodge their complaints against the Royal Nepal Army. Previously this had been an impossible matter to pursue.[133]The Nepalese courts were aware of this context. They interpreted the date of release from detention in terms of physical and psychological factors accepting also the relative complaints. The effect of a misunderstanding in the UK court was an indication from the judge to the jury that according to overall evidence from the victim, the jury had to approach the victim's

127R v Sherratt [1991] 1 SCR 509, par. 31: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/734/index.do M.D.A. Freeman, The Jury on Trial, in Current Legal Problems, 34, 1981, pp. 65, 90; P.H. Robinson, J.M. Darley, Justice, Liability and Blame: Community Values and the Criminal Law, Westview Press, Boulder CO, 1995, 5-7.

128Cheryl Thomas, Diversity and Fairness in the Justice System (Ministry of Justice Research Series 2/07, (June 2007) par. 6: https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/diversity-fairness-in-the-jury-system.pdf

129Sir W. Holdsworth, A History of English Law, Methuen & Co, London, 1922, pp. 351ss.

130New York State Unified Court System, Criminal Jury Instructions of General Applicability: https://www.nycourts.gov/judges/cji/1General/cjigc.shtml

131W. Ling Cheah, Culture and International Criminal Law, in The Oxford Handbook of International Criminal Law, op. cit., pp. 762ss.

132BBC News, Nepalese Rebels Freed from Jail, BBC News 13 June 2006: http://news.bbc.co.uk/1/hi/world/south_asia/5075594.stm

133I. Massagé, M. Sharma, Regina v Lama: Lessons Learned in Preparing a Universal Jurisdiction Case, op. cit.,

testimony in a protective manner.[134]

Court proceedings with universal jurisdiction have not ignored the challenges arising from different cultures. And in inquisitorial systems such as in the Netherlands, investigating judges conducted trials with universal jurisdiction. Psychologists, interpreters were also regularly involved as part of the team. The aim was to receive advice from them through the examination of evidence. The judges of court proceedings with universal jurisdiction are conducted in Sweden, the Netherlands, Finland and have made field visits, thus accompanying prosecutors, lawyers and defense attorneys to visit places relevant for the witnesses.[135]

International criminal court procedures have evolved along the lines of recognizing the impact of linguistic and cultural diversity.[136] The adversarial system has demonstrated the ability to integrate cultural attributes and a style of communication that differs from court personnel. Judges in Australia and Canada working on cases involving indigenous peoples are required to participate in training and development programs designed to explain to their societies, customs, cultures, and Aboriginal traditions.[137]

The same capacities for information and adaptation are shown in the English courts. One recalls the jurisdiction in the courts of UK in the R v. Sawoniuk case. The jury was taken to Belarus, to Domachevo, the town where the accused murdered four Jews during the Nazi occupation. The jury being taken out of the UK to visit a place of an alleged crime was a reality. Such a procedure was not, however, followed in the Lama case.[138] The exercise of universal jurisdiction has continued to raise questions about appropriate procedures taking into account the distinct communities and cultures.[139]

134W. Ling Cheah, Culture-specific Evidence before Internationalized Criminal Courts: Lessons from Asian Jurisdictions, in Journal of International Criminal Justice, 17, 2019, pp. 1032ss. B. Sander, The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law, in International Criminal Law Review, 19, 2019, pp. 1015.

135M. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Proces, op. cit., pp. 112ss.

136L. Swigart, Linguistic and Cultural Diversity in International Criminal Justice: Toward Bridging the Divide, in University of the Pacific Law Review, 48, 2016, pp. 198ss. N. Combs, Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions, op. cit.,

137See: "Recommendation 96" of the Report of the Royal Commission into Aboriginal Deaths in Custody (Australia), vol V (15 April 1991): https://www.austlii.edu.au/au/other/IndigLRes/rciadic/. D. Eades, Judicial Understandings of Aboriginality and Language Use, in The Judicial Review, 12, 2016, pp. 472ss.

