The applicability of universal jurisdiction - Have we forgotten to act as a society?

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1. INTRODUCTION

This paper[1] addresses the principle of universal jurisdiction from the perspective of access to justice. This is done in a critical manner, highlighting the victim as the subject who has the right of access to justice. To this end, the content is framed within the general right of access, and then linked to the basis of the principle of universal jurisdiction. This makes it possible to observe how the fight against impunity is the main basis of the principle of universal jurisdiction and is closely related to the right of access to justice. Therefore, in this paper, a review of its particular foundation is carried out, which leads to a focus on the effective access to universal jurisdiction in Spain.

Since its latest reforms, the configuration of universal jurisdiction in Spain has become increasingly restrictive and therefore affects the right to effective judicial protection of the victims of certain criminal acts, so much so that it is practically inapplicable. This is the main reason why access to jurisdiction through this principle has been achieved by establishing limitations on access. Limitations which are mainly based on the figure of the victim, but also from the procedural point of view, as applicable assumptions are established which condition the prosecution of the criminal act.

With the content provided, various questions are raised, on the one hand, in relation to access to justice in today's society, as this part considers that it is framed in the efficiency of the procedural system and not in the original meanings. Likewise, the difficulty of the regulatory precept of the principle of universal jurisdiction is raised, for which this part systematises in a schematic way,

1 It is part of Project PID2020-113083GB-I00 (IPS Sonia Calaza and José Carlos Muinelo): Ejes de la Justicia en tiempos de cambio.

as well as the pitfalls that a victim of certain criminal acts has to face in view of the conceptualisation of victim granted by our law, as well as their nationality and corroborated in the strict sense by our jurisdictional bodies.

2. THE PRINCIPLE OF UNIVERSAL JURISDICTION AND ITS TWO MAIN PURPOSES: GUARANTEEING THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION AND THE FIGHT AGAINST IMPUNITY

2.1. The protection of an injured right outside the national territory

In my opinion, the principle of universal jurisdiction has two main purposes: To guarantee the right to effective judicial protection of citizens and at the same time to fight against impunity, the latter is the classic and original basis that has been attributed to the creation of the principle of universal jurisdiction when victims were not yet protagonists in the creation of international procedural instruments; peace and social security were simply sought through the fight against impunity without taking into account that the right to effective judicial protection as a human right has to be recognised as another of the purposes and at the same level as the aforementioned.

Therefore, in this article, in order to analyse the applicability of the principle of universal jurisdiction, we will address, on the one hand, the recognition of access to jurisdiction as a subjective right that is included within the right to effective judicial protection, and on the other hand, the classic basis of the fight against impunity and its relationship with access to justice and the search for international peace and security.

The right of access to jurisdiction falls within the right to effective judicial protection, as Reifarth[2] states that it is the "core substance" (the author refers to: SSTC 37/1995, of 7 February (FJ 5º.);201/2012, of 12 November (FJ 3º);90/2013, OF 22 April (fjº3);140/2016,of 21 July (FJ 12º);149/2016, of 19 September (FJ 3º)) of effective judicial protection, through which the possibility of being able to turn to a judicial body and obtain a pronouncement on the right or interest injured is recognised.

According to Añón[3], the right of access to justice is not only instrumental in nature, but is also a fundamental part of the rule of law, closely linked to the principles of independence, impartiality, integrity and credibility through which the judiciary is legitimised . It is conceived as a human, social

2 Reifarth Muñoz, Walter. *La tutela colectiva de los derechos fundamentales*. Aranzadi, 2023, p.189.

3 Añón, Maria José. «El derecho de acceso como garantía de justicia», in García-Pascual, Cristina *Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos*. Tirant lo Blanch, 2018,p.20.

and multidimensional right that should be characterised as such due to its complexity[4] , not only because of the rights intrinsic to access to justice, but also because of the humanisation of justice[5] , which in its evolution has meant that the guarantee of the right of access to justice must be carried out from various dimensions.

As Garcia Añón states, the right of access to justice includes, on the one hand, the acquisition of rights, and on the other, the guarantee and effectiveness of their recognition by the State Administration or other entities[6] . Therefore, in order to guarantee the right of access to justice, it must not only be carried out from a procedural point of view, but also from an institutional point of view, and must be adequate for the parties and citizens. This adequacy refers to the fact that it should not be forgotten that the quality and management of justice are also included in the right of access to justice, in line with Juan-Sánchez[7].

The right of access to jurisdiction provided for above must be linked to the right of victims of criminal acts in accordance with the principle of universal jurisdiction. However, in order to address these aspects, it is undoubtedly necessary to refer to the basis of the principle of universal jurisdiction itself, since this basis is what allows us to configure access to justice in a State other than the one where the criminal act is committed. However, it is worth noting that the main basis for the regulation of the principle of universal jurisdiction was the fight against impunity and the safeguarding of peace and international security, but it has not been determined that it is access to justice, because the victims of criminal acts have hardly played a leading role.

Without an adequate configuration of the jurisdictional system in a globalised society such as today's, insofar as the aim is to extend the exercise of the jurisdictional power of the judges and courts of a state to judge and enforce what has been judged when a criminal act is committed, a system of access to justice for the victims of criminal acts is being developed. However, the recognition of the status of victim, which allows you to articulate this right of access to jurisdiction through the system of universal jurisdiction, will be nuanced and even threatened, as we will see below.

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4 Idem. P.21

5 De Lucchi López-Tapia, Yolanda, *Las personas con discapacidad: el derecho fundamental de acceso a la misma en condiciones de igualdad.* Revista de Estudios Europeos, n.º Extraordinario monográfico, 2023, p.156-181.

6 García Añon, J. "El acceso a la justicia como garantía de los derechos humanos: apuntes sobre su evolución", in De Lucas Martín, Javier; Vidal Gil, Ernesto; Fernández Ruiz-Gálvez, Encarnación; Bellver Capella, Vicente (coord.).Pensar el tiempo presente Homenaje al profesor Jesús Ballesteros Llompart. Tirant lo Blanch,2018,p.663-676.

7 Juan-Sánchez, Ricardo. "Calidad de la justicia, gestión de los tribunales y responsabilidades públicas: algunos estándares internacionales y otras buenas prácticas para favorecer el acceso a la justicia", in Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos. Tirant lo Blanch, 2018.

2.2. First aim: The principle of universal jurisdiction as a guarantee of effective judicial protection

It is necessary to go into the basis of the principle of universal jurisdiction for one main reason, and that is that if we do not understand its origin and basis, or if we do not know it in a few brief lines that will be dedicated to it, it is not possible to articulate and configure an adequate access to jurisdiction through this principle.

First of all, it is necessary to define the principle of universal jurisdiction; however, we note that there is no unanimous definition, nor even a consensus in the doctrine regarding its name, as the reference to this principle has different names[8] . Denominations which allude to the branch of specialisation of the author who studies it. The definition that will be given here is taken from the *Princeton Principles on Universal Jurisdiction*, basically because it is the one used by the United Nations General Assembly (United Nations General Assembly, 2001):

> "universal jurisdiction means a criminal jurisdiction based exclusively on the nature of the offence, regardless of the place where the offence was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim or any other nexus with the state exercising such jurisdiction".

