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Universal Jurisdiction: Law out of Context

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Universal jurisdiction enables the prosecution of international crimes by domestic courts in the absence of any nexus between the prosecuting state and the crime charged. While the temptation is for domestic judges to proceed with 'business as usual' in the conduct of such trials, difficulties in the practice of universal jurisdiction reflect the importance of developing a better understanding of the distinctive communities, interests, crimes and cultures these trials are intended to serve. The exercise of universal jurisdiction is commonly regarded as a form of domestic jurisdiction exercised pursuant to a sovereign right under international law. This article invites a re-conceptualisation of the concept of universal jurisdiction, explaining that it is not a form of domestic jurisdiction acquired based on sovereign nexus between the crime charged and the prosecuting state. Instead, it should be recognised as a form of decentralised 'international jurisdiction', exercised as part of a state's contribution to the enforcement of international criminal law. This re-conceptualisation has implications for the way in which domestic courts engage with many of the challenges facing universal jurisdiction trials, including problems of community, case selection, proof and translation.

Universal jurisdiction enables the prosecution of extraordinary crimes through ordinary means. This emerging legal concept recognises that certain grave international crimes can be prosecuted by a state's domestic courts in the absence of any connection between the prosecuting state and the crime charged.[1] For example, international crimes such as genocide, war crimes, crimes against humanity and torture can be prosecuted by courts in the UK regardless of the fact the crime was not committed in the UK, by a UK national or against UK nationals or interests.[2] The problem is that important objectives achiev-

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1 Princeton Principles on Universal Jurisdiction (2001) at http://hrlibrary.umn.edu/instree/princeton.html [https://perma.cc/9WFW-69Z9]; Madrid-Buenos Aires Principles of Universal Jurisdiction (2015) at http://jurisdiccionuniversal.org/wp-content/uploads/2018/07/Versión-final-Ppios-JU-Madrid-Buenos-Aires_EN-versión-última.pdf [https://perma.cc/EN78-5BH7]. See also the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences (2002).

2 International Criminal Court Act 2001, ss 51, 67A and 68 (genocide, crimes against humanity and war crimes, though individual must subsequently have become UK national or resident); War

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able through prosecution of international crimes risk being neglected through recourse to 'ordinary' municipal courts. While universal jurisdiction offers the potential greatly to expand the reach of international criminal law, it also creates difficult and under-appreciated challenges for domestic courts. A commonly under-appreciated factor is that such trials share more in common with international criminal justice than domestic criminal justice. While the temptation is for domestic judges to proceed with 'business as usual' in the conduct of universal jurisdiction trials, this can ignore certain incompatibilities between domestic and international criminal law.

The focus of this article is on universal jurisdiction prosecutions in the UK, concentrating in particular on challenges encountered in the common law adversarial tradition. Many of the reflections in this article were developed while observing the trial of Nepali Colonel Kumar Lama in London's Old Bailey. The trial of Colonel Lama was only the third universal jurisdiction trial ever to be completed in the UK.[3] In 2015 and 2016, Colonel Lama, a Colonel in the Royal Nepal Army, was tried in the UK on two counts of torture allegedly committed against two Nepali prisoners at the Gorusinghe army barracks in 2005 during Nepal's civil war (1996-2006). Colonel Lama was acquitted on one charge and the jury failed to reach a verdict on the other. At the trial's conclusion, the presiding judge Mr Justice Sweeney dismissed the jury with the words, '[i]t is relatively rare for so many witnesses to require interpreters and indeed for so many problems to arise in one case'.[4] Even the accused's solicitor, who had every reason to be happy with the acquittal verdict at the end of the trial, acknowledged in his statement to the media after the verdict that '[t]his case has run into a number of difficulties, in particular, the complexities arising from the fact that most evidence was in Nepal and in Nepali and that the witnesses were located in Nepal. The reliance by British police and the CPS on evidence gathered by a human rights organisation … has proven to be a mistake'.[5]

This article invites attention to the fact that the DNA of universal jurisdiction trials is distinct in important ways from that of other domestic criminal trials, connecting domestic courts to qualitatively different communities, interests, crimes and cultures. The foundations of the concept are still not fully understood. Indeed, to date, a coherent definition of universal jurisdiction has proven elusive. For James Crawford, 'attempting to derive a coherent theory for the extension of universal jurisdiction with respect to some crimes but not others

Crimes Act 1991; Criminal Justice Act 1988, s 134 (foreign torture 'whatever his nationality'); Geneva Conventions Act 1957.

3 The three completed universal jurisdiction trials to date in the UK are the prosecution of Belarusian Nazi commandant Andrei Sawoniuk in 1999 (war crimes), Afghan warlord Faryadi Sarwar Zardad in 2005 (torture) and Nepali Colonel Kumar Lama in 2016 (torture). On the first two trials, see further Mike Anderson and Neil Hanson, *The Ticket Collector from Belarus: An Extraordinary True Story of the Holocaust and Britain's Only War Crimes Trial* (London: Simon and Schuster, 2022); Tobias Kelly, *This Side of Silence: Human Rights, Torture and the Recognition of Cruelty* (Philadelphia, PA: University of Pennsylvania Press, 2011).

4 Owen Bowcott, 'Nepalese officer cleared of torturing suspected Maoist detainees' *The Guardian* 7 September 2016 at https://www.theguardian.com/law/2016/sep/06/nepalese-officer-col-kumar-lama-cleared-torturing-maoist-detainees [https://perma.cc/PT3C-SJ9Y].

5 *ibid*.

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is a futile exercise: rather, it may simply be that such jurisdiction is extended on a case-by-case basis in customary international law'.[6] Along these lines, leading scholars on the concept of jurisdiction in international law characterise universal jurisdiction as a form of domestic jurisdiction, additional and akin to other forms of extra-territorial jurisdiction, exercisable where the state's right to do so is recognised under treaty law or customary international law.[7] In this article, we take a different position. Contrary to these traditional perspectives, we argue that a coherent theory of universal jurisdiction is achievable if this form of jurisdiction is understood, not as a form of domestic jurisdiction dependent on state will expressed through treaty or custom, but as a form of international jurisdiction attaching to international crimes. Domestic courts exercising universal jurisdiction do so – not in pursuit of the state's sovereign right to do so – but as an element in a broader international criminal justice system. This internationalised function has implications that can only be appreciated through a greater understanding of (1) the community on whose behalf universal jurisdiction is exercised, (2) the interests such trials legitimately serve, (3) the dimensions of the evidentiary framework and (4) the broader cultural context in play.

The focus of this article is on the distinct challenges encountered by adversarial systems in universal jurisdiction trials, noting these challenges differ in some ways from those faced by inquisitorial systems.[8] The conclusion is not to suggest that UK courts must adopt entirely different rules of evidence and procedure when hearing such cases (although it is notable that over 20 states, including the UK, have now adopted specialised international crimes prosecution units and certain states such as Germany and the Netherlands are moving in the direction of specialised international crimes chambers).[9] The problem is rather that staunch adoption of a domestic mindset in decision-making related to such trials flies in the face of an increasingly pluralistic reality, ignoring innovations and developments in the prosecution of similar crimes by the Inter-

6 James Crawford, *Brownlie's Principles of Public International Law* (Oxford: OUP, 9th ed, 2019) 453.

7 Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 745-747; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: OUP, 2004) 4-5, 20-25; Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: OUP, 2015) ch 4 'Principles of Extraterritorial Jurisdiction' 129-130.

8 It is notable that, while international criminal tribunals initially adopted procedures that were primarily adversarial in nature, they are increasingly adopting more inquisitorial elements: Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (New York, NY: CUP, 2010) 290; Alphons Orie, 'Accusatorial v Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in Proceedings before the ICC' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 1439, 1442-1456; Francis J. Pakes, 'Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia' in Peter J van Koppen and Steven D. Penrod (eds), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (New York, NY: Springer, 2003) 309, 315-316. For an interesting comparison between the two systems, see Mirjan Damaška, 'Presentation of Evidence and Factfinding Precision' (1975) 123 *University of Pennsylvania Law Review* 1083.

9 International Center for Transitional Justice, 'Gearing Up the Fight Against Impunity: Dedicated Investigative and Prosecutorial Capacities' (Research Report, March 2022) at https://www.ictj.org/sites/default/files/2022-03/ICTJ_Report_Specialized_Units_Web.pdf [https://perma.cc/3RT9-NAPQ].

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national Criminal Court, ad hoc tribunals, specialist courts and other domestic courts involved in the prosecution of international crimes.[10] Universal jurisdiction trials that fail to account for the communities, interests, crimes and cultures engaged by such trials risk making a negligible or even corrosive impact, wasting the resources of domestic courts and failing to achieve the objectives of international criminal law.

THE 'PUBLIC' PROBLEM: QUESTIONS OF POLITICAL COMMUNITY

As the jury settled into their seats for the opening of *R* v *Kumar Lama* in Court No 1 in the Old Bailey, it was hard to avoid the discomfiting whiff of remoteness. The prosecutor's opening words to the jury summoned all the immediacy of a bygone fairy-tale, '[t]his is a story of what happened a long time ago to two men in a country which is far, far away'.[11] When the foreign court has no evident connection to the alleged crime, the question naturally arises for those assembled in the domestic courtroom: what business is this of ours? When the term 'universal jurisdiction' was mentioned in passing during the questioning of a witness on the ninth day of the Lama trial, a juror passed up a rare note asking the judge to explain its meaning. The judge explained that, while usually jurisdiction of courts is connected to geographical territory, universal jurisdiction means there are certain crimes that any court can prosecute regardless of where they happened and that 'torture is one of those'. The parties had nothing to add. For the presiding judge, and indeed for legal counsel, the question of the court's jurisdiction, being based in section 134 of the Criminal Justice Act 1988, was legally uncontroversial and merited little attention.

In the day-to-day business of domestic criminal law enforcement, jurisdiction is assumed to provide authority, with little opportunity to think about the justification of that authority. Yet the problem with the ritual performance of jurisdiction is that it can lead to the assumption that, so long as 'normal' rules are applied, the legal process can escape the political conflicts of a pluralistic society.[12] There seems little basis for this assumption in the case of universal jurisdiction trials. This highlights a potentially significant and under-analysed structural distinction between universal jurisdiction trials and domestic criminal trials. Duff describes this as the 'relational' character of criminal law.[13] Blackstone described criminal law as concerned with 'a breach and a violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity'.[14] The authority of the domestic criminal court to call another to account is based on the notion that the criminal law

10 For an earlier reprimand of the 'Reluctant Cosmopolitan', see Paul Roberts, 'Why International Criminal Evidence?' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Portland: Hart, 2007) 347.

11 Prosecution Opening Statement, Transcript, 7 June 2016, 2.

12 Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964) xiii.

13 R. A. Duff, 'Relational Reasons and the Criminal Law' (2013) 2 *Oxford Studies in Philosophy of Law* 175.

14 Sir William Blackstone, *Commentaries on the Law of England* (1813) iv, 5.

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addresses 'public' wrongs, properly concerning all members of the domestic community as citizens.[15] Thus, in the United Kingdom, cases are labelled as Rex (or Regina) v X, capturing the conception of being answerable to a local sovereign; in some US states, cases are labelled as People v X, capturing the idea of being liable to one's fellow citizenry; in France, criminal judgments are issued 'au nom du peuple français'; while in China, criminal cases are in the name of the 'People's Procuratorate' at various local levels, whose role is to 'educate the citizens to be loyal to their socialist motherland'.[16]

Observing a universal jurisdiction trial, it is impossible to escape the impression that the communities engaged are intrinsically different from the community addressed in normal domestic criminal trials. Hannah Arendt famously disparaged the 'common illusion that the crime of murder and the crime of genocide are essentially the same', explaining that '[t]he point of the latter is that an altogether different order is broken and an altogether different community is violated'.[17] The problem is that there does not yet seem to be a clear understanding of the political community on whose behalf universal jurisdiction prosecutions are undertaken. A number of alternatives present themselves, including the international community, the inter-state community, the affected victim community and the domestic community of the prosecuting state.[18]

The international community

It is commonly said of universal jurisdiction that it enables the prosecution of crimes that are so heinous that they 'shock the conscience of mankind' such that those who commit them are properly deemed 'enemies of humanity'.[19] The characterisation of these crimes as an attack on humanity is not simply rhetorical but has normative significance.[20] International crimes, distinguishable from transnational crimes or domestic crimes,[21] are identifiable based on an overwhelming consensus in the *international community* as to their moral

15 R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007) 54-55; R. A. Duff, 'Criminal Law and Political Community' (2018) 16 *International Journal of Constitutional Law* 1251, 1255.

16 Organic Law of the People's Procuratorates of the People's Republic of China, Art 4.

17 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, NY: Penguin, 2006, originally published 1963) 272.

18 Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 *European Journal of International Law* 427. See also Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: OUP, 2011).

19 The 'Princeton Principles on Universal Jurisdiction' (2001) n 1 above, present universal jurisdiction as a tool for vindicating 'the fundamental interests of the international community as a whole'. 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; *Filartiga* v *Pena-Irala*, 630 F.2d 876 (2nd Circuit, 1980) 890; Supreme Court of Israel 336/31, *Attorney General* v *Eichmann*, 36 ILR 28 at [10].