138N. Hopkins, War Crimes Jury to Visit Belarus, in The Guardian (9 February 1999): https://www.theguardian.com/uk/1999/feb/09/nickhopkins

139R. Paternoster, How Much Do We Really Know about Criminal Deterrence?, in The Journal of Criminal Law and Criminology, 100, 2010, pp. 765, 785ss: "(…) privilege consequentialist over retributivist justifications. Criminal law theories share the idea that public confidence is invested (…) aggregated symbol of a stable justice system (…) publicly announcing citizens' rights and responsibilities in the penal sphere (…)". P. Roberts, Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication, in R.A. Duff and others (eds), The Trial on Trial: Volume 2, Hart Publishing, Oxford, Oregon, Portland, 2006, pp. 57ss.

19. RAISING PUBLIC AWARENESS.

Proceedings under universal jurisdiction have a broad communicative function, both positive and negative. In universal jurisdiction proceedings, the national courtroom is not limited to serving a national audience but is also a conciliation forum for the interests of the international community, the interstate community and the communities of victims. The proceedings have a broad grouping of their objectives. Proceedings under universal jurisdiction differ from other national proceedings in this respect. In national criminal law, publishing individual proceedings is less important for national criminal justice, which comprehensively respects the daily ritual of national criminal proceedings. National criminal law aims to achieve a deterrent effect based on a broad critical expectation in the publicity of laws, that applied rigorously and with reasonable speed and consistency.

International criminal trials are exceptional, symbolic and representative. A psychological and pedagogical goal for individual international criminal trials is also ambitious, as individual trials seek to play a role in changing and understanding political and governmental systems. The ability of international criminal law to achieve its intended goals depends on an expressive function of individual trials of the communities involved. A value and legitimacy function is an authoritative expression for justice.[140] The English accusatory trial system has no basis equipped to perform its communicative function. The Lama trial went through the national justice system with cases of shoplifting, drug possession, domestic violence, etc. The dedications in the prints were blank. Restrictions on disclosure were in place. Publication of the documents during the trial, social media, the names of the judge, the accused, the lawyers for crimes charged to their accused were prohibited. The Lama trial took place in the Old Bailey as a private conservation between judge and lawyers.

The trial was not easy. The system considered public access as a threat. It was forbidden to take transcripts from the court. During the second day of the trial the judge threatened to close his gallery for some people, who were oriented towards the outside, that is to the balcony of the gallery to take some notes. At the end of the trial he did not deliver his sentence. After the lifting of the restrictions and the disclosure the verdict did not attract the interest of the media of the UK. The only relevant article in the press was about the verdict that appeared on a page of Times.[141]

The verdict was however in the national dailies of Nepal. Media reports showed some confusion and misunderstanding regarding the verdict process.[142] In the Nepalese

140B. Wringe, Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment, in Law and Philosophy, 25, 2006, pp. 161ss. A. Robert Sloane, The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law, in Stanford Journal of International Law, 43, 2007, pp. 39, 70. M. Damaška, What is the Point of International Criminal Justice?, in Chicago-Kent Law Review, 83, 2007, pp. 331ss

141J. Ames, Officer cleared of Nepalese torture claims, in The Times (7 September 2016): https://www.thetimes.com/uk/law/article/nepalese-officer-cleared-of-torture-claims-r2s085k6l

142S. Shrestha, The Curious Case of Colonel Kumar Lama: Its origins and impact in Nepal and the United Kingdom, and its contribution to the discourse on universal jurisdiction, in TLI Think! Paper 2/2018, pp. 22.

media it was explained that the expert committee, referring also to the jury, declared that Colonel Lama was clean, innocent.[143] Within a year Colonel Lama was promoted to Brigadier General. He returned to Nepal and one of the victim's witnesses asked: "(…) why didn't they believe me? (…), even though I didn't lie to myself and they hurt me". The accusatory process does not deal with the typical community. Participants and interests go beyond those of the parties involved. A bipolarity of the accusatory process is structured to achieve a delicate balance of power between the prosecutor and the defense. At the time of third party representations, the interventionist judge considered the interruption undesirable. The victims are marginalized through accusatory processes and in normative terms were strangers to their own proceedings.[144] The role of an accusatory process is aimed at healing the conflicts existing within the different communities. The effect is to aggravate them. The law is confronted with an aspect that recognises the accusatory process and witnesses, who are turned into weapons used against the opposing parties.[145] Victims become like "probative fodder".[146] The victim witnesses in the Lama trial are not met and briefed by the prosecutor. Are cut off by representatives of the non-governmental organisations based on the fact that these representatives were called as witnesses and discouraged from being in contact with members of the Nepalese community in the UK.[147] The victims as witnesses in the Lama trial faced with a cross-examination of an intimidating nature and were shocked and humiliated to be accused of lying.[148]

