Living with Impunity Versus Living in Fear:

Universal Jurisdiction Defendants, Due Process, and the Use of Democracies by Autocracies to Prosecute Their Opponents

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Abstract

This paper introduces a new analytical category to provide a more accurate, comprehensive, and nuanced account of universal jurisdiction defendants: defendants living in fear. In contrast to defendants living with impunity, defendants living in fear are defendants whose home state is very much willing and able to prosecute and punish them. Using an original database, this article shows that there is a substantial number of universal jurisdiction defendants who live in fear, and that their percentage has increased since the early 2000s. The paper also shows that defendants living in fear are more than ten times more likely to be arrested and more than thirty times more likely to be tried than defendants living with impunity. In addition, this article argues that the function and justification of universal jurisdiction for defendants living in fear is not (only) the traditional justification of avoiding impunity, but (also) providing a fair trial that prevents wrongful convictions, and then assigning proportionate punishment if the defendant is found guilty. Finally, this article discusses what democracies should do with living-in-fear cases to avoid being instruments of autocratic regimes that often prompt or encourage universal jurisdiction cases in other states against their military and political opponents.

Keywords: universal jurisdiction, international criminal law, types of universal jurisdiction defendants, function and justification of universal jurisdiction, democracies versus autocracies

Despite predictions in the 2010s that universal jurisdiction was singing its swan song, universal jurisdiction complaints and trials have increased in the last twenty years.[4] This method of accountability for the commission of international crimes is once again at the forefront of academic, policy and media discussions. Conflicts from Syria to the Islamic State to Ukraine have given new impetus to universal jurisdiction prosecutions by adding a fresh set of potential defendants to the docket of former Yugoslavs, Latin Americans, and Rwandans from the 1990s and the 2000s. The limited number of defendants that the International Criminal Court (ICC) has been able to prosecute and the absence of new *ad hoc* international tribunals in the last two decades has also made clear to victims, nongovernmental organizations (NGOs), and governments that domestic transnational prosecutions are an important venue for accountability efforts.

A substantial part of the academic literature and human rights NGOs have claimed that universal jurisdiction is a crucial tool against alleged perpetrators who are 'living with impunity' – that is, those who are the target of universal jurisdiction because their home states are unwilling or unable to prosecute them.[5] Within this account, Augusto Pinochet and Vladimir Putin would be archetypical universal jurisdiction defendants. This article introduces a new analytical category to provide a more accurate, comprehensive, and nuanced account of universal jurisdiction defendants: defendants living in fear. These are defendants whose home state is very much willing and able to prosecute and punish them. They are often military or political opponents of their home

[4] Works of the authors removed as indicated in submission instructions so that the authors cannot be identified. https://www.cambridge.org/core/journals/leiden-journal-of-international-law/information/author-instructions/preparing-your-materials.

[5] *See, e.g.,* C. C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', (1996) 59 *Law and Contemporary Problems* 153; S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction* (2001) (impunity for the commission of serious crimes must yield to accountability); Trial International, 'Universal Jurisdiction, an Overlooked Tool to Fight Conflict-Related Sexual Violence', (2022) *Universal Jurisdiction Annual Review*, 10 (raising the question of how universal jurisdiction can contribute to the fight against impunity for conflict-related sexual and gender-based violence); Clooney Foundation for Justice, 'A Global Mapping Tool to Increase Survivors' Access to Justice', (2023) *Justice Beyond Borders*, 1 (including universal jurisdiction as part of a growing commitment to combat impunity).

government, who are on the run from persecution. They have often fled or migrated from their home state to seek asylum in a host state. Even when these defendants are tried in other countries, the defendant's home state often assists, supports and encourages their prosecution. These defendants thus create a predicament for other states, particularly democracies, that find them in their custody—states that practice universal jurisdiction don't want the alleged perpetrator on their soil, but they are also hesitant to deport or extradite them back home where the defendant is likely to be subjected to poor treatment and an unfair trial.

By introducing this analytical category, this article provides a more comprehensive and nuanced account of universal jurisdiction by explaining that even if many universal jurisdiction defendants live with impunity, there is also a substantial number of them who live in fear. The distinction between defendants living with impunity and defendants living in fear is important for additional reasons. It provides a framework to analyze how the universal jurisdiction regime has changed over time. Using an original database of universal jurisdiction cases, this article shows that the percentage of defendants living in fear has increased since the early 2000s. In addition, this framework allows us to disentangle which universal jurisdiction cases are more likely to end up with an arrest and a trial. Specifically, this article shows that defendants living in fear are more than ten times more likely to be arrested and more than thirty times more likely to be tried than defendants living with impunity. This finding has implications for the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) because if universal jurisdiction trials are much more likely to concentrate on defendants living in fear, the ICC OTP has then grounds to concentrate on defendants living with impunity to fill the accountability gaps that universal jurisdiction trials do not cover. This finding also has implications for victim communities because it suggests that victims should look for accountability mechanisms different from universal

jurisdiction trials for defendants living with impunity or for ways in which universal jurisdiction prosecutions against this type of defendants can become more effective in reaching the trial stage.

This framework also allows us to interrogate what the actual function and justification of universal jurisdiction is. Traditionally, courts, NGOs, and commentators have claimed that the justification for the existence and exercise of universal jurisdiction is avoiding impunity of those who commit international crimes, thus advancing the goals of punishment, such as crime prevention and accountability. This justification still applies to defendants living with impunity. But defendants living in fear would not avoid punishment or other serious negative consequences if they were returned to their home country. Rather, many of them would be tortured, extra-judicially executed, subjected to a show trial, or sentenced to death if returned there. This article then argues that an additional and even the main function and justification of universal jurisdiction for these defendants is providing a fair trial that prevents wrongful convictions, and then assigning proportionate punishment if the defendant is found guilty. Thus universal jurisdiction prosecutions should advance human rights in two ways, not only one: they should avoid impunity gaps, but they should also advance defendants' procedural rights and the right to fair punishment. Using our original universal jurisdiction database, this article provides data that suggest that, on average, universal jurisdiction defendants in general and defendants living in fear in particular have had true adjudicatory trials, and that, when convicted, they have not been subjected to disproportionately harsh punishment.

Finally, this article discusses what democracies should do with living-in-fear cases to avoid being instruments of autocratic regimes. In this regard, the article argues that the fact that a universal jurisdiction case is prompted or encouraged by an authoritarian state to neutralize a political or military opponent is not a reason *not* to prosecute a case, *per se*. But this article also

proposes various measures that democracies exercising universal jurisdiction should consider to avoid being instruments of authoritarian regimes. These measures include not prosecuting non serious international crimes, launching prosecutions against defendants living with impunity in parallel to the launching of prosecutions against defendants living in fear, and taking measures other than their own domestic criminal prosecutions against (officials of) the authoritarian state. Otherwise, democracies risk promoting unequal application of the law, distorting the historical record about the commission of atrocities in a given situation, and undermining the rights to access justice and reparations.

This article is organized as follows. Section I introduces the concept of defendants living in fear and how they differ from defendants living with impunity. It also discusses what the justification of universal jurisdiction is regarding defendants living in fear. Section II describes our database and shows the variation over time of these two types of universal jurisdiction defendants. Section III examines the differing likelihood of arrest, investigative measures, formal proceedings and trials for each type of defendant. Section IV discusses whether universal jurisdiction trials have been true adjudicatory processes, and which sentences they have issued against convicted defendants. Section V discusses how autocratic regimes have prompted democratic states to use universal jurisdiction prosecutions against political and military opponents of the autocratic regimes, and what democracies could do in response.

I. Two Types of Universal Jurisdiction Defendants: Living with Impunity Versus Living in Fear

Most crimes around the world are prosecuted by the state in whose territory they took place. But under the principle of universal jurisdiction, any state may prosecute certain crimes, even if the state in question did not have any territorial, nationality, or national-interest link with the crime

when it was allegedly committed. Piracy is a classical universal jurisdiction crime.[6] Since pirates are highly mobile, any state that catches pirates may apply its laws to try and punish them. In recent decades, states have also claimed universal jurisdiction over the so-called core international crimes—including crimes against humanity, genocide, torture, and war crimes.[7] These core international crimes are established by customary international law and have *jus cogens* status. As such, any state may apply its laws to try and punish them.[8]

The predominant justification for the exercise of universal jurisdiction of the core international crimes is preventing impunity. Since crimes against humanity, genocide, torture, and war crimes are typically committed by state officials, the state whose officials committed these crimes is often unwilling or unable to prosecute and punish them. To prevent these crimes from going unpunished, any state should then be entitled to apply its laws to prosecute them.[9]

Under this predominant account of universal jurisdiction, then, the typical universal jurisdiction defendant is a current or former state official living with impunity in their home state or in a friendly state that has no interest in prosecuting them. In other words, it is someone who has allegedly committed an international crime but whose state of nationality is unwilling or unable to hold them accountable. The exercise of universal jurisdiction against Augusto Pinochet fits into this account.

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[6] See, e.g., R. Geiss & A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 145-148.

[7] Though torture as an independent crime is not always included in the list of core international crimes, we include it here given that it presents similar issues to the other three crimes mentioned in the text and that many states have claimed universal jurisdiction over it.