In our view, from a procedural perspective, the above definition does not really give the principle of universal jurisdiction its true material use, for one simple reason, and that is that with the first sentence "universal jurisdiction means criminal jurisdiction based exclusively on the nature of the crime" it seems clear that the jurisdiction of a state will extend beyond its territory based on the nature of the criminal act, which is indeed the case. This is indeed the case, but the following sentence alludes to a principle of territoriality, which is meaningless, because the state exercises its *ius puniendi* in its territory, except when certain circumstances arise that generate impunity and therefore the jurisdiction of another state must be applied in order to protect the general interests of international society. It also goes on to refer to the principle of active and passive personality and suggests that there must be a connecting link for its application. This has meant, over the years, the transition to restriction in the various states, which is why this part considers that this definition would not be the most appropriate given the basis and application of the principle. However, it is not the main objective of this paper to go into it in more detail.

Now, this foundation of the principle of universal jurisdiction to which reference is made, is the one unfounded by Grotius[9] which determined that the punitive power held by a State extends to any State because it emanates from natural law, with the following sentence: "*Ponunt enim illi puniendi potestatem*

8 Vázquez Serrano, Irene. The principle of universal jurisdiction. Revista Electrónica de Derecho Internacional Contemporáneo: REDIC, ISSN-e 2618-303X, Vol. 1, Nº. 1, 2018, p. 6-31.

9 Grotius, H. De iure belli ac pacis. 1625. Translation: Arriaga Benitez, J.M. Annotated translation of Hugo Grotius' De Iure belli ac pacis on the *Ius ad bellum*.2015, p.XX,XL,4.

esse effectum proprium jurisdictionis civilis, cum nos eam sentiamus venire etiam ex jure natural". It also determined that sovereigns had the duty to take care of human society in the face of serious violations of natural law[10] . Nor should we forget De Vattel[11] , who defended the possibility of applying the punitive power of a State to the most serious crimes in order to safeguard public security, as Covarrubias referred to the protection of international peace and security through the exercise of a State's jurisdiction[12] .

Well, beyond the spiritual foundations of the principle's basis, as Bassiouni[13] stated, the principle of universal jurisdiction is about going beyond criminal cooperation. The principle of universal jurisdiction is therefore the principle applicable to the commission of a given criminal act regardless of the territory and the persons who have committed it, with the aim of guaranteeing international peace and security as well as the fight against impunity.

The recognition of the rights and freedoms of natural persons at the international level undoubtedly entails the recognition of the principle of universal jurisdiction because it is the procedural means by which their protection is guaranteed[14] . In the same sense, Orihuela[15] states that the basis of the instruments which provide for the exercise of jurisdiction outside the territory is based on the defence of the interests of the community and acts as a suitable principle for this purpose. He mentions the *Principles for the Protection and Promotion of Human Rights* and 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* (A/RES/60/147) as two of the instruments that provide for such a basis.

The need for such protection is reflected in the United Nations Charter of 26 June 1945, the Universal Declaration of Human Rights of 10 December 1948, the four Geneva Conventions of 1949 and their Additional Protocols, the United Nations General Assembly, the International Covenant on Civil and Political Rights and its annexed Protocols on the Implementation of Obligations and on the Abolition of the Death Penalty of 1966, among many others that were adopted subsequently.

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10 Ollé Sesé, Manuel. Universal Justice for International Crimes. La Ley. 2008,p.96-98.

11 De Vattel, Emer. The Law of Nations. Liberty Fund, 1797.

12 Martinez Alcañiz, Abraham. "El principio de justicia universal. In: El Principio de Justicia Universal y los Crímenes de Guerra. p.119 y ss. IUGM-UNED. Madrid, 2015.

13 Cherif Bassiouni, Mahmud. Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice. Virginia Journal of International Law Association. 2001, 42 Va. J. Int'l. L. 81.

14 See in this regard: Berdugo Gómez de la Torre, Ignacio. "Acerca de la Internacionalización del Derecho Penal", in El principio de Justicia Universal: Fundamentos y límites. Tirant Lo Blanch. 2012. p. 23-32. Simón, J.M. Universal Jurisdiction. La perspectiva del derecho internacional público. Revista Electrónica de Estudios Internacionales, 2002, www.reei.org.

15 Orihuela Calatayud, Esperanza. Universal Jurisdiction in Spain. Real Academia de Legislación y Jurisprudencia de la Región de Murcia, 2016, p.19.

Likewise, taking a brief look at the various international instruments which include the principle of universal jurisdiction, it is worth highlighting, as Brotons and Orihuela[16] determine, that there are instruments which provide for mandatory prosecution by any state in the prosecution of a specific criminal act, but through a regulatory framework to be developed by the domestic state, which will be of obligatory application as long as the principle of territoriality is not applied in order to avoid impunity; On the other hand, there are other conventions which, for the same purpose, provide for the *aut dedere aut iudicare* rule, such as, for example, the following, among others *Convention on the Prevention and Punishment of Genocide, of 9 December 1948; Convention relating to the Status of Stateless Persons, of 13 September 1954; Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 4 September 1956; International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 10 December 1988.*

As can be seen, the basic foundation of the principle of universal jurisdiction is therefore to be the mechanism through which the rights and general interests of international society are protected in order to fight against impunity, provided that the principle of territoriality does not apply in the territory where the criminal act is committed. What do we mean by impunity in a state, and what is its relationship with access to justice?

2.3. Second aim: the fight against impunity as a safeguard for international peace and security

As stated above, the main basis of the principle of universal jurisdiction is the fight against impunity, since this principle undermines the *forum loci comissi delicti*, i.e. the sovereignty of a state to exercise jurisdiction over the commission of a criminal act in its own territory is transferred to another state, which acts through the exercise of its jurisdictional power as if the criminal act had been committed within its own territory. However, the impunity that arises from the commission of certain criminal acts has various meanings, as we shall see below. On the one hand, the study on impunity carried out by Saavedra[17] , states that the basis of universal jurisdiction falls within the so-called "structural impunity", and what does this impunity consist of? The author points out two kinds of impunity,

16 See in this regard: Orihuela Calatayud, Esperanza. La Jurisdicción Universal en España. Real Academia de Legislación y Jurisprudencia de la Región de Murcia, 2016,p.52./Remiro Brotóns, Antonio. La persecución de los crímenes internacionales por los tribunales estatales: el principio de universalidad. Tirant lo Blanch, 2007. Chapter XXX (paragraph CLII)/.