The victim witnesses in the Lama trial did not understand that their lawyer did not intervene when they were being accused. The national courts exercised universal jurisdiction in a cautious manner, neglecting the respective communities on whose behalf the universal jurisdiction trials are conducted, including the communities of the victims.[149] Written judgments were issued, which were ideally summarized in various press releases translated into the relevant languages. Practices that sensitize universal jurisdiction trials are compared also for other jurisdictions such as Sweden, Netherlands, Germany,[150] etc. In the Netherlands for example the prosecutors had a certain

143I. Massagé, M. Sharma, Regina v Lama: Lessons Learned in Preparing a Universal Jurisdiction Case, op. cit.,

144J. Doak, "Victims" Rights in Criminal Trials: Prospects for Participation, in Journal of Law and Society, 32, 2005, pp. 294, 298. A. Ashworth, Punishment and Compensation: Victims, Offenders and the State, Oxford Journal of Legal Studies, 6, 1986, pp. 86ss.

145W.T., Pizzi, Trials Without Truth. New York University Press, New York, 1999, pp. 197-198.

146M. Cavadino, J. Dignan, Towards a Framework for Conceptualizing and Evaluating Modes of Criminal Justice from a Victim's Perspective, in International Review of Victimology, 4, 1996, pp. 153, 155ss.

147I. Massagé, M. Sharma, Regina v Lama: Lessons Learned in Preparing a Universal Jurisdiction Case, op. cit., S. Shrestha, The Curious Case of Colonel Kumar Lama: Its origins and impact in Nepal and the United Kingdom, and its contribution to the discourse on universal jurisdiction, op. cit.,

148I. Massagé, M. Sharma, Regina v Lama: Lessons Learned in Preparing a Universal Jurisdiction Case, op. cit., S. Shrestha, The Curious Case of Colonel Kumar Lama: Its origins and impact in Nepal and the United Kingdom, and its contribution to the discourse on universal jurisdiction, op. cit.,

149O. Kavran, Communicating Justice: Lessons from International and National Courts and Prosecution Authorities Dealing with International Crimes, Asser Institute, (June 2022): https://www.asser.nl/media/795748/communicating-justice-lessons-from-international-and-national-courts-and-prosecution-authorities-dealing-with-international-crimes.pdf. See for example: Netherlands Public Prosecution Service: https://www.prosecutionservice.nl/topics/international-crimes

150The first trial under the VstGB was initiated in 2011 on 39 counts of war crimes and with 27 counts of crimes against humanity: https://trialinternational.org/latestpost/ignace-murwanashyaka/. It is noted

specialization in universal jurisdiction trials and for international crimes in the district court of the Hague. It is the only competent court to hear first instance trials concerning international crimes, that were active in the mass media, through press conferences, issuing press releases and running websites in various languages thus providing newspapers with summaries for criminal proceedings as well as access to an archive of audiovisual recordings with written summaries.[151] In some universal jurisdiction trials in the Netherlands, victims were recorded and sent a live streaming link to proceedings translated using subtitles in their mother tongue.[152]

In Germany, a bill was passed that included proposed amendments to the Gerichtsverfassungsgesetz. This is the law on the constitution of its own courts that improved the reception and dissemination of international criminal trials and judgments in German territory.[153] The amendments allowed its foreign media representatives to