[8] *See, e.g.,* American Law Institute*, Restatement of the Law Fourth, the Foreign Relations Law of the United States* (2018) at Section 413: "International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, the slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated."

[9] *See, e.g.,* L. May, *Crimes Against Humanity: A Normative Account* (2005); A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (2010).

Augusto Pinochet was the dictator of Chile from 1973 until 1990. During his regime, thousands of people were kidnapped, tortured, and killed. After he left office, he remained as commander-in-chief and then senator-for-life under the same constitution he had enacted during his regime. His hold on the Chilean military and an amnesty that had been passed during his regime enabled him to live with impunity in Chile for most of the 1990s. But in October 1998, when he was in London for a medical procedure, he was arrested by Scotland Yard based on an arrest request by the Spanish investigating judge Baltasar Garzón. The justification for such an arrest was again preventing Pinochet from living with impunity. However, after fifteen months in house arrest pending his extradition proceedings, the United Kingdom released him and let him return to Chile.[10]

Today, defendants who are "Living with Impunity" are typically high-level government officials that hold positions of power in their home state's regime. They are often targeted for prosecution when they visit a foreign state on official business. For example, Bouguerra Soltani was a leader of the Movement for the Society of Peace (an Islamist party) and a former minister in the Algerian government. In 2009, TRIAL International, a human rights NGO, filed a criminal complaint against Soltani after learning that he was speaking at an event in Switzerland. TRIAL International accused Soltani of ordering, authorizing, and inciting public officials to commit acts of torture. After learning of the charges, Soltani immediately fled back to Algeria where he did not face judicial consequences.[11]

[10] *See, e.g.,* N. Roth-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2006).
[11] *See*, 'Alleged Algerian Torturer Barely Escapes Swiss Justice', *Trial International*, 17 July 2017 available at https://web.archive.org/web/20230113193141/https://trialinternational.org/latest-post/alleged-algerian-torturer-barely-escapes-swiss-justice/ (last accessed August 9, 2023).

These defendants often hold immunity, which enables them to leave the state where the complaint is filed and travel safely back to their home state.[12] In the rare cases in which a defendant is arrested and held, he often receives legal and diplomatic support from his home state. For example, Khaled Nezzar, the former Minister of Defense of Algeria, was detained for 48 hours in Switzerland in October 2011, before being released under the condition that he attended subsequent hearings.[13] He could then return to Algeria without being bothered.[14] After proceedings against him dragged for over a decade and included discussions over immunity and other legal issues, he was indicted by Swiss prosecutors for alleged crimes against humanity and war crimes committed in Algeria, and a trial start date was set for his case for June 2024.[15] But there were serious doubts that he would come to trial because Algeria protected him and would most probably refuse to force him to come to Switzerland.[16] On December 29, 2023, Mr. Nezzar died in Algiers at the age of 86 years-old.[17]

Another example is the case of Hamid Nouri who was a prison official and prosecutor in Iran. In 2019, he was arrested while traveling for personal reasons to Sweden. He was accused of committing crimes against humanity and war crimes in connection with mass killings of prisoners

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[12] *See, e.g.,* Letter from Jean-Claude Marin, prosecutor of the TGI, Paris, to Patrick Baudouin, FIDH attorney (Nov. 16, 2007) (on file with authors) (dismissing complaint filed against Donald Rumsfeld under the argument he had immunity).

[13] *See* Julia Crawford, *Assad and Nezzar: Swiss Justice Finally Moving, but not so Convincingly*, Justiceinfo.net, October 2, 2023, available at https://www.justiceinfo.net/en/122563-assad-nezzar-swiss-justice-finally-moving-but-not-so-convincingly.html#:~:text=Nezzar%20was%20arrested%20in%20Geneva,that%20he%20attend%20subsequent%20hearings. (last accessed on June 7, 2024).

[14] Trial International, *Victims of the Algerian Civil War Still Await Justice,* October 19, 2021, available at https://perma.cc/4EBH-YHJF.

[15] Trial International, *Algeria: Dates for the Trial of General Khaled Nezzar Finally Announced,* December 28, 2023, available at https://trialinternational.org/latest-post/algeria-dates-for-the-trial-of-general-khaled-nezzar-finally-announced/ (last accessed on June 7, 2024).

[16] *See* Crawford, *supra* note 10 (quoting Trial International legal advisor Benoit Meystre).

[17] *See, e.g.,* Adam Nossiter, *Khaled Nezzar, General at Center of Algeria's Bloodshet, Dies at 86,* The New York Times, Jan. 30, 2024, available at https://www.nytimes.com/2024/01/30/world/africa/khaled-nezzar-dead.html <accessed on June 7, 2024>.

in Iran in 1988. Iran described the trial as illegal and formally protested the trial to the Swedish envoy to Tehran. Despite these complaints, Nouri was found guilty and sentenced to life in prison in May 2022.[18] However, Iran did not give up in its efforts to protect Nouri, and he was released in a prisoner exchange with Sweden in June 2024.[19]

In contrast, defendants who are "Living in Fear" of their home state have typically fled their home state and sought asylum in a host state. Some of these defendants have found themselves on the losing side of a civil war and have fled their home state in fear for their lives. For example, Pascal Senyamuhara Safari—who is primarily known by his alias Pascal Simbikanwa—was a Chief Intelligence Officer for the Habyarimana regime that held power during the genocide in Rwanda in 1994. After the genocide, he fled Rwanda first to the Democratic Republic of the Congo, then east Africa, the Comoros Islands, and finally in 2005 Mayotte—a French department in the Indian Ocean—where he requested refugee status using a false name. He was arrested there by French authorities in 2008 for his participation in the production of false documents. At that point, the authorities discovered his true identity, as well as the fact that Rwanda wanted him for his participation in the genocide and that there was an Interpol red notice out against him. But France rejected Rwanda's extradition request and instead tried him first in relation to the false documents and then for his participation in the genocide in Rwanda.[20] Four NGOs participated as civil parties in this second trial. He was convicted by the Court of Assises in Paris for genocide and complicity in crimes against humanity and sentenced to twenty-five years of

[18] *See* Nevitt, 'Hamid Nouri: How Sweden Arrested a Suspected Iranian War Criminal', *BBC News*, 5 September 2021, available at https://web.archive.org/web/20230209030400/https://www.bbc.com/news/world-europe-58421630 (last accessed August 9, 2023).

[19] *See, e.g.,* 'A Brief History of Iran's Hostage Swapping', New York Times, June 16, 2024, available at https://www.nytimes.com/2024/06/16/world/middleeast/iran-hostage-swap-history.html#:~:text=In%20the%20exchange%2C%20Sweden%20released,%2C%20a%20dual%2Dnational%20Iranian. <accesed on June 18, 2024>.

[20] The description of the first half of this paragraph is based onH. L. Trouille, 'France, Universal Jurisdiction and Rwandan Genocidaires', (2016) 14 J. Int. Crim. Justice 195, at 195-197.

imprisonment on March 14, 2014. The conviction and sentence were later confirmed by a second French court of assises and by the French Cassation Court.[21]

Similarly, Ousman Sonko was the Minister of Interior of The Gambia for about a decade during the presidency of Yahya Jammeh, whose regime was accused of committing very serious human rights abuses. In the final months of Mr. Jammeh's rule, in September 2016, Mr. Sonko applied for residency in Sweden but was denied.[22] He was arrested in Switzerland at a centre for asylum seekers in January 2017.[23] On May 15, 2024, he was convicted in Switzerland for crimes against humanity committed in The Gambia.[24]

Defendants who are living in fear may even become citizens of the prosecuting state. Alemu Eshetu came to the Netherlands as a refugee and eventually acquired Dutch citizenship. Meanwhile he was tried *in absentia* in his home state of Ethiopia, and sentenced to death for the killings of many persons during the Derg regime. After The Netherlands created its war crimes unit, he was arrested in 2015. On December 15, 2017, a Dutch court found him guilty of war

[21] Cour d'Assises de Seine Saint Denis, 3 December 2016, No. 51/2016;Jeannerod, 'French Court Confirms Genocide Conviction of Former Rwandan Intelligence Chief', *Human Rights Watch*, 5 December 2016, available at https://www.hrw.org/news/2016/12/05/french-court-confirms-genocide-conviction-former-rwandan-intelligence-chief (last accessed December 9, 2023).

[22] *Who is Ousman Sonko, the former Gambian politician on trial in Geneva?,* Al Jazeera, Jan. 8, 2024, available at https://www.aljazeera.com/news/2024/1/8/who-is-ousman-sonko-the-gambian-politician-on-trial-in-geneva (last accessed on June 7, 2024).