17 Saavedra Alessandri, Pablo. "La respuesta de la jurisprudencia de la Corte Interamericana a las diversas formas de impunidad en casos de graves violaciones de derechos humanos y sus consecuencias", in La Corte Interamericana de Derechos Humanos. Un Cuarto de Siglo: 1979-2004, San José de Costa Rica: Corte Interamericana de Derechos Humanos, 2005, p. 385-413.

one called normative or legal impunity, and the other, structural impunity. The first, the author determines, is produced when the state renounces its punitive power through the promulgation of certain norms; the second is that which is generated by factors that affect the *ius puniendi* of the state, that is, it is generated because a series of factors lead the state to act evasively or omissively in the face of the commission of criminal acts. This distinction was already made by Ambos[18] , who referred to the existence of three levels of impunity, distinguishing between legal-material impunity, procedural impunity and structural impunity.

a) Legal-material impunity: Within this, a distinction is made between so-called normative impunity, which arises from an absence of norms or norms that determine the punishable act as lawful or exempt from criminal responsibility; or it can be factual because it arises from an absence of material elements that allow for criminal prosecution and punishment.

b) With regard to procedural impunity, what the author does in order to determine it is to relate it to what we currently recognise as the efficiency of the justice administration system and he relates it to the phase of the process affected by this inefficiency, whether it is investigative, declaratory or executive - the author uses other terminology: investigative, plenary and executive - by establishing the existence of different types of impunity which can be schematically determined in the following way:

De facto impunity: impunity arising from the absence of a criminal prosecution for the initiation of proceedings.

Investigative impunity: Lack of mechanisms for the development of an adequate investigation or directly the absence of an investigation of the act.

Impunity by congestion: Collapse of the system of administration of justice.

Legal impunity: Lack of procedural or procedural rules applicable to the case.

Criminal impunity: Criminal acts are committed against the parties to the proceedings.

c) Impunity as a structural problem: According to Ambos, this impunity stems from socio-political problems, representing "an image of the socio-economic and political relations of an "underdeveloped" society"[19] which produces an absence of credibility on the part of society in justice, favouring those who hold a privileged social class and generating inequality.

Thus, having explained the various types of impunity, this section observes the existence of impunity related to the set of substantive and procedural rules that directly affect the exercise of jurisdictional power, the effectiveness of the system of administration of justice and, therefore, the right of access to justice. It is deduced that the levels of impunity determined by Ambos and Saavedra are

18 Ambos, Kai. Impunity and International Criminal Law. Ad-Hoc, 1999.

19 Ambos, Kai. Impunity and International Criminal Law. Ad-Hoc, 1999, p.42, *in fine*.

interrelated, which is why this party considers that in view of the protection of human rights through universal jurisdiction as a mechanism to fight impunity, and considering the existing relationship between access to justice and impunity, it would not be necessary to make such a differentiation at the present time, Rather, impunity could be defined as impunity resulting from the ineffectiveness of the system of administration of justice, which *per se* encompasses the impunity that exists in the norm for the commission of certain criminal acts, impunity resulting from a deficient procedural and procedural system, and impunity resulting from a corrupt social system, promoted by politics and the economy as the driving force of society and not by the protection of human rights.

Currently, States, at least theoretically, seem to be moving towards a more effective justice system, towards the achievement of Sustainable Development Goal 16 "Peace, justice and strong institutions", which reflects the implementation of a justice system in which access to justice is guaranteed to any citizen, who knows the institution, has the appropriate information mechanisms, is involved to the extent that he/she considers it appropriate in this justice[20] , we are moving towards a more humane, closer, integrative, collaborative justice system, which aims to guarantee the absence of impunity for acts that violate the rights or interests of another person or a group, and also aims to protect victims as vulnerable persons[21].

The change of paradigm and the evolution in access to justice that has been observed over the years allows us to determine that the relationship between the efficiency of the justice administration system, impunity and the right to effective judicial protection is unavoidable. For this reason, it is necessary to reflect on the relationship between the basis of the most classic principle of universal jurisdiction, in order to adapt it to the social reality and to guarantee access to justice for all citizens regardless of the territory where they reside, or rather in today's globalised society, where their rights have been violated.

See also the study by Juan-Sanchez[22] in relation to the quality of justice in which he states that effective access to justice "is also achieved by improving the conditions in which the Administration of Justice is administered and managed", and invites us to reflect by referring, for example, to technological updating through the incorporation of new computer equipment in the administration of justice, which undoubtedly conditions the exercise of jurisdictional functions

20 Corneloup,S./Verhellen,Jinske. "SDG 16: Peace,Justice and Strong Institutions", in The private side of transforming our World.UN Sustainable Development Goals 2030 and The Role of Private International Law.Intersentia, 2021, p. 507.

21 De Lucchi López-Tapia, Yolanda, Las personas con discapacidad: el derecho fundamental de acceso a la misma en condiciones de igualdad. Revista de Estudios Europeos, n.º Extraordinario monográfico, 2023, p.156-181.

22 Juan-Sánchez, Ricardo. "Calidad de la justicia, gestión de los tribunales y responsabilidades públicas: algunos estándares internacionales y otras buenas prácticas para favorecer el acceso a la justicia", in Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos. Tirant lo Blanch, 2018.

and adds that the quality of justice is a criterion for legitimising a public service; however, it is doubtful whether the jurisdictional power provided to guarantee the protection of the injured right or interest includes these aspects that condition its exercise, which inevitably affect the right of access to justice.

3. THE MATERIAL APPLICABILITY OF THE PRINCIPLE OF UNIVERSAL JURISDICTION

The functioning and configuration of the principle of universal jurisdiction in Spain is regulated in Article 23.4 of the Organic Law of the Judiciary (LOPJ) [23]. A reading of the precept, and taking into account the definition initially set out, which relates the application of the principle of universal jurisdiction to the nature of the criminal act, could lead us to wrongly deduce that the model applicable in Spain regarding the principle of universal jurisdiction is a broad model; however, unfortunately, this is not the case *"appearances can be deceiving"* also in a normative sense.

The system currently regulated in the LOPJ is configured as a restrictive model of universal jurisdiction whereby certain conditions are established to determine the applicability of the State's jurisdiction. However, the absolute model, which was the one initially envisaged in Spain, defended by this party, is not conditioned by the subjects of the legal relationship, or by attempting to link it to the State. Rather, its application is based on the nature of the criminal act, see the different models [24]:

This party's decision to opt for this model is basically based on the rationale of the principle, which is the instrument for guaranteeing those rights that are injured and which are not protected by the state where the injury occurred in defence of the general interests of international society, which, by conditioning them, not only runs the risk of directly affecting the sphere of the right to effective judicial protection, but also of creating a legal-material or procedural impunity in a state outside the state where the act was committed, which produces structural impunity at the international level; but also of creating a legal-material or procedural impunity in a State where the act was committed and in the State outside the State where the act was committed, which produces structural impunity at the international level.

When analysing the models of impunity, it seems that the description of the models only applies to a specific state, but not to the international level, when it should be the most relevant in order to safeguard peace and security. In this

23 Ley Orgánica del Poder Judicial. Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.BOE núm. 157, de 02/07/1985.

24 Ollé Sesé, Manuel. "La aplicación del derecho penal internacional por los Tribunales nacionales", in Gil Gil, Ailicia. Maculan, Elena. Derecho Penal Internacional. Dykinson. 2019.

respect, and taking Taruffo's phrase, it should be borne in mind that the right of access to justice as a constitutional guarantee "cannot be interpreted as if it referred only to individual rights, simply leaving aside collective rights"[25] and the fact is that we live in a globalised society and the models of guarantees of the right to effective judicial protection must be adapted to today's society.