that the Stuttgart Court of Appeal in 2015 sentenced Ignace Murwanashyaka, president of the FDLR (Democratic Forces for the Liberation of Rwanda), as well as his deputy Straton Musoni and thirteen others to eight years in prison. They were all arrested in Germany in 2009. Murwanashyaka was also convicted of aiding and abetting war crimes that were committed in the eastern Democratic Republic of Congo between 2008 and 2009. It was also noted that he was the head of the foreign terrorist organization. Musoni was also convicted of the charge of participating in a terrorist organization. Already in 2018, the Federal Court of Justice overturned the conviction against Murwanashyaka and a new trial was held (FDLR: Groundbreaking Trial in Germany: https://www.ecchr.eu/en/case/groundbreaking-trial-in-germany; In 2019, the defendant died but the trial has not been concluded yet. Note the application of VstGB. Germany asserted its jurisdiction based on conditional universal jurisdiction since Murwanashyaka and Musoni have been found on German territory since 1980. According to the principle of territoriality, the crimes were substantial since they ordered massacres that took place in the Democratic Republic of the Congo and were committed within German territory. See in argument: Rwandan Rebel Leader Dies in Germany Awaiting Retrial (2019): https://www.dw.com/en/rwandan-rebel-leader-dies-in-germany-awaiting-retrial/a-48385651). The prosecutor was based on the power of obligation to initiate investigations according to the rules of German international law. The suspicion thus formed the basis for investigations against himself. In practice, the relevant structural investigations for war crimes, other crimes that are based and derived from VstGB, have been consolidated (Strukturverfahren). We can speak of investigations directed against unidentified subjects to investigate evidence on structures and groups related to individual subjects. The instrument of structural investigations is compared with situations investigated with the ICC. It is noted in 2011 the norm of the Strafprozessordnung that provides for it, as well as the legal mechanisms that are used for other types of investigations such as hearing witnesses. The collection of evidence, the reports that are presented to the media, non-governmental organizations, international organizations that are not perfect have a form used in courtrooms. Preliminary investigations have an advantage in themselves. It, thus, allows the public prosecutor to act against the suspect, who identifies the investigations to a system that has allowed him to enter into the German territory, which constitutes the basis for the relative obligation to act. This constitutes an advance legal assistance against a certain suspect. In this case we are talking about absentia as well as about strong suspicions that the Federal Supreme Court has called and issued an arrest warrant against a specific object.

151F. Streiff, H. Rikkelman, Syrian Regime Crimes on Trial in the Netherlands, in Just Security (22 November 2023): https://www.justsecurity.org/90225/syrian-regime-crimes-on-trial-in-the-netherlands/

152German Ministry of Justice, Draft of a law for the further development of international criminal law, (14 July 2023): https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RegE/RegE_Voelkerstrafrecht.pdf?blob=publicationFile&v=2

153S. Talmon, Federal Minister of Justice Announces Major Changes to German Criminal. Law and Procedure with regard to Crimes Against International Law (GPIL-German Practice in International Law,

access simultaneous interpretation through universal jurisdiction trials, also authorizing audio and video recordings in the transfer trials for academic and historical purposes, which allowed the translation from German into English of judgments that were significant on international criminal law.[154]

20. CONCLUSION.

From the previous paragraphs it is evident that universal jurisdiction presents difficulties. It is not enough to be a reality to start and operate international justice and criminal proceedings in every country in the world in order to punish atrocities and international crimes that have not found justice and punishment in the international arena so far.[155]

With the birth of ad hoc criminal courts the constant flow for a new commitment, that exercises international criminal jurisdiction including hybrid courts, specialized reaching the maximum of the super partes court that deals with international crimes, namely the ICC, is a reality. In recent years we have witnessed an internal prosecution for international crimes through the mechanism of universal jurisdiction.[156]

International criminal proceedings recognize a system of international criminal justice, namely an emerging, decentralized justice. National courts exercise a universal jurisdiction that does not ignore the project they are part of.

In the UK the exceptional nature of trials with universal jurisdiction leads several legal teams at a distance providing an impetus to national actors to take stock of a situation that is confronted with lessons, that are immediately taken as history of the past. The lack of distinction in universal jurisdiction processes loses the processes, that achieve their goals.

At the international level, attention must be paid to the development of an agreed framework of rules and guidelines, that allow processes a universal jurisdiction, that best plays its role for the actors in the decentralized international criminal justice system.

At the national level, the actors of universal jurisdiction processes include political actors, such as governments, judges, lawyers, who assume responsibility and claim normative communities in question. Courts such as the Old Bailey risks becoming a legal world of a pluralist nature, as a reliance of the local roadmaps that translate the global disorientation. Thus, through the continuous war, the balance of the international community is lost and/or acquires a new face more challenging for the coming years in

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the fight against atrocities and impunity.

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