[23] *Id.*

[24] *See, e.g.,* Trial International, *Sonko Case: A Historic Conviction, Yet a Missed Opportunity to Recognize Sexual Violation as a Weapon of Repression,* May 24, 2024, available at https://trialinternational.org/latest-post/the-ousman-sonko-case-a-historic-conviction-yet-a-missed-opportunity-to-recognize-sexual-violence-as-a-weapon-of-repression/ (last accessed on June 7, 2024). Another recent illustration of a defendant living in fear is the case of Belarussian Yuri Harauski who sought asylum in Switzerland, arguing that his life was at risk in Belarus because he spoke up about his former involvement with the Belarussian Ministry of Internal Affairs and his alleged envolvement in three forced disappearances. Mr. Harauski was tried but ultimately acquitted by a Swiss court that found his confession insufficient to enter a conviction in September 2023. *See, e.g.,* Trial International, *Belarus:Acquittal of Lukashenka regime henchman in Switzerland*, September 28, 2023, available at https://trialinternational.org/case/yuri-harauski/ (last accessed on June 7, 2024).

crimes, including arbitrary detention, inhumane treatment, torture, and murders. He was sentenced to life in prison in the Netherlands.[25]

Other defendants who are living in fear of their home state include those who held positions of power in their home state but chose to defect from the ruling regime. For example, Eyad al-Gharib was an official in Syria's notorious General Intelligence Directorate. He was part of Branch 251, which is responsible for internal security in the Damascus region. In 2013, he defected from the Assad regime and spent five years in hiding before entering Germany and seeking asylum. In 2019, he was arrested on charges of aiding and abetting crimes against humanity because of his involvement in transporting and burying the bodies of detainees from Syrian detention facilities. He was sentenced to four and a half years in prison in 2021.[26]

In each of these cases, the defendants were not living with impunity. To be sure, when they were subjected to universal jurisdiction prosecutions, they had not been punished in their home state yet. But Rwanda and The Gambia wanted to try Simbikanwa and Sonko respectively. Eyad al-Gharib was at risk of being extrajudicially executed and/or tortured if returned to Syria, and Ethiopia had convicted Eshetu in absentia and sentenced him to death. Knowing the fates that awaited them in their home states, these defendants were leaving in fear, claiming refugee status in their receiving countries, and hiding from authorities. In these cases, the justification of universal jurisdiction trials was then not only or even mainly preventing impunity, since deportation or extradition back to their home state would have subjected these defendants to punishment or other harsh consequences. Rather, the main justification of these universal jurisdiction trials could be understood as providing a fair trial and sentence for these defendants.

[25] Judgment, *Eshetu A.* (ECLI:NL:RBDHA:2017:16383), District Court of The Hague, 15 December 2017 available at https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2017:14782.
[26] *See, e.g.,* Trial International, *supra* note 2, at 54-55.

Some prior scholars have examined how the incentives of the political branches of the prosecuting state can affect the prosecuting state's willingness to pursue universal jurisdiction cases.[27] Factors that can affect the exercise of universal jurisdiction include the benefits and costs that individual universal jurisdiction prosecutions would bring to the legislature and the executive branch of the prosecuting state.[28] In this article, we consider a complimentary question: how politics in the defendant's home state affects whether a universal jurisdiction case will occur.[29] Defendants living in fear and defendants living with impunity have different relationships with their home government. While defendants living in fear are disfavored by the sitting government of their home state, defendants living with impunity are either serving in their home state's sitting government or openly or tacitly supported by the government. In this regard, the distinction between defendants living with impunity and defendants living in fear is a political distinction since it relies on the political relationship of the defendant with his/her/their home state government.[30] But as this article demonstrates, this distinction has important implications for universal jurisdiction as a legal concept and for the legal cases that rely on such a concept.

Others have noted the opposition between "small versus big fish" to distinguish between universal jurisdiction defendants.[31] But the difference between "small versus big fish" does not

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[27] *See* M. Langer, 'The Diplomacy of Universal Jurisdiction', (2011) 105 Am. J. Int'l L. 1.

[28] The benefits for the legislature and the executive branch would include being responsive and getting the support of constituencies in the prosecuting state that care about international human rights and of human rights NGOs. The costs would include the international relations costs that other states may impose on the prosecuting state. While defendants from powerful states who do not want their nationals to be prosecuted can impose high international relations costs since they can threaten or impose economic, diplomatic, political, or other negative consequences on prosecuting states, defendants from states that do not defend their nationals and states that are politically weak would impose no costs or low costs on the prosecuting state. *See* Langer, *supra* note 15.

[29] The content of this footnote is removed from this version so that the authors cannot be identified. https://www.cambridge.org/core/journals/leiden-journal-of-international-law/information/author-instructions/preparing-your-materials.

[30] A defendant disfavored by the government of his/her/their home state will then typically fear that his government will impose negative consequences on him/her/them. However, the determining criterion is what the political relationship between the defendant and his/her/their home state government is, not whether the defendant actually subjectively experiences fear.

[31] We are grateful to one of the anonymous reviewers of this piece for raising this point.

mirror the distinction we introduce in this article either. After all, Nezzar, Nouri, and Soltani (who we classify as living with impunity), and Simbikanwa, Sonko, and Alemu (who we classify as living in fear) would all have been considered "big fish" when they (allegedly) committed international crimes. And in Germany, the "small fish" Eyad Al-Gharib was tried jointly with the "big fish" Anwar Raslan, a colonel who led an intelligence unit in Syria but that like Al-Gharib was a universal jurisdiction defendant living in fear.[32]

The following sections explore important descriptive, predictive, and normative implications of our analytical distinction, demonstrating that classifying defendants as living with impunity or living in fear provides important insights about universal jurisdiction theory and practice.

II. The Evolution of Universal Jurisdiction Complaints Over Time

This section shows that defendants living in fear make up a substantial portion of universal jurisdiction defendants, and that their proportion has increased since the early 2000s. We begin by describing how we collected our database of universal jurisdiction defendants. We then describe how we classified each defendant in the database based on attributes of the defendant into one of the two categories: "Living with Impunity" and "Living in Fear." Finally, we show how the frequency of these two types of defendants has evolved over time.

[32] *See, e.g.,* Tamara Qiblawi, Jomana Karadsheh and Christina Streib, *A Syrian colonel is jailed for life in a first torture trial for the Assad regime. It's one step in a 'long path to justice,' say victims' families,* CNN, January 13, 2022, available at https://perma.cc/S537-A5D5.

A. Identifying Defendants

Our universal jurisdiction data contain information on every known criminal complaint (or case considered by public authorities on their own motion) that involved the alleged commission of one or more of the four core international crimes—crimes against humanity, genocide, torture, and war crimes—by physical individuals; was filed or initiated between 1957 and 2022; and fully or partially relied on universal jurisdiction. These data thus do not include information on civil lawsuits. They also do not include criminal cases against corporations or other nonphysical entities. To create the original database, two research assistants independently found and coded cases using judicial decisions; LEXIS-NEXIS and Westlaw; law journals; books on universal jurisdiction and international criminal law; websites of the Center for Constitutional Rights, the Hague Justice Portal, Human Rights Watch, the International Center for Transitional Justice, the International Federation of Human Rights and TRIAL International; reports by Amnesty International, Human Rights Watch, and Redress; newspaper articles and other media documents; and the Google search engine.

These data are made up of 2,205 complaints. Each complaint lists an individual defendant, a prosecuting state, and a specific year. Because victims can file complaints in multiple prosecuting states, individual defendant names often appear multiple times in the data. We know the defendant names for 1,066 of the complaints. The remaining defendants are coded as "John Doe" because their names are unknown.

For this research project, we remove all "John Doe" complaints because we have insufficient information to code the life circumstances of such defendants and their relationship with their home state's sitting government when the complaint was filed. We also remove the 1957 criminal case against Adolph Eichmann because the circumstances of his arrest lead to unclear

classification. Additionally, changing legal norms about the death penalty from the early 1960s to the contemporary period make it difficult to draw conclusions about disproportionate punishment. We are thus left with a dataset of 1,065 complaints with named defendants that span from 1983 to 2022.

B. Measuring Defendants Attributes

To classify the defendants, we considered their life circumstances at the time that the complaint was filed against them and in subsequent case proceedings. Namely, we sorted them into two mutually exclusive categories. The first category—"Living with Impunity"—includes individuals like Augusto Pinochet who fit into the classic understanding of universal jurisdiction defendants. The second category—"Living in Fear"—includes individuals who migrated to escape legal liability and/or violence in their home state.

This sorting process required a holistic assessment based upon the best available information about the defendant. However, we inductively developed consistent criteria to guide this assessment. These criteria are available in Table 1.

Table 1: Classifying the Defendants

Living with Impunity	Living in Fear
At least one of these criteria is met: • The defendant continued to hold government or military positions after the complaint was filed. • The home state issued statements condemning the case and supporting the defendant. • The defendant maintained his residence in his home state and entered the prosecuting state temporarily, if at all. • The defendant either fled back to his home state after learning about the charges or chose not to enter the prosecuting state's territory because of the charges.	*At least one of these criteria is met:* • A state or institution with territorial or active nationality jurisdiction over the crime requested extradition of the defendant.[33] • The defendant either sought asylum in the home state or was living there undocumented. • The home state sentenced the defendant for his crimes *in absentia*. • The defendant was a member of a rebel or terrorist group that was actively fighting against the home state's regime and fled while the conflict was ongoing. • During court proceedings in the prosecuting state, the defendant

[33] Such requests include both formal and informal requests for extradition by either the defendant's state of nationality or the state in which the crime occurred. We treat Interpol arrest warrants as equivalent as requests for extradition.

