
The Quiet Expansion of Universal Jurisdiction

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Abstract

Based on an original worldwide survey of all universal jurisdiction complaints over core international crimes presented between 1961 and 2017 and against widespread perception by international criminal law experts that universal jurisdiction is in decline, this article shows that universal jurisdiction practice has been quietly expanding as there has been a significant growth in the number of universal jurisdiction trials, in the frequency with which these trials take place year by year and in the geographical scope of universal jurisdiction litigation. This expansion is likely the result of, among other factors, the adoption of International Criminal Court implementing statutes, the creation of specialized international crimes units by states, institutional learning by states and non-governmental organizations (NGOs), technological changes, new migration and refugee waves to universal jurisdiction states, criticisms of international criminal law as neo-colonial and the search of new venues by human rights NGOs. The expansion of universal jurisdiction has been quiet because most tried defendants have been low-level, universal jurisdiction states have not made an effort to publicize these trials and observers have wrongly assumed that Belgium and Spain were representative of universal jurisdiction trends. The article finally assesses positive and negative aspects of the quiet expansion of universal jurisdiction for its defenders and critics.

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1 Introduction

In recent years, international criminal law scholars have claimed that the practice of investigating and trying violations of international criminal law on the basis of universal jurisdiction is dying or in decline, citing a series of high-profile setbacks to the practice that have taken place since 2003.¹ In this article, we challenge this common ‘rise and fall’ narrative. Using data gathered as part of a review of all universal jurisdiction cases² that have involved at least one allegation of a core international crime,³

¹ See, e.g., Ben-Ari, ‘Universal Jurisdiction: Chronicle of a Death Foretold?’, 43 *Denver Journal of International Law and Policy* (2014–2015) 165; de la Rasilla del Moral, ‘The Swan Song of Universal Jurisdiction in Spain’, 9 *International Criminal Law Review* (2009) 777; Genovese and Barral Diego, ‘The Slow Death of Universal Jurisdiction: The Case of Spain’, *ALIBI* (10 October 2014), available at www.alibionline.nl/the-slow-death-of-universal-jurisdiction-the-case-of-spain/; Hwang, ‘China: The Growth of a New Superpower and the Extinction of Universal Jurisdiction’, 32 *Wisconsin International Law Journal* (2014) 334; Luban, ‘After the Honeymoon: Reflections on the Current State of International Criminal Justice’, 11 *Journal of International Criminal Justice (JICJ)* (2013) 505, at 512 (pointing out that one of the phenomena that must be addressed is the demise of universal jurisdiction); Reydams, ‘The Rise and Fall of Universal Jurisdiction’, in W. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (2011) 337; Roth-Arriaza, ‘Just a Bubble? Perspectives on the Enforcement of International Criminal Law by National Courts’, 11 *JICJ* (2013) 537, at 540: ‘One area where pruning back has definitely occurred is in the acceptance and use of universal jurisdiction to prosecute international crimes in third party courts.’

² This review was conducted as part of an effort to update and build out the database of universal jurisdiction cases originally compiled by Máximo Langer. This database contains information on every known criminal complaint (or case considered by public authorities on their own motion) that (i) involved the alleged commission of one or more of the four core international crimes (in which we include crimes against humanity, genocide, torture and war crimes) by physical individuals; (ii) was filed or initiated between 1957 and 2017; and (iii) fully or partially relied on the principle of universal jurisdiction under which a state may have authority to prosecute, try and punish certain crimes even if the state in question did not have any territorial, nationality or national-interest link with the crime when the crime was committed. The database thus does not include information on complaints filed under universal civil jurisdiction, criminal cases against corporations or other non-physical legal entities or cases that involve the alleged commission of other crimes subject to universal jurisdiction such as piracy or slave trading. The original database was created by Máximo Langer between July 2009 and June 2010. Langer gathered the cases contained in the original database using a double-blind research system in which he tasked two research assistants with identifying and coding universal jurisdiction cases, checked their work and then thoroughly documented the cases cleared for inclusion. Mackenzie Eason initiated the current update and expansion of the database in 2016. Langer and Eason have since worked together to investigate cases that have occurred since the initial survey, add a series of new factors to the dataset and more deeply document the cases already contained in the database. The information contained in the Langer-Eason Universal Jurisdiction Database is drawn from a variety of sources, including published judicial decisions; Lexis-Nexis and Westlaw; specialized journals like the *Journal of International Criminal Justice* and the *Yearbook of International Humanitarian Law*; key books on universal jurisdiction and international criminal law; the websites of the Center for Constitutional Rights, the Center for Justice and Accountability, the European Center for Constitutional and Human Rights, the Hague Justice Portal, Human Rights Watch, the International Center for Transitional Justice, the International Federation of Human Rights and TRIAL International; reports on universal jurisdiction and international criminal law cases by Amnesty International, Civitas Maxima, Human Rights Watch and Redress; newspaper articles and other media documents and the Google search engine.

³ The four core crimes included as selection criteria for the Langer-Eason Database are crimes against humanity, genocide, torture and war crimes. Though torture is sometimes not included among the core international crimes, we include it in this category for convenience of use and because its prosecution based on universal jurisdiction presents similar issues to that of the other three crimes.

stretching from 1961 to 2017,⁴ we show not only that the use of universal jurisdiction has not been declining over recent decades but also that it has in fact been persistently, if quietly, expanding over that time. (For a description of how the data were collected and the definitions used in coding, see notes 2–4 and 10–12.)

This expansion has been taking place in a number of dimensions. Numerically, the sum total of cases initiated and the defendants tried on the basis of universal jurisdiction has continued to rise. More importantly, though, its rise over recent years has become at once more regular and more rapid. Each of the last 10 years has seen at least one universal jurisdiction-based prosecution brought to trial, and, over this decade, there have been more such trials than in the prior two decades combined. In addition to this numerical expansion, we have found that universal jurisdiction has also been expanding geographically. While the last decade has seen setbacks for the practice of using universal jurisdiction to try international crimes in parts of Western Europe, this same period has seen breakthroughs in the use of this practice elsewhere in the world as a growing number of states – in both the developed and developing world – have hosted or undertaken universal jurisdiction litigation. This growth in the number and geographic distribution of states that permit or encourage such litigation is particularly striking as the cases taking place in these new venue states include not only initial complaints and investigations but also a growing number of formal investigations and even trials.

In Parts 2 and 3 of this article, we discuss these empirical findings in more detail and consider why universal jurisdiction has been expanding in these particular ways. In Part 2, we present our findings on the numerical expansion of universal jurisdiction and consider a number of factors that may have contributed to this trend. These factors include: the passage of domestic legislation implementing the International Criminal Court (ICC) framework containing universal jurisdiction provisions; the creation of special units within domestic law enforcement institutions dedicated to investigating and prosecuting international crimes; the growing number of non-governmental organizations (NGOs) dedicated primarily to documenting and advocating for the prosecution of international crimes; officials and advocates incrementally improving their investigation and litigation strategies by learning from past universal jurisdiction cases; the effects of technological change on the cost of gathering and organizing the evidence needed to prosecute crimes committed thousands of miles away from the investigating institution and the extraordinary number of refugees and other migrants coming to Western states having participated in, or bringing reports of, international crimes committed in Iraq, Syria and elsewhere. In Part 3, we present our findings on the geographical expansion of

⁴ The earliest case contained in the Langer-Eason Database is the 1961 trial of the notorious Nazi official Adolf Eichmann in Israel – often considered to be the first example of a domestic court relying on universal criminal jurisdiction to adjudicate one or more core crimes of international law. The most recent cases contained in the updated database were filed (or had their trial completed) in 2017. The database is now up to date as of the end of the 2017 calendar year. Thus, the coding of any ongoing or pending cases – and any discussion of these cases in this article – reflects the status of these cases as of that time.

universal jurisdiction and discuss the set of factors that have likely contributed to this trend. These factors include victims' and NGOs' search for new venues in which to seek justice for international crimes; critiques against universal jurisdiction as being biased against African officials and an 'extraterritorial backfire effect' against certain universal jurisdiction countries like Spain.⁵

After this discussion of how and why universal jurisdiction has been expanding, we dedicate Part 4 to a further and no less puzzling question: why has the expansion of universal jurisdiction been so quiet that even the top experts on international criminal law and universal jurisdiction have missed it? We suggest that this expansion has gone largely unnoticed by those writing on the health of universal jurisdiction for the following reasons. The first explanation is because most recent cases have not involved the kinds of defendants or geopolitical struggles that tend to make 'noise' in international legal circles. Unlike the paradigmatic Eichmann or Pinochet cases, most universal jurisdiction investigations and trials have focused on low-cost defendants⁶ and defendants who were already residing in the prosecuting state. The second reason is that there have been a number of shifts in the procedure and politics of filing and conducting universal jurisdiction cases that have led to changes in the incentives for different types of actors initiating these cases. As a growing number of states have established special units of police, prosecutors and even judges dedicated to prosecuting international crimes, the way that universal jurisdiction cases are filed and investigated may have changed, with cases being initiated by state actors bound by institutional and professional norms of confidentiality or secrecy. And, for those NGOs and advocates most involved in universal jurisdiction litigation, the strategic benefits and costs of 'noisy' litigation strategies have changed in recent decades, and those involved in filing cases against higher-profile defendants capable of resisting or fleeing justice efforts may have an incentive to 'keep quiet'. In addition, universal jurisdiction states have at times treated universal jurisdiction trials as mostly domestic trials and have not made (enough) efforts for international audiences to know about and understand them. The salience of certain reforms like the amendments to the Belgian and Spanish universal jurisdiction statutes may also help explain why the expansion of universal jurisdiction has not been noticed.