Analysing the principle of universal jurisdiction is an arduous task, firstly because Article 23.4 is made up of 16 paragraphs (from letter a) to p), each of which provides for certain types of crime, some of which refer to only one and others to several. Within each of these sections, in turn, certain requirements or conditions are laid down which are cumulative or alternative for the initiation of criminal proceedings, through the exercise of criminal action. Therefore, in view of their configuration and for purely methodological purposes, the most appropriate approach is to analyse access to universal jurisdiction through the provision of connective links with the State, which are the conditions and limits of access that are provided for and which are of different natures.

Therefore, firstly, we will consider the crimes included in the aforementioned precept and for which the principle of universal jurisdiction can be applied. Secondly, we will consider the limits that we could classify as merely procedural and personal.

3.1. The applicability of the principle to certain criminal acts

The application of the principle of universal jurisdiction in each State, as has already been stipulated, can be delimited in accordance with the type of crime that has been committed. Thus, in Article 23, section 4 of the Organic Law of the Judiciary, we find a diversity of criminal acts which, following the classification made in a previous work[26] , can be divided into three large groups: a first group of crimes which can be committed anywhere; a second group of crimes which refer to international conventions because they are included in them; and a third group which are crimes committed in marine areas.

a) The first group: Offences committed in any territory in a broad sense.

1. Crimes of genocide. Art. 607 CP.

2. Crimes against humanity. Art. 607 bis CP.

3. Offences against persons and property protected in the event of armed conflict. Art. 608 to 614 bis CP.

4. Provisions common to those of Art. 615 to 616a.

5. Crimes of torture and against moral integrity. Art. 173 to 177 CP, although 23.4 LOPJ excludes the basic type of art. 173, specifying the inclusion of the types of art. 174 to 177 CP.

25 Taruffo, Michele. Páginas sobre justicia civil. Marcial Pons, Madrid,2009,p.35.

26 Spada Jiménez, A. Climate justice and procedural efficiency, Thomson Reuters Aranzadi, 2021.

6. Terrorism. Art. 573 to 580 CP.

7. Trafficking in human beings. Art. 177 bis CP.

8. Illegal trafficking in toxic drugs, narcotics or psychotropic substances. Arts. 359 to 378 CP.

9. Corruption offences between individuals or in international economic transactions. Articles 286 bis to 286 *quater* CP provide for corruption in business dealings.

10. Offences related to criminal groups or criminal organisation (formation, financing, integration or implementation).

11. The autonomous classification of the offence of belonging to a criminal organisation or group for the commission of crimes is established in Arts. 570 bis to 570 *quáter* and in relation to terrorism, in Arts. 571 and 572 CC, however, there are various offences that provide for the commission of the offence by a criminal organisation or group: Threats by terrorist groups or organisations: Art.170.2 CC; Trafficking in human beings: Art. 177 bis. 6 CC. Organisations for corruption or money laundering: Art. 302; For the illegal financing of political parties: Art. 304 ter CC; Against the right of foreign citizens: Art. 318. Bis. 3. a) CC; Against public health: Arts. 371 and 376 CC; Against State institutions and the division of powers. Art. 505 CC. Unlawful associations: Art. 515 CC.

12. Crimes against sexual freedom and indemnity in underage victims.

To be taken into account: All of Title VIII CP would be included as long as the victim is a minor. Sexual assault: Art. 178 to 180 CP; Sexual abuse: Art. 181 to 182 CP; Sexual assault and abuse of minors under the age of sixteen: Art. 183 to 183 *quater*; Sexual harassment: 184 CP; Exhibitionism and sexual provocation: 185 and 186 CP; Prostitution, sexual exploitation and corruption of minors: Art. 187 to 190 CP; Provisions common to the above: Art.191 to 194 CP.

b) The second group: refers to offences referred to in Conventions to which the precept refers.

1. International Convention for the Protection of All Persons from Enforced Disappearance, done in New York on 20 December 2006[27] . In the Convention, art. 6 defines the conducts that should be criminalised as the crime of enforced disappearance. In our national legislation, art. 607 bis. CP integrates it within the crime against humanity, where enforced disappearance is included as a subspecies of it. Therefore, there is no autonomous and specific classification of the crime of enforced disappearance in national legislation as provided for in the Convention.

27 Instrument of Ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, done at New York on 20 December 2006. BOE No. 42, 18 February 2011, pages 18254 to 18271.

2. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970[28] . Although national legislation does not specifically mention the offence, the criminal conduct included in the Convention coincides with that of Art. 616 ter and *quater* of the CP, as a crime of piracy, and in turn is included within the conduct of the crime of terrorism in Art. 573 CP. However, the CP is not the only text that regulates such conduct, as it is established in the Criminal and Procedural Law on Air Navigation of 1964, specifically in Art. 39 and 40 as an offence against the law of nations[29] .

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 1988[30] . In relation to the conducts envisaged by this procedural instrument, as with the aforementioned Convention, they are not specifically regulated in the CP, and therefore the applicable precepts are Art. 573 and 616 *ter* and *quater* CP, Title II of the Criminal and Procedural Law on Air Navigation and Art. 1 of the Convention itself.

4. Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980[31]. The Spanish Criminal Code (CP) regulates offences relating to nuclear energy and ionising radiation, from Art. 341 to 345, typifying the criminal conduct foreseen in Art. 7 of the Convention.

5. Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011[32] . The criminal conducts regulated by the Convention from art. 36 to 42, coincide with some of the conducts included in the CP, being found in different systematic locations within the law itself, in relation to female genital mutilation, which is provided for in art. 149; the crime of abortion, in art. 144 to 146; the crime of abortion, in art. 144 to 146; the crime of abortion, in art. 144 to 146; the crime of rape, in art. 149; and the crime of rape, in art. 149.The crime of abortion, in Art. 144 to 146; forced marriage, in Art. 172 bis and marriage included in human trafficking in Art.177 bis.1, e); in relation to the crimes of sexual indemnity and freedom in Title VIII of the CC, they should also be considered included. The CP qualifies

28 Instrument of Ratification of the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970. BOE No. 13 of 15 January 1973, pages 742 to 743.

29 Law 209/1964, of 24 December 1964, Criminal and Procedural Law on Air Navigation. BOE no. 311, 28 December 1964.

30 Instrument of Ratification of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, BOE No. 9 of 10 January 1974, pages 551 to 553. Instrument of Ratification of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (done at Montreal on 23 September 1971), done at Montreal on 24 February 1988. BOE No. 56 of 5 March 1992, pages 7565 to 7567.

31 Instrument of ratification of the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980. BOE No. 256, 25 October 1991, pages 34558 to 3456.

32 Instrument of ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE No. 137, 6 June 2014, pages 42946 to 42976.

what the Convention establishes and the Convention does not specifically provide for certain conducts.