• The defendant continued living in the home state with no legal repercussions after the complaint was filed.	claimed that he would be in danger if he were returned to his home state. • The defendant fled his home state after the crimes were committed.

In our view, one of the strongest indicators that a defendant was living with impunity is that he or she was a government official who was able to remain in his or her office, even after the complaint was filed. For example, Khaled Ben Saïd was convicted *in absentia* in France and sentenced to twelve years of imprisonment for torture committed in Tunisia against a Tunisian citizen. He was a Tunisian Vice Consul in France and when the complaint was launched he returned to Tunisia where he was said to continue working in the Tunisian Ministry of the Interior.[34] Similarly, home states often publicly condemned universal jurisdiction cases and publicly pledged to support the defendants, like when a Spanish investigating judge issued formal charges against forty Tutsi former members of the Rwandan Patriotic Front and Rwandan officials.[35] President Paul Kagame condemned the Spanish investigation and the Spanish Supreme Court dismissed the case against all of them.[36] Other more subtle indicators of living with impunity include the ability

[34] *See, e.g.,* 'Appeal Trial of Khaled Ben Saïd, a Tunisian National: French Justice System Faced with the Challenge of Judging the Most Serious International Crimes', *International Federation of Human Rights*, 8 September 2010, available at https://www.fidh.org/en/issues/litigation/litigation-against-individuals/Ben-Said-Case/Appeal-trial-of-Khaled-Ben-Said-a (last accessed on December 8, 2023); Mandraud, 'Un Ex-Diplomate Tunisien Condamné pour Tortures', *Le Monde*, 25 September 2010, available at https://www.lemonde.fr/societe/article/2010/09/25/un-ex-diplomate-tunisien-condamne-pour-tortures_1415874_3224.html.

[35] Juzgado Central de Instrucción No. 4, Audiencia Nacional, Sumario 3/2008, Madrid, 6 February 2008 (on file with the authors).

[36] Justice Info, 'Rwanda/Spain – President Kagame Blasts 'Arrogance' of Spanish Judge', *Fondation Hirondelle*, 2 April 2008, available at https://www.justiceinfo.net/en/19962-en-en-020408-rwandaspain-president-kagame-blasts-arrogance-of-spanish-judge1075910759.html (last accessed December 8, 2023);'Spain Dismissed Rwanda War Crimes Case Against 40 Officials', *BBC News*, 8 October 2015, available at https://www.bbc.com/news/world-africa-34477883 (last accessed December 8, 2023).

of a defendant to return to his home state and/or maintain a residence, even after being named in a universal jurisdiction complaint.

In contrast, the strongest indicator that a defendant was living in fear was that a state or institution with territorial or active nationality jurisdiction over the crime requested extradition of the defendant. For example, in the 1980s the UK received numerous universal jurisdiction complaints against Soviet nationals who allegedly committed war crimes during World War II and were hiding in the UK. The USSR asked the UK to extradite these suspects so that they could face trial in their home country, but the UK refused to do so.[37] Similarly, many of the defendants in our dataset are Rwandan Hutus who were living in hiding in various European states while fearing extradition to either Rwanda or the International Criminal Tribunal for Rwanda (or both).[38]

Another common indicator that defendants are living in fear is that they apply for (and are often granted) status as refugees, often in the state that ultimately prosecutes them.[39] Under the 1951 Refugee Convention and 1967 Protocol, to receive refugee status, an individual must, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, be outside the country of his nationality and be

[37] See S. Hyland & P. Jackson, 'Campaigning for Justice: Anti-Fascist Campaigners, Nazi-Era Collaborator War Criminals and Britain's Failure to Prosecute, 1945-1999', in T. Lawson & A. Pearce (eds.), *The Palgrave Handbook of Britain and the Holocaust* (2020), 201-218. ISBN 978-3-030-55931-1 ISBN 978-3-030-55932-8 (eBook) https://doi.org/10.1007/978-3-030-55932-8. Available at: https://link.springer.com/content/pdf/10.1007/978-3-030-55932-8.pdf.

[38] *See, e.g.,* Justice Info, 'Rwanda/Belgium – "Genocide Banker" Sentenced to 30 Years in Prison' *Fondation Hirondelle*, 1 December 2009, available at https://www.justiceinfo.net/en/22062-en-en-011209-rwandabelgium-qgenocide-bankerq-sentenced-to-30-years-in-prison1286912869.html (on the case of Ephrem Nkezabera whose arrest was requested by the International Criminal Tribunal for Rwanda but who was ultimately tried in Belgium);'Onesphore Rwabukombe', *Trial International*, 24 March 2013, available at http://web.archive.org/web/20230130233619/https://trialinternational.org/latest-post/onesphore-rwabukombe/ (last accessed on December 8, 2023) (on Onesphore Rwabukombe whose extradition was requested by Rwanda but who was ultimately tried in Germany); Trouille, *supra* note 11 (on the case of Pascal Simbikangwa regarding whom Rwanda requested extradition but who was ultimately tried in France).

[39] *See, e.g.,* the case of Jacques Mungwarere from Rwanda in Canada, CCIJ's Public Cases and Interventions, 'Jacques Mungwarere', *Canadian Centre for International Justice*, available at http://web.archive.org/web/20130508183138/www.ccij.ca/programs/cases/index.php?DOC_INST=19 (accessed December 9, 2023).

unable, or, owing to such fear, be unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, be unable or, owing to such fear, be unwilling to return to it.[40] But the status of refugee does not apply to any person who has committed a crime against peace, a war crime, or a crime against humanity.[41] In some cases, defendants who were living in fear became the subject of universal jurisdiction complaints because evidence of their crimes came to light during the process of their refugee application. In other cases, defendants received refugee status before evidence of their alleged crimes was reported or came to light.

Third, defendants who are living in fear are often prosecuted in other states *in absentia*. These trials are sometimes the basis for arrest warrants and requests for extraditions.[42]

Fourth, defendants who are living in fear are often members of rebel or terrorist groups like the Free Syrian Army or Islamic State. Given their past histories of challenging the government of their home state, these individuals are inherently fearful of political retribution.

Fifth, a handful of defendants explicitly said they were living in fear during court proceedings. These defendants explicitly argued that deportation to their home state would violate the host state's legal obligations, because of the risk that they would face persecution or harm in their home state.

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[40] 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, Art. 1.A(2) (1951);1967 Protocol Relating to the Status of Refugees, 606 UNTS 267, Art. 1.2 (1967).
[41] 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, Art. 1.F (1951).
[42] *See, e.g.,* the cases of Alemu Eshetu (see *supra* note 13, and accompanying text), and Theodore Tabaro who was tried and convicted *in absentia* in Rwanda that requested his extradition to Sweden but who was ultimately tried in Sweden. *See, e.g.,* Nshimiyimana, 'Swedish Court Opens Trial of 3rd Rwandan Genocide Suspect', *KTPress*, 12 September 2017, available at https://www.ktpress.rw/2017/09/swedish-court-opens-trial-of-3rd-rwandan-genocide-suspect/ (accessed December 9, 2023);'Swedish Court Hands Life Sentence to Rwandan-Born Man Over Genocide', *Punch*, 27 June 2018, available at https://punchng.com/swedish-court-hands-life-sentence-to-rwandan-born-man-over-genocide/ (accessed December 9, 2023).

And finally, we felt confident that a small group of defendants were living in fear based on the details of their case, such as the timing of their flight, the details of their alleged crimes, and their former professions in their home states. These individuals were primarily Hutus in Rwanda and pro-Assad defectors in Syria. However, we could not classify these individuals using the other criteria. We accordingly added the final criterion to our list: "The defendant fled his home state after the crimes were committed."

We were unable to classify 52 complaints into one of these two categories because there was insufficient information about the defendant's circumstances when the complaint was filed. This coding process left us with 1,013 observations in our final dataset.

Across all observations, we classified 78.1% of complaints as applying to defendants who were living with impunity and 21.9% of complaints as applying to defendants who were living in fear. In other words, about one out of every five universal jurisdiction defendants was living in fear when the universal jurisdiction complaint against them was filed.

In addition to identifying which defendants were "living with impunity" versus "living in fear," other variables that we use for this article are the name of the defendant, the defendant's home state (i.e., the state of the defendant's nationality when the crime was allegedly committed, which is often also where the alleged crimes took place), the prosecuting state (i.e., the state filing the universal jurisdiction complaint or before whom the universal jurisdiction complaint was filed), and proceeding variables that we discuss later in the article. We also use trial outcome (i.e., whether an accused was convicted for all, some or no charges at trial) and sentence (i.e., which sentence the accused received if convicted).

C. "Living with Impunity" Versus "Living in Fear" Over Time

Is "Living in Fear" a relatively new phenomenon, or has it been a persistent feature of universal jurisdiction cases? To answer this question, we examined a cross-section of our data, first by comparing "Living in Fear" rates by decade, and then by year.