Finally, the article describes and assesses the scope and patterns of the quiet expansion of universal jurisdiction trials. In terms of scope, in the last 10 years there have been more completed universal jurisdiction trials than in the previous 20 years combined, and there have been substantially more completed universal jurisdiction trials than completed trials at the ICC. The expansion in the number

⁵ On the concept 'extraterritorial backfire effect', see note 107 below and accompanying text in Part 3.C.

⁶ Low-cost defendants are those defendants whose prosecutions do not impose substantial diplomatic and other costs to the political branches of the prosecuting state, whether because – among other possible factors – the defendant's home state is relatively weak or does not protest or does not otherwise impose substantial costs on the prosecuting state. On the concept of low-cost, mid-cost and high-cost defendants, see Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law* (2011) 1.

and frequency of universal jurisdiction trials can be considered a positive development for defenders of universal jurisdiction to the extent that these trials hold accountable those who have participated in the commission of core international crimes. In terms of patterns, we see two encouraging trends emerging for defenders of universal jurisdiction. First, despite allegations that universal jurisdiction has been overused against African nationals and state officials, we find that this is not the case. We find that the vast majority of complaints have been issued against nationals of states outside Africa, and more than half of the cases that have resulted in a completed trial have not involved defendants from an African country. Furthermore, even in those trials that have involved African defendants, most defendants had become citizens or residents of the prosecuting states prior to the initiation of proceedings against them. Given this, we find that domestic universal jurisdiction trials have been far less concentrated on African defendants than the cases thus far pursued by the ICC.

We also point out that the quiet nature of the cases that have made up the ongoing expansion of universal jurisdiction suggests that critics' dire predictions that universal jurisdiction would substantially disturb international relations or deeply infringe upon states' sovereignty have not come to pass.⁷ The prevalence of low-cost defendants and defendants who are already present or residing in the prosecuting state also suggests that, in practice, universal jurisdiction has not been global vigilante justice.⁸ However, the 'quiet' character of universal jurisdiction expansion can also be considered problematic. First, if unnoticed by potential participants in international crimes and by other actors, universal jurisdiction cases, trials and punishments would not be able to successfully further their goals of deterrence and the projection of norms against the commission of core international crimes embraced by so many international justice advocates or foster prosecutions in the states where the crimes were committed. In addition, the concentration of universal jurisdiction trials in residents of the prosecuting states also means that these prosecutions are reactive rather than proactive, and, thus, trials do not reflect the seriousness of international crimes committed by the different sides in a given situation but, rather, just the international and involuntary mobility of these groups. This concentration in residents may reflect an understanding of the role of universal jurisdiction states as not being safe havens for perpetrators of international crimes rather than being global enforcers of international human rights.⁹

⁷ Among these critics, see, e.g., Kissinger, 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs* (2001), at 86–96; see also texts cited in note 124 below.

⁸ See Langer, *supra* note 6.

⁹ For the articulation of the distinction between 'no safe haven' versus 'global enforcer' conceptions of the role of states within the universal jurisdiction regime, see Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction', 13 *JICJ* (2015) 245.

2 The Numerical Expansion of Universal Jurisdiction

Our data show that the use of universal jurisdiction as the basis for complaints and trials of individuals accused of committing one or more core international crimes has held steady or increased – both in terms of number and frequency – over time.¹⁰ In this part, we will first discuss our findings regarding criminal complaints and cases considered by the authorities by their own motion. We will then turn to our findings regarding completed universal jurisdiction trials.¹¹

A Complaints and Cases Considered by Authorities by Their Own Motion (Proprio Motu Investigations)

Máximo Langer reported 1,051 criminal complaints (or cases considered by state authorities on their own motion) filed on the basis of universal jurisdiction between the Eichmann case that was tried in 1961 and June 2010.¹² In the 2016–2018 updating of our database, we found 911 complaints (or cases considered by authorities by their own motion) previously not included in the database, 614 of which were initiated

¹⁰ Our analysis in this part will be based on trends in the total number of universal jurisdiction complaints and trials. This is a meaningful approach for two reasons: the total number of complaints and trials and the changes in the rates at which complaints are filed and trials held over time (i) are evidence of shifts in the scope and acceptance of this practice and (ii) provide one way to assess the accuracy of the central assumption of the ‘rise and fall’ narrative regarding universal jurisdiction – namely, that the total number of universal jurisdiction complaints and trials are in decline. This approach is, admittedly, agnostic to the possibility that shifts in the rates of universal jurisdiction-based complaints and trials is driven, at least in part, by the rates at which individuals around the world are committing acts that could constitute violations of international criminal law. A more in-depth analysis of the evolution and spread of universal jurisdiction would take into account data on levels and geographic distribution of international crimes in any given year, examining not only how often victims, advocates and state actors have used this legal tool but also how often the circumstances have arisen in which they could have done so. Although this alternative approach may be promising, and may be a path we pursue in future research, it would require significant formal and statistical research that is beyond the scope of this article.

¹¹ For the purposes of this article, we define universal jurisdiction trials as prosecutions based on this jurisdictional principle that have been adjudicated with a formal verdict after a trial.

¹² For the purposes of this project, a criminal complaint was defined as a report by an individual or organization presented to state authorities against a physical person about the possible commission of a crime. The individual defendant was the unit of analysis. This means that if a complaint was presented or a trial was held against two defendants, two complaints or trials were coded – one per defendant. In cases where complaints were presented against unknown defendants, a single complaint was coded, unless the number of unknown defendants could be identified or estimated. Complaints (or cases considered by the authorities on their own motion) were coded that involved at least one of the core international crimes (crimes against humanity, genocide, torture and war crimes) and were based fully or partially on universal jurisdiction. For coding purposes, a universal jurisdiction complaint or trial was defined as one in which the prosecuting state did not have any territorial, personal or national-interest link to at least one of the core international crimes in question when the crimes were committed. The coding thus included cases of pure universal jurisdiction – in which there was no link between the prosecuting state and the crime or defendant even after the crime was committed – and non-pure universal jurisdiction – in which there was a link between the prosecuting state and the crime or defendant after the crime was committed, such as presence of the defendant in that state’s territory.

between July 2010 and December 2017.¹³ This finding alone is sufficient to show that the use of universal jurisdiction is expanding, at least in terms of running totals. More importantly, we found no evidence that the rate at which new universal jurisdiction cases are being initiated is decreasing. As we can see in [Figure 1](#), the yearly totals vary widely from year to year, making it hard at first glance to point to any such coherent trend. When we go beyond first glance, however, we find evidence that the rate of new universal jurisdiction cases being initiated has actually been increasing over time. When fitted with a trend line set using a simple linear regression, we find that the rate of new cases being initiated is holding steady or even slightly increasing over time.¹⁴ A decade-on-decade comparison provides further support. Before 1988, there were 286 universal jurisdiction cases initiated. In the decade between 1988 and 1997, 342 universal jurisdiction cases were initiated. In the following decade – 1998–2007 – there were 503 such cases. And, in the last decade of our data – 2008–2017 – there were 815 new universal jurisdiction cases, which represents a total nearly as high as the two previous decades combined.

These findings are remarkable, and particularly notable in the context of this article, because they challenge a key strain of the ‘decline of universal jurisdiction’ narrative. To wit, many of the international criminal law scholars who have embraced this narrative¹⁵ have pointed to a series of amendments to the universal jurisdiction statutes in states like Spain and Belgium that had been central to early applications of universal jurisdiction, suggesting either that these efforts to narrow the use of universal jurisdiction in these states were an indicator that other states would follow suit or that these amendments would result in a reduction in the use of universal jurisdiction. This focus on Spain and Belgium is understandable given the outsized role that these two states played in the early development of this practice in the 1990s and the first years of the 2000s. As it turns out, however, neither of these predictions has come true.

