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The Uneven Application of Universal Jurisdiction: Living with Impunity vs. Living in Fear

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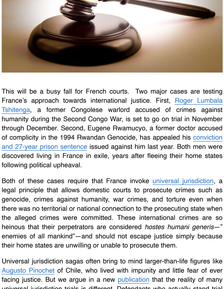

This will be a busy fall for French courts. Two major cases are testing France's approach towards universal jurisdiction. First, Roger Lumbala Tshitenga, a former Congolese warlord accused of crimes against humanity during the Second Congo War, is set to go on trial in November through December. Second, Eugene Rwamucyo, a former doctor accused of complicity in the 1994 Rwandan Genocide, has appealed his conviction and 27-year prison sentence issued against him last year. Both men were discovered living in France in exile, years after fleeing their home states following political upheaval.

Both of these cases require that France invoke universal jurisdiction, a legal principle that allows domestic courts to prosecute crimes such as genocide, crimes against humanity, war crimes, and torture even when there was no territorial or national connection to the prosecuting state when the alleged crimes were committed. These international crimes are so heinous that their perpetrators are considered *hostes humani generis*—"enemies of all mankind"—and should not escape justice simply because their home states are unwilling or unable to prosecute them.

Universal jurisdiction sagas often bring to mind larger-than-life figures like Augusto Pinochet of Chile, who lived with impunity and little fear of ever facing justice. But we argue in a new publication that the reality of many universal jurisdiction trials is different. Defendants who actually stand trial are more often like Tshitenga and Rwamucyo—people who fled their home states out of fear, rather than those who remain powerful and protected.

Universal Jurisdiction Defendants: 'Living with Impunity' versus 'Living in Fear'

Defendants who are living with impunity tend to be high-level government officials who retain political power and influence. They are often targeted for prosecution when they visit a foreign state on official business. These individuals often hold immunity, which enables them to leave if a complaint is filed and travel safely back to their home state. Even if detained, they often receive diplomatic and legal support from their home governments.

A striking example is Khaled Nezzar, Algeria's former Minister of Defense. In 2011, Swiss authorities detained him for 48 hours over allegations of war crimes and crimes against humanity during Algeria's Black Decade. However, Nezzar was released on the condition that he return for further hearings. He then returned to Algeria, where he died in 2023 without ever facing trial.

In contrast, defendants who are living in fear of their home state have often 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. Others have held positions of power in their home state but defected from the ruling regime. For example, Eyad al-Gharib was an official in Syria's notorious General Intelligence Directorate. 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 for crimes against humanity, and he was sentenced to four and a half years in prison in 2021. Unlike Nezzar, al-Ghrarib had no diplomatic shield or powerful allies to intervene on his behalf.

A Pattern of Bias in Universal Jurisdiction Prosecutions

To examine how a defendant's political status affects case outcomes, we compiled a dataset containing 1,013 criminal universal jurisdiction complaints filed between 1983 and 2022. We classified every defendant as either 'living with impunity' or 'living in fear' based on his or her life experiences. A full description of our dataset and coding decisions is available here.

The data revealed a striking pattern. Across all observations, 78% of defendants lived with impunity, while 22% lived in fear. Yet, those living in fear were significantly more likely to be arrested, investigated, and tried.

Arrests are a major turning point in universal jurisdiction cases, as they deprive a defendant of physical freedom and signal that prosecutors have met a probable cause standard. Despite this, only 14% of all complaints resulted in arrests. However, the likelihood of arrest depended on the defendant's status: only 4% of those living with impunity were ever arrested, while 49% of those living in fear were taken into custody.

Similar differences were apparent at every stage in criminal proceedings. A complaint against a defendant living in fear was about 30 times more likely to reach the trial stage than a complaint against a defendant living with impunity. This is remarkable given the challenges in building universal jurisdiction cases for alleged international crimes that happened hundreds or thousands of miles away from the prosecuting state.

Why This Bias Matters

This imbalance presents serious challenges for the legitimacy of universal jurisdiction. The first is a problem of equality before the law, a cornerstone of international justice. When legal accountability is one-sided, international criminal law risks becoming a tool for selective prosecution rather than an instrument of impartial justice. If both sides in a conflict commit atrocities but only one is prosecuted, victims may view these trials as biased, undermining trust in the system.

The second problem is that, since Nuremberg, one of the functions of international criminal jurisdictions has been setting a historical record about the commission of atrocities. But if, in a given situation, only the crimes committed by one side are tried, universal jurisdiction prosecutions could create a distortive historical record that would only partially reflect what happened. Besides their transitional justice dimensions, these records of historical grievances may also set the basis for current and future claims to political power.

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

Moreover, some authoritarian states may weaponize universal jurisdiction to target political opponents. For example, Rwamucyo was first identified in France after a nurse at his hospital saw his name on Interpol's website, following a Rwandan Red Notice requesting his arrest. Regardless of how they originate, these prosecutions of political opponents by host states are welcome news for authoritarian regimes.

Correcting for Bias in Legal Outcomes

To address these issues, prosecuting states must ensure greater balance in universal jurisdiction enforcement. Germany's approach to Syrian war crimes offers a useful model, as it pursued both Assad regime officials and opposition actors well before Assad's regime ended. This policy has advanced, at least to some extent, access to justice for victims, regardless of where the perpetrators are located. 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—including the United States—have instead embraced a *no safe haven* approach, prosecuting only those who reside within their jurisdiction. But these states could still take measures to try to address this bias in legal outcomes. 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. *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 organizations, or helping to document ongoing and historical atrocities even if no immediate legal remedies are attached, such as by supporting UN Investigative Mechanisms.

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As Rwamucyo and Tshitenga face French justice, their cases will be judged on the facts and law. But a broader political question remains: Why do some perpetrators face justice while others remain beyond reach? Defendants living in fear—those who flee repressive governments—are often the lowest-hanging fruit for universal jurisdiction prosecutions. Meanwhile, those living with impunity—protected by their positions of power—continue to evade accountability. If universal jurisdiction is to fulfill its promise of delivering impartial justice, prosecuting states must confront their biases, close accountability gaps, and ensure that justice is applied to all perpetrators, regardless of their political status or connections.

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