1. Comparisons by Decade

Table 2 breaks down our data by decade beginning in 1980. At the start of this research project, we initially hypothesized that the percentage of defendants living in fear would increase over time due to the growth of international migration,[43] the use of extradition requests and Interpol's red notices by states against political and military opponents,[44] and the ratification of new treaties by states and the expansion of refoulment prohibitions with them in response to extradition requests.[45] But our data by decade show instead a "V" trend with higher percentages of defendants living in fear in the 1980s and the 2010s, and lower percentages in the 1990s and 2000s. The variation in the percentage of defendants living in fear seems to be related to the

[43] In 1995, 161 million people were international migrants, with this number climbing to 174 million in 2000, 221 million in 2010, and 281 million in 2020. While in 1975, 2% of the world population were international migrants, by 2020 3.6% of the world's population was. Data from the United Nations Population Division (2020) International Migrant Stock. Available at: https://www.un.org/development/desa/pd/content/international-migrant-stock.

[44] *See* R.H. Wandall, *Ensuring the Rights of EU Citizens Against Politically Motivated Red Notices* (2022), at 77-85, available at https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)708135 (last accessed on March 26, 2023).

[45] *See, e.g.,* for example, a.1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Art. 3(1) (1984); 'Model Treaty on Extradition', UN Doc. A/RES/45/116 (1990), at 213 (Art. 3(f)). See also *ibid.* Art. 3(b) (including among the mandatory grounds for results if the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons); 2006 International Convention for the Protection of All Persons from Enforced Disappearances, UNGA A/RES/61/177, Art. 16(1) (2006). International bodies have also acknowledged or created obligations in this regard. See, e.g., *Soering v. United Kingdom*, Judgement of 7 July 1989, 161 ECHR (Ser. A.) (holding that an extradition of someone accused of a capital offense in the United States could be a violation of Art. 3 of the European Convention of Human Rights that establishes that no one shall be subjected to torture or to inhuman or degrading treatment or punishment); *Cruz Varas and Others v. Sweden*, Judgement of 20 March 1991, 201 ECHR (Ser. A.); *Chahal v. United Kingdom*, Judgement of 15 November 1996, 123 EHRR 413; 'General Comment No. 36, Article 6 (Right to Life)', UN Doc. CCPR/C/GC/35 (2019), at paras. 31 and 34.

nationals of which states are subjected to universal jurisdiction rather than to the factors we initially considered.

From 1980 to 1989, nearly 69% of complaints were against defendants living with impunity, and about 31% were against defendants living in fear. The defendants living in fear during this time period were mostly people who had allegedly been Nazis or Nazi collaborators. These individuals were wanted by the Soviet Union for allegedly participating in Nazi-era international crimes. Between 1990 and 1999, attention shifted to Latin America. Human rights activist and victims began filing universal jurisdiction complaints to seek justice for alleged atrocities committed in places like Argentina, Chile, and Guatemala. Most of these defendants were living in impunity. However, the number and percentage of complaints against defendants living in fear began to grow dramatically in the 2000s and beyond with the rise of cases against Rwandan Hutus, Syrian migrants, members of Islamic State, and other similar individuals who could not be returned to their home state for prosecution without risking their basic human rights.

Table 2: Variation in Defendant-Type by Decade

Time period	Impunity	Fear	Total
1980-1989	33 (68.8%)	15 (31.2%)	48
1990-1999	174 (82.5%)	37 (17.5%)	211
2000-2009	349 (81.4%)	80 (18.6%)	429
2010-2022	235 (72.3%)	90 (27.7%)	325
Pooled	791 (78.1%)	222 (21.9%)	1,013

2. Comparisons by Year

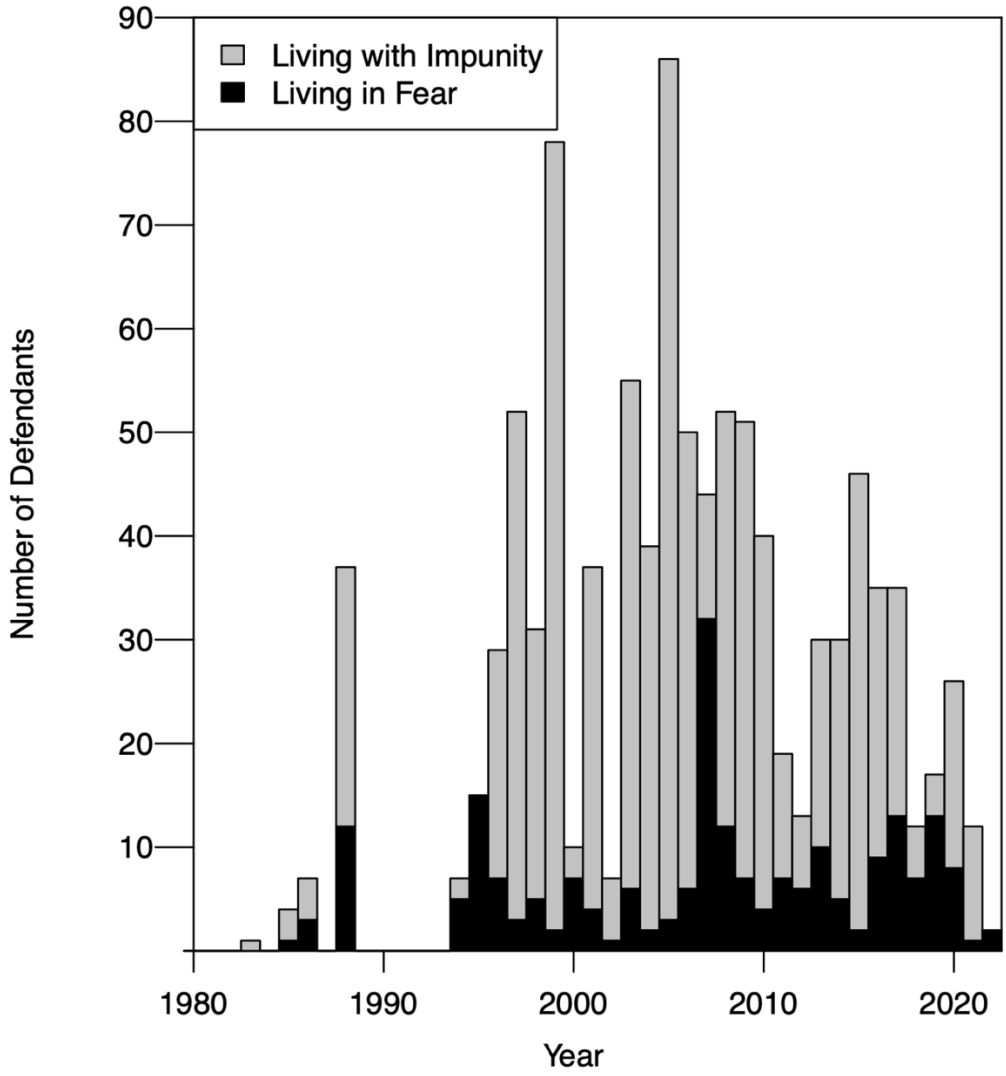
Figure 1 visually shows comparisons in the data by year. Once again, we see that complaints against individuals who are living in fear are a regular and persistent feature of universal jurisdiction cases. These cases are not new, unique, or extraordinary.

Careful readers may question the large spike in living in fear complaints in 2007. This outlier was caused by a major campaign to launch a case in Spain against individuals from Western Sahara. The defendants named in these complaints were members of the Polisario Front rebel group and/or the Sahrawi Arab Democratic Republic government, which is not recognized by Morocco as a legitimate government.

Also note that the decline in cases in recent years is likely a result of our data collection process since the filing of many cases is not immediately publicly known or easy to determine and of the fact that we are excluding John Doe cases from our analysis for the reasons already explained *supra*.[46] Governments rarely publicly announce every complaint they receive (or case they consider by their own motion). We are thus reliant on media, NGO publicity, other scholars, and the legal process itself to reveal over time what complaints have been filed. As complaints generate investigations and hearings over time, we will have more knowledge about the documents that initiated these processes.

[46] The launching of structural investigations in countries like Germany has been one of the reasons why John Doe cases increased in the last decade.

Figure 1: Variation in Defendant-Type by Year



III. The Likelihood that each Type of Defendant will be Arrested and Tried

We can now examine whether defendant-types differ in their likelihood of being investigated, having a formal procedure opened, arrested and tried following a universal jurisdiction complaint. We expect that proceedings against defendants living in fear would move forward towards arrest and trial at higher rates than defendants living with impunity for multiple

reasons.[47] First, the home state of the defendant will typically be supportive of prosecuting defendants who are living in fear because these defendants are often opponents of the home state regime. Often, the home state will put pressure on the receiving state to prosecute these defendants through an Interpol red notice, an extradition request, or in a more informal fashion. In contrast, defendants who are living with impunity are usually supported by their home state, meaning that the prosecuting state will face pressure from the home state to end the proceedings.