20 Ruti Teitel, *Humanity's Law* (Oxford: OUP, 2011).

21 Neil Boister describes international criminal law as 'a hierarchical order established by an international 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':

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heinousness.[22] International criminal law is 'a node of affective politics' uniting a broader community – namely the international community – around a notion of shared horror. Courts prosecuting such crimes have expressed themselves as acting in the name of a shared consciousness, described variously in judicial contexts as the 'common sense of mankind', 'the dictates of public conscience' and the 'Law of Humanity'.[23] Duff himself explained the relational aspect of international criminal law in terms that '[s]ome kinds of wrong should concern us, are properly our business, in virtue of our shared humanity with their victims (and perpetrators): for such wrongs the perpetrators must answer not just to their local communities, but to humanity'.[24] One of the normative implications of the connection between these crimes and the international community is that recognition of such crimes cannot be reduced to the will of a state, a set of states or even the will of the inter-state community. The prohibition of international crimes including genocide, crimes against humanity, war crimes and torture are peremptory norms, attracting the application of concepts such as *jus cogens* and *erga omnes*, taking compliance with these norms beyond the realm of state consent and recognising the role of the broader community in their enforcement.[25] In a similar vein, the right to exercise universal jurisdiction emerges from recognition that enforcement of these underlying norms transcends the will of individual states, justifying their enforcement in the name of the international community.[26]

Neil Boister, 'Further reflections on the concept of transnational criminal law' (2015) 6 *Transnational Legal Theory* 9, 15-16.

22 According to Hannah Arendt, 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': Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, NY: Penguin, 1994) 268-269. See also Christine Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in Kevin Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford: OUP, 2020) 769-771; Robert Cryer, 'International Criminal Law' in Malcolm Evans, *International Law* (Oxford: OUP, 5th ed, 2018) 745; William Schabas, 'Atrocity Crimes' in William Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge: CUP, 2016) 203.

23 International 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 Nuernberg Military Tribunals under Control Council Law No 10 (October 1946-April 1949), Vol IV(1) 496, 498.

24 R. A. Duff, 'Authority and Responsibility in International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: OUP, 2010) 589, 601.

25 International 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.

26 In Theodor Meron's words, 'the teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the "legislative" character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, 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': Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *American Journal of International Law* 348, 361. See also ICTY, *Prosecutor* v *Tadić*, Decision on Defence Motion on Jurisdiction of 10 August 1995, Trial Chamber, Case no IT-94-1 at [42], [44] and Decision

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The inter-state community

While universal jurisdiction relies on a shared consciousness in the international community about the criminality of the underlying conduct, the *inter-state community* must be engaged at an organisational level to engage the jurisdiction of domestic courts. Universal jurisdiction can be understood as a strategy devised by the inter-state community to assist in addressing international criminal law's enforcement gaps. According to this characterisation, it is a form of decentralised enforcement of universal legal values, establishing a burden-sharing agreement within the inter-state community through which states agree to allocate domestic courts an important role in the international criminal justice system.[27] The exercise of universal jurisdiction requires evidence of consensus by the inter-state community, consensus that can be expressed either via treaty or customary international law. In the case of treaties, it is important to recognise that not all treaties can grant truly 'universal' jurisdiction. There is a set of treaties recognising an obligation to exercise universal jurisdiction (sometimes described as 'prosecute or extradite' provisions) in relation to less serious crimes, including counterfeiting, drug-trafficking, money laundering and participation in organised crime.[28] Here, the obligation to exercise jurisdiction only applies *inter partes* and cannot create an entitlement to exercise criminal jurisdiction opposable to third states beyond the limits of customary international law.[29] By contrast, other instruments such as the UN Convention Against Torture, the Geneva Conventions and the Draft Articles on Prevention and Punishment of Crimes Against Humanity have been interpreted as extending the obligation to exercise universal jurisdiction beyond the collective jurisdiction of the states parties to the treaty.[30] Adoption of the 2023 Ljubljana-Hague Convention on

on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, Appeals Chamber, Case no IT-94-1 at [57], [59].

27 Frédéric Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political' (2015) 6 *Transnational Legal Theory* 89, 93.

28 Such treaties relate to transnational rather than international crimes, directed at the protection of 'parallel state interests' and based on reciprocity, equality and state consent, rather than the protection of fundamental values of the international community: Claus Kreß, 'International Criminal Law' in *Max Planck Encyclopedias of International Law* (March 2009) para 8; Boister, n 21 above, 16. For a full list of treaties, see 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 at https://legal.un.org/ilc/documentation/english/a_cn4_630.pdf (last visited 5 April 2024).

29 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 56-65; Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 589, 594; Kreß, *ibid*, para 6. Against this position, see Michael Scharf, 'Application of Treaty-Based Jurisdiction to Nationals of Non-State Parties' (2001) 35 *New England Law Review* 363.

30 For example, in the *Pinochet* decision, the UK House of Lords recognised that the UK could exercise jurisdiction over alleged torture committed in Chile from 29 September 1988 (the date the UK implemented its obligation under the Convention Against Torture into UK law) despite the fact Chile only ratified the Convention Against Torture on 30 September 1988 (what a difference a day makes!): *R* v *Bow Street Stipendiary Magistrate and Others, Ex parte Pinochet (No 3)* [1999] 2 All ER 97. Similarly in *Questions relating to the Obligation to Prosecute or Extradite*

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International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and other International Crimes has the potential to further consolidate this trend (Ljubljana-The Hague Convention). Under Article 8(3) of the Ljubljana-The Hague Convention, ratifying states assume an obligation to establish jurisdiction to prosecute any alleged offender of international crimes present in any territory under their jurisdiction.[31] Even if not all states ultimately ratify the treaty or accept the binding obligation in Article 8(3), adoption of this treaty provision by the conference of states parties evidences agreement that states have a right to assume an obligation to exercise universal jurisdiction in relation to the crimes of genocide, crimes against humanity, war crimes and other international crimes.[32]

The victim community

While the inter-state community has a right to recognise universal jurisdiction in relation to certain international crimes recognised as heinous by the international community, exercise of jurisdiction over these crimes is not purely a question of state right. As Alex Mills has identified, 'jurisdiction is no longer exclusively a right of states, but is at least to some extent a matter of individual right, that is, an obligation owed to individuals'.[33] In legal terms, this highlights an important connection between universal jurisdiction and the right of access to justice for victims and victim communities.[34] Under international human rights law, states have a legal duty to provide individuals with an effective remedy where their rights and freedoms have been violated.[35] The duty to provide an effective remedy does not necessarily encompass a duty to prosecute all crimes associated with human rights violations. Yet the situation is arguably different in relation to international crimes, where the obliga-

(Belgium v *Senegal)* [2012] ICJ Rep 422, the International Court of Justice was concerned 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: at [102].

31 Ljubljana-The Hague Convention, Arts 8(3) and 14. Note, however, 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. See discussion of drafting debates in Bruno de Oliveira Biazatti, 'The Ljubljana-The Hague Convention on Mutual Legal Assistance: Was the Gap Closed?' *EJIL:Talk!* 12 June 2023.

32 According to the Preamble, '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.

33 Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187, 229.

34 Hovell, n 18 above; Frédéric Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political' (2015) 6 *Transnational Legal Theory* 89.

35 International Covenant on Civil and Political Rights, Art 2(3); European Convention on Human Rights, Art 13; American Convention on Human Rights, Art 25; African Charter on Human and Peoples' Rights, Art 7.

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tion to prosecute appears to be shifting from a state right to a duty owed to victims.[36]

The victim community has a recognised interest in the prosecution of international crimes.[37] This is clear from the practice of universal jurisdiction. In descriptive terms, it is clear that most universal jurisdiction prosecutions occur as a result of pressure from victims and victim-support groups.[38] The legal question is whether this interest can be regarded as a right by victims of international crimes to access to justice, imposing a duty on states to prosecute such crimes in certain circumstances. In General Comment 31, discussing the duty to provide an effective remedy under Article 2(3) of the International Covenant on Civil and Political Rights, the Human Rights Committee noted that failure to bring to justice perpetrators of certain violations, including the prohibition against torture and crimes against humanity, would itself amount to a human rights violation.[39] In 2005, the General Assembly passed Resolution 60/147 on 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'. According to the Preamble, 'in 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'.[40] The resolution recognises 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]'.[41]

36 Antonio 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' (2018) 16 *Journal of International Criminal Justice* 751; Paola Gaeta, 'The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford: OUP, 2012); Payam Akhavan, 'Whither National Courts? The Rome Statute's Missing Half: Towards an Express and Enforceable Obligation for the National Repression of International Crimes' (2010) 8 *Journal of International Criminal Justice* 1245.

37 UN 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; Francesco Francioni, *Access to Justice as a Human Right* (Oxford: OUP, 2007) 37.

38 For a broader statistical survey, see Leslie Johns, Máximo Langer and Margaret E. Peters, 'Migration and the Demand for Transnational Justice' (2022) 116 *American Political Science Review* 1184. See also Reydams, n 7 above, 221.

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

40 GA Res 60/147, Preamble.

41 GA Res 60/147, Art 4. See also UN Commission on Human Rights Res 2005/81 (21 April 2005); 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.

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The domestic community of the prosecuting state

Paradoxically, the political community with the most remote interest in the trial is that of the prosecuting state. Universal jurisdiction prosecutions cannot be explained solely on the basis of the sovereign interests of the prosecuting state acting on behalf of its domestic public.[42] The Lama trial could hardly be described as a 'fury of judging' by a galvanised English public. Instead, it proceeded in a fairly mundane register overlooked by a relatively disengaged jury, an empty public gallery and minimal media attention.

That is not to say that the interests of the domestic public are irrelevant to the justification for assuming jurisdiction. The point is that these interests are largely derivative of the interests of other communities, reinforcing the sense that universal jurisdiction should be understood as a state's contribution to the enforcement of international criminal law. In the second universal jurisdiction trial in the UK (*R* v *Zardad*), the then-Attorney-General Lord Goldsmith took the rare decision to act as lead prosecutor in the case.[43] In doing so, he explained he was acting, not on behalf of the British people, but 'on behalf of the rule of law',[44] invoking the idea that the interest at the heart of the trial was the enforcement of international law. On the other hand, other UK representatives have been quick to emphasise that they do not wish UK courts to assume a broad role as global enforcer. In the House of Lords debate relating to the scope of UK jurisdiction over international crimes, Baroness Scotland (who introduced the International Criminal Court Bill into the House of Lords) recalled the long-term policy and concern of the UK that it does not wish 'unilaterally take on the role of global prosecutor'.[45] Another member of the House of Lords emphasised that '[o]ur aim is not to become a policeman for the world'.[46]

If anything, the interests of the prosecuting state are deployed to narrow the 'universality' of universal jurisdiction, requiring some link to the prosecuting state. This is clear from the rationale most often used by the UK and other states to justify the exercise of universal jurisdiction, articulated in terms of providing 'no safe haven'.[47] The War Crimes Act 1991 enabling the prosecution by UK courts of Nazi war criminals was passed following advice of the War Crimes Inquiry 1988 that inaction would 'taint the United

42 Higgins, n 29 above, 56.

43 Of the 30 court appearances during his time in office, this 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 (last visited 5 April 2024).

44 Interactive Dialogue on 'Universal Criminal Jurisdiction: A Key Tool in the Fight Against Impunity for Atrocity Crimes in Ukraine and Beyond' New York, 16 October 2022. In explaining to the court why the UK had decided to try the case, Lord Goldsmith described the accused's acts as an 'affront to justice': 'Afghan Zardad jailed for 20 years' *BBC News* 19 July 2005.

45 *ibid*.

46 HL Deb vol 712 col 658 7 July 2009, Lord Bach (Parliamentary Under-Secretary of State Ministry of Justice).

47 Máximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Jurisdiction' (2015) 13 *Journal of International Criminal Justice* 245. See also Mari Takeuchi, 'Asian Experience with Extraterritoriality' in Austen Parrish and Cedric Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (Cheltenham: Edward Elgar, 2023) 165.

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Kingdom with the slur of being a haven for war criminals'.[48] Indeed, during the debate in the House of Lords over the scope of universal jurisdiction to be recognised by the International Criminal Court Act 2001, it was noted that the 'primary concern' of a number of their Lordships was that 'someone could come and hide here [in the UK]; that we could have a situation where a war criminal, a despot, a tyrant, was able to make Britain a safe haven'.[49] The aim of the intended Act was described as being to 'provide a robust regime which will prevent the UK being, or being seen as, a safe haven for war criminals'.[50]

Conclusion: the political communities of universal jurisdiction trials

The better view is that universal jurisdiction trials are not carried out in the interests of a single political community but are polycentric.[51] Universal jurisdiction forms part of a state's contribution to the enforcement of international criminal law. It is essentially a licence granted by the *inter-state community* to universalise the right of access to justice for *victim communities* enabling *third states* to prosecute certain heinous crimes of concern to the *international community*. As we shall see in the next section, greater clarity about the communities on whose behalf universal jurisdiction trials are undertaken can be critical to determining the appropriate balance between the competing interests at play in the controversial question of case selection. It is in achieving the appropriate balance between these interests that universal jurisdiction faces its next significant challenge: to address and temper claims of the inherent selectivity of international criminal justice.