6. Council of Europe Convention on the counterfeiting of medical products and similar offences that pose a threat to public health of 28 October 2011[33] . The Convention provides for criminal conduct from art. 5 to art. 9, coinciding with those regulated in art. 361 to 362 *quater* CP.

c) The third group: Offences committed in marine areas.

The article itself differentiates it as the only paragraph that has a broad applicability of the principle of universal jurisdiction, including the following:

1. Piracy. Arts. 616 ter and 616 *quáter* CP.

2. Terrorism. Arts. 573 to 580 CP.

3. Crimes of illegal trafficking in toxic drugs, narcotics and psychotropic substances. Arts. 359 to 378 CP.

4. Trafficking in human beings. Art. 177 bis. CP.

5. Against the rights of foreign citizens. Art. 318 bis CP.

6. Against the safety of maritime navigation. The offence is not defined in national legislation, although it can be included in the offence of terrorism by determining the commission of the offence against maritime navigation in Art. 573 CP.

To be taken into account: Despite the absence of criminal conduct constituting the offence expressly, the European Union has set the protection of peace and security at sea as its main objective in the 2014 Maritime Safety Strategy[34] , for which it has developed various action plans. Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[35] is responsible for defining what constitutes conduct against maritime safety.

3.2. Conditional right of access to jurisdiction for victims

3.2.1. The concept of victim and its interpretation as a first condition

The concept of victim is relevant in relation to the active legitimation in the process, given that for the attribution of competence for universal jurisdiction, the LOPJ establishes the need for a complaint to be filed by the offended party or by the MF, but who holds the status of offended party?

33 Instrument of ratification of the Council of Europe Convention on counterfeiting of medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011. BOE No. 286 of 30 November 2015, pages 112677 to 112692.

34 European Union Maritime Safety Strategy of 24 June 2014.

35 Instruments of Ratification of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. BOE No. 99 of 24 April 1992, pages 13842 to 13846.

3.2.1.1. The general concept of victim under international law

In an international context and with a universal scope of application, the concept of victim is established in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[36] , where two groups of victims are described: as a victim of an unlawful criminal conduct and as a victim of a conduct derived from abuse of power[37] , establishing a fairly broad concept, however, the national legislations of various States recognise the victim as the one who suffers the harm directly, i.e. as the owner of the protected legal right[38] . The above definition was qualified by General Assembly Resolution 60/147 of 16 December 2005[39] , adding the possibility of attributing the term victim to the family, dependents of the victim or persons who have assisted the victim, thus distinguishing the subjects and leaving it to the discretion of each state to regulate it.

However, the International Criminal Court, in the Rules of Procedure and Evidence[40] , grants the status of victim to persons who have suffered harm without distinguishing whether the harm should be direct or indirect, although it does establish this in the case of institutions or organisations, which will only have such status for direct harm.

3.2.1.2. The general concept of victim in Community law

The concept of crime victim is defined in Directive 2012/29/EU[41] , although it is not applicable to victims of particularly serious crimes, which have their own specific European legislation[42] , which establishes that a victim is a natural person who has suffered physical, mental, emotional or economic harm as a result of a criminal offence and includes in the following section the relatives of the victim who have suffered harm or damage as a result of the death. It establishes a

36 General Assembly Resolution 40/34 "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" A/RES/40/34 (29 November 1985).Available at: https://www.ohchr.org/sp/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx

37 To understand by any harm those included in the Resolution *"physical or mental injury, emotional suffering, financial loss or substantial impairment of their fundamental rights"* Paragraphs A and B of A/RES/40/34 (29 November 1985).

38 Sanz Hermida, Ágata. *La situación jurídica de la víctima en el proceso penal.* Tirant lo Blanch. Valencia 2008. p. 21-25.

39 General Assembly Resolution 60/147 "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". A/RES/60/147 (of 16 December 2005). Available at: https://www.ohchr.org/sp/professionalinterest/pages/remedyandreparation.aspx

40 Rule 85 of the Rules of procedure and evidence. Available at: https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdfn

41 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA. OJEU No. 315 of 14 November 2012, pages 57-73.

42 Blázquez Peinado, Mª D. "La Directiva 2012/29/UE ¿Un paso adelante en materia de protección a las víctimas de la Unión Europea?" *Revista de Derecho Comunitario Europeo.* Madrid September/December.2013. p. 919 .

definition in a later section of "family members", where it includes the spouse, a person of analogous relationship, direct relatives, siblings and dependants of the victim.

3.2.1.3. The general concept of victim in domestic law

The transposition of Directive 2012/29/EU in Spain is carried out through the creation of the Crime Victims' Statute (EV)[43] , the Regulation for the development of the Statute and the regulation of assistance offices[44], Real Decreto 1110/2015[45] and the modification of articles 109 *bis* and 110 of the Criminal Procedure Act (LECrim)[46] .

The concept of victim in the EV, like the Directive, is divided into direct victim and indirect victim, however, it limits the concept of indirect victim by establishing a list of family members in order of priority[47] , which is quite debatable, given that it makes the bringing of criminal proceedings against some family members conditional on the existence or not of others, thus excluding the victim's siblings or parents[48] . Do these subjects not suffer the loss; would they not have the same right to bring criminal proceedings as the spouse and children?

The practical consequence of such wording, together with the restriction of the JU, is materialised in Judgment 1/2017 of Audiencia Nacional, where the sister of a citizen who is dead after suffering the commission of several crimes by the Syrian regime is denied the status of victim and in which the status of victim is attributed only to the passive subject of the crime, in accordance with the Plenary Order of the Audiencia Nacional[49] under appeal and the jurisprudence of the SC on the JU. Therefore, the Spanish judicial body is declared to lack jurisdiction, not having been considered an indirect victim of the crime[50] .

3.2.1.4. Concept of victim in specific crimes

For the specific types of crime where the victim is allowed to prosecute, there are a number of legal instruments that provide for victim protection and which could be useful to reinforce the restricted victim concept.

43 Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

44 Royal Decree 1109/2015, of 11 December, which implements Law 4/2015, of 27 April, on the Statute of the Victims of Crime, and regulates the Offices for Assistance to Victims of Crime. BOE no. 312, of 30 December 2015, pages 123162 to 123181.

45 Royal Decree 1110/2015, of 11 December, which regulates the Central Register of Sex Offenders. BOE No. 312, 30 December 2015 Sec. I. P. 123182.

46 Amended by Law 4/2015, of 27 April. Ref. BOE-A-2015-4606.

47 See art.2 of Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

48 Gutiérrez Romero, F.M. "Estatuto de la víctima del delito: algunos comentarios a la Ley 4/2015" Revista Aranzadi Doctrinal num.7/2015 parte Estudios. Editorial Aranzadi, S.A.U., Cizur Menor.2015.

49 Audiencia Nacional. Sala de lo Penal. Order 35/2017, of 27 July 2017.

50 Audiencia Nacional. Sala de lo Penal. Judgment 1/2017 of 15 December 2017.

For terrorist offences: Directive 2017/541/EU on combating terrorism[51] does not establish the concept specifically, although it does determine the applicability of protection measures to victims and family members, without distinction, so it could be understood that both the owner of the legal asset and their family members would have the status of victim[52] . At the state level, the recipients of compensation for being victims of terrorism are established in Law 29/2011[53] , however, in accordance with the purpose of the regulation, in my opinion, it only provides for the recognition of the victim for the purposes of compensation and not for legal standing.