A. Arrests

Table 3 presents data on arrests that are consistent with this prediction. Arrests may take place at any time after a complaint is filed.[48] An arrest does not necessary mean that the defendant stays in jail pending prosecution and trial, since defendants may be released on bail and may even flee the prosecuting state before facing trial.[49] But arrests constitute deprivations of physical freedom for defendants and are much more invasive than the mere filing of a complaint. As such, arrests impose substantial burdens on defendants. Arrests also require that the prosecution meets a burden

[47] Langer made the same prediction regarding "low-cost defendants"—i.e., defendants whose prosecution did not impose (significant) costs on the prosecuting state—and showed that that out of 1051 "low-cost" and "high-cost" defendants against whom complaints had been filed at the time, only 32 low-cost defendants had been tried. See Langer, *supra* note 15. But Langer did not explore the impact of the domestic politics of the home state in the prosecuting state as we are doing in this article. In addition, he did not present data on investigations, opening of formal proceedings, and arrests, as we are doing here. Third, he did not show the probability of an arrest, an investigation, a formal proceeding, and a trial, as we are doing in this article.

[48] Also, though unusual in universal jurisdiction cases, cases can move towards trial and conviction without a pretrial arrest for two reasons. First, criminal justice authorities may summon instead of arresting a defendant before trial. Second, the legal systems of a number of universal jurisdiction states admit trials *in absentia.* For instance, that was the case of Khaled Ben Saïd, a vice consul of Tunisia in France when a complaint was filed against him, who left France before being arrested and tried *in absentia* for torture committed in Tunisia. *See* Cour d'assises Bas-Rhin*, Ordonnance de mise en accusation de Khaled Ben Saïd,* No. J.20009/01 (Feb. 16, 2007), reprinted in Groupe d'action judiciaire de la FIDH, *L'affaire Khaled Ben Saïd: Le premier procès en France d'un fonctionnaire tunisien accusé de torture* (2009), available at http://www.fidh.org/IMG/pdf/Bensaid512fr2008_FINAL.pdf (last accessed on August 9, 2023).

[49] For instance, this was the case of Ely Ould Dah, a Mauritanian lieutenant, that was arrested in France for torture committed in Mauritania. After being released pending the proceeding, he ran away and was tried *in absentia* in France. *See, e.g.,* Fédération Internationale des Ligues des Droits de l'Homme, *Groupe d'Action Judiciare de la FIDH, Mauritanie: Affaire Ely Ould Dah* (2005) (on file with the authors).

of proof of probable cause or a similar standard that the defendant committed the offense. Arrests thus convey that there are evidentiary grounds for the allegations against the defendant. Consequently, arrests of defendants living with impunity may trigger protests or other ways to oppose the arrest by the defendant's sending state. In contrast, the sending state may welcome an arrest when the defendant is living in fear.

Table 3: Arrests by Defendant-Type

	Defendants	Impunity	Fear
Number of Arrests	142	33	109
Number of Complaints	1,013	791	222
Percentage of Arrests	14.02%	**4.17%**	**49.10%**

It is worth emphasizing two points about the data on arrests. First, notice that defendants living in fear are more than ten times more likely to be arrested than defendants living with impunity, confirming our prediction that the former are much more likely to be arrested than the latter.

In addition, defendants living in fear have almost a 50% chance of being arrested if a complaint is filed against them. This is remarkable since most criminal complaints around the world do not end up with an arrest as defendants are often not identified or found; cases get dismissed for insufficient elements of proof, for public policy considerations, or for formal reasons; and in the cases that are charged or go to trial many states summon the defendant instead of arresting him/her.

B. Proceedings

Criminal procedure varies substantially among states. States establish different requirements and procedural steps that a case has to meet to move towards a verdict and punishment, use different terminology and concepts that do not find an exact equivalent in other legal systems, and have different conceptions of what the goals of criminal procedure are. States also differ on which should be the right balance among these goals when they conflict with each other, and have different understandings of what the role of prosecutors, defense attorneys, judges, and other actors is. Overall, the institutional, cultural, political, and economic settings where criminal procedure operates varies widely between states.[50]

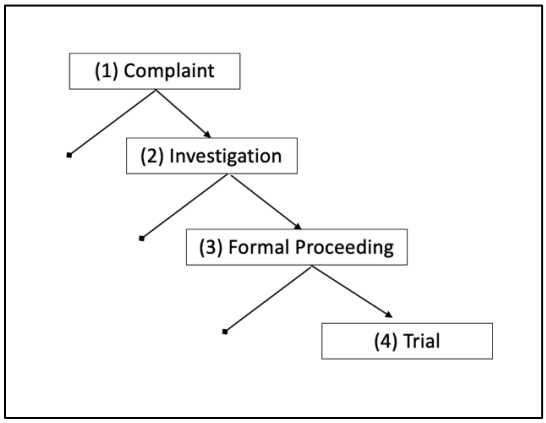
However, every criminal process includes a sequence of potential or actual procedural steps towards adjudication. To analyze universal jurisdiction cases across states, we thus created a common criminal procedure matrix of proceedings variables from the filing of a complaint towards adjudication. Besides arrests already discussed in the prior subsection, these proceedings variables include complaints, investigative measures, formal proceedings, and trials. A "complaint" includes two types of situations: a) public authorities of the prosecuting state consider whether a certain person should be investigated for the commission of a criminal offense; or b) a private individual, NGO, another state, or other legal entities file a report before the authorities of the prosecuting state alleging that a person has committed a criminal offense. "Investigative measures" is the next procedural step and it applies if the prosecuting state investigates the allegations against the defendant or inquires whether other states are investigating or prosecuting the defendant. Next, "Formal proceedings" applies when the prosecuting state issues an indictment, information or

[50] *See, e.g.,* M. Damaška, *The Faces of Justice and State Authority* (1986); J. Ross & S. Thaman (eds.), *Comparative Criminal Procedure* (2016); D. K. Brown, J. I. Turner & B. Weisser (eds.), *The Oxford Handbook on Criminal Process* (2019); D. Nelken & C. Hamilton (eds.), *Research Handbook of Comparative Criminal Justice* (2022).

other formal charge against the defendant, when one of its investigating judges or prosecutors moves the proceedings further forward against the defendant, or when the authorities arrest the defendant to move forward with the charges against him. "Trial" is the next procedural step and refers to the adjudication stage at which a court or other adjudicating body decides whether the defendant is guilty or not guilty.

Figure 2 represents the relationship between these procedural steps as a temporal sequence towards adjudication. Every case against a defendant starts with a complaint. This complaint may be dismissed or investigated. If the complaint against the defendant is investigated, the case may again be dismissed, or formal charges may be issued against a defendant. At the formal proceedings stage, once again the case may be dismissed, or the case may be brought for adjudication at trial. At any of these stages, the case against the defendant may be dismissed due to insufficient evidence, for public policy reasons (e.g., the prosecution decides that pursuing the case forward is not in the public interest), or for formal reasons (e.g., the defendant has immunity).

Figure 2: Procedural Steps of a Universal Jurisdiction Case Against a Defendant



The further a case against a defendant moves forward in this temporal sequence of procedural steps, the closer the defendant is to getting convicted for the commission of a core international crime. One would thus predict that cases against defendants living in fear are more likely to move through this temporal sequence of procedural steps, since in these cases the home state often puts pressure on the receiving state to prosecute.

Consistent with our prediction, Tables 4(a) and 4(b) show that a case against a defendant living in fear is much more likely to move from one procedural step to the next than the case of a defendant living with impunity. A complaint against a defendant living in fear is about thirty times more likely to reach the trial stage than a complaint against a defendant living with impunity. Also, almost one out three complaints against defendants living in fear end up with a trial. This is remarkable given the challenges to build universal jurisdiction cases for alleged international crimes that happened hundreds or thousands of miles away of the prosecuting state.

Table 4: The Impact of Living in Fear on the Stages of Legal Proceedings

(a) Distribution of Outcomes by Type of Defendant

Stage Number	Stage Name	All (Pooled) Defendants	Living with Impunity	Living in Fear
1	Complaints	1,013	791	222
2	Investigation	629	430	199
3	Formal Proceeding	473	303	170
4	Trial	75	8	67

(b) Probability of Escalation by Type of Defendant

Conditional on Reaching Stage	Likelihood of Reaching Stage	All (Pooled) Defendants	Living with Impunity	Living in Fear
1	2	62.09%	54.36%	89.64%
2	3	75.20%	70.47%	85.43%
3	4	15.86%	2.64%	39.41%
Ex ante likelihood of trial, based on complaint:		7.40%	**1.01%**	**30.18%**

IV. Do Universal Jurisdiction Trials Fulfill Their Due Process and Proportionate Punishment Functions?

In Section I, we explained that in the case of defendants living in fear, the justification for universal jurisdiction prosecutions and trials is not only or even mainly preventing impunity, since many defendants will be punished or be subjected to other negative consequences—such as being tortured, extra judicially executed, subjected to a show trial, or sentenced to death—if they were returned to their home state. Rather, in many of these cases, the justifications for the exercise of universal jurisdiction are providing due process to defendants so that they are not wrongly convicted, and their procedural rights are respected, and, in case of conviction, applying a proportionate punishment to them.

Based on the universal jurisdiction database already described, we assess whether universal jurisdiction exercised against defendants living in fear has lived up to these justifications. To provide broader context, we also include data on trials for defendants living with impunity. But we

make no predictions about whether each type of defendant would have a higher likelihood of being convicted or more heavily sentenced, as this is heavily context-dependent.