THE 'SELECTIVITY' PROBLEM: QUESTION OF INTERESTS

Greater understanding of the political communities on whose behalf universal jurisdiction trials are prosecuted assists in providing clarity about the interests legitimately in play in decision-making about such trials. Where there is a perceived gulf between the political communities of the prosecutor and the prosecuted, questions naturally arise as to the interests served by the trial. Where case selection is based on interests seen as remote from those of affected communities, the objectivity of the courtroom becomes open to question. The concept of universal jurisdiction has been accused of masking significant political contests through which a domestic court can become complicit in imposing the

48 Thomas Hetherington and William Chalmers, *Report of the War Crimes Inquiry* (London: HMSO, 1989) para 9.18. See further A. T. Richardson, 'War Crimes Act 1991' (1992) 55 *Modern Law Review* 73.
49 HL Deb vol 623 col 423 8 March 2001, Lord Goldsmith.
50 HL Deb vol 623 col 419 8 March 2001, Baroness Scotland of Asthal.
51 Thank you to Annemarie Devereux for prompting clarification of this point.

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prosecuting state's interests on external political communities while failing to consider the political interests of those communities.[52]

The most common form of this critique emphasises the 'selectivity' of universal jurisdiction prosecutions. Of course, selective enforcement is not inherently wrong. Prosecuting all persons responsible for international crimes is impossible.[53] The problem arises where the interests that form the basis of case selection are perceived as irrelevant or illegitimate.[54] In order to unpack real and perceived anxieties about the selectivity of universal jurisdiction, we examine three critiques stemming from concerns about the interests driving such prosecutions: (1) the imperial problem; (2) the lawfare problem; and (3) the diplomatic cost problem. Interrogation of the bases of these critiques reveals they can be based on distorted understandings of the interests driving universal jurisdiction prosecutions, but also underlines the need to agree conditions regulating case selection. In the final section, we recommend proposed criteria to regulate prosecutorial discretion in relation to universal jurisdiction trials.

The imperial problem

Colonel Lama was only the second person in the UK ever to be prosecuted for torture. Considering the arc of history, Colonel Lama seems rather unlucky to have earned this infamy. No British national has ever been prosecuted in UK courts for torture, despite credible criminal allegations being made against British personnel.[55] In the House of Lords, the idea of prosecuting any British soldier for international crimes was ridiculed, with Lord Hoyle exclaiming that the very idea that a 'gallant' UK officer could end up 'in the same dock as that

52 Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1 *London Review of International Law* 63; Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Oxford: Routledge, 2012).

53 ICTY, *Delalić et al*, Judgment of 20 February 2001, Appeals Chamber, Case No IT-96-21-A at [602].

54 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2009) 192-193.

55 Perhaps the most controversial allegations to emerge publicly relate to the death of Baha Mousa, who sustained 93 injuries and was beaten to death in Basra in 2003 while in the custody of British soldiers. This resulted in only one successful criminal prosecution on the charge of inhuman treatment, resulting in a sentence of 12 months. Over the course of a six-month court martial costing £20 million, one soldier pleaded guilty to the war crime of inhuman treatment and received a sentence of 12 months, while charges were dropped or acquittals entered against six other soldiers: Nathan Rasiah, 'The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice' (2009) 7 *Journal of International Criminal Justice* 177. A critical report of the court martial can be found here: Mark Townsend, 'How army's £20m trial failed to find the killers' *The Observer* 18 March 2007) at https://www.theguardian.com/uk/2007/mar/18/iraq.military [https://perma.cc/45VQ-VJKM]. See also Sir Peter Gibson, *The Report of the Detainee Inquiry* (London: TSO, 2013); Sir Thayne Forbes, *The Report of the Al-Sweady Inquiry Vol II* HC 818-II (2014) para 5.196; Sir William Gage, *The Baha Mousa Public Inquiry Report Vol I* HC 1452–I (2011) 1043-2.1045; *In the Matter of Applications by Margaret McQuillan, Francis McGuigan and Mary McKenna* ('Hooded Men' case) [2021] UKSC 55; Conor Gearty, 'British Torture, Then and Now: The Role of Judges' (2021) 84 *Modern Law Review* 118.

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in which Milosevic has appeared must be wrong in itself'.[56] The Lama trial was only the third universal jurisdiction trial to have run to completion in the UK.[57] By contrast, universal jurisdiction prosecutions have failed to be initiated against alleged perpetrators from Israel, China and Egypt.[58] Nothing seems to distinguish Colonel Lama for this unusual distinction except that, like the first person to be prosecuted Afghan warlord Faryadi Sarwar Zardad, he was a foreign citizen from a small developing country. While Nepal's government reacted angrily to Colonel Lama's arrest, this served merely to expose the unholy (and inverse) relationship between justice and power. Besides submitting a protest note to the UK government, the most Nepal's government could do in reaction to Lama's arrest was to reject the offer of RAF chinook helicopters to help in the relief effort following the devastating earthquake in Nepal in April 2015.[59]

Looking more broadly, a map of the nationalities of prosecutors and accused in universal jurisdiction prosecutions reveals a familiar though uncomfortable pattern. A survey of completed universal jurisdiction trials until 2020 shows that 75 trials were conducted by 18 prosecuting states, 16 of which form part of the Western European and Others group in the United Nations.[60] Conversely the accused in universal jurisdiction trials (if we exclude the five trials against former Nazi accused) are drawn from 13 states, none of whom are from the Western European and Others group and all of whom are classified as developing economies.[61] The survey seems to repeat a historical pattern in which 'morality comes from the West as a civilizing agent against lower forms of civilization'.[62] Against this backdrop, it is understandable that universal jurisdiction has been critically described as a 'form of international aid' or part of a 'newfangled civilizing mission' through which the rule of law is delivered to the 'unruly space' of the Global South under the tutelage of more developed states.[63] This was the message of Judge ad hoc Bula Bula's dissenting opinion in the International Court of Justice's *Arrest Warrant* case, in which the judge

56 HL Deb vol 673 col 1223 14 July 2005, Lord Hoyle, cited in Gerry Simpson, *Law, War & Crime* (Cambridge: Polity, 2007) 68.

57 See n 3 above.

58 Requests to issue or execute arrest warrants failed against Israeli General Doron Almog, former Israeli foreign minister Tzipi Livni, Israeli defence ministers General Shaul Mofaz and Ehud Barak, China's Minister for Commerce and International Trade Bo Xilai and director of the Egyptian Military Intelligence Service Lt General Mahmoud Hegazy. Though General Augusto Pinochet was cleared for extradition to Spain by the House of Lords, then-UK Home Secretary Jack Straw blocked his extradition and facilitated his return to Chile, accepting medical evidence that he was unfit to stand trial in Spain on charges of torture.

59 Janak Sapkota and David Brown, 'Nepalese army officer charged with torture' *The Times* 5 January 2013 at https://www.thetimes.co.uk/article/nepalese-army-officer-charged-with-torture-zb76p360qvn [https://perma.cc/KL3P-D75L].

60 Data is drawn from Johns, Langer and Peters, n 38 above, 1189-1190.

61 https://www.imf.org/external/pubs/ft/weo/2022/01/weodata/groups.htm [https://perma.cc/FRM3-2VFZ].

62 Mukau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia, PA: University of Pennsylvania Press, 2002) 15.

63 David Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 505, 512; John Reynolds and Sujith Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice' (2016) 14 *Journal of International Criminal Justice* 959, 961.

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described universal jurisdiction as a 'variable geometry', selectively exercised against some states to the exclusion of others.[64]

Along the same lines, scholars have condemned international criminal justice as 'less a toll of international justice than the judicial concomitant to Western intervention'.[65] Yet we might want to question too much handwringing over imperialism at just the point where wealthier states offer a system of judicial burden-sharing to enable victims of post-colonial governments access to justice. As Asad Kiyani notes, the aim of the imperialist critique is not to prioritise the interests of the decolonised Third World state and its elites, but to prioritise the interests of Third World peoples.[66] The point of universal jurisdiction prosecutions is to offer access to justice for victims in circumstances where it is otherwise unavailable.[67] Where the principle is understood in terms of access to justice for individuals, an argument that supports equality of arms for developed and developing states to shield their officials from prosecution seems misconceived. Applied to the context of universal jurisdiction, the imperial critique finds a not-so-distant echo in Lord Rodger's expressed concern in *Al Skeini* v *Secretary of State for Defence* that the extension of ECHR protections to Iraqi claimants allegedly killed and tortured by British forces risked engaging in 'human rights imperialism'.[68]

The potential intellectual misstep in the imperial critique is that it misconstrues the driving force behind universal jurisdiction prosecutions. It imagines a scenario in which the foreign prosecuting states forge ahead with prosecution in circumstances where courts in the affected state or states are themselves willing and able to prosecute. In practice, as discussed above, in most if not all universal jurisdiction trials, the motivation for prosecution quite clearly does not derive chiefly from the prosecuting state. A recent study by Leslie Johns, Máximo Langer and Margaret Peters reflects that victim migrants are the main agents driving the initiation of universal jurisdiction claims, demonstrating through statistical research that states typically assert jurisdiction based on pressure from migrants fleeing repression and war who move across state borders and seek

64 *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 at [15]. In a spirit 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, summoning the spectre of Belgian atrocities in the Congo a century before: '[e]ven as 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'.

65 Tor Krever, 'Dispensing Global Justice' (2014) 85 *New Left Review* 67, 97; Samuel Moyn, 'Of Deserts and Promised Lands: The Dream of Global Justice' *The Nation* 19 March 2012.

66 Asad Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14 *Journal of International Criminal Justice* 939, 941. See also Anthony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in International Conflicts' (2003) 2 *Chinese Journal of International Law* 77, 78.

67 Anghie and Chimni, *ibid*, 95.

68 *Al Skeini and ors* v *Secretary of State for Defence* [2007] UKHL 26 at [78]. In a context where Britain had invaded and occupied parts of Iraq, Lord Rodgers argued that 'the 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': *ibid* at [78].

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out avenues for prosecution.[69] There is an argument that this statistical reality should be converted into a legal condition of 'complementarity' in order to avoid future abuse of the principle, such that universal jurisdiction may only be exercised where courts with a greater nexus to the crime are unwilling or unable to prosecute.[70] In the meantime, strategic pursuit of litigation by victims and victim organisations should not be described as imperialistic. On the contrary, where universal jurisdiction fulfils the right of victim populations to access to justice, it can be regarded instead as 'an important facet of today's international criminal justice system' with important 'counter-hegemonic potential'.[71]

The lawfare problem

According to the interpretation of universal jurisdiction we have proposed, foreign domestic courts are intended to provide neutral vessels for the delivery of access to justice to victim populations. Of course, the humanitarian basis of a principle is no antidote to misdeed. Anxiety about universal jurisdiction extends to a concern that foreign domestic prosecutions could be manipulated or deployed as an instrument of legal warfare against political adversaries. This problem was raised by Henry Kissinger (himself a target of attempted universal jurisdiction prosecutions), who described universal jurisdiction as a form of 'judicial tyranny' which could '[turn] into a means to pursue political enemies rather than universal justice'.[72] More broadly, there is a concern that universal jurisdiction prosecutions might be used as ammunition to delegitimise political projects rather than as a mechanism through which to establish individual accountability for international crimes.

Henry Kissinger's outrage at the move to submit 'international politics to judicial procedures' sounds increasingly off-key to the modern ear more accustomed to distinguishing between state policy and international crimes.[73] However, these concerns about the abuse of the principle by political enemies are not entirely unfounded.[74] In 2009, UK newspaper *The Times* reported that '[t]he Islamist group Hamas is masterminding efforts to have senior Israeli leaders arrested for alleged war crimes when they visit European countries including Britain'.[75] In fact, it was not Hamas but NGOs, including the EU-funded Palestinian Centre for Human Rights (PCHR) and UK-based Lawyers for Palestinian Human Rights, who were behind requests to issue UK arrest warrants against General Doron Almog (2005) and former Israeli foreign minister Tzipi

69 Johns, Langer and Peters, n 38 above.
70 See further Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 *Journal of International Criminal Justice* 561.
71 Florian Jeßberger and Leonie Steinl, 'Strategic Litigation in International Criminal Justice' (2022) 20 *Journal of International Criminal Justice* 379, 400-401.
72 Henry Kissinger, 'The Pitfalls of Universal Jurisdiction' *Foreign Affairs* July/August 2001.
73 *ibid*.
74 Ordre Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: OUP, 2016) ch 6.
75 James Hider, 'Hamas Using English Law to Demand Arrest of Israeli Leaders for War Crimes' *The Times* 21 December 1994.

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Livni (2009). Nevertheless, and despite the fact these arrest warrants were not executed, Kittrie notes that the issue of arrest warrants can still have damaging interim effects, 'potentially [influencing] the decision-making calculus of Israeli commanders; [contributing] to Israel's delegitimization and demoralization; and [reducing] Israel's ability to conduct diplomatic relations and communicate effectively with foreign audiences'.[76]

It is clear that anxieties about punishment of state officials continue to exist alongside anxieties about the impunity of state officials. The problem is that the lawfare critique and associated anxieties stem from a misconception of universal jurisdiction as a tool (or weapon) at the disposal of the prosecuting state. Overemphasis of the risk of state lawfare ignores the fact that there is little evidence that states are the main drivers of universal jurisdiction prosecutions.[77] Far from engaging in an aggressive pursuit of universal jurisdiction prosecutions, states have at times been too responsive to each other's concerns, rolling back universal jurisdiction legislation and reducing the reach of their jurisdiction rather than expanding it.[78] Nevertheless, the risk of universal jurisdiction prosecutions being conducted in bad faith should not be entirely discounted. As in the case of human rights litigation, it seems appropriate that the state should recede in importance in directing the selection of universal jurisdiction trials and more openly acknowledge and notarise the role of victims and victim organisations. In order to quell both the fear and potential for abuse of universal jurisdiction, a state's exercise of discretion in decision-making about universal jurisdiction should include due regard to whether there has been a request by victims or a representative victim organisation in circumstances where the territorial state or state of nationality is unwilling or unable genuinely to prosecute.