For human trafficking offences: Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[54] does not specifically define the victim, but the Convention of 16 May 2005 on Action against Trafficking in Human Beings[55] does[56] and equates it with the passive subject of the offence, i.e. the holder of the protected legal interest.

For crimes against sexual indemnity and sexual freedom: In the 2011 Istanbul Convention[57] , the victim of a crime of violence against women and of domestic violence is defined as the victim who has suffered physical, mental or economic harm, without specifying the subjects. At the European level, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order[58] and Regulation No. 606/2013[59] , although they seem to apply specifically to crimes of gender-based violence, do not define the concept of victim.

In offences of counterfeit medical products that are a threat to public health: The 2011 Moscow Convention[60] does not distinguish between family members and victim, it only requires the harm to have been suffered as a

51 Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OJ L 88/6 31.3.2017.

52 Vid. art.24 section 1 and 7, and art. 25 *Ibid.*

53 Law 29/2011, of 22 September, on the Recognition and Comprehensive Protection of Victims of Terrorism. BOE no. 229, 23 September 2011, pages 100566 to 100592.

54 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/628/JHA. OJ L 101/1 of 15.4.2011.

55 Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. BOE" No 219 of 10 September 2009, pages 76453 to 76471.

56 BOE" No 219 of 10 September 2009, pages 76453 to 76471.

57 Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE" No. 137, 6 June 2014, pages 42946 to 42976.

58 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order. OJ L 338/2, 21.12.2011.

59 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters. OJ L 181/4 of 29.06.2013.

60 Council of Europe Convention on counterfeit medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011.

result of the use of a particular product[61] . The Convention also includes a state obligation around the exercise of jurisdiction when a national or habitual resident is the victim.

For offences against maritime navigation and piracy: In the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)[62] and for piracy offences and in the United Nations Convention on the Rights of the Sea (UNCLOS)[63] , there is an absence of the concept of victim.

3.2.2. The nationality of the victim and the perpetrator as a condition for access

Once the limits set around the victim and his or her conceptualisation have been overcome, there are also limits around the nationality of the victim, granting him or her the possibility of accessing the jurisdiction if he or she is a Spanish national for certain criminal acts[64] . For other types of criminal offences, it is determined that the victim can bring a criminal action regardless of his or her nationality[65] ; and for others, access to justice is conditional on the perpetrator of the criminal offence, allowing access if the perpetrator is in our territory[66] , otherwise, it is not possible.

The legislator does not go beyond the above, which means that it will always be materially unfeasible for a victim who does not know whether or not the perpetrator is in Spain to bring a criminal action, the proceedings could not be initiated due to a lack of standing, and a pre-procedural investigation phase will not be initiated because it is a procedural requirement. In view of the above, we can only question whether this regulation complies with Directive 2012/29, insofar as it states (recital 10) that Member States may not make victims' rights conditional on nationality or residence. With the above, we refer to the provisions on nationality for each type of crime set out in the list of Article 23 LOPJ, in which the legislator confuses the principle of universal jurisdiction with the principle of passive personality, as some require the victim to be a national, in others the perpetrator and in others that he/she is in Spain, whether or not he/she is a national.

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61 Art. 4 (k) *Ibid.*

62 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. BOE No. 99 of 24 April 1992, pages 13842 to 13846.

63 United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982. BOE No. 39 of 14 February 1997, pages 4966 to 505.

64 Art.23.4 e), k) LOPJ.

65 Art. 23.4 d), j), e) LOPJ.

66 Art.23.4 b), c) LOPJ. Instrument of ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE No. 137 of 6 June 2014; Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. BOE No. 219 of 10 September 2009.

3.2.2.1. Offences where the nationality of the victim or the perpetrator is not a determining factor

The only offences for which no limitation is foreseen in relation to either the perpetrator or the victim are the following:

a) In the crimes of piracy, terrorism, illegal trafficking in toxic drugs, narcotics or psychotropic substances, trafficking in human beings, crimes against the rights of foreign nationals and the safety of maritime navigation[67] , provided that they have been committed in "maritime areas", meaning international waters[68] .

b) Crimes intended to be committed in Spain by a criminal group or organisation, including the constitution, financing or integration, punishable by more than three years' imprisonment[69] .

3.2.2.2. Crimes in which the victim is not conditioned by reason of his or her nationality

Access to jurisdiction through the above-mentioned offences is not provided for in a broad manner and should not be confused with the above-mentioned offences. This group includes those offences in which the victim is not required to fulfil a condition, but the possibility of bringing a criminal action depends on the nationality of the perpetrator of the offence.

a. Crime of genocide, against humanity or against protected persons and property in the event of armed conflict[70] .

b. Offences that are included in the Convention for the Suppression of Unlawful Seizure of Aircraft, which are the exercise of violence, threat, or intimidation for the purpose of seizing or unlawfully controlling an aircraft in flight[71] .

c. Offences set out in the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation[72] and its 1988 Supplementary Protocol[73] .

67 Art. 23.4 d) *Ibid.*

68 Supreme Court. Judgment 810/2014, of 3 December of the Criminal Chamber, establishing the difference between letter d) and i) of Art.23.4 LOPJ, understanding "marine spaces" as international waters.

69 Art.23.4(j) *Ib.*

70 Art.23.4.a) of Organic Law 6/1985, of 1 July, of the Judiciary. "BOE" no. 157, of 02/07/1985.

71 Art. 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. BOE No. 13 of 15 January 1973.

72 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971. BOE No. 9 of 10 January 1974, pages 551 to 553.

73 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (done at Montreal on 23 September 1971), done at Montreal on 24 February 1988. BOE No. 56 of 5 March 1992, pages 7565 to 7567.

d. Offences under the 1980 Convention on the Physical Protection of Nuclear Material[74] .

e. Crime of illegal trafficking in intoxicating drugs that is not carried out in international waters[75] .

f. Corruption offences between private individuals and international economic transactions[76] .

3.2.2.3. Crimes in which only the victim with Spanish nationality can bring criminal proceedings

In this case, the legislator confuses the principles applicable to the extension of jurisdiction, as it confuses the principle of universal jurisdiction with the principle of passive personality. This means that it determines access to jurisdiction only for its own nationals when they are the passive subjects of the crime.

a. In relation to the crime of terrorism[77] not committed in international waters, the victim of Spanish nationality will be able to exercise the criminal action as long as he/she had it at the time the criminal acts were committed. It is unfounded that the legislator does not add requirements for the victims in the case of terrorist crimes committed in maritime space, and when they occur on land, it does the opposite; such a differentiation makes no sense, as both are victims of the same criminal act.

b. For crimes against sexual freedom and indemnity whose victims are minors[78] .

c. For offences under the 2011 Convention on the counterfeiting of medical products and which are a threat to public health[79] .

3.2.2.4. Offences in which the victim is dependent on the passive subject being in Spain

a. Crimes of torture, offences against moral integrity[80] and enforced disappearance[81].