¹³ This means we found 297 complaints or *proprio motu* cases filed before July 2010 not previously included in the database. This was not surprising for us. As discussed in Langer, *supra* note 6, at 7–8, n. 23, any tally of the complaints and *proprio motu* cases filed each year that relies on a review of publicly available sources will inevitably under-estimate the actual number of complaints and cases for two reasons: first, because some authorities and complainants may not publicly announce that such a complaint has been lodged (in fact, a substantial percentage of complaints we found filed before July 2010 were publicly announced only after that date) and, second, because of the difficulty of scouring the vast number of sources from around the world in which complaints or cases could be announced or reported. The article also explained why that possible under-representation of complaints and *motu proprio* cases would not undermine its framework, hypotheses, analysis and conclusions but, rather, would actually further confirm them given that the number of universal jurisdiction trials was substantially less likely to be under-represented because trials are typically public. The fact that in the current updating of the database we have not found a single trial held before July of 2010 not reported in the original survey further validates this reasoning.

¹⁴ We reached this conclusion by running a univariate regression, regressing the total number of cases initiated on the year variable. This regression showed that, for each additional year, the rate of cases being filed increased slightly – a positive coefficient of 0.03 that was statistically significant at a confidence level of 0.01.

¹⁵ See note 1 above.

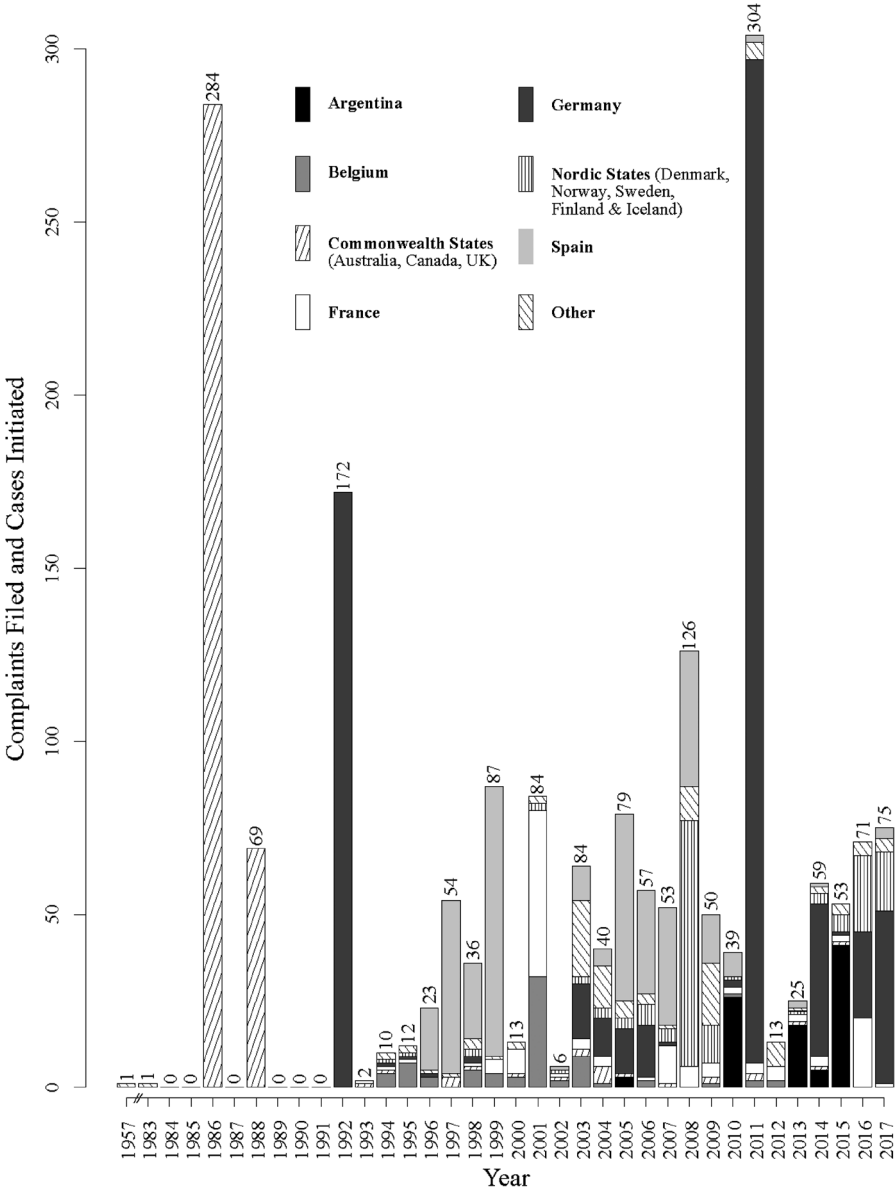


Figure 1: Universal jurisdiction complaints by year and prosecuting state

As we can see in Figure 1, the amendments to Belgium’s universal jurisdiction statute in 2003 and the amendments to the statute governing universal jurisdiction in Spain in 2009 and 2014 did have a noticeable effect. The number of complaints and investigations initiated in Belgium and Spain does in fact drop sharply after 2003 and 2009 respectively. That said, these changes had little effect upon the total number of complaints filed in those and subsequent years. In the case of Belgium, this lack of an overall effect was due to the

relatively small numbers of complaints Belgium received even at its height as compared to the total number of complaints filed each year. Indeed, even during the late 1990s and early 2000s – the heyday of Belgian universal jurisdiction litigation – there were many more cases initiated in France and Germany than in Belgium. And this dynamic has continued to blunt the loss of Belgium as a robust universal jurisdiction venue in the years since 2003 as France and Germany have continued to be active universal jurisdiction states, maintaining or increasing the number of cases they hear over the ensuing decades.

In the case of Spain, although its courts had handled a significant share of the universal jurisdiction complaints filed between 1996 and 2008, and the number of universal jurisdiction complaints / *proprio motu* investigations did indeed drop significantly after the 2009 amendments limiting Spanish courts' ability to hear universal jurisdiction cases, the effects of this change on the overall number of complaints filed in 2009 and subsequent years were blunted as a series of states that had previously not shown a willingness to endorse universal jurisdiction stepped in to fill the gap. Given the steady growth of universal jurisdiction litigation in these new venues – including, notably, Argentina and several Scandinavian states – the overwhelming emphasis that international criminal law scholars writing on universal jurisdiction placed on developments in Spain and Belgium appears to have been misplaced. Although these states were indeed instrumental in the early development of universal jurisdiction litigation, as of the mid- to late 2000s they were neither bellwethers nor the only states that were open to this practice.

All of this said, we have to be cautious in our assessment of trends in the rate of universal jurisdiction complaints over time – and in our interpretation of the underlying data on which it is based – for a number of reasons. First, there are some cases that we added based on reports of an arrest or other formal process for which we have entered an estimated year of the filing of the complaint or initiation of *proprio motu* investigation, but for which we have yet to find reliable reports as to the exact date on which the case was originally filed.¹⁶ Second, as already explained by Langer, there are likely selection effects that may lead to under-reporting of universal jurisdiction complaints / *proprio motu* investigations and, thus, that would significantly distort any trend we see over time.¹⁷ For instance, we know that Germany has undertaken two structural investigations into crimes committed in Syria and by individuals affiliated with the Islamic State, and Sweden and France each have ongoing structural investigations into crimes committed in Syria.¹⁸ But we do not know how many individuals have

¹⁶ In a number of cases, we have a range of years in which complaints or cases considered by authorities by their own motion were filed. In these circumstances, we coded all of these cases as filed in the first year in the range. For instance, we know that a structural investigation on Syria was opened in Germany in 2011 and has continued until today. We also estimate that, in the course of this structural investigation, German authorities have opened individual investigations into at least 300 individuals. In all but a few of these cases, though, German authorities have not released any information as to when investigators began looking into the actions of each individual suspect. We have thus coded these cases as having been filed in 2011.

¹⁷ Langer, *supra* note 6, at 7–8, n. 23.

¹⁸ See, e.g., Human Rights Watch (HRW), 'These Are the Crimes We Are Fleeing' Justice for Syria in Swedish and German Courts (2017), at 33, 44.

been considered as potential suspects in all of these structural confidential investigations.¹⁹ If these structural investigations are on the scale of those undertaken in the past – many of which have resulted in the investigation of hundreds of individuals²⁰ – or if they grow to that scale in the future, the trend of universal jurisdiction complaints could change and go further upward. Without leaving all of these qualifications aside, our data do not indicate a decline in the number of universal jurisdiction complaints and *proprio motu* investigations over time.

B Completed Trials

According to Langer, there were 32 universal jurisdiction cases that resulted in a completed trial between 1961 and June 2010.²¹ In our 2016–2018 updating of the Langer-Eason Database, we found 29 universal jurisdiction trials that were completed between July 2010 and 2017. Aside from this increase in the overall total of completed universal jurisdiction trials, our data on completed trials show two other interesting results when plotted over time. As [Figure 2](#) indicates, universal jurisdiction trials have become increasingly frequent over the past few decades. In the decade between 1988 and 1997, verdicts were issued in only eight universal jurisdiction trials. Between 1998 and 2007, this number increased to 18. And, finally, in the last decade – from 2008 to 2017 – there have been a staggering 34 universal jurisdiction trials completed.²² To put this into perspective, there have been more completed trials in the last 10 years than in all previous years combined.