76 Kittrie, n 74 above, 262. Indeed, the 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': PCHR, *The Principle and Practice of Universal Jurisdiction: PCHR's Work in the Occupied Palestinian Territory* (January 2010) 131.

77 The UK opposed the inclusion of universal jurisdiction provisions in the Genocide Convention and Apartheid Convention and initially in the Torture Convention, fearing its application to UK personnel in the context of the on-going violence in Northern Ireland. It changed its position following the judgment from the European Court of Human Rights in *Ireland* v *UK* that UK interrogation techniques did not reach the threshold of torture: Amina Adanan, 'United Kingdom Policy Toward Universal Jurisdiction Since the Post-War Period' (2021) 21 *International Criminal Law Review* 1025.

78 Immaculada Sanz, 'China Bristling, Spain Seeks to Limit its Judges' International Rights Powers' *Reuters* 11 February 2014; Gordon Brown, 'Britain must protect foreign leaders from private arrest warrants' *The Telegraph* 3 March 2010; Ian Black, 'UK to review war crimes warrants after Tzipi Livni arrest row' *The Guardian* 16 December 2009; 'Straw Apology on Israeli Arrest' *BBC News* 22 September 2005; Statement by Foreign Secretary David Miliband, 15 December 2009; 'Belgium Moves to Limit War Crimes Law, Repair US Ties' *LA Times* 2 August 2003; Craig Smith, 'Rumsfeld Says Belgian Law Could Prompt NATO to Leave' *New York Times* 12 June 2003. See further Sarah Williams, 'Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions' (2012) 75 *Modern Law Review* 368.

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The 'diplomatic cost' problem

While there may be significant rhetorical force in imagining universal jurisdiction oscillating ambivalently between imperialist interventions and aggressive show trials, these arguments are based more on reasonable suspicion than reasonable evidence. In practice, universal jurisdiction trials tend to be the result of a sensible wager on the part of the prosecuting state in each individual case, weighing diplomatic credit for participating in the prosecution of international crimes against the economic and diplomatic cost in international relations terms. For many lawyers, there will be considerable discomfort in the idea that criminal law's enforcement hangs in the balance with the subtle compromise of diplomatic relations. Yet as others have acknowledged, this perpetual negotiation is 'the very stuff of international criminal law'.[79] Máximo Langer has written persuasively on the 'diplomatic cost' of universal jurisdiction prosecutions. He recognises that 'states have strong incentives to concentrate on defendants who impose low international relations costs because it is only in these cases that the political benefits of universal jurisdiction prosecutions and trials tend to outweigh the costs'.[80]

While this is an accurate description of the cost/benefit analysis as a structural feature of universal jurisdiction claims, it does not explore the potential for normative guidance. One advantage of drawing a connection between universal jurisdiction and the right of access to justice for victims is that it attracts the application of the human rights proportionality framework. The right of access to justice is not absolute.[81] Indeed, in implementing this right, the prosecuting state is legally entitled to engage in a proportionality analysis balancing the right of victim communities to access to justice in any particular case against the impact on the prosecuting state's legitimate aims and interests. Building on the definition proposed in the first part above, universal jurisdiction can be described in legal terms as a licence by the inter-state community to universalise the right of access to justice for victim communities in relation to crimes of concern to the international community *where this does not disproportionately affect the interests of the prosecuting state*.

Conclusion: proposed legal criteria for the exercise of universal jurisdiction

Universal jurisdiction is often characterised, and sometimes dismissed, as inherently political. For scholars including James Crawford, 'the reality of universal jurisdiction … is often influenced – it may be decisively – by political considerations'.[82] We argue that, by defining with more particularity the communities,

79 Simpson, n 57 above, 53. See also Elies van Sliedregt, 'One Rule for Them – Selectivity in International Criminal Law' (2021) 34 *Leiden Journal of International Law* 283.

80 Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1, 2.

81 *Al-Dulimi and Montana Management Inc* v *Switzerland*, Application no 5809/08, Judgment, 21 June 2016, at [129].

82 Crawford, n 6 above, 453.

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rights and interests engaged by universal jurisdiction prosecutions, it becomes possible to situate decision-making about universal jurisdiction within a potential legal framework. As discussed above, the traditional view of jurisdiction as a sovereign right emanating from the 'free will' of states has been superseded.[83] A prosecuting state's decision whether or not to exercise universal jurisdiction is not separate from but connected to rights and obligations to the international community, the inter-state community and victim communities. States have a degree of discretion as to the crimes and offenders to be prosecuted. The prosecuting state is entitled to take account of its own fundamental interests, including cost, impact on diplomatic relations and the effective administration of justice. However, an opaque broad discretion should not relieve states of the need to defend their decisions based on a coherent set of criteria by which to achieve proportionality between the rights and interests of affected communities and other legitimate interests of the prosecuting state.[84] States should work together to determine conditions for the exercise of universal jurisdiction. Having regard to the above discussion regarding the political communities and legitimate interests in play, criteria to be weighed in the balance should include: (1) international consensus as to the seriousness of the crime; (2) desire by victims or victim organisations for access to justice; (3) risk that the alleged offences would not otherwise be prosecuted; (4) location of the accused; (5) effective administration of justice, given quantity and quality of available witnesses and evidence; (6) vulnerability and security of victims and witnesses; (7) impact on standing, reputation and diplomatic relations of the prosecuting state; and (8) affordability of cost of prosecution.

THE 'PROOF' PROBLEM: QUESTIONS OF EVIDENCE

Beyond the different communities and interests implicated in universal jurisdiction trials, such trials also engage with a different type of crime. International crimes are distinct in important ways from domestic crimes. International criminal law addresses mass criminality on an institutional scale committed in foreign states which are unwilling or unable to prosecute the crimes. Impunity in relation to such crimes has traditionally existed not simply because perpetrators have managed to evade authorities and hide the evidence but because perpetrators *are* the authorities and control the evidence. This state-based or institutional context can create problems of proof in domestic courts. Domestic courts are not accustomed to addressing mass crime, let alone crimes that implicate the policy of a foreign state where prosecution has the potential to pose a threat to foreign governmental or non-governmental systems. Difficulties in accessing evidence, the impact of mass social fear and trauma, the normative importance of exposing the institutional context and complexity of chains of

83 *Case of SS Lotus (France* v *Turkey)* PCIJ Series A, No 10, 19; Lassa Oppenheim, *International Law: A Treatise* Vol I (London: Longmans, Green and Co, 1905) 194, §143.

84 George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705. See criticism of the proportionality analysis by the ECtHR in *Naït Liman* v *Switzerland*, Application no 51357/07, Judgment, 15 March 2018 in Hovell, n 18 above, 450–452.

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command implicated in the prosecution of international crimes can build in serious fault-lines between what happened and what can be proved in universal jurisdiction trials. In the following section, we assess problems that can arise in universal jurisdiction trials with (1) collection of evidence; (2) recollection of evidence; (3) the collective context; and (4) connection to the accused.

The problem of collection

Police, investigators, prosecutors and courts of the prosecuting state are understandably not generally the first responders to the crimes at issue in universal jurisdiction trials. The reason such trials end up in the courts of third states is often on account of the failure or refusal by the territorial state's authorities to investigate or prosecute. In these circumstances, the prosecuting state's investigators and prosecutors may face difficulty or even hostility if they attempt to gain access to the territory in which the crime was committed. More problematically, they can legally be denied direct access to the crime site, victims, witnesses and other evidence. A foreign state's officials are actively prohibited under international law from entering a foreign state to exercise any enforcement powers (including police powers of investigation) without the territorial state's consent.[85]

As a consequence, domestic courts exercising universal jurisdiction may find themselves placing unaccustomed reliance on evidence collected by non-governmental organisations (NGOs). NGOs tend to be the first responders in cases of civilian emergencies involving the commission of international crimes and can contribute in significant ways to the process of evidence collection in universal jurisdiction trials. Getting a universal jurisdiction case off the ground is almost always a process of inter-dependence between state authorities and NGOs or victim organisations, with the latter very often bearing the burden of initiating the complaints and providing the authorities with essential information, including the location of the suspect, the nature of the accusations and the names of potential witnesses living in the host state or overseas.[86] In the Lama trial, the work of locating Colonel Lama, alerting authorities, assembling the case file and pressuring the UK to prosecute was undertaken predominantly by Advocacy Forum, a Nepal-based NGO.

85 *Case of SS Lotus* n 83 above at [45]. For further discussion of the position under UK law, see Tim Cochrane, 'The Presumption Against Extraterritoriality, Mutual Legal Assistance and the Future of Law Enforcement Cross-Border Evidence Collection' (2021) 85 *Modern Law Review* 526.

86 Victim organisations such as the Simon Wiesenthal Centre (Jewish human rights organisation); the *Collectif des Parties Civiles pour le Rwanda*; the Association for International Justice in Rwanda; Advocacy Forum (Nepal); the Association of the Victims of Crimes and Political Repression in Chad; the Revolutionary Association of the Women of Afghanistan; the International Truth and Justice Project (Sri Lanka), sometimes assisted by global human rights organisations such as the European Centre for Constitutional and Human Rights; the *Féderation Internationale des Ligues des Droits de l'Homme*; and Human Rights Watch have all been pivotal in the initiation and support of universal jurisdiction prosecutions against perpetrators of international crimes. For a broader statistical survey, see Johns, Langer and Peters, n 38 above; Reydams, n 7 above, 221.

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The problem is that domestic courts and NGOs can be awkward bedfellows. While NGOs are trained to catalogue human rights violations for a variety of reasons, including medical, humanitarian and advocacy purposes, they are not always trained in collection of evidence for criminal prosecutions. Even where information is gathered with a view to future prosecutions, domestic criminal systems operate according to different legal standards and procedures. There is not always clarity as to where such prosecutions might take place, which can lead to contamination and even inadmissibility of evidence if inappropriate procedures are used. NGOs can also be placed in a difficult position when comandeered to serve a court's processes, especially where this interferes with carefully fostered relationships to individuals and communities built on confidentiality, affiliation and trust. The fact that NGOs must be responsive to a range of stakeholders can also interfere with perceptions of their objectivity and neutrality.

According to some participants in the Lama trial, reliance on NGOs for collection of evidence used in the Lama trial 'prove[d] … to be a mistake'.[87] In a reflective article by two practitioners who worked with the NGO Advocacy Forum to build the case file in the Lama case, they note 'one of the big lessons [for NGOs] … is to focus as much on process as on substance'.[88] Under cross-examination, it emerged that Advocacy Forum had entrusted interns with collecting witness statements, that original notes from interviews had been destroyed (albeit due to security concerns in the civil war context) and that the interns met with witnesses a number of times contrary to best practices promoting minimal interaction with potential witnesses. Moreover, computer records revealed that the 'first' statement from one of the key victim witnesses was in fact a composite of three different documents and that there had been at least eight previous drafts of this statement. Emails between Advocacy Forum staff and interns suggested that substantive amendments had been proposed and in some cases inserted into witness statements by Advocacy Forum staff and interns. At one point, the judge interrupted cross-examination to remind the witness from Advocacy Forum of the privilege against self-incrimination on the basis her answers to certain questions suggested involvement in the crime of perverting the course of justice.[89] In his summing-up, the judge gave a stern direction to the jury advising 'special need for caution' in considering evidence from Advocacy Forum, noting that 'in this country, based on centuries of experience, there are potential dangers that if you put together a case without special procedures, this will result in injustice'.[90]

Despite the challenges, it is clear that universal jurisdiction trials place domestic courts and NGOs in a relationship of mutual dependence. An increasing number of NGOs are now focused on criminal accountability in atrocity

87 Owen Bowcott, 'Nepalese officer cleared of torturing suspected Maoist detainees' *The Guardian* 7 September 2016 at https://www.theguardian.com/law/2016/sep/06/nepalese-officer-col-kumar-lama-cleared-torturing-maoist-detainees [https://perma.cc/2LWC-YESC].

88 Ingrid Massagé and Mandira Sharma, '*Regina v Lama*: Lessons Learned in Preparing a Universal Jurisdiction Case' (2018) *Journal of Human Rights Practice* 1, 13.

89 Authors' notes, 13 July 2016.

90 Authors' notes, 20 July 2016.

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contexts and are developing more rigorous methodologies for evidence collection.[91] NGOs have learned a number of lessons and are demonstrating increased sensitivity to the complexity of prosecuting international crimes.[92] In 2022, the Office of the Prosecutor at the International Criminal Court and Eurojust developed a set of guidelines for NGOs to follow in documenting international crimes.[93] The Guidelines recognise the importance of a separation of roles between NGOs, on the one hand, and domestic investigators and prosecutors, on the other. A key problem is the importance of minimising the number of interviews of key victim witnesses to avoid inappropriate questioning practices and inconsistencies between different accounts. The Guidelines advise that NGOs should limit themselves to eliciting a general account and refrain from taking detailed accounts from vulnerable potential witnesses.