Table 5 shows that the percentage of total and partial acquittals in universal jurisdiction trials has been substantial.[51] These acquittal rates suggest that universal jurisdiction trials are, on average, true adjudicatory processes—i.e., processes in which the determination of guilt or innocence is based on the available elements of proof, rather than predetermined by political expediency. There has also been a substantial percentage of total and partial acquittals at trials against defendants living in fear, many of whom would have otherwise been subjected to torture, extrajudicial execution, a show trial, or the death penalty, had they been extradited to their home country. Instead, these defendants were fully acquitted in ten percent of universal jurisdiction living-in-fear trials, and fully or partially acquitted in forty percent of these trials. In addition, two convictions—one against a defendant living with impunity, another against a defendant living in fear—were reversed on appeal, making the percentage of defendants fully acquitted at trial or on appeal even larger.[52] In the small number of trials against defendants living-with-impunity, the substantial acquittal rates suggest that these trials have also been true adjudicatory processes—

[51] As a comparison reference, the percentage of acquittals on all charges in U.S. federal courts in bench and jury trials between October 1, 2021, and September 30, 2022, was 17.38%. But this statistic does not include cases in which defendants were convicted by pleading guilty in the U.S. federal system that have been nonexistent in universal jurisdiction cases around the world but that constitute the vast majority of convictions in the United States. If pled cases are included, only 0.43% of defendants were acquitted at trial, while 99.57% of defendants were convicted through guilty pleas and trials in the U.S. federal system. *See* Table D-4. U.S. District Courts-Criminal Defendants Disposed of, by Type of Disposition and Offenses, During the 12-Month Period Ending September 30, 2022, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf (accessed on August 16, 2023). At the International Criminal Tribunal for the former Yugoslavia, 16.51% of defendants were acquitted on all charges at trial, while 83.49% of defendants were convicted through a guilty plea or a trial. *See* United Nations, International Criminal Tribunal for the former Yugoslavia, *Key Figures of the Cases*, available at https://www.icty.org/en/cases/key-figures-cases (accessed August 16, 2023). At the International Criminal Tribunal for Rwanda, 18.67% of defendants were acquitted on all charges at trial, while 81.33% of defendants were convicted through a guilty plea or a trial. https://unictr.irmct.org/en/cases/key-figures-cases. *See* United Nations, International Residual Mechanisms for Criminal Tribunals, available at https://unictr.irmct.org/en/cases/key-figures-cases (accessed on August 16, 2023).

[52] These two cases were against John Demjanjuk in Israel and against Milic Martinovic in Sweden. There was also the case against Ignace Murwanashyaka in Germany whose initial trial conviction was reversed on appeal, but who died before he could be retried.

though it is not possible to make strong conclusions with confidence on these cases given the low number of trials in this category.

Table 5: Trial Outcomes in Universal Jurisdiction Cases

Trial Outcomes*	All (Pooled) Defendants	Living with Impunity	Living in Fear
Acquittal on all charges	12.05% (10 of 83)	25.00% (2 of 8)	10.00% (7 of 70)
Mixed outcome**	27.71% (23 of 83)	12.50% (1 of 8)	30.00% (21 of 70)
Conviction on all charges	60.24% (50 of 83)	62.50% (6 of 8)	60.00% (42 of 70)

* The total number of trials is higher than the addition of living-with-impunity and living-in-fear trials because we did not have sufficient information to classify five defendants in either category

** Acquittal on some charges and conviction on some charges

Table 6 shows the range of sentences against defendants living with impunity and defendants living in fear who were convicted in universal jurisdiction trials for crimes against humanity, genocide, torture, and war crimes.

Table 6: Sentences Against Universal Jurisdiction Defendants

Sentences*	All (Pooled) Defendants	Living with Impunity**	Living in Fear***
Life imprisonment	29.58% (21 of 71)	40.00% (2 of 5)	30.65% (19 of 62)
30 to 15 years imprisonment	15.49% (11 of 71)	20.00% (1 of 5)	16.13% (10 of 62)
14 to 10 years imprisonment	16.90% (12 of 71)	40.00% (2 of 5)	12.90% (8 of 62)
9 to 5 years imprisonment	18.31% (13 of 71)	0% (0 of 5)	20.97% (13 of 62)
Less than 5 years imprisonment	19.72% (14 of 71)	0% (0 of 5)	19.36% (12 of 62)

* The total number of sentenced defendants is higher than the addition of living-with-impunity and living-in-fear sentenced defendants because we did not have sufficient information to classify four defendants in either category

** There are only 5 defendants living with impunity against whom a sentence was ultimately imposed because the conviction against a 6th defendant was reversed on appeal.

*** There are only 62 defendants living in fear against whom a sentence was ultimately imposed because the conviction against a 63rd defendant was reversed on appeal.

About a third of convicted defendants living in fear were sentenced to life imprisonment—a sentence not necessarily disproportionate or otherwise inadequate given that some core international crimes are among the most serious crimes imaginable. Again, given the potential punishments or other negative consequences these defendants would have faced had they been returned to their home country, even a sentence of life imprisonment may be playing a protection function for them.

More than half of convicted defendants living in fear received a sentence of 14 years of imprisonment or less, about forty percent less than nine years of imprisonment, and remarkably about a fifth less than five years of imprisonment. Since these are sentences for the commission of core international crimes, these sentences are, on average, not disproportionately harsh—though in some cases, they may be too lenient for the crime in question.[53] At the same time, it is important to notice that core international crimes include war crimes, some of which may not be among the most serious crimes. For instance, there have been convictions for war crimes such as degrading treatment against defendants who appeared in a photograph next to the corpse of a person protected under humanitarian law. Though this behavior may be reprehensible, it is not nearly as serious as, for instance, a killing of a protected person or one or more killings committed as part of a widespread or systematic attack against a civilian population, or killings committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. In any case, since many defendants living in fear would have faced unfair treatment and trial, the death penalty, and dire prison conditions had they been returned to their home country, sentences lower than fourteen years of imprisonment may be playing a protection function for them.

The number of living-with-impunity defendants who have received sentences is too low to make any strong conclusions regarding these cases.

Our interpretation of these data is tentative because, in contrast with our data on universal jurisdiction trials and sentences, we only have anecdotal information about how defendants living in fear are treated when they are caught, prosecuted, tried, convicted, and sentenced by their home state. We also do not have coded data about certain characteristics of each case to assess whether a sentence is proportionate for it—e.g., on the number of victims a convicted defendant's actions

[53] For an analysis of sentences in international criminal jurisdictions, see J. Doherty & R. H. Steinberg, 'Punishment and Policy in International Criminal Sentencing: An Empirical Study', (2016) 110 Am. J. Int'l L. 49.

affected. However, based on our data and this anecdotal information, it is plausible to infer that universal jurisdiction trials and sentences may be advancing their goals of protecting defendants living in fear against wrongful conviction, unfair treatment, and disproportionate sentencing.

V. Should Universal Jurisdiction Democracies Do Anything Against Being Used by Autocracies to Prosecute the Latter's Opponents?

The previous section showed that universal jurisdiction states seem to have generally respected minimum due process standards and to have generally not applied disproportionately harsh punishments against defendants living in fear. However, there are other normative and public policy issues in relation to the prosecution of these defendants. One of these issues is that authoritarian states may be using universal jurisdiction to make other states prosecute and punish their political or military opponents by formally or informally reporting the presence of these opponents in the territory of the other state or by requesting the extradition of opponents from the other state. For instance, extradition requests by the authoritarian government of Rwanda have triggered many universal jurisdiction prosecutions in European states. It is also possible—though it is hard to find reliable evidence on it given the nature of intelligence operations—that authoritarian governments like Syria have done intelligence operations in other states to prompt or facilitate the universal jurisdiction prosecution of defectors or opponents to their regimes. And even if these intelligence operations have not taken place, these prosecutions by third states are welcome news for these authoritarian regimes.

This is not a problem *per se*—provided, of course, that the accused person is actually guilty. The motivations of informants and complainants are generally irrelevant when the decision is whether to prosecute and punish perpetrators of heinous crimes. Using a domestic analogy, if a

national of state X commits a murder in the territory of state X against a national of state X, it is generally irrelevant that the authorities of state X learn about the murder through an informant or complainant who is himself engaged in problematic behavior and who is not looking for justice, and who rather reports the murderer because he is the murderer's competitor in another realm, such as business, politics, personal relations, or illegal activities. The murderer should still be punished.

Similarly, if a universal jurisdiction state learns about a defendant living in fear in its territory through a formal or informal report or other prompting by the defendant's authoritarian home state, it would still be justified to punish her or him for the commission of a serious core international crime based on the goals of punishment, such as retribution, deterrence, or the enforcement of a social norm against the commission of these crimes.[54] In other words, it would still be just to punish the perpetrator, and the punishment could advance the goal of creating incentives against the commission of international crimes for other defendants, and of strengthening the social norm around the world against the commission of such crimes.