74 The types of offences provided for in the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980. BOE No. 256, 25 October 1991, pages 34558 to 34562.

75 Art. 23.4.i) Organic Law 6/1985, of 1 July, of the Judiciary. "BOE" no. 157, of 02/07/1985.

76 Art. 23.4.n) *Ibid.*

77 Art.23.4 e) *Ib.*

78 Art. 23.4 k) *Ib.*

79 Council of Europe Convention on counterfeiting of medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011. BOE No. 286 of 30 November 2015, pages 112677 to 112692.

80 Art.23.4 b) *Ut supra.*

81 Art.23.4 c) *Ibid.*

b. Section 23.4 (l) refers us to the crimes of violence against women and domestic violence provided for in the 2011 Istanbul Convention[82].

c. Crimes of trafficking in human beings. Although it is contrary to the provisions of the Convention on Action against Trafficking in Human Beings[83] which determines the exercise of jurisdiction among other cases when the victim is a national of the State Party[84].

3.3. Kinship as a condition for legitimising the victim

They are called personal limits because they relate both to the active subjects, who are those who have committed the criminal act, and to the passive subjects, who are the victims. It is the latter who will be the focus of attention in this part of this section, as they are where the right of access to jurisdiction effectively lies.

The victims, as we have previously observed in the procedural requirements, must file a complaint to initiate the process, but beyond this requirement to activate the jurisdictional function, they must take into account that depending on the criminal act that has been committed, certain requirements must be met for the exercise of the criminal action; or rather, certain external conditions must be met that do not depend on them in order to do so.

Bearing this in mind, first of all, it should be observed whether the victim has standing to be considered a victim and to bring a criminal action, otherwise it will be impossible to do so. However, it should be borne in mind that the condition of victim is not a specific requirement in the procedural rule that regulates the principle[85] , nor in the Statute of the Victim of the Crime[86] , and if we go deeper, neither in the international or European Union regulations, Rather, it is at the jurisprudential level where such statements have been made and the initiation of proceedings through the principle of universal jurisdiction has been made impossible, alleging an absence of jurisdiction because the criminal action must be brought by the person who the court interprets to be considered a victim (see STS 139/2019, 13 March).

However, in order to carry out an adequate analysis of this issue, a more in-depth study should be carried out, but with regard to access to jurisdiction through the principle of universal jurisdiction, reference will be made to the

82 Instrument of ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE No. 137 of 6 June 2014, pages 42946 to 42976 (31 pp.).

83 Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. BOE No. 219 of 10 September 2009, pages 76453 to 76471.

84 Art.31 Ibid.

85 Art.23.4.a) of Organic Law 6/1985, of 1 July, of the Judiciary. "BOE" no. 157, of 02/07/1985.

86 Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

concept of victim in the legislation and then to the provisions of the courts in this regard.

If we go into the framework of international law, the recognition of rights and respect for international legislative instruments for victims is provided for in 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*[87] , However, the general concept of victim as a subject of rights regulated in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[88] , is a broader and less descriptive concept, where two groups of victims are distinguished: As a victim of unlawful criminal conduct and as a victim of conduct arising from abuse of power - which have resulted in any harm whether physical, moral or pecuniary. On the other hand, the *Rules of Procedure and Evidence of the International Criminal Court*[89] , attribute the status of victim to natural persons and to institutions or organisations. For the former, it only provides that they have suffered harm without distinguishing whether the harm should be direct or indirect, whereas for the latter, they will only be considered when they suffer direct harm.

In the European Union, the concept of victim is set out in Directive 2012/29/EU[90] , which establishes as an objective the need to recognise the need for information, support, protection and participation in criminal proceedings. As regards the general definition of "victim" in Article 2, which states *"(i) a natural person who has suffered harm or damage, in particular physical or mental injury, emotional harm or economic loss, directly caused by a criminal offence, (ii) the relatives of a person whose death has been directly caused by a criminal offence and who have suffered harm or damage as a result of that person's death;The* term "family members" includes *"the spouse, the person who lives with the victim and maintains an intimate and committed personal relationship with him or her in a common household on a stable and continuous basis, immediate family members, brothers and sisters, and dependants of the victim".*

As regards the commission of specific offences for which there is specific regulation, the Directive does not apply. There are numerous instruments specialised in certain criminal acts[91] , in some there is no definition of the victim,

87 General Assembly resolution 60/147 of 16 December 2015. *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. A/RES/60/147.*

88 General Assembly Resolution 40/34 of 29 NOVEMBER 1985. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. A/RES/40/34.

89 Rule 85 of the Rules of procedure and evidence.

90 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA. OJEU No 315 of 14 November 2012.

91 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order. OJ L 338/2, 21.12.2011; Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters. OJ L 181/4 of 29.06.2013.;Council of Europe Convention on the counterfeiting of medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011.

but in others where it is determined, there is also no distinction of any kind of victim[92] , the victim being the natural person who is the subject of the protected legal right that has been damaged and his or her relatives in the event of death, who have the status of victim, and therefore, the legitimacy to attribute to him or her all the rights inherent to the right to effective judicial protection.

However, in the national regulation on the victim of the crime, there is a restriction on the concept of victim. This restriction, as mentioned above, is due to the interpretation that has been given at the jurisdictional level. This party does not consider understandable the regulation granted by our legislator to the concept of victim when transposing Directive 2012/29/EU developing the Statute of the victim of the crime (EV)[93] , the Regulation of development of the Statute and the regulation of assistance offices[94] , the Royal Decree 1110/2015[95] and the articles of exercise of the criminal action of the Criminal Procedure Act (LECrim) (Which have been modified for the last time in 2021 arts. 109 *bis* and 110)[96] , since the EV distinguishes between direct victim and indirect victim, limiting the concept of indirect victim through an order of priority of relatives[97] , stipulating that the direct victim is the one who has suffered damage to his or her physical or moral person or assets; and the indirect victim is defined as the relatives and friends of the direct victim in the case of death or disappearance due to the commission of a criminal act. What is striking, among other questions[98] , is the order of preference set out in the following paragraph: *"2. In the absence of the above, to the other relatives in a straight line and their siblings, with preference, among them, to the one who holds the legal representation of the victim"*[99] .

Art. 4(k); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. BOE No. 99 of 24 April 1992; United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982. BOE No. 39 of 14 February 1997, pages 4966 to 505.

92 Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OJ L 88/6 31.3.2017. Vid. art.24 paragraph 1 and 7, and art. 25; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/628/JHA. OJ L 101/1, 15.4.2011; Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. See: BOE No 219 of 10 September 2009, pages 76453 to 76471.

93 Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

94 Royal Decree 1109/2015, of 11 December, which implements Law 4/2015, of 27 April, on the Statute of the Victims of Crime, and regulates the Offices for Assistance to Victims of Crime. BOE no. 312, of 30 December 2015, pages 123162 to 123181.

95 Royal Decree 1110/2015, of 11 December, which regulates the Central Register of Sex Offenders. BOE No. 312, 30 December 2015 Sec. I. P. 123182.