[Figure 2](#) also shows that these trials have become a more regular occurrence. In the first two decades depicted here, universal jurisdiction verdicts were a rather sporadic occurrence. Indeed, in the two decades between 1988 and 2007, there were nine years in which there was not a single verdict issued in a trial based on universal jurisdiction. By contrast, there have been universal jurisdiction trials verdicts in every one of the last 10 years. This marked increase in the number and rate of universal

¹⁹ In the case of the structural investigation on Syria in Germany, we know that 300 communications on alleged individual perpetrators have been referred to the federal prosecutor. See Deutscher Bundestag, Drucksache 18/12533, 30 May 2017. From this information, we cannot know whether several of these communications referred to an alleged individual perpetrator or whether there were communications not initially referred to an individual perpetrator that was later identified. However, we coded complaints against 300 individuals in this situation as an estimate of the scope of this structural investigation. Consequently, the 300 defendants number could be either an over- or under-estimation depending on whether (i) there is overlap among the referents of these communications or (ii) whether the German authorities have not yet gotten around to coding or investigating some of the communications against non-individualized perpetrators.

²⁰ See, e.g., J. Deschênes, *Commission of Inquiry on War Criminals* (1986); T. Hetherington and W. Chalmers, *War Crimes: Report of the War Crimes Inquiry* (1989); Hannich, 'Justice in the Name of All: Die praktische Anwendung des Völkerstrafgesetzbuchs aus der Sicht des Generalbundesanwalts beim Bundesgerichtshof', 13 *Zeitschrift für Internationale Strafrechtsdogmatik* (2007) 507, at 510–511.

²¹ Langer, *supra* note 6.

²² Garrod, 'Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and "Universal Jurisdiction" in the Light of the *Habré Case*', 59 *Harvard International Law Journal* (2018) 125, has recently reported 34 trials against 41 suspects. But he has tried to argue that none of these trials are

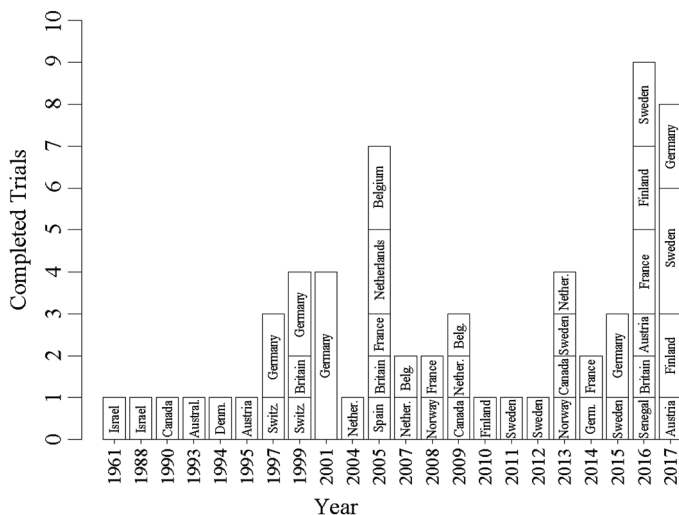


Figure 2: Completed universal jurisdiction trials by year and prosecuting state

based on universal jurisdiction. The difficulty and implausibility of his argument are indicated by the fact that, in order to develop it, he needs to explicitly disagree with, criticize, dismiss as dicta or disregard opinions, decisions, statements and practice by multiple states (e.g., at 145, 160–162, 171), multiple state courts and judges (e.g., at 143, 145, 181, 182), the International Court of Justice (ICJ) (e.g., at 126, 130, 135–172), the International Law Commission (e.g., at 128, 146ff), the International Tribunal for the former Yugoslavia (e.g., at 142–143, 180–181, 183), the European Court of Human Rights (at 190), the International Committee of the Red Cross (e.g., at 146, 183), the United Nations Committee against Torture (e.g., at 145), the Restatement (Third) of Foreign Relations Law of the United States (e.g., at 146), the Restatement (Fourth) of Foreign Relations Law of the United States (e.g., at 128, 146), the Institute of International Law (e.g., at 145–146) and many commentators and scholars (e.g., at 128, 134–135, 145, 167–169). The first step in his argument is distinguishing between universal jurisdiction and what he refers to as ‘treaty-based jurisdiction’. Though he does not provide a clear definition of ‘universal jurisdiction’, he seems to understand it as the absence of any link at all between the crime and the prescribing state (e.g., at 131–132) and in which the jurisdictional claim has its basis in customary international law (e.g., at 165–167, 176–177). He defines ‘treaty-based jurisdiction’ as jurisdiction arising out of treaty obligations to extradite or prosecute (at 132) and ‘as the permission under international law to establish jurisdiction over a relevant treaty-offense committed abroad, including the national of another party to the treaty regime, in the absence of any other lawfully accepted jurisdictional link to the prescribing state at the time of the relevant conduct’ (at 175), says that treaty-based jurisdiction applies *inter partes* (at 177) and that the custodial state acts as a representative of another state party to the treaty that has a relevant link to the crime such as territoriality or nationality (e.g., 177–178). In contrast, consistently with the opinion by the ICJ in *Habré* (see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422, paras 74–75, 84, 91, 119) and with many other authorities, we include within the concept of universal jurisdiction jurisdictional claims by a prosecuting state that did not have a territorial, national or national interest link with a crime at the time of its commission and we consider that such a jurisdictional claim may be based on customary international law or a treaty. The second step by Garrod is claiming that the 34 trials against 41 individuals that he reports have all been exclusively based on a treaty-based jurisdiction that establishes a duty to either extradite or prosecute (e.g., at 127, 170–171). Such a claim is flawed even within Garrod’s own framework since it is not consistent with the empirical record. For instance, his count includes, like ours,

jurisdiction complaints / *proprio motu* investigations that have resulted in a completed trial is even more significant when compared with the number of universal jurisdiction complaints for two reasons. First, we have much less reason to doubt the accuracy of our data on the number of completed trials. This is because trials and trial verdicts – unlike complaints – are publicly reported, and, thus, we can be much more confident that our accounting of completed trials has not been distorted by under-reporting or other sources of measurement error. In a finding that reinforces this increased confidence, we searched as part of the 2016–2018 updating of the Langer-Eason Database for any additional trials conducted prior to July 2010 and did not find a single universal jurisdiction trial omitted in Langer’s original coding.

Second, the number of completed trials is likely a better indicator of venue states’ support of, and dedication to, the principle of universal jurisdiction. Given the relatively low cost of receiving and reviewing criminal complaints, an increase in the number of complaints gives us little insight into the level of support for universal jurisdiction among state officials in the venue state. Indeed, since private individuals and organizations may file criminal complaints, any attempt to use this rate as a measure of state support would need to account for the confounding effects of the preferences and choices of private complainants and advocacy organizations. By contrast, seeing such cases through the process of formal investigation, indictment and trial is an expensive and difficult task for prosecuting states and the decision to do so rests more squarely in the hands of state officials.²³ Thus, the rate of completed trials is not only a more costly signal of support but also one that is a more reliable measure of the revealed preferences of prosecuting states.

C Explanatory Factors

These increases in the frequency and the number of universal jurisdiction trials are striking and are likely the result of a number of causal factors. In terms of the incentives and disincentives that state officials face when deciding whether to pursue universal jurisdiction cases – discussed in detail in Langer²⁴ – all of the explanatory factors discussed in this part act to lower the relative costs – whether they be economic,

the trial of Adolfo Scilingo in Spain that he considers a treaty-based passive nationality case, overlooking the fact that even if the Spanish trial court and Supreme Tribunal mentioned that there were Spanish citizens and people of Spanish descent among the thousands of victims of the military dictatorship in Argentina, Scilingo was convicted for the killings of 30 people for whom there was no evidence that they were Spanish citizens or even of Spanish descent. He also overlooks that the basis for the exercise of universal jurisdiction by Spain according to the Spanish Supreme Tribunal was crimes against humanity under customary international law that did not have any possible treaty basis at the time the crimes were committed. See Sala Nacional, *Sala en lo Penal, Sección Tercera*, Sentencia no. 16/2005; Tribunal Supremo, *Sala de lo Penal, Sentencia no. 798/2007*.

²³ On how the political branches of prosecuting states may determine which cases go to trial not only through prosecutorial decisions but also through the enactment and amendment of universal jurisdiction statutes, see Langer, *supra* note 6.

²⁴ *Ibid.*, at 5.

logistical, professional or political – of pursuing universal jurisdiction litigation or to raise the relative costs of deciding not to pursue universal jurisdiction litigation.