The problem of recollection

Another evidentiary challenge in universal jurisdiction trials is the capacity to elicit evidence in the circumstances of social trauma, fear and chaos attending mass criminality. As highlighted above, alleged perpetrators may often have the legal and political capacity to deny access to material evidence. The bulk of evidence provided in universal jurisdiction trials will therefore usually be in the form of witness testimony, subjecting evidence collection – or rather recollection – to very human fallibilities.

Fear of reprisals can heavily impact the reliability of witness evidence in this setting. International criminal law deals with the 'long tail' of mass crime but does not necessarily serve to muzzle endemic criminality at its source. Prosecuting state authorities have no capacity to protect victim witnesses and their families in their home states. Former ICTY Judge Patricia Wald was aware that '[i]ntimidation, anonymous phone calls and word-of-mouth threats relayed by third party intermediaries occur with some frequency when the word gets out that someone is coming to testify at the Hague', noting that – as time passed – witnesses became more reluctant to come to The Hague to testify.[94] During the first iteration of the Lama trial in 2015, the government-owned newspaper in Nepal, *Gorkha Patra*, published the names and identities of all victims and witnesses involved in the case, leading to increased levels of anxiety among

91 NGOs focused on criminal accountability include Civitas Maxima, Commission for International Justice and Accountability, European Center for Constitutional and Human Rights, Global Rights Compliance, International Federation for Human Rights, Syrian Justice and Accountability Centre, Legal Action Worldwide and Bellingcat. Other NGOs such as Eyewitness are working on developing better technology for evidence-gathering.

92 Harmen van der Wilt, '"Sadder but Wiser"?: NGOs and Universal Jurisdiction for International Crimes' (2015) 13 *Journal of International Criminal Justice* 237.

93 'Guidelines for civil society organizations: Documenting international crimes and human rights violations for accountability purposes' (International Criminal Court, 21 September 2022) at https://www.icc-cpi.int/news/documenting-international-crimes-and-human-rights-violations-accountability-purposes [https://perma.cc/5AQ2-NWZQ].

94 Patricia Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (2002) 5 *Yale Human Rights and Development Law Journal* 217, 220.

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witnesses and security concerns for some of them.[95] One witness stopped his involvement in the case because the risk of losing his job was high if he gave evidence against a Nepali Army officer.[96]

Witness trauma can also have a corrosive impact on the reliability of evidence in international criminal trials. Clinical psychologists and psychiatrists have studied how trauma can interfere with the typical pathways for the storage of memories, affecting a victim's ability to produce a complete, accurate, coherent and chronological account of events.[97] Virtually all contemporary international criminal tribunals address the issue of the effect of trauma on memory, with these tribunals continuing to seek the appropriate balance in assessing the credibility of evidence.[98] The jurisprudence of the ad hoc tribunals for the former Yugoslavia and Rwanda has been the most detailed on this issue.[99] The ICTY tended to distinguish between the 'essence' of the event and 'peripheral details',[100] with judges focusing on the 'fundamental features' of the testimony,[101] accepting that 'the fact that a witness may forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his or her evidence given in relation to the central facts relating to the crime'.[102] Of course, judges also recognise the need to ensure the reliability of probative evidence, cautioning against 'explain[ing] away contradictions and inconsistencies on the basis of the fact that a long time has passed since the events took place or indeed that witnesses may have suffered trauma from witnessing the events

95 Mandira Sharma, 'Torture in Non-International Armed Conflict and the Challenge of Universal Jurisdiction: The Unsuccessful Trial of Colonel Kumar Lama' in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge: CUP, 2019) 624, 636.

96 Massagé and Sharma, n 88 above, 13.

97 Jane Herlihy and Stuart Turner, 'Should discrepant accounts given by asylum seekers be taken as proof of deceit' (2006) 16 *Torture* 81. See also Anya Topiwala and Seena Fazel, 'Memory and Trauma' in Morten Bergsmo and Wui Ling Cheah (eds), *Old Evidence and Core International Crimes* (Beijing: TOAEP, 2012); Ellie Smith, 'Victim Testimony at the ICC: Trauma, Memory and Witness Credibility' in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the ICC: Bridging the Gap between Research and Practice* (2020) at https://www.law.ox.ac.uk/sites/default/files/migrated/iccba_-_oxford_publication_30_november_2020_.pdf [https://perma.cc/4WUX-S7Q8].

98 Judgments to date in the International Criminal Court invariably contain general recognition that '[b]earing 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 *Bemba*, Judgment of 21 March 2016, Trial Chamber III, Case No ICC-01/05-01/08 at [230]; reflecting similar approaches in ICC, *Prosecutor* v *Thomas Lubanga Dyilo*, Judgment of 14 March 2012, Trial Chamber I, Case No ICC-01/04-01/06 at [103]; ICC, *Prosecutor* v *Germain Katanga*, Judgment of 7 March 2014, Trial Chamber II, Case No ICC-01/04-01/07 at [83]; ICC, *Prosecutor* v *Mathieu Ngudjolo*, Judgment of 18 December 2012, Trial Chamber II, Case No ICC-01/04-02/12 at [49]; ICC, *Prosecutor* v *Bosco Ntaganda*, Judgment of 8 July 2019, Trial Chamber IV, Case No ICC-01/04-02/06 at [79]-[80]. See further Smith, *ibid*.

99 See discussion in Robert Cryer, 'A Message from Elsewhere: Witnesses before International Criminal Tribunals' in Roberts and Redmayne, n 10 above, 381, 395-399.

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

101 ICTY, *Prosecutor* v *Delalic, Mucic, Delic and Landžo*, Judgment of 20 February 2001, Appeals Chamber, Case No IT-96-21-A at [485].

102 *ibid* at [497].

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in question'.[103] The ICTY Appeals Chamber emphasised that 'a Trial Chamber must be especially rigorous in assessing identification evidence'.[104] In the ICC, Judge Van den Wyngaert emphasised there should be 'cogent reasons that convincingly explain why a witness' memory is faulty with regard to one part of her testimony but is nevertheless considered reliable in relation to the other part'.[105] In difficult cases, judges will consider evidence from pyschologists to assess the impact of trauma on memory.[106]

In the Lama trial, the Court declined to engage with the question of witness trauma. For the most part, the regular refrain of 'I don't remember' from the key prosecution witness was treated as a source of frustration for the prosecutor, defence, judge and jury alike. The witness could not remember whether he had been dragged behind a car, whether he had been pecked by a bird until it drew blood, whether he had had water poured up his nose or whether his legs had been cut by razor blades and chilli and salt rubbed into the wounds, though he had made such allegations in earlier witness statements. When asked if he had had a heavy log rolled over him, he said 'I remember the sensation. It was heavy. I can't remember if it happened.'[107] The judge described him as an 'idiosyncratic witness' and, at a point of clear exasperation, interrupted defence cross-examination to say to the witness, 'a very long time ago, you were asked [a question]. This seems to me to be a yes/no answer. Which is it?' The witness responded, 'I have answered this many times. I have tried hard to remember. But a lot of my memory has lapsed. I could repeat everything if you wish'.[108] On another occasion, the witness said, 'these events happened 11–12 years ago. I have taken a lot of medication since that time and there is a lot I don't remember'.[109] Though both prosecution and defence obtained expert reports on the issue, the judge declined the prosecutor's request to introduce expert evidence on the effects of post-traumatic stress disorder on memory.[110] According to English case law, expert memory evidence is not normally admissible on the basis that external determinations of witness credibility and reliability trespass upon the remit of the jury.[111] Ultimately, the judge instructed the jury that the situation of fear

103 *Prosecutor* v *Germain Katanga* n 98 above at [152].

104 ICTY, *Prosecutor* v *Kunarac, Kovac and Vukovic*, Judgment of 12 June 2002, Appeals Chamber, Case No IT-96-23-T & IT-96-23/1-T at [324].

105 *Prosecutor* v *Germain Katanga* n 98 above, Opinion of Judge Van den Wyngaert at [152]-[153].

106 ICC, *Prosecutor* v *Bosco Ntaganda*, Judgment of 8 July 2019, Trial Chamber IV, Case No ICC-01/04-02/06 at [79], note 172; ICC, *Prosecutor* v *Thomas Lubanga Dyilo*, Judgment of 14 March 2012, Trial Chamber I, Case No ICC-01/04-01/06 at [105].

107 Authors' notes, 27 June 2016.

108 Authors' notes, 27 June 2016.

109 Authors' notes, 13 June 2016.

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

111 In *R* v *Pendleton* (2002) 1 WLR 72, Lord Hobhouse advised that 'the courts should be cautious about admitting evidence from psychologists, however eminent, as to the credibility of witnesses. The assessment of the truth of verbal evidence, save in a very small number of exceptional circumstances, is a matter for the jury' (*ibid* at [45]). See also *R* v *Bernard V* [2003] EWCA Crim 3917; *R* v *JH; R* v *TG (deceased)* [2006] 1 Cr App R 195; [2005] EWCA Crim 1828. For critical assessments on these directions, see Tanja Benton, and others, 'Eyewitness memory is still not common sense: Comparing jurors, judges and law enforcement to eyewitness experts' (2006) 20 *Applied Cognitive Psychology: The Official Journal of the Society for Applied Research in Memory and Cognition* 115.

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and trauma counted *against* the reliability of the victim witness's evidence, with the judge pointing out that the victim witness had had very little sleep, had been assaulted at the armed police barracks *en route* to the accused's barracks, was blindfolded at the time of the alleged torture in the forest and potentially distracted by noises from the forest itself (for example dry leaves and people around).[112] The best the prosecutor could do in his concluding statement was to ask the jury to apply their 'collective common sense and experience of life' in considering inconsistencies and gaps in the victim witness's testimony and ask themselves: 'What do you think the effects of torture might be?'[113]

Domestic courts exercising universal jurisdiction must engage with the effect of fear and trauma in a way that is fair to the accused without disproportionately impacting or impairing the rights of traumatised or vulnerable victims. Determining the effect of individual and collective psychological responses to trauma and mass atrocity is not appropriately left to the common sense and experience of jurors.[114] Extensive research in the behavioural sciences has shown that memory is highly complex and that 'accurately distinguishing true and false memory … is hugely challenging', even for experts.[115] Domestic criminal justice systems have worked hard to enhance their capacity to understand and address the impact of private trauma on memory in other specific contexts, for example, in individual cases of rape and historic sexual violence.[116] The law and jurisprudence of international criminal tribunals can contribute valuable guidance to domestic courts in assessing the position, needs and rights of vulnerable and traumatised witnesses.[117]

The problem of collective context

While the state or institutional context builds in challenges for the prosecution of international crimes, recognition of this context is an important element of

112 Authors' notes, 25 July 2016.
113 Authors' notes, 20 July 2016.
114 Smith, n 97 above, 125.
115 Rebecca Helm, 'Evaluating Witness Testimony: Juror knowledge, false memory, and the utility of evidence-based directions' (2021) 25 *International Journal of Evidence and Proof* 264, 265.
116 Crown 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) at https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes [https://perma.cc/L99U-Q7JY]; Crown Prosecution Service, 'Psychological Evidence Toolkit – A Guide for Crown Prosecutors' (Legal Guidance, 11 September 2019) at https://www.cps.gov.uk/legal-guidance/psychological-evidence-toolkit-guide-crown-prosecutors [https://perma.cc/5BR5-328Y]. See also Diane Bögner, Jane Herlihy and Chris R Brewin, 'Impact of Sexual Violence on Disclosure During Home Office Interviews' (2007) 191 *British Journal of Psychiatry* 75.
117 S. Megan Berthold and Gerald Gray, 'Post-Traumatic Stress Reactions and Secondary Trauma Effects at Tribunals: The ECCC Example' in Beth Van Schaack, Daryn Reicherter and Youk Chang (eds), *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Documentation Center of Cambodia, 2011) 92; Landy F. Sparr and J. Douglas Bremner, 'Post-Traumatic Stress Disorder and Memory: Prescient Medicolegal Testimony at the International War Crimes Tribunals?' (2005) 33 *Journal of the American Academy of Pyschiatry and the Law* 71.

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international criminal justice. The revolutionary move of international criminal law was to recognise that international law extended beyond the abstract entity of the state and implicated individual criminal responsibility of the plurality of individual officials constituting the state. Individual criminal responsibility is intended to achieve accountability for the crimes of aggression, genocide, crimes against humanity and war crimes, crimes that are typically committed by groups against individuals as members of groups.[118] International criminal prosecutions are in this way often intended to be representative of a broader criminality. For example, the dock at Nuremberg was carefully curated to contain one representative from each of the main divisions of the Nazi administration.