96 Amended by Law 4/2015, of 27 April. Ref. BOE-A-2015-4606.

97 See art.2 of Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

98 Carrizo Gonzalez Castel, A. Luces y sombras en torno al ejercicio de la acción penal derivado de los artículos 109 y 109 bis de la Ley de Enjuiciamiento Criminal. La Ley, nº 8796. Ref. D-267, LA LEY. 2016.

99 Article 2 of the Crime Victims' Statute.

The differentiation made on the grounds of kinship raises at least some doubts as to its constitutionality insofar as it limits the exercise of criminal action, and therefore effective judicial protection, as well as contradicts the provisions of European legislation (see recitals 10, 11 and 22 of Directive 2012/29). Furthermore, it is worth highlighting the sentence set out in the Tribunal Supremo Judgment (Supreme Court) [100] in the case of a Spanish national victim whose brother disappeared, was tortured and murdered under the Syrian regime and whose family at the time of the events resided in Syria, who was denied access to jurisdiction based on the principle of universal jurisdiction for not having the status of victim, stating the following: *"…to claim the status of victim, something more than a subjective perception is needed. Mere awareness of one's own victimisation does not confer the status of a victim of crime. Nor does the psychological experience of injustice suffice. Conceptualisation as such cannot be derived from the emotional impact of the crime. Victimisation, even understood in its most historical dimension, must be understood as an objective condition, originating from a suffering directly linked to a punishable act"* (FJ 4º).

I do not intend to go further into the matter because it deserves a more detailed study, but the Court's pronouncement denotes that it is guided by a more political will in order not to get involved in the fight against the Syrian regime than in a conceptual one, A review of international instruments and the doctrine [101] suffices to determine that this decision restricts the right of access to victims insofar as "universal jurisdiction derives from an international obligation, a decision not to prosecute, based on considerations of expediency, constitutes a breach of that obligation" [102] .

Reflecting briefly on the case, it seems that the legislation grants victims levels of protection according to their kinship; the Public Prosecutor's Office does not file a complaint, although it must do so in order to defend the general interest and is, of course, empowered to do so; The aforementioned Directive is applicable to the European Union, which means that the order of priority will always be applicable when an action is intended to be brought within the territory of the European Union, regardless of the origin or provenance of the victim, however, they apply this regulation to limit access to justice when the rest of the victims are within Syrian territory in an armed conflict, therefore it is absolutely impossible to bring a criminal action and only the action of the victim who is in Spain can be brought. What cannot be allowed is that in a case such as this, the victims have been left without effective judicial protection.

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100 Judgment 139/2019 of the Criminal Division of the Supreme Court, of 13 March 2019 (FJ.4º).

101 See the study by Diaz Cabiale, J./Cueto Moreno, C. 2022,p.27) Víctimas, ofendidos y perjudicados: concepto tras la LO 8/21. Electronic Journal of Criminal Science and Criminology. 2022, núm. 24-04.

102 Pigrau, A. La Jurisdicción Universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales. Barcelona: Oficina de Promoción de la Paz y de los Derechos Humanos, Generalitat de Cataluña (Recerca x Drets Humans, 3), 2009, p.59.

3.4. Procedural constraints

The limits that we refer to as procedural are specifically so because they apply in general to all cases, and condition the admissibility and admissibility of the criminal action. By this, I am referring to the requirements regulated in sections 5 and 6 of Article 23 of the Organic Law of the Judiciary. The first of these provides for lis pendens, which prevents the possibility of initiating proceedings if another State is hearing the same facts. On the other hand, reference is made to the principle of subsidiarity with which the principle of universal jurisdiction is configured, foreseeing that in the existence of concurrent jurisdictions where another principle of extension of jurisdiction is applied, it will have a subsidiary nature, with the other principle being applied first. However, the principle of passive personality as such is not provided for in the Organic Law of the Judiciary and, given the subsidiarity and complexity of its regulation, its application will not be viable in the majority of cases.

Paragraph 6 stipulates that a complaint by the victim of the crime or the Public Prosecutor's Office must be filed in order for proceedings to be initiated, and this cannot be done by means of a complaint or by means of the exercise of popular action. This paragraph does nothing more than "bury universal justice even more if possible"[103] and burden the victim with a legislative framework and with the economic costs that such compliance confers on them, which hinders their access to jurisdiction.

4. CONCLUSIONS

The conclusions reached in this paper are set out in the respective sections of the study, although the following are worth highlighting:

The principle of universal jurisdiction has two purposes that should not be forgotten by international society. On the one hand, it guarantees the right to effective judicial protection through access to the jurisdiction of a state other than the one in which the criminal act was committed. On the other hand, as a legal mechanism to avoid impunity, since it has preventive, dissuasive and retributive effects.

In relation to access to justice, this party considers that in order to overcome the deficiencies that affect the justice administration system and to achieve a more efficient system, it must be taken into account that we find ourselves in a more humane society, which demands a justice system that is close, fast, accessible, among others. Thus, the integration of elements of quality, administration,

103 Esteve Moltó, Elias. *La Ley Orgánica 1/2014 de reforma de la jurisdicción universal: entre el progresivo avance de la globalización comercial y de la deuda y la no interjerencia en los asuntos internos de China.* Spanish Yearbook of International Law. Vol.30, 2014.

institution and responsibility are defended within the sphere of the right to effective judicial protection.

As for the application of the principle of universal jurisdiction, as a mechanism for the protection of rights violated by the commission of certain criminal acts and with the aim of safeguarding international peace and security, it cannot be configured in the way it is currently envisaged in our Organic Law of the Judiciary. The existence of procedural prerequisites, as well as the framework of crimes and conditions to be fulfilled, make it practically inapplicable.

Linked to the above, the non-application of a system of universal jurisdiction in a globalised society such as today's, leads us to run the risk of falling into impunity of a juridical-material and, in the long term, structural nature.

This has led this party to question the inexistence of global impunity, or rather, to claim the existence of a type of global impunity, which is effectively generated when neither internal nor external instruments allow citizens access to jurisdiction in defence of their violated rights.

Regarding to the second aim, the conceptualisation of direct and indirect victims in Spain, the interpretation of case law, and its relationship with the exercise of criminal action, have led this party to frustration regarding the true existence of the right to effective judicial protection of the victims of a criminal act committed abroad. Likewise, the wording chosen by the legislator to grant a citizen the concept of victim is incomprehensible to this party, as it does so, firstly, by restricting the provisions of European and international law, and secondly, because it determines that on the basis of the criminal offence, the nationality or family status of the victim must be taken into account, the nationality or family relationship with the victim who has died or disappeared, you will be granted more or less protection of the injured right by the judicial bodies, which leads to a violation of the right of access to justice through the principle of universal jurisdiction.

As a final reflection on the above, I would like to say that society is becoming more and more globalised, it is intercultural and connected practically in real time, thanks to technology. However, despite this, it seems that society is lacking in collective action for the protection of both individual and collective rights and interests; or at least the laws reflect this. We should not let ourselves fall into such individualism because it will only lead to a more unjust society.

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