1 ICC Implementing Legislation

One such factor could be the adoption of new universal jurisdiction provisions, generally as part of the domestic implementation of the Rome Statute.²⁵ Such statutory changes set the stage for the expansion in both universal jurisdiction complaints and trials by increasing the range of venues in which it is possible for universal jurisdiction claims to be heard.

2 Creation of Specialized Investigative Units

In addition to these statutory changes leading to a greater number of venues in which universal jurisdiction litigation is permitted, the increasing frequency and regularity of universal jurisdiction cases and trials is also likely due in part to a series of institutional changes and processes that have increased the number of venues in which universal jurisdiction is logistically possible. One of these institutional changes has been the creation of special international crimes units in the police and/or in the office of the prosecutor or among investigating judges.²⁶ The creation of such units supports the filing, investigation and prosecution of universal jurisdiction offences not only because they provide the resources and expertise necessary to do so but also because, in many cases, they establish an institutional nexus within which officials involved in law enforcement, immigration, intelligence or other relevant fields can share information. We can see evidence of the effect of these specialized units in the spate of recent cases, several of which have resulted in a trial verdict, in which these special

²⁵ Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90. See, e.g., Loi 2010–930 portant adaptation du droit pénal à l’institution de la Cour pénale internationale, 9 August 2010, Art. 8, Official Journal of the French Republic (JO), 10 August 2010, at 14678 (France); Völkerstrafgesetzbuch (VStGB) [Code of Crimes against International Law], 26 June 2002, para. 1 (Germany); International Criminal Court Act, 2001, ch. 17, para. 53(3) (United Kingdom). On how the ratification of the Rome Statute has led to the adoption of new universal jurisdiction provisions, see Langer, ‘The Archipelago and the Wheel: The Universal Jurisdiction and the International Criminal Court Regimes’, in M. Minow, C. True-Frost and A. Whiting (eds), *The First Global Prosecutor: Promises and Constraints* (2015) 204, at 224; B. Van Schaack and Z. Perovic, ‘The Prevalence of “Present-In” Jurisdiction’, Proceedings of the 107th Annual Meeting of the American Society of International Law, 2013; see also the South Africa Zimbabwe Torture case discussed in notes 81–90 below and accompanying text, filed (and upheld by South African Constitutional Court) ‘under the country’s Rome Statute Act’. See C. Gevers, ‘Guest Post: The Zimbabwe Torture Docket Case’, *Opinio Juris* (20 May 2014), available at <http://opiniojuris.org/2014/05/20/guest-post-zimbabwe-torture-docket-case/>.

²⁶ See, e.g., Central Unit for the Fight against War Crimes and Further Offenses pursuant to the German Code against Crimes under International Law, *Zentralstelle zur Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch*, available at www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html (Germany); War Crimes Prosecution Unit within Office of Federal Prosecutor (Germany); HRW, *supra* note 18, at 29; Police War Crimes Unit (Sweden), available at <https://polisen.se/en/Languages/Victims-of-Crime/War-Crime--Swedish-Police-efforts/>; Specialized War Crimes Unit within Prosecution Authority (Sweden) (at 26).

investigatory units have been instrumental²⁷ and in the fact that most of the states that have held universal jurisdiction trials in recent years have such units.²⁸

3 Institutional Learning

In addition to these explicit efforts to increase the capacity of state officials to investigate and prosecute international crimes, the growth of universal jurisdiction has also likely been partly due to a less obvious institutional process: institutional learning. The term ‘institutional learning’²⁹ refers to the ‘capability’ of complex institutions to ‘learn about, adapt and change’ both their institutional frameworks and operational strategies over time.³⁰ While this process of learning and adaptation can be the result of active research, we are more interested here in the ways in which it can occur as a ‘byproduct of routine ... activities’.³¹ According to one prominent theory of institutional learning, there are three ways in which this experiential institutional learning occurs: learning by doing, learning by using and learning by interacting. The first two of these modes of learning refer to the way in which producers of complex systems can learn from repeated experience to be more effective/efficient at producing those systems and how users can learn, in the same iterative process of trial and error, how to be more effective/efficient in using these complex systems. The third refers to the way in which interaction – whether direct feedback between users and producers or communication amongst communities of producers or communities of users – can lead to effectiveness/efficiency gains for both users and producers.³²

We can see evidence of the first two of these modes of experiential learning in our data. Whether one casts state officials involved with universal jurisdiction investigations and trials as producers or users of the complex system of doctrine and practice surrounding universal jurisdiction, we can see evidence of these kinds of officials

²⁷ See, e.g., the trial of Sadi Bugingo, a Rwandan national prosecuted in Norway. This case grew out of an investigation of 19 accused *genocidaires* living in Norway by the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes. G. Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity* (2013), at 209. Similarly, the 2011 conviction of Ahmet Makitan (a former Yugoslav national) for war crimes and torture in Sweden grew out of an investigation carried out by Sweden’s National War Crimes Commission, available at www.jurist.org/paperchase/2010/10/sweden-prosecutor-brings-war-crimes-charges-against-former-bosnian-prison-guard.php. See also, e.g., the trial of Eshetu Alemu in which the ‘criminal investigation has been conducted by the International Crimes Team of the Netherlands National Police’, available at www.om.nl/@100733/large-scale/.

²⁸ On these units, see, e.g., HRW, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* (2014).

²⁹ We borrow this concept from work in economics examining the phenomenon of innovation that treats knowledge – both theoretical and practical – as an economic good and the generation of knowledge as a mode of production.

³⁰ Johnson, ‘Institutional Learning’, in B.-Å. Lundvall (ed.), *National Systems of Innovation: Toward a Theory of Innovation and Interactive Learning* (2010), vol. 2, 23.

³¹ B.-Å. Lundvall and B. Johnson, *The Learning Economy and the Economics of Hope* (1994), at 118.

³² *Ibid.*, at 94 (citing works by Arrow, Rosenberg and Lundvall); see also Lundvall, ‘The Economics of Knowledge and Learning’, in J. Christensen and B. Lundvall (eds.), *Product Innovation, Interactive Learning and Economic Performance* (2004), vol. 8, at 21, available at <https://pdfs.semanticscholar.org/24a2/80d129d8347c0b8ed51f6c39417541dae683.pdf>.

'learning by doing' and 'learning by using', becoming more effective/efficient the more cases they conduct. As Table 1 indicates, the majority of states that have held one or more universal jurisdiction trials in the last decade did so after having held at least one such trial in the previous decade. And, among those states that had no trials held before 2008, all but one conducted more than one trial in the years between 2008 and 2017. This pattern suggests that experience conducting universal jurisdiction cases generates institutional knowledge that facilitates holding more universal jurisdiction trials in the future.³³

We can also see evidence of both states and NGOs engaging in a process of 'learning by interacting'. In recent years, new networks and official databases on international crimes have been established that have facilitated that public officials working on these cases meet regularly and exchange information about international crimes.³⁴ NGOs have also participated in these meetings and have created or strengthened their own databases of international crimes. These developments have thus also enabled and facilitated institutional learning that may have been used to hold and manage a larger number of universal jurisdiction trials.

4 Technological Change

Alongside these legal and institutional factors, there have also been a number of technological shifts that have reduced the logistical difficulty and economic cost of universal jurisdiction investigations and litigation. The first of these is the increase in the availability of Internet-connected devices capable of audio/video/photo recording and the use of this technology to document the kinds of abuses criminalized under international law. As smartphones are becoming ubiquitous even in the poorest and most conflict prone areas of the world, more and more individuals have the means to reliably and clearly 'record and document acts of atrocity'.³⁵ As these devices are also

³³ A similar trend might be found if one casts plaintiffs groups and human rights NGOs as 'users' of this regime. While we have not yet parsed the data to see if those groups that have been involved in initiating universal jurisdiction cases have tended to be involved in more cases in the future or if the likelihood of those cases reaching a verdict has increased, we have found that there are a few groups that have been involved in, or have been responsible for, a large number of the cases we have documented. These groups include Civitas Maxima, European Center for Constitutional and Human Rights, the Civil Plaintiffs Collective for Rwanda, International Federation for Human Rights, Redress, TRIAL International and so on. There is reason to expect that this repeated and iterative engagement with the officials and rules governing universal jurisdiction would have generated a 'learning by use' effect.

³⁴ Official networks include the Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes against Humanity and War Crimes (EU Genocide Network), which is biannually convened by the presidency of the Council of the EU. In this regard, it is also worth mentioning the recent creation of the 'European Asylum Support Office Exclusion Network in Europe', available at www.easo.europa.eu/easo-exclusion-network-0. In terms of databases, INTERPOL has created its own international crimes section. There are also ongoing efforts to create a central database for war crimes, crimes against humanity and genocide within Europol. On this last effort, see HRW, *supra* note 18, at 55–56.