However, the instrumental prompting of or pressure for these prosecutions by authoritarian states may create problems in some situations. For example, when both sides of a conflict commit international crimes, but the prompting or pressure by the authoritarian state leads to the prosecution of only one side by universal jurisdiction states. For instance, in Rwanda, on top of the genocide committed by many Hutus, there were allegations of crimes against humanity and war crimes committed by the predominantly Tutsi members of the Rwandan Patriotic Front that

[54] On the goals of punishment in international criminal law, see, e.g., M. Drumbl, *Atrocity, Punishment, and International Law* (2007); F. Jeßberger & J. Geneuss (eds.), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law* (2020).

have been running the country since they took power in 1994.[55] In Syria, there have been allegations that both members of Assad's regime and opponents to it have committed international crimes. But if only Hutus and opponents of the Assad's regime were forced to emigrate to universal jurisdiction states, only the crimes committed by one side are likely to be prosecuted by universal jurisdiction states prompted or pressured by the home state. This pressure is partially enabled by international treaties and organizations that are designed to promote judicial cooperation, such as extradition treaties and Interpol.

These situations create three types of problems. The first is a problem of equality before the law. One of the ideals of any law, including international criminal law, is that it must be equally applied across people and cases.[56] But if two sides commit international crimes and only the members of one side are prosecuted, tried, and punished, international criminal law is not equally applied.[57] This may provide grounds for claims by individual defendants on *tu quoque*, selective prosecution or other similar grounds.[58] It may also provide grounds for criticism by the broader audiences to whom these prosecutions, trials, and punishments are directed—such as members of the societies where the international crimes occurred or the international community as a whole.[59]

[55] *See, e.g.,* A. Carnegie & A. Carson, *Secrets in Global Governance: Disclosure Dilemmas and the Challenge of International Cooperation* (2020).
[56] *See, e.g.,* 'Universal Declaration of Human Rights', UN Doc. A/RES/217(III), at 2 (Arts. 1, 2, and 7); 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Arts. 3, 14(1) and 26 (1966).
[57] On selectivity as one of the traditional challenges for international criminal law, see, e.g., M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1999).
[58] This type of arguments has traditionally not been successful in international criminal jurisdictions that have rejected "tu quoque" challenges since Nuremberg. *See, e.g., Prosecutor v. Milan Martić*, Judgement of 8 October 2008, Case No. IT-95-11-A, International Criminal Tribunal for the former Yugoslavia, 8 October 2008. But domestic criminal jurisdictions have accepted them in some circumstances under the selective prosecution and related doctrines. A classical reference in the United States is *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).
[59] On the various ways in which the international community can be understood in the universal jurisdiction context depending on one's conception of the international order, see M. Langer, 'Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code', (2013) 11 J. Int. Crim. Justice 737.

The second problem is that since Nuremberg, one of the functions of international criminal jurisdictions have been setting a historical record about the commission of atrocities.[60] But if in a given situation, only the crimes committed by one side are tried, universal jurisdiction prosecutions, trials, and punishment would have an inter-state or inter-situation distortive effect—i.e., they would provide a distortive historical record that would only partially reflect what happened.[61] Besides their transitional justice dimensions, historical grievances may also set the basis for current and future claims to political power.[62]

The third problem is the denial of the right to access to justice and of the right to reparations to victims of defendants living with impunity.[63] If prosecuting states focus all their resources on prosecuting living in fear defendants because their home states support these prosecutions, prosecuting states may skew resources away from equally serious cases against defendants who are living with impunity.

Are there measures that universal jurisdiction states could take to avoid these problems when prompted by authoritarian states to prosecute defendants living in fear? If the international crimes in question are not as serious as other international crimes—such as appearing posing in a photograph next to a corpse, or a head of a person—the receiving state could simply choose not to prosecute. The goals of respecting the principle of equality before the law or of not distorting the

[60] *See, e.g.,* M. J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997); R. A. Wilson, *Writing History in International Criminal Trials* (2011). For critical views on this function of international criminal trials, see, e.g., M. Koskenniemi, 'Between Impunity and Show Trials', (2002) 6 *Max Planck Yearbook of United Nations Law* 1.
[61] See Langer & Eason *, supra* note 17, at 815.
[62] For instance, Paul Kagame has used his public image as the savior of the Tutsi people to help legitimize his ongoing autocratic rule over Rwanda.
[63] On relationship between access to justice and universal jurisdiction, see D. Hovell, 'The Authority of Universal Jurisdiction', (2018) 29 Eur. J. Int. Law 427; F. 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.

historical record may be sufficient public policy grounds for the authorities of the receiving state to not pursue punishment when a crime is not very serious.

But if a crime is serious—as most core international crimes are—the principle of equality before the law or accuracy in setting the historical record may not provide enough public policy grounds for the authorities of the receiving state not to pursue the case. Going back to a domestic analogy, if two murders are committed in the territory of state X, each by a member of two competing gangs, the authorities of state X should prosecute and punish both. But if one of the murderers were beyond the reach of state X—for instance, because he escaped outside of the boundaries of the state—the principle of equality before the law would not provide enough grounds not to punish the other murderer. In this situation, the authorities of state X should still punish the murderer within their reach, while doing their best to still find and hold accountable the murderer who escaped outside of their territory.

If this analogy held in the context of universal jurisdiction, a prosecuting state should punish a perpetrator that was or is a member of one of the sides in a conflict, while giving their best effort to still find and hold accountable perpetrators of the other side outside of the state's boundaries. This is what Germany has been doing regarding the situation in Syria. It has launched not only prosecutions against defendants living in fear in its territory, but also against defendants living with impunity in Syria.[64] This policy has advanced, at least to some extent, access to justice for victims, regardless of where the perpetrators are located.

[64] In June 2018, Germany issued an arrest warrant against Jamil Hassan, then hear of the Syrian Air Force Intelligence, who was a defendant living with impunity in Syria. *See, e.g.,* 'German Authorities Issue Arrest Warrant Against Jamil Hassan, Head of the Syrian Air Force Intelligence', *European Center for Constitutional and Human Rights*, available at https://www.ecchr.eu/en/case/german-authorities-issue-arrest-warrant-against-jamil-hassan-head-of-the-syrian-air-force-intelligence/#:~:text=The%20fact%20that%20the%20German,an%20important%20step%20towards%20ending (accessed on August 16, 2023).

Germany's approach requires that universal jurisdiction states embrace a *global enforcer* conception of universal jurisdiction—under which states prevent and punish core international crimes committed anywhere in the world. However, many universal jurisdiction states have instead embraced a *no safe haven* conception of universal jurisdiction, limiting their role in the universal jurisdiction regime not to be a refuge for participants in core international crimes.[65] For the latter states, prosecuting perpetrators outside of their territory would not be an option. But these states could still take measures to try to advance the principle of equality before the law, to not distort the historical record, and to advance the right to access to justice and the right to reparations of those harmed by defendants living with impunity in their home states or elsewhere. For instance, *no safe haven* states could file communications before the International Criminal Court against members of the other side of the conflict or ask the UN Security Council to refer the situation to the ICC so that perpetrators from both sides are prosecuted. *No safe haven* states could also use tools different from criminal prosecutions, such as issuing sanctions against the authoritarian regime, publicly denouncing or exposing the commission of international crimes by members of the ruling authoritarian regime, supporting the work of human rights international bodies or nongovernmental organizations doing such a work, or getting the international community more involved in documenting ongoing and historical atrocities even if no legal remedies are attached—e.g., through UN Fact-Finding Missions.

VI. Conclusion

This article has articulated an analytical distinction between universal jurisdiction defendants living with impunity and universal jurisdiction defendants living in fear. It has shown that this analytical distinction allows us to make a more nuanced description of universal jurisdiction

[65] On the distinction between global enforcer and no safe haven universal jurisdiction, see Langer, *supra* note 17.

defendants and on how universal jurisdiction has evolved over time. This distinction also helps us make predictions and explain why defendants living in fear are much more likely to be arrested, investigated, have formal proceedings against them, and be tried, than defendants living with impunity.

Our distinction also enables rethinking the justifications of universal jurisdiction. For defendants who are allies of their home state's government, the justification for the exercise of this type of extraterritorial jurisdiction is still fighting impunity. But for defendants who are living in fear of their home state's government, the justifications for this extraterritorial exercise of jurisdiction may also and even mainly be avoiding wrongful convictions, respecting due process, and imposing proportionate punishment to those convicted for the commission of international crimes. We have presented data that suggest universal jurisdiction trials against defendants living in fear tend to advance these goals.

Finally, the two categories we have articulated have also enabled us to show that authoritarian states may be using universal jurisdiction states to prosecute their political and military opponents. We have demonstrated some of the issues that may arise from this practice, such as unequal application of the law, distortion of the historical record and the denial of the right to access to justice and of the right to reparations for victims of defendants living with impunity. We have discussed how universal jurisdiction states may respond to the instrumental use of their laws and apparatus of criminal justice by autocratic regimes.

As universal jurisdiction trials continue to increase in number and importance, we hope that the addition of this new analytic category will help prosecuting states to consider how the political status of the defendant in relation to their home state may impact the pursuit of justice for international crimes.