International criminal law's focus on systemic crime gives rise to an unfortunate paradox in domestic prosecution of international crimes. Collective guilt is anathema to domestic criminal justice where the focus is generally squarely on the individual accused. According to a liberal vision of criminal justice, individual agency is not a question that should be surrendered to or anonymously submersed in collective will. Yet this liberal perspective can create problems when it intersects with the structural heart of international criminal justice. Acknowledging the individual's agency is of course important so as not to cover up the role of the individual within a broader state or institutional system. However, separating out the collective element can obscure the point of international criminal law. While domestic criminal law generally deals with exceptional criminal acts that deviate from social normality, international criminal law deals for the most part with authorised acts that form part of a criminal normality. Singular focus on the individual's guilt ignores the systematic or collective nature of the crimes, enabling the individual to be cast as a 'bad apple', covering up the criminality of the system.[119]

Domestic systems are accustomed to focusing cases around an individual accused. However, in universal jurisdiction cases, it may be that investigation starts with the collective context and is then traced back to the individual accused. Certain jurisdictions including Germany, France and Sweden have started explicitly to engage in a practice of 'structural investigations', where domestic

118 George Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton, NJ: Princeton University Press, 2002) ch 3. See definitions of the core crimes in the Rome Statute: Art 6 (Genocide): requires 'an intent to destroy, in whole or in part, a national, ethnical, racial or religious group'; Art 7 (Crimes Against Humanity): must be committed 'as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack'; Art 8 (War Crimes): '[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'; Art 8 *bis* (Aggression) can only be committed by 'a person in a position effectively to exercise control over or to direct the political or military action of a state' where the relevant 'act of aggression' constitutes 'the use of armed force by a State'.

119 This was highlighted in an outburst by the accused (Andrei Sawoniuk, known as Andrusha) during his cross-examination in the first universal jurisdiction trial in the UK: 'Andrusha Andrusha Andrusha. They say only Andrusha Andrusha. No one else killed no one. Only Andrusha. Everyone else just watches and claps. Only they pick on me': cited in David Hirsh, 'The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination' (2001) 10 *Social and Legal Studies* 529. At a broader level, Koskenniemi argues that international criminal trials 'serve as an alibi for the population at large to relieve itself from responsibility': Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1, 14.

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prosecutors open investigations on specific structures within which international crimes have been allegedly committed before identifying specific perpetrators.[120] This reflects the practice of the International Criminal Court, which organises its investigations and cases under the rubric of 'situations' rather than individual accused, focusing its investigation on a particular conflict in a particular territory over a particular time span.

One problem is that the choice of individual accused in a universal jurisdiction trial addressing situations of mass criminality can sometimes seem haphazard or contrived. In universal jurisdiction cases, the choice of accused is largely dependent on which alleged perpetrator may travel or take up residence in a country willing to exercise universal jurisdiction. Victim organisations face the challenge of tracking the travel plans and movement of potential defendants and preparing case files depending on who is travelling and where they travel. For NGOs who have gathered information or evidence on the broad crime base during or in the immediate aftermath of war or atrocity, this may entail the need to match up particular documented physical acts of atrocity with relevant figures, effectively 'inserting' these figures into the narrative after the fact. In the Lama trial, the process of finding potential defendants with a connection to the UK and 'working backwards' to insert them into the narrative was described by Advocacy Forum and successfully exploited by defence counsel in the course of cross-examination.[121] In his summing-up to the jury, the judge concluded that '[t]he fact Kumar Lama was involved was clearly a late addition at the suggestion of Advocacy Forum'.[122] The judge highlighted a number of reasons why the jury should not rely on the key victim witness's testimony, including the fact the relevant victim had not mentioned the accused in any of his initial statements in the immediate aftermath of the alleged torture.[123]

Consistently with good domestic practice, the judge in the Lama trial worked hard to cut away evidence relating to the collective enterprise out of a sense it could obscure the innocence of the individual accused. As trial observers, it was hard not to be left with the concern that pulling too hard at an individual thread could serve to unravel the tapestry. On the ninth day of the trial, the doctor who examined the key prosecution witness let slip that he had seen over 400 cases of similar injuries in his medical practice.[124] However, the court declined to admit other evidence testifying to the systematic practice of torture in Nepal at the relevant time by the police, the armed police and the Royal Nepal Army. Much intended testimony from Manfred Nowak, former UN Special Rapporteur on Torture, was determined to be inadmissible and the judge warned the jury that his admitted evidence had 'limited relevance' given Nowak had not had personal dealings with the accused or any of the relevant witnesses.[125] In his 2006 UN report, the Special Rapporteur found torture to

120 Wolfgang Kaleck and Patrick Kroker, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' (2018) 16 *Journal of International Criminal Justice* 165.
121 Transcript, 13 July 2016, 41-42.
122 Authors' notes, 25 July 2016.
123 *ibid*.
124 Authors' notes, 16 June 2016.
125 Authors' notes, 20 July 2016.

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have been systematically practised in Nepal, with the torture methods outlined in his report mirroring the conduct of which the chief prosecution witnesses complained.

By contrast, international criminal tribunals acknowledge greater scope for admissibility of circumstantial evidence, recognising that 'circumstantial evidence may be necessary … where there is … no eye-witness or conclusive documents relating to particular alleged facts'.[126] The Rules of Procedure and Evidence of the Yugoslav Tribunal provide that evidence of a consistent pattern of conduct relevant to serious violations may be admissible in the interests of justice.[127] The standard of reasonable doubt applies whether the evidence evaluated is direct or circumstantial. In the latter case the inference drawn from the circumstantial evidence must be the only reasonable one that could be drawn from the evidence presented.[128]

The problem of connection

One of the most interesting and complex problems of proof in universal jurisdiction prosecutions stems from the fact they do not always involve those who have participated directly in physical acts of atrocity. Unlike domestic criminal law, international criminal law does not tend to focus primarily on individuals who engaged in physical acts of violence against victims. Instead, international criminal law is an attempt to reach higher-ranked individuals who bear the greatest responsibility for planning, preparation, initiation and execution of systems or policies in accordance with which international criminal atrocity is committed. The problem is that high-ranking defendants are not often the main protagonists in the statements and testimony of victim witnesses. The names, faces or voices that haunt the memories and testimony of victims are most often those of lower-ranked individuals charged with carrying out physical acts of atrocity. Even if questioned about the role of particular higher-ranked individuals in events, it is unlikely that those swept up in the chaos and violence that accompanies most international crimes will have a clear and accurate memory or understanding of who precisely was planning or directing the atrocity and what role that individual played.[129]

In recognition of the institutional nature of international crimes, international criminal law has developed its own distinctive modes of liability, recognising that its focus is not the individual considered in abstraction but the individual as an element of the authority, institution, government or even

126 ICTY, *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 at [10]. See also ICTY, *Prosecutor* v *Delalić* above n 53 at [458].

127 ICTY, 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 at [67].

128 ICTY, *Prosecutor* v *Stakić*, Appeals Judgment of 22 March 2006, Appeals Chamber, Case no IT-97-24-A at [219]-[220]. See also ICTR, *Prosecutor* v *Ntagerura*, Appeals Judgment of 7 July 2006 Appeals Chamber, Case no ICTR-99-46-A at [304]-[306].

129 Combs, n 8 above, 17.

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society the individual represents.[130] For example, the doctrine of command responsibility enables prosecution of commanders who have failed to prevent or punish crimes committed by forces under their effective command or control[131] while the mode of co-perpetration enables prosecution of individuals who have contributed to the commission of a crime by 'a group of persons acting with a common purpose'.[132] These modes of liability provide a more transparent focus on the role of higher-ranked individuals. The focus is not so much on proving the accused's direct involvement in physical acts of violence but rather on proving the accused's official position or institutional affiliation in the context of the international crimes committed.[133]

While proof of leadership in a complex criminal enterprise is not uncomplicated,[134] it places the burden of proof in a more appropriate setting. The problem in universal jurisdiction trials in domestic criminal contexts is that international criminal modes of liability are not always available. As defence counsel declared in his summing-up to the jury in the Lama trial, there is 'no such thing in this court as command responsibility'.[135] With command responsibility not available, it was necessary to prove the existence of a direct order by the accused to commit the torture.[136] Proof of direct orders are difficult to come by in circumstances of war or mass atrocity. Given the victim was blindfolded at the time of the alleged torture, the question of proof ultimately came down to a matter of voice identification and whether the accused could be placed at the scene. The dangers of voice identification were clearly set out for the jury in the judge's directions.[137] The judge instructed the jury in his summing-up, 'experience has shown [voice] evidence should be treated with great caution' and 'it is clear that this ID by [the victim witness] is at the most dangerous end of the spectrum' as the victim witness was not an expert in voice-identification and had not recorded the voice.[138] The accused's role in the chain of command was not regarded as relevant to his guilt. Indeed, the accused's role in the chain of command was ultimately deployed as relevant to his innocence. In his concluding statement, defence counsel asked the jury to 'imagine how hard it would be to control soldiers in [the] context' of a civil war, explaining that the Colonel had 'many more things to worry about' so could not be '100% focused

130 See, for example, Rome Statute, Arts 25 and 28.
131 Rome Statute, Art 28.
132 Rome Statute, Art 25(3)(d).
133 Combs, n 8 above, 334.
134 Senior prosecutors in international criminal tribunals recognise that proof of leadership in a complex criminal enterprise can be 'extremely difficult and time/resource consuming': Carla del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level' (2006) 4 *Journal of International Criminal Justice* 539, 546. Del Ponte explains the importance of the cooperation of 'insiders' (*ibid*, 543), as well as 'access to contemporaneous records, notes, videos, minutes of meetings, orders, diaries, intercepts and photographs' (*ibid*, 554). She also describes 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'.
135 Authors' notes, 22 July 2016.
136 Authors' notes, 20 July 2016.
137 This was in accordance with English law: *R* v *Flynn and St John* [2008] 2 Cr App R 20; [2008] EWCA Crim 970.
138 Authors' notes, 25 July 2016.

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on [a particular] prisoner'.[139] While under international criminal law, Colonel Lama's failure to prevent or punish torture by his subordinates would be the basis for conviction, in the domestic setting, his position of leadership was used as grounds for his exoneration.

THE 'TRANSLATION' PROBLEM: QUESTIONS OF LANGUAGE, CULTURE AND OUTREACH

This final section engages with the complexity and importance of translating the courtroom in universal jurisdiction trials. The prosecutor opened the Lama trial by explaining to the jury that '[c]ultural and linguistic difficulties, forgive me, differences, may make this process difficult, frustrating and possibly at times even painful.'[140] The conflation of differences and difficulties in the prosecutor's opening statement was more than a linguistic slip. Universal jurisdiction trials such as the Lama trial have been a stark demonstration of the difficulties that can arise from neglect of cultural and linguistic differences.[141] Some of these challenges are not unique to universal jurisdiction prosecutions and can occur in any trial engaging foreign elements. Yet universal jurisdiction trials by their nature involve proceedings against foreign nationals conducted outside the territory in which the alleged crime occurred. Judges, jurors, prosecutors and even defence counsel will almost invariably be personally unfamiliar with relevant factors such as geography, locations where the crime took place, distances, language, cultural idiosyncrasies and relevant political or historical background.

In universal jurisdiction trials, the problem of translation is not a one-way street. Recalling the multiplicity of communities engaged by such trials, the problem is not merely about how the courtroom understands foreign events and participants but also how certain foreign individuals and communities understand the courtroom. As argued above, the exercise of universal jurisdiction represents a domestic court's contribution to the enforcement of international criminal law. This potentially places different demands on a domestic court in terms of outreach. In universal jurisdiction trials, the domestic courtroom does not merely serve a domestic audience but is a venue for the reconciliation of the interests of the international community, the inter-state community and victim communities. The adversarial system is particularly ill-suited to trials involving heterogeneous political communities. Adversarial trials are structured as a narrow contest between prosecutor and defence (generally considered as agents of the prosecuting state and accused respectively) according to an ethic described by David Luban as morally 'non-accountable partisanship'.[142] This provides lit-

139 Authors' notes, 22 July 2016.
140 Transcript, 'Prosecution Opening' 8 June 2016, 14.
141 Susan Aboueldahab and Fin-Jasper Langmack, 'Universal Jurisdiction Cases in Germany: A Closer Look at the Poster Child of International Criminal Justice' (2022) 31 *Minnesota Journal of International Law* 1.
142 David Luban, 'Twenty Theses on Adversarial Ethics' in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (Sydney: Federation Press, 1999) 134, 140.

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tle scope for any ethic of responsibility toward external communities, interests, evidence or culture. In the following section, we examine how the linguistic, cultural and social distance between the parties, fact-finding adjudicators and victim communities builds in challenges to achieving the objectives of universal jurisdiction trials.

The problem of language

Universal jurisdiction trials often involve the prosecution of crimes committed in a foreign language. The adversarial courtroom is unforgiving when the courtroom encounters a second language. Adversarial trials work on the basis of competitive process between 'two vigorous and fiercely partisan' parties based on a fast-paced question-and-answer discourse.[143] Lawyers do not make the task of interpretation easy given their tendency to use technical or specific vocabulary, legal qualifications, multi-part questions and complex syntax, all of which can lead to confusion.[144] In the adversarial courtroom, where the lawyers are almost exclusively responsible for providing the narrative, this provides much latitude to exploit linguistic unfamiliarity and distortions, either unintentionally or as a truth-defeating stratagem.[145]

It follows that the court interpreter can be one of the most important actors in universal jurisdiction trials.[146] The significance of the interpreter's role is not generally recognised, with one study recognising that court interpreters 'are not particularly liked by anyone in the courtroom' and are generally seen 'as a necessary evil that is tolerated rather than welcomed'.[147] Inattention to the importance of interpretation was reflected in the Lama trial. Though scheduled to hear evidence from 20 Nepali witnesses, the first iteration of the trial in 2015 started with only a single interpreter. In a classic market error, the interpreter was also informed he was the only interpreter available, and he subsequently requested a fee that was nine times the usual daily court interpreter's

143 Malcolm Feeley, 'The Adversary System' in Robert Janosik (ed), *Encylopedia of the American Judicial System* (New York, NY: Scribner, 1987) 753.