³⁵ See, e.g., E. Irving, 'And So It Begins ... Social Media in an ICC Arrest Warrant', *OpinioJuris* (17 August 2017), available at <http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/>; A. Whiting, 'The ICC's New Libya Case: Extraterritorial Evidence for an Extraterritorial Court', *Just Security* (23 August 2017), available at www.justsecurity.org/44383/icc-libya-case-extraterritorial-evidence-extraterritorial-court/?print.

Table 1: Evidence of institutional learning

Universal jurisdiction trial states in 2008–2017	Number of universal jurisdiction trials between 2008 and 2017	Universal jurisdiction trial/s before 2008?
Austria	2	Yes
Belgium	1	Yes
Canada	2	Yes
Finland	5	No
France	4	Yes
Germany	5	Yes
Norway	2	No
Senegal	1	No
Sweden	9	No
The Netherlands	2	Yes
United Kingdom	1	Yes

connected to the Internet, this same technological shift has made it easier for victims to send this documentary evidence directly to advocates or to share it with others via social media.

These technological changes have reduced the logistical and economic costs of gathering the evidence needed for international criminal cases. Indeed, there have been a number of recent cases in which crucial photographic and video evidence (with meta-data and time stamps) was readily available to prosecutors on social media,³⁶ having been posted by victims or by the alleged perpetrators themselves.³⁷ While advocates and prosecutors have certainly not foregone the practice of gathering their own evidence, we can see in recent cases an increasing willingness to employ pictures and videos shared on social media as evidence in both international and domestic courts.³⁸ Advocacy groups have begun to respond to this trend, providing training for victims and observers on how to capture evidence in real time in ways that increase the likelihood that they will be useful to prosecution efforts.³⁹ Legal and advocacy groups have responded to this same trend by designing technological solutions to the problem of

³⁶ See, e.g., the trials in Finland against Jebbar Salman Ammar and Hadi Habeeb Hilal (both Iraqi nationals) and those conducted in Sweden against Mouhannad Droubi and Haisam Omar Sakhanh (both Syrian nationals).

³⁷ In cases like this, the evidence ultimately used by plaintiffs or prosecutors is often posted by alleged perpetrators or the groups with which they are associated as part of recruitment or propaganda efforts. In reference to the International Criminal Court (ICC), see Whiting, *supra* note 35.

³⁸ See, e.g., *ibid.*

³⁹ See, e.g., *ibid.*: ‘Organizations like Witness ... provide training and guidance in documenting crimes through video’; Trial International, Training Journalists on Human Rights Reporting, 7 July 2016, available at <https://trialinternational.org/latest-post/training-journalists-on-human-rights-reporting/>.

maintaining evidentiary validity⁴⁰ and working through legal and strategic questions as to how this material can best be leveraged as evidence.⁴¹

These technologies have also made it easier for evidence to be transmitted across borders. The increasing availability and falling cost of cellular and hard-wired Internet access have allowed photo and video evidence to be shared by victims or perpetrators and then accessed by investigators and prosecutors thousands of miles away. And, in those places where Internet access is inaccessible or filtered, the availability of inexpensive and compact digital storage devices has made it easier for even large troves of evidence to be physically smuggled across borders.⁴²

Finally, the ubiquity with which photographic, video and other evidence has been shared online has also had the effect of increasing public awareness of, and public pressure to act upon, atrocities committed around the world. The phenomenon of media coverage of atrocities leading to increased public awareness and pressure is by no means new. Indeed, it was discussed widely enough in the late 1990s that it was given a colloquial nickname (the ‘CNN effect’).⁴³ This effect has been amplified as the immediacy of high-definition photos and live footage gathered and presented without the mediating influence of journalistic filters, along with the amplifying effects of social media sharing and trending algorithms, have meant that the average digital

⁴⁰ See, e.g., ‘Collect Verifiable Photos and Videos’, *Eye Witness Project*, available at www.eyewitnessproject.org/; Whiting, *supra* note 35: ‘[T]he International Bar Association has created an app to allow for the authentication and secure transfer of videos.’ A number of private companies are also working on technologies meant to solve other problems raised by the proliferation of digital evidence. For example, a recent ICC case saw the first high-profile test of a software package that aimed to solve a problem caused not by the lack, but, rather, by the overabundance, of evidence. This software aims to help prosecutors arrange and present a large amount of digital evidence, including videos, photos, satellite imagery, panoramas and structural diagrams, in a way that is both ‘compelling’ and accessible to technical non-experts. See L. Stinson, ‘The Hague Convicts a Tomb-Destroying Extremist with Smart Design’, *Wired* (25 August 2016), available at www.wired.com/2016/08/hague-convicts-tomb-destroying-terrorist-smart-design/.

⁴¹ See, e.g., A. Koenig, ‘Harnessing Social Media as Evidence of Grave International Crimes’, *Medium.com* (23 October 2017), available at <https://medium.com/humanrightscenter/harnessing-social-media-as-evidence-of-grave-international-crimes-d7f3e86240d>.

⁴² The German federal public prosecutor opened investigations of international crimes in Syria soon after the outbreak of the conflict. Pending currently are two so-called structural investigations that focus on the entire situation of the civil war and all parties to the conflict. In one of these investigations, prosecutors have been analysing 28,000 photos of people tortured to death in Syrian prisons. The photos were smuggled out of Syria by the former Syrian military photographer ‘Caesar’ and are now at the disposal of prosecutors in Europe. See, e.g., P. Brosch, ‘Here Is How German courts Are Planning to Prosecute Syrian War Crimes’, *Washington Post* (4 April 2017), available at www.washingtonpost.com/news/democracy-post/wp/2017/04/04/heres-how-german-courts-are-planning-to-prosecute-syrian-war-crimes/?utm_term=.d9bc67448e29; European Center for Constitutional and Human Rights, ‘Survivors of Assad’s Torture Regime Demand Justice’, *Criminal Complaints in Germany* (October 2017), available at www.ecchr.eu/en/international-crimes-and-accountability/syria/the-caesar-files.html?file=tl_files/Dokumente/Universelle%20Justiz/Syria_Torture_Complaints_ECCHR_QA_2017Oct.pdf.

⁴³ Historian Gary Bass discusses a similar dynamic – albeit resulting from the advent of telegraphy and the publication of photographs by the international press – first occurring during the Greek Civil War in the 19th century. See G.J. Bass, *Freedom’s Battle: The Origins of Humanitarian Intervention* (2008).

citizen has been able to experience and witness recent violence in ways that were not possible even a decade ago.

5 *Immigration and Asylum Applications*

Finally, the last factor that has possibly influenced the rate and scope of universal jurisdiction litigation has been the high levels of conflict-based migration in the past decade. Migration and displacement have always been significant factors driving universal jurisdiction litigation,⁴⁴ and the current wave of migration from conflict-ridden states in the Middle East and elsewhere to Western Europe has likely contributed to an increase in the number of complaints and trials for a number of reasons. First, it has resulted in increased opportunities for states to exercise universal jurisdiction. The millions of individuals displaced by conflict that have sought safe haven in European states and states in the Organisation for Economic Co-operation and Development in the last decade have included alleged victims who may seek redress from officials in their receiving state as well as alleged perpetrators who have voluntarily entered the jurisdiction of those officials. In other words, we would expect conflict-based migration to lead to an increase in the number of universal jurisdiction cases because it brings scores of potential plaintiffs, witnesses and defendants to jurisdictions with the resources – both economic and legal – to prosecute international crimes.⁴⁵

Second, the procedural and institutional realities of conflict-based migration have brought more of these opportunities to exercise universal jurisdiction to the attention of state officials. In some cases, officials have initiated investigations into alleged crimes based on information submitted by the alleged perpetrators themselves as part of their immigration applications.⁴⁶ We can see evidence of the tie between an

⁴⁴ The first two widely recognized and publicized universal jurisdiction cases – Supreme Court of Israel, *Attorney General v. Adolf Eichmann*, Criminal Appeal 336/61, 29 May 1962; *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985); Supreme Court of Israel, *State of Israel v. John (Ivan) Demjanjuk*, Verdict, 29 July 1993 – and the first round of structural investigations initiated based on the universal jurisdiction principle were all partially a result of the massive wave of conflict-based migration that occurred during and after World War II. See, e.g., D. Fraser, *Law after Auschwitz* (2005).

⁴⁵ On this point, see Langer, *supra* note 25.

⁴⁶ This was the situation in many of the recent cases in Western and Northern Europe. In the ‘Iraqi Twin case’ in Finland – a case against two defendants whose real names were not disclosed to the press – the initial investigation leading to the case was opened by Finnish immigration investigators on the basis of information submitted in their asylum applications. The same was true of the Syrian defendant – whose name was similarly withheld – in a recent Swedish trial. See ‘Swiss Authorities Open Syrian War Crimes Investigation’, *SwissInfo.ch*, available at www.swissinfo.ch/eng/human-rights-violation_swiss-authorities-open-syrian-war-crimes-investigation/42490180. Similarly, the cases against Habibullah Jalalzoy and Abdullah (or Abdoullah) Faquirzada (or Faqirzada) were initiated by the Netherlands National Investigation Team for War Crimes on the basis of statements the two defendants made on immigration forms, and the ongoing Norwegian investigations into 20 Syrian asylum seekers were sparked by ‘tips from refugees and local immigration authorities’. See S. Jacobsen, ‘Norway Police Search for War Criminals among Asylum Seekers’, *Reuters* (15 January 2016), available at <http://uk.reuters.com/article/uk-europe-migrants-warcrimes-norway/norway-police-search-for-syrian-war-criminals-among-asylum-seekers-idUKKCNOU1FG>.