144 Brenda Danet, 'Language in the Legal Process' (1980) 14 *Law and Society Review* 445. For example, the interpreter struggled in the Lama trial to translate the question from defence counsel: 'Were you telling the truth when you told Advocacy Forum in 2008 that in 2005 you did not need to ask who was in charge of the barracks because you knew that from the time you were detained?'

145 In the words of Thomas Macaulay, it entitles an advocate who knows a statement to be true to 'do all that 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': 'Lord Bacon' in Thomas Babington Macaulay (ed), *The Works of Lord Macaulay* vol 6 (1897) 136, 163. See also Marvin Frankel, 'The Search for the Truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031, 1038; Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (Chicago, IL: University of Chicago Press, 2002) 20.

146 Berk-Seligson, *ibid*. Former ICTY judge Patricia Wald records, 'I know of 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': Patricia Wald, 'Running the Trial of the Century' (2006) 27 *Cardozo Law Review* 1559, 1570-1571.

147 Sandra Hale and John Gibbons, 'Varying Realities: Patterned Changes in the Interpreter's Representation of Courtroom and External Realities' (1999) 20 *Applied Linguistics* 203, 207.

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fee. It soon became clear the court was not getting what it paid for. There were countless errors in translation: 'kick' was translated as 'stick'; 'bleeding' as 'injured'; 'crying' as 'restless'; 'quietly' as 'slowly'; 'tears in his eyes' as 'affection in his eyes'. People were said to be 'covering' the witness instead of 'carrying' him and the parrot that was placed on the witness's back to peck him was said to have a 'soft' instead of a 'sharp' beak. Even where interpretation was technically correct, it became clear that meaning was being inadequately conveyed on account of the interpreter's delivery style and voice quality.[148] For example, there were points in the Lama trial where the victim witness started sobbing uncontrollably yet without garnering the empathy of the courtroom as the interpreter's tone and translation of the witness's testimony lacked any of the expected emotional cues.[149] Ultimately the first trial was discontinued on the basis of the prosecutor's concerns there had been too many interruptions due to interpretation issues and the jury was becoming disconnected.[150]

As the opening date for the second trial approached, there had been limited success in finding further qualified court interpreters. The court had organised for four interpreters to take the relevant court interpreter examination in the break between the first and second trials. All four failed.[151] The second trial therefore started using one of the same interpreters from the first trial, checked by two other interpreters who sat in the well of the court. Defence counsel expressed concern on the fourth day of the trial that things were going at 'snail's pace' with continuing errors in interpretation. He reflected that, while 'it might be ok just to get the gist' during examination of witnesses, cross-examination required exact words to be accurately translated.[152] Indeed, in a trial that hung on voice identification, the need for precise language was crucial. The witness was blindfolded when the alleged torture occurred and the issue came down to whether the witness had correctly identified the accused's voice in the forest at the time of the torture. Yet there was significant confusion as to whether, in the course of examination, the witness had used the word 'soft' in describing the voice he heard, or whether the word he used was 'polite'. Another crucial error occurred when the interpreter translated the word 'sab' as 'Colonel' instead of 'sir' – translating the witness's testimony that he had heard the soldiers say 'the Colonel is coming' when in fact the witness had said he had heard the soldiers say, 'Sir is coming' when he arrived at the site of the alleged torture.

Literature on court interpretation in the judicial process reflects that the Lama trial was not unusual in encountering significant difficulties with interpretation of witness statements and witness testimony.[153] Nevertheless, it has been recognised that interpreting quality is generally higher in international criminal tribunals, highlighting that domestic courts would do well to adopt practices

148 Berg-Seligson, n 145 above.
149 Authors' notes, 9 March 2015; Authors' notes, 10 June 2016.
150 Authors' notes, 16 March 2015.
151 Authors' notes, 24 August 2015.
152 Authors' notes, 10 June 2016.
153 Cryer, n 99 above, 381, 395-399; Combs, n 8 above.

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from these tribunals.[154] In practice, nearly all interpretation in international criminal trials is simultaneous, preserving the flow of translated speech, with international courtrooms generally fitted with dedicated interpreting booths and simultaneous interpreting equipment, computer terminals that display an online transcript of the proceedings and connected to the internet to enable access to online references. International criminal tribunals have also produced codes of ethics for interpreters, setting out requirements for interpretation and translation in the judicial environment.[155] Another relevant innovation introduced in international criminal tribunals is the increased provision for evidence to be admitted in written or pre-recorded form rather than via live oral testimony where that evidence goes to proof of a matter other than the acts or conduct of the accused.[156] The effect of enabling access to written or pre-recorded testimony is to reduce the cost, delay and opportunity for linguistic error in providing such evidence, particularly where it must be delivered via an interpreter.

The problem of culture

In judging the facts, adjudicators and fact-finders also judge the context.[157] The adversarial courtroom faces distinct challenges when the task of judging takes place in relation to a foreign cultural context. In adversarial systems, adjudicators are actively prohibited from informing themselves independently about background evidence or cultural context. Instead, the role of bridging the significant political, social and cultural gaps is generally given over to expert witnesses, who have a tendency to present historical evidence at great length in the style of a university lecture.[158] An added complication in adversarial trials is that the legitimate role of the advocate can be to sow confusion or

154 Ludmila 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' [2012] *T & I Review* 7; Joshua Karton, 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony' (2008) 41 *Vanderbilt Journal of Transnational Law* 1. 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 [https://perma.cc/Z23G-4DHJ].

155 See, for example, United 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) at https://www.irmct.org/sites/default/files/documents/171102-mict-20-code-of-ethics-for-interpreters-translators.pdf [https://perma.cc/6CGP-8FJ9].

156 ICC Rules of Procedure and Evidence, Rule 68. See further Steven Kay QC, 'The Move from Oral Evidence to Written Evidence' (2004) 2 *Journal of International Criminal Justice* 495. For a critical perspective, see Megan A. Fairlie, 'The Abiding Problem of Witness Statements in International Criminal Trials' (2017) 50 *NYU International Journal of Law and Politics* 75.

157 Koskenniemi, n 119 above, 16.

158 Robert Donia described his expert evidence on the history of Bosnia-Herzegovina and the background of the Croat-Muslim war in the Blaskic trial as 'more an extended lecture on regional history than court testimony': Robert Donia, 'Encountering the Past: History at the Yugoslav War Crimes Tribunal' (2004) 11 *Journal of the International Institute* at https://quod.lib.umich.edu/j/jii/4750978.0011.201/–encountering-the-past-history-at-the-yugoslav-war-crimes?rgn=main;view=fulltext [https://perma.cc/X95F-JWS7].

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raise doubts in the mind of the adjudicator or fact-finder on admitted evidence, including background evidence. In the Lama trial, an academic expert marched the jury (at what the judge described as 'machine-gun speed')[159] through Rajas (kings) and Ranas (prime ministers), an absolutist monarchy and the declaration of a state of emergency. The word 'terrorist' was used on several occasions when discussing the Maoist opposition forces. When defence counsel asked the expert whether the Maoists were 'sort of like Al Qaeda', this wasn't contradicted.[160] Defence counsel expertly drew a link between the Maoist insurgency and the post-9/11 plot-line familiar to those in the English courtroom in which the Royal Nepal Army were our allies in the 'war against terror' and Nepal's Maoist insurgents became the existential threat to us all.

The English system's preference for juries as fact-finding adjudicators further exacerbates the problem of cultural disconnect in universal jurisdiction prosecutions.[161] The role of the jury is traditionally to build a bridge between the law and the community to which it is applied, with juries intended to comprise 'a representative cross-section of society, honestly and fairly chosen'.[162] Locality is crucial to the jury's role, with juries typically drawn from the area in which the crime was committed.[163] Sir William Holdsworth described the contribution of the jury system in terms that it 'has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense'.[164] It has accordingly become standard to direct juries that '[i]n evaluating the evidence and the issues presented, you should use your common sense, knowledge, and experience, just as you would in making decisions in your daily life'.[165]

In accordance with this perspective, the judge explained to the jury in the Lama trial that 'your role is to bring your joint experience of life and your common sense' to judgment of the facts.[166] The obvious problem was that there

159 Authors' notes, 9 June 2016.
160 Authors' notes, 8 June 2016.
161 Damaška describes the distinction between 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': Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, CT: Yale University Press, 1986) 17.
162 *R* v *Sherratt* [1991] 1 SCR 509 at [31]. See also M. D. A. Freeman, 'The Jury on Trial' (1981) 34 *Current Legal Problems* 65, 90; Paul H. Robinson and John M. Darley, *Justice, Liability and Blame: Community Values and the Criminal Law* (Boulder, CO: Westview Press, 1995) 5-7.
163 The Sixth Amendment to the US Constitution requires that the jury must be drawn from 'the State and district wherein the crime shall have been committed'. In the UK, jurors must be registered on the electoral roll (and have been resident in the UK for at least five years), with each court having a unique catchment area for jurors based on postcode districts that lie within a specified distance from the court: Juries Act 1974, s 1. Cheryl Thomas, *Diversity and Fairness in the Justice System* (Ministry of Justice Research Series 2/07, June 2007) 6 at https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/diversity-fairness-in-the-jury-system.pdf [https://perma.cc/TLK4-MV8K].
164 Sir William Holdsworth, *A History of English Law* vol 1 (London: Methuen & Co, 3rd ed, 1922) 349.
165 See, for example, New York State Unified Court System, *Criminal Jury Instructions of General Applicability* at https://www.nycourts.gov/judges/cji/1-General/cjigc.shtml [https://perma.cc/EC5U-Q7AJ] (select 'Juror Expertise').
166 Authors' notes, 20 July 2016.

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was little joint or common between the jury's experience and that of a Nepali colonel operating at the height of a civil war. There were many points during the trial – significant and less significant – where evidence risked being understood in the wrong context. Jurors shifted uncomfortably in their seats and exchanged glances when the victim witness explained he had been arrested while he was emptying his bowels in a cornfield. Jurors are unlikely to have understood that most households did not have their own bathrooms in the farm area in which the victim witness lived. Establishing the timing of events was difficult on account of the fact that witnesses used the Nepali rather than the Gregorian calendar and were from a region in Nepal where farmers conducted day-to-day life by reference to the sun and the moon rather than the 24-hour clock.[167] More problematically, the judge gave an extremely stern direction to the jury regarding the victim witness's credibility based on the judge's impression that the victim witness had fraudulently procured compensation from the District Court in Kapilvastu under Nepal's Torture Compensation Act. In November 2007 the victim witness received 75,000 rupees compensation (approximately £470) based on a court finding he had been subjected to torture in a petition naming the accused, among others. Yet the judge instructed the jury in the English courtroom that this finding had been obtained 'by fraud'. This instruction was based on the judge's impression that the victim witness had lied on oath to the Nepali District Court that he had reported to the barracks until June 2006 (instead of June 2005) so as to bring himself within the time limit under the Nepali Act requiring applicants to bring their claims within 35 days of release. What the judge (and jury) may not have understood is that there had been a political shift in Nepal in April 2006 with the King restoring parliament and ceding power to government,[168] providing victims with the opportunity to bring claims against the Royal Nepal Army that would have been impossible previously.[169] Nepali courts, aware of this context, interpreted the date of release from detention in both physical and psychological terms and accepted claims on this basis.[170] The effect of this misunderstanding in the UK court was a direction from the judge to the jury that the fact this decision was obtained 'by fraud' should be highly relevant to their consideration of the victim's overall evidence and that the jury should approach the victim witness's evidence 'with special caution'.[171]

Courts undertaking universal jurisdiction prosecutions should not ignore the challenges raised by cultural diversity.[172] In inquisitorial systems such as the

167 It is not uncommon for witnesses in international criminal trials to be unfamiliar with Western understandings of time or space or to have difficulty explaining when or where events took place: Wui Ling Cheah, 'Culture and International Criminal Law' in *The Oxford Handbook of International Criminal Law* n 22 above, 761; Combs, n 8 above, 81-82.

168 See, for example, US Department of State, 'Nepal' (Country Reports on Human Rights Practices, 6 March 2007) at https://2009-2017.state.gov/j/drl/rls/hrrpt/2006/78873.htm [https://perma.cc/CLW7-55WH].

169 'Nepalese Rebels Freed from Jail' *BBC News* 13 June 2006 at http://news.bbc.co.uk/1/hi/world/south_asia/5075594.stm [https://perma.cc/9V48-LNQ8].