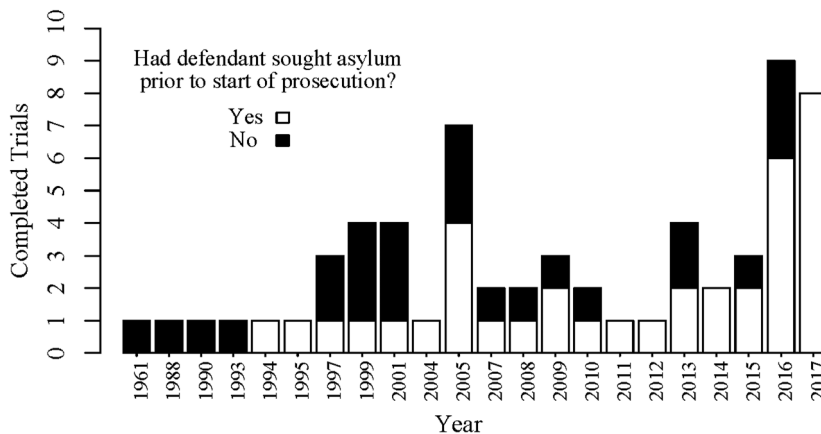


Figure 3: Completed universal jurisdiction trials by defendant asylum applications

individual's successful prosecution under universal jurisdiction and their having previously opened themselves up to scrutiny by applying for asylum in Figure 3, showing that most defendants that have been tried on the basis of universal jurisdiction in recent years had sought asylum status in the prosecuting state prior to proceedings being initiated against them. Indeed, 65 per cent of all of the defendants ever to be tried on the basis of universal jurisdiction had sought asylum status in the prosecuting state prior to proceedings being initiated against them.⁴⁷

In other cases, though, state officials have been alerted to the presence of alleged perpetrators by fellow asylum seekers. These kinds of reports have sometimes come as a result of concerted and intentional efforts by victims and their families to identify abusers hidden among asylum applicants,⁴⁸ but these reports have also come through more chance encounters in which alleged victims have recognized their abusers in the streets or crowded shops of their country of refuge.⁴⁹ In a bid to formalize this

⁴⁷ And this percentage might be higher as we were unable to find conclusive evidence either way in nine of these cases. As already indicated above, we are including in our calculation trials that were finished by the end of 2017.

⁴⁸ This was the means by which, for example, the cases of Duško Tadić (a former Yugoslav official prosecuted in Germany) or the Butare Four (Rwandans tried in Belgium) were initiated. See Vierucci, 'The First Steps of the International Criminal Tribunal for the Former Yugoslavia', 6 *European Journal of International Law (EJIL)* (1995) 134, at 136 (reporting that Tadić's arrest was the result of 'Muslim refugees to the effect that he was one of the authors of the atrocities committed in the Prijedor Region of Bosnia-Herzegovina'; see also Reydams, 'Universal Criminal Jurisdiction: The Belgian State of Affairs', 11 *Criminal Law Forum* (2000) 183, at 202 (reporting that the initial complaints identifying the Butare Four as alleged *genocidaires* came when 'relatives of Rwandan and Belgian victims of the massacres filed complaints with the office of the public prosecutor in several jurisdictions').

⁴⁹ See, e.g. the case of Etienne Nzabonimana and Samuel Ndashykirwa, two Rwandans who had fled to Belgium, whose prosecution began after a fellow Rwandan national recognized Nzabonimana in a Brussels grocery store. See Redress and African Rights, 'Survivors and Post-Genocide Justice in Rwanda', *Redress* (November 2008), available at <https://rgfl.files.wordpress.com/2011/11/survivors-and-post-genocide-justice.pdf>. See also the case of Nizar al-Khazraji, an Iraqi national whose prosecution was

process of gathering information from those who may have first-hand knowledge of alleged offences, Germany has begun including questions about whether applicants witnessed the commission of any acts that could constitute international crimes in interviews conducted with all applicants.⁵⁰ Furthermore, many states have implemented institutional reforms that have made it easier for immigration officials to share information with law enforcement officials, lowering the logistical cost of engaging in universal jurisdiction prosecution by making it easier for prosecutors to build up sufficient evidence to prosecute suspected perpetrators.⁵¹

And, finally, the ongoing nature of the conflicts in Syria, Iraq and elsewhere in the Middle East and Africa has prevented receiving states from dealing with non-national defendants via deportation and extradition. Because deportation and extradition are often less expensive than prosecution and trial, both in financial and political costs, they are often state officials' preferred methods of dealing with alleged perpetrators of international crimes.⁵² And, in most cases, state officials can avail themselves of these alternative responses because – in all but very specific circumstances – states enjoy largely unfettered discretion over whether to allow individuals to enter or stay within their territory, and this discretion is especially wide in relation to individuals credibly suspected of serious or international crimes.⁵³ In certain circumstances, however, these alternatives are not available. In cases where the home state of such an individual is in the midst of a violent civil war and deportation or extradition would result in a real risk of serious harm to the individual, the receiving state cannot deport or extradite that individual without violating its obligations under international human rights treaties.⁵⁴ In cases

reportedly sparked by a tip from 'a Kurdish refugee living in Denmark' who 'recognized him in the street and reported him to the authorities'. See Amnesty International, 'Denmark/Iraq: International Justice for the Victims of Halabja', press release, 22 November 2002, available at www.amnesty.org/download/Documents/116000/eur180022002en.pdf.

⁵⁰ See, e.g., 'Refugees in Germany Reporting Dozens of War Crimes', *Deutsche Welle* (11 April 2016), available at www.dw.com/en/refugees-in-germany-reporting-dozens-of-war-crimes/a-19179291.

⁵¹ See, e.g., 'Schweizer Justiz ermittelt wegen Kriegsverbrechen in Syrien', *Tages Anzeiger* (2 October 2016), available at www.tagesanzeiger.ch/schweiz/standard/schweizer-justiz-ermittelt-wegen-kriegsverbrechen-in-syrien/story/21007826 (the asylum authorities are obliged to notify law enforcement suspicions concerning international crimes. The federal prosecutor currently leads several methods based on indicators of the State Secretariat for Migration. This would affect different conflicts in different countries).

⁵² Indeed, leaving aside civil suits, this has been the main means by which the USA has dealt with such individuals.

⁵³ These limited circumstances are generally those in which individuals seeking immigration have a well-founded fear of persecution should they be returned to their home country. States are obliged under Art. 1 of the 1951 Refugee Convention to extend certain protections against deportation and extradition to such persons. Convention Relating to the Status of Refugees 1951, 189 UNTS 150. That said, under Art. 1(F), states are permitted to refuse such protections to individuals who are credibly suspected of an international crime, a serious transnational or domestic crime (such as hijacking or murder) or acts contrary to the purposes of the United Nations (such as terrorism or aggression). Thus, in most cases in which there is sufficient evidence for a state to try a given individual on the basis of universal criminal jurisdiction, there is also sufficient evidence for state officials to deny that individual refugee status and thereby to open the way to their deportation or extradition.

⁵⁴ E.g., the European Convention on Human Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) 1984, 1465 UNTS 85.

where the home state is incapable or unwilling to accept the return of the suspected individual, deportation or extradition is impossible as a matter of practicality. And in cases where the accused individual has become a permanent resident or naturalized citizen of the receiving state, some states' domestic laws do not allow for extradition.⁵⁵ In any of these situations in which an accused individual is considered not only 'undesirable' but also 'unreturnable', state officials may have little choice but to pursue prosecution.⁵⁶

3 The Geographical Expansion of Universal Jurisdiction

A Complaints

Until 2009, universal jurisdiction complaints were concentrated almost exclusively in Western Europe and the developed Commonwealth, with a small handful of exceptional complaints in Israel,⁵⁷ Senegal,⁵⁸ South Korea,⁵⁹ Poland⁶⁰ and Russia⁶¹ – the latter three of which did not even lead to the opening of formal proceedings, as far as we know. The years since 2009 have seen two significant geographical shifts. First, the geographical distribution of universal jurisdiction complaints filed within Europe has shifted. The number of complaints filed in Belgium and Spain has dropped sharply – as discussed above – while Germany and France have continued to host significant numbers of universal jurisdiction cases, and the Nordic states – including Denmark, Finland, Iceland, Norway and Sweden – have quietly assumed a more significant role. Second, while the bulk of universal jurisdiction complaints / *proprio motu* investigations are still filed in European and developed Commonwealth states, the number of states outside these areas that have received such complaints or seen such investigations has continued to

⁵⁵ E.g., this was the reason that Dutch courts gave for asserting jurisdiction to prosecute Yvonne Besabya (or Basebya) despite Rwanda's outstanding request for her extradition.