170 Sharma, n 95 above, 637; Massagé and Sharma, n 88 above, 15.

171 Authors' notes, 20 July 2016.

172 Robert Cryer, n 99 above, 395-399; Combs, n 8 above; Wui Ling Cheah, 'Culture-specific Evidence before Internationalized Criminal Courts: Lessons from Asian Jurisdictions' (2019) 17

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Netherlands, investigative judges conducting universal jurisdiction trials now routinely engage anthropologists, psychologists and interpreters as part of their teams and are able to take advice from them as they consider the evidence. Judges in universal jurisdiction prosecutions conducted in Sweden, the Netherlands and Finland have also engaged in field visits (accompanied by prosecutors and defence counsel) to see the relevant locations and speak to witnesses in country.[173] International criminal tribunals have evolved their procedures in recognition of the impact of linguistic and cultural diversity.[174] Adversarial systems have also demonstrated the capacity to build in adaptations where the cultural attributes and communication style of defendants and witnesses differ from those of courtroom personnel. For example, judges in Australia and Canada working on cases involving indigenous populations are required to participate in appropriate training and development programs, designed to explain contemporary Aboriginal society, customs and traditions.[175] English courts have also shown the capacity to adapt. It is interesting to recall that in the first universal jurisdiction case in UK courts, *R* v *Sawoniuk*, the jury was taken to Domachevo in Belarus to visit the town where the accused had allegedly murdered four Jews during the Nazi occupation. This was the first time a jury had been taken outside Britain to visit the site of an alleged crime.[176] The exercise of universal jurisdiction should continue to prompt searching questions about appropriate procedures, taking into consideration the distinctive communities and cultures such trials put into relation.[177]

The problem of outreach

One of the most overlooked aspects of universal jurisdiction trials is the distinctive breadth of their communicative or expressive function. In universal jurisdiction trials, the domestic courtroom does not merely serve a domestic audience but is a venue for the reconciliation of the interests of the international community, the inter-state community and victim communities. The reach of such trials must necessarily be broader if such trials are to achieve their goals. Universal jurisdiction trials differ from other domestic criminal trials in this

Journal of International Criminal Justice 1031; Barrie Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law' (2019) 19 *International Criminal Law Review* 1014.

173 Notably, field visits are more frequently undertaken in criminal trials in continental European countries: Damaška, n 161 above, 112.

174 Leigh Swigart, 'Linguistic and Cultural Diversity in International Criminal Justice: Toward Bridging the Divide' (2016) 48 *University of the Pacific Law Review* 197. The Special Court for Sierra Leone hired Sierra Leone specialist Corinne Dufka 'to educate investigators on the basic history of the conflict and orient them to Sierra Leonean society': Combs, n 8 above, 299.

175 The need for judicial training was recognised in 'Recommendation 96' of the *Report of the Royal Commission into Aboriginal Deaths in Custody* (Australia), vol V (15 April 1991) at https://www.austlii.edu.au/au/other/IndigLRes/rciadic/ [https://perma.cc/8MRE-HXJV]. See also Diana Eades, 'Judicial Understandings of Aboriginality and Language Use' (2016) 12 *The Judicial Review* 471.

176 Nick Hopkins, 'War Crimes Jury to Visit Belarus' *The Guardian* 9 February 1999 at https://www.theguardian.com/uk/1999/feb/09/nickhopkins [https://perma.cc/LFJ5-5AXA].

177 Roberts, n 10 above.

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respect. In domestic criminal law, the publicity of *individual* trials is generally less important in terms of the goals of domestic criminal justice than the overall public perception of the daily ritual of domestic prosecutions. Domestic criminal law is concerned to achieve deterrence based on the creation of a broad public expectation that laws will be rigorously and generally enforced with reasonable swiftness and consistency.[178] International criminal trials, by contrast, are more exceptional, representative and symbolic. The socio-pedagogical aim of individual international criminal trials must be more ambitious, where individual trials seek to have a role in shifting or recalibrating understanding of entire governmental systems or policies. The capacity for international criminal law to achieve its goals depends on the expressive function of individual trials among the relevant communities: their 'value, legitimacy and persuasiveness as an authoritative expression' of justice.[179]

The English adversarial trial system is not well equipped to perform this communicative function. Unreported, unobserved, the Lama trial in Court 13 of the Old Bailey might well have passed through the factory of domestic justice like so many incidents of shoplifting, drug possession or domestic violence. Public and press galleries were consistently empty. Reporting restrictions were in place prohibiting the publication of any report of the proceedings during the trial (including on social media) beyond the names of the judge, the accused and the lawyers and the offences with which the accused was charged. The Lama trial proceeded, like many trials in the Old Bailey, as something of a private conversation between judge and lawyers, upon which the public gallery were intrusive eavesdroppers. Trial observation is not easy in a system increasingly geared to see public access as less an aspiration of than a threat to the justice system.[180] Those in the public gallery were prohibited from taking notes and

178 Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence?' (2010) 100 *The Journal of Criminal Law and Criminology* 765, 784. The idea is not here to privilege consequentialist over retributivist justifications. Criminal law theories share the idea that public confidence is invested in 'the aggregated symbol of a stable justice system … publicly announcing citizens' rights and responsibilities in the penal sphere': Paul Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in R. A. Duff and others (eds), *The Trial on Trial: Volume 2* (Oxford: Hart, 2006) 55.

179 Koskenniemi, n 119 above; Bill Wringe, 'Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment' (2006) 25 *Law and Philosophy* 159; Annette Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 39, 70; Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2007) 83 *Chicago-Kent Law Review* 329.

180 Access to the public gallery in court involved standing in the security line from nine in the morning and again after the lunch break, which regularly led us to miss the first half-hour of proceedings while waiting to be processed. No laptops, phones, food or water were permitted in the public gallery. Trial observation day-to-day therefore entailed negotiations with local cafes to hold phones and laptops while we were in court. During adjournments we would wait in the stairwell, sometimes for an hour or more. We eventually sought special dispensation from the judge to take notes though had to give our names, affiliations and reasons the notes were required. Following the trial's conclusion, we applied for court transcripts for eight hours of the hearings, following which we received two rounds of questions from the judge asking us to explain the nature of our academic study, including the use to which we intended to put the requested transcripts. We received the requested transcripts several months later at a cost of £712.60 + VAT.

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transcripts are very difficult to obtain. On the second day of the trial, the judge threatened to close the public gallery on account of the fact some individuals in the gallery were leaning in (it was often very hard to hear from the public gallery balcony) and were seen to be taking notes. Significantly, no judgment was issued at the conclusion of the trial. Even once reporting restrictions were lifted, the verdict did not attract the interest of the UK media, with the only report in the printed media on the verdict appearing on page 12 of *The Times*.[181] In the meantime, the verdict was front-page news of most national newspapers in Nepal. Media articles revealed confusion and misunderstanding about the trial and verdict.[182] In the Nepali media, it was explained that a 'panel of experts' (referring to the jury) had given Colonel Lama 'clean chit' (that is, had found him innocent), describing his release as a 'victory'.[183] Within a year, Colonel Lama had been promoted to Brigadier. Back in Nepal, one of the victim witnesses asked, 'Why didn't they believe me? People keep saying I'm lying. You know I did not lie. These things happened to me. I got hurt'.

The complication is that the adversarial courtroom is not typically concerned with communities, participants or interests beyond those of the parties to the case. The bi-polar contest in the adversarial trial is carefully structured to achieve a delicate balance of power between prosecutor and defence where the representations of third parties (including an interventionist judge) are generally regarded as an unwelcome disruption. In practice, victims are typically sidelined during adversarial trials and, in normative terms, are regarded as outsiders to the proceedings.[184] The role of the adversarial trial is not to heal existing conflicts within or between different communities. Indeed, the effect can be to deepen them. The right of confrontation is a recognised aspect of the adversarial process, where witnesses are turned into 'weapons to be used against the other side'[185] and victims can become 'evidentiary cannon fodder'.[186] Adhering to the appropriate ethics of the English bar, victim witnesses in the Lama trial were not met or briefed by the prosecutor, were cut off from NGO representatives on the basis these representatives had also been called as witnesses and were discouraged from contact with members of the Nepali community in the UK.[187] Victim witnesses in the Lama trial found cross-examination intimidating and frightening and were upset and humiliated at being accused of lying in the course of cross-examination, with one witness expressing that they were petrified by how the defence counsel looked at him 'like a buffalo'.[188]

181 Jonathan Ames, 'Officer cleared of Nepalese torture claims' *The Times* 7 September 2016.
182 Sneha 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' *TLI Think! Paper 2/2018* 22.
183 Massagé and Sharma, n 88 above, 10.
184 Jonathon Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294, 298; Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Oxford Journal of Legal Studies* 86.
185 William T Pizzi, *Trials Without Truth* (New York, NY: NYU Press, 1999) 197-198.
186 Michael Cavadino and James Dignan, 'Towards a Framework for Conceptualizing and Evaluating Modes of Criminal Justice from a Victim's Perspective' (1996) 4 *International Review of Victimology* 153, 155 cited in Doak, n 184 above, 299.
187 Shrestha, n 182 above, 18.
188 Massagé and Sharma, n 88 above, 9; Sharma, n 95 above, 636; Shrestha, *ibid*, 18.

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In subsequent interviews, victim witnesses in the Lama trial explained they thought the prosecutor was their legal representative and did not understand why 'their lawyer' did not properly brief them or intervene when they were being subjected to accusations from defence counsel.

Domestic courts exercising universal jurisdiction must be cautious not to overlook the relevant communities on whose behalf universal jurisdiction trials are conducted, including victim communities.[189] In universal jurisdiction trials, it is important to generate understanding and publicity within the relevant communities if such trials are to contribute to the objectives of international criminal justice. Written judgments should be issued, ideally summarised in press releases translated into relevant languages. It is interesting to compare outreach practice in universal jurisdiction trials in other jurisdictions, with the Netherlands, Sweden and Germany leading the way. In the Netherlands, specialised prosecutors in the International Crimes Unit and the Hague District Court (the only court competent to hear first-instance trials concerning international crimes) are active on social media, hold press conferences, issue press releases and maintain comprehensive and informative websites in multiple languages, providing daily updates and summaries of proceedings as well as access to an archive of audio-visual recordings with written summaries.[190] In certain universal jurisdiction trials in the Netherlands, registered victims have been sent a link to enable them to watch a live-stream of proceedings translated through the use of subtitles into their native language.[191] In Germany, a Draft Bill has been introduced including proposed amendments to the *Gerichtsverfassungsgesetz* (Courts Constitution Act) in order to 'improve the reception and dissemination of international criminal trials and judgments' in Germany.[192] These amendments will allow foreign media representatives access to simultaneous interpretation during universal jurisdiction trials, authorise audio and video recordings of proceedings for academic or historical purposes and enable significant judgments on international criminal law to be translated from German into English.[193]

189 Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: CUP, 2007) 175.

190 Olga Kavran, 'Communicating Justice: Lessons from International and National Courts and Prosecution Authorities Dealing with International Crimes' (Asser Institute, June 2022) at https://www.asser.nl/media/795748/communicating-justice-lessons-from-international-and-national-courts-and-prosecution-authorities-dealing-with-international-crimes.pdf [https://perma.cc/T5P5-HGFY]. See for example: https://www.prosecutionservice.nl/topics/international-crimes [https://perma.cc/4EH6-LUR4], https://twitter.com/warcrimes_nl (last visited 9 April 2024) and https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Over-de-rechtbank/Organisatie/Paginas/International-crimes-cases.aspx [https://perma.cc/6EGB-NDU4].

191 Fritz Streiff and Hope Rikkelman, 'Syrian Regime Crimes on Trial in the Netherlands' *Just Security* 22 November 2023 at https://www.justsecurity.org/90225/syrian-regime-crimes-on-trial-in-the-netherlands/ [https://perma.cc/2VMN-SW4W].

192 German Ministry of Justice, 'Draft of a law for the further development of international criminal law' (14 July 2023) available in German at https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RegE/RegE_Voelkerstrafrecht.pdf?__blob=publicationFile&v=2 (last visited 9 April 2024).

193 Stefan 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, 28 February 2023) at https://gpil.jura.uni-bonn.de/2023/02/federal-

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CONCLUSION

The 'justice cascade' of international criminal prosecutions described by Kathryn Sikkink may have started as a trickle but is generating momentum.[194] The last few decades have witnessed the establishment of a steady stream of tribunals exercising international criminal jurisdiction, including *ad hocs*, hybrids, specialist courts and of course the permanent International Criminal Court. In more recent years, there has been a surge in the domestic prosecution of international crimes through the mechanism of universal jurisdiction.[195] This bricolage of international criminal prosecutions is appropriately recognised as an emerging (decentralised) international criminal justice system. Domestic courts exercising universal jurisdiction should not ignore the broader project of which they are part. In the UK, the exceptional nature of universal jurisdiction trials, pursued by different legal teams sometimes with years between them, has provided little impetus for domestic actors to take stock and engage with lessons learned. Yet by failing to acknowledge the distinct nature of universal jurisdiction trials, the potential for these trials to serve their objectives is missed. At the international level, greater consideration must be given to the development of an agreed set of rules or guidelines to better enable universal jurisdiction trials to fulfil their role as actors in the decentralised international criminal justice system.[196] At the domestic level, all actors in universal jurisdiction trials, including governments, lawyers and judges, must take responsibility for the authority they claim and the normative communities they bring into relation. Otherwise, courts such as the Old Bailey risk becoming just another site where – in an increasingly pluralist legal world – blinkered reliance on local road maps results in global disorientation.

minister-of-justice-announces-major-changes-to-german-criminal-law-and-procedure-with-regard-to-crimes-against-international-law/ [https://perma.cc/2VMW-JY6A].

194 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York, NY: W. W. Norton & Co, 2011).

195 Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 *European Journal of International Law* 779.

196 See Devika Hovell, 'Modern Guidelines for Universal Jurisdiction' *ICC Forum* 13 September 2023 at https://iccforum.com/decentralized-accountability#Hovell_refAnnex [https://perma.cc/7GHN-ZBGF].

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