⁵⁶ In this context, individuals are deemed 'undesirable' if they are credibly suspected of committing serious crimes – whether in the receiving country or elsewhere – and deemed 'unreturnable' if the receiving state is unable to remove them from its territory. See Center for International Criminal Justice, *Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality Who Cannot Be Removed* (2016), available at <https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf>; see also Bolhuis, Battjes and van Wijk, 'Undesirable but Unreturnable Migrants in the Netherlands', 36(1) *Refugee Survey Quarterly* (RSQ) (2017) 61, available at <https://doi.org/10.1093/rsq/hdw019>; Doğar, 'Against All Odds: Turkey's Response to "Undesirable but Unreturnable" Asylum-Seekers', 36(1) *RSQ* (2017) 107, available at <https://doi.org/10.1093/rsq/hdw027>.

⁵⁷ See *Eichmann and Demjanjuk* cases, *supra* note 44.

⁵⁸ See *Habré* case, *infra* note 102, in Senegal, which will be discussed in detail later in this part.

⁵⁹ Complaints were filed in 2003 against Jiang Zemin and Luo Gan in South Korea. See *Seoul, Korea: Korean Falun Gong Practitioners File Lawsuit Charging Jian Zemin and "610 Office" Head Luo Gan with Genocide*, available at <http://en.minghui.org/emh/articles/2003/12/29/43602.html>.

⁶⁰ A complaint was filed in 2004 against Bo Xilai in Poland. See 'Summary of European Lawsuits against Jiang Zemin and his Accomplices in the Chinese Communist Party', *ClearHarmony.net* (16 March 2005), available at www.clearharmony.net/articles/a25406-Summary-of-European-Lawsuits-against-Jiang-Zemin-and-his-Accomplices-from-the-Chinese-Communist-Party.html.

⁶¹ A complaint was filed in 2004 against Bo Xilai in Russia. See *ibid*.

grow. More significantly, a number of these complaints filed outside Europe and the developed Commonwealth have led to the opening of formal proceedings and investigations, and at least one has resulted in a completed trial. In this section, we illustrate this trend by discussing two universal jurisdiction cases that have resulted in formal proceedings. In describing these cases, we show that the factors that have likely contributed to this geographic expansion partially overlap and partially differ from the factors that may explain the numerical expansion of universal jurisdiction that we discussed in Part 2.

1 *Formal Proceedings Ongoing in Argentina.*

On 14 April 2010, two individuals and a group of NGOs presented a complaint in the federal justice system of the city of Buenos Aires, Argentina, for the possible commission of genocide and crimes against humanity (including torture, forced disappearances and kidnapping of children), committed in Spain during its civil war/coup and under the Franco regime and its aftermath between 17 July 1936 and 15 June 1977.⁶² David Baigún, Máximo Castex, Beinusz Szmukler and the other members of the team of lawyers behind the complaint saw it as a way to foster territorial prosecutions over these crimes in Spain, in the same way that they thought the universal jurisdiction investigations in Spain of international crimes committed in Argentina had facilitated later Argentine territorial prosecutions over these crimes.⁶³ The Argentine prosecutor initially assigned to the case responded to the complaint, arguing that the principle of universal jurisdiction was established in Article 118 of the Argentine Constitution but that the subsidiarity principle prevented Argentine courts from exercising jurisdiction over the case because there was no legal obstacle to the investigation of the case by Spanish authorities, given that the Spanish Amnesty Law of 1977 did not include crimes against humanity and genocide.⁶⁴ The initial complainant victims then requested to be admitted as private prosecutors in the case. After the prosecutor insisted that the case be dismissed, the investigating judge, María Romilda Servini de Cubría, argued that she could not proceed without the filing of charges by the prosecution.⁶⁵

⁶² See *Promueven Querrela Criminal por la Comisión de los Delitos de Genocidio y/o de Lesa Humanidad que Tuvieron Lugar en España en el Período Comprendido entre el 17 de Julio de 1936 y el 15 de Junio de 1977*, 14 April 2010 (on file with the authors); Juzgado Nacional Criminal y Correccional Federal 1, CFP 4591/2010 'N.N. s/genocidio', Decision, 18 September 2013, at 1.

⁶³ Phone interview with Máximo Castex, attorney for many of the private prosecutors in the case in Argentina, 30 November 2018.

⁶⁴ CFP 4591/2010 'N.N. s/genocidio', *supra* note 62, at 2–5. Amnesty Law, Law 46/1977, 15 October 1977. On whether the universal jurisdiction forum state should give priority to the territorial and active nationality states, see e.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 11, at 59, Joint Separate Opinion of Judges Buergenthal, Higgins and Kooijmans; Council of the European Union, AU-EU Technical Ad Hoc Expert Group, Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09REV1 (2009), para. 14; Institute of International Law, Seventeenth Commission, Resolution on Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes (2005); M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010); M. Bergsmo and L. Yan (eds), *State Sovereignty and International Criminal Law* (2012).

⁶⁵ CFP 4591/2010 'N.N. s/genocidio', *supra* note 62, at 5.

The private prosecution appealed the decision by the investigating judge, and the Federal Court of Appeals of the city of Buenos Aires reversed it. The Appeals Court held that, under the international human rights to justice and effective judicial protection, Argentina was obliged to ensure that alleged victims of serious international crimes could seek redress for such crimes in its courts. And, given that Argentina's criminal justice system includes a system of private criminal prosecution, extending this right to alleged victims of serious international crimes would be an appropriate way to implement these victims' right to access to justice.⁶⁶

Consequent to this ruling, Judge Servini de Cubría opened an investigation and invoked the Argentine statute implementing the ICC regime in Argentina as one of the reasons why she could exercise universal jurisdiction over the case. In the course of her investigation, Judge Servini de Cubría issued rogatory letters asking whether Spanish authorities had investigated the crimes included in the complaint; issued requests that Spanish authorities gather and hand over elements of proof and information relevant to the Argentine investigation; sought the testimony by video conference of a number of witnesses located in Spain; travelled to Spain with, among others, Ramiro González, a public prosecutor assigned to the case that had been supportive of the investigation, and Máximo Castex, the attorney of many of the private prosecutors of the case, to take testimony to witnesses and collect other elements of proof in that country; ordered Argentine consulates in Spain and elsewhere to take testimony to witnesses overseas; took witness testimony in Buenos Aires, including the testimony of Spanish former investigating judge Baltasar Garzón; and accepted testimony by various *amici curiae*.⁶⁷

On 18 September 2013, in response to a request by the private prosecutors, Judge Servini de Cubría issued arrest warrants against four individuals.⁶⁸ On 30 October 2014, in response to new requests by the public prosecution and the private prosecution, Judge Servini de Cubría decided that she had grounds to issue arrest warrants against another 20 individuals.⁶⁹ In 2017, the Federal Court of Appeals of the city

⁶⁶ See Cámara en lo Criminal y Correccional Federal, *Sala II. Causa n. 29.275 'N.N. s/ desestimación de denuncia y archivo'*, Decision, 3 September 2010, at 3. On 11 June 2018, the Federal Cassation Court of Argentina admitted as private prosecutors in the case the mother and brother of Gustavo Adolfo Muñoz de Bustillo Gallego for his alleged killing on 11 September 1978, in Barcelona, and the grandson of José Salmerón Céspedes who was allegedly subjected to forced labour, tortured and killed in 1936 in Tétouan in the Spanish Protectorate in Marruecos. See Cámara Federal de Casación Penal, *Sala 4, CFP 4591/2010/7/CFC2*, Registro no. 655/18, Decision, 11 June 2018; Cámara Federal de Casación Penal, *Sala 4, CFP 4591/2010/7/CFC2*, Registro no. 656/18, Decision, 11 June 2018.

⁶⁷ See CFP 4591/2010 'N.N. s/genocidio', *supra* note 62; Juzgado Nacional Criminal y Correccional Federal 1, CFP 4591/2010, *Exhorto, Al Titular del Juzgado Territorial por Razones de Turno Corresponda con Jurisdicción en Guadalajara, Reino de España*, 18 February 2014; Juzgado Nacional Criminal y Correccional Federal 1, CFP 4591/2010 'Galvan Abascal Celso; Muñecas Aguilar; Giralte González, José Ignacio ... y otros s/ imposición de torturas...', 30 October 2014, at 156ff; *El juzgado y la fiscalía recogen en España pruebas por los crímenes del franquismo*, 28 May 2014, available at www.fiscales.gov.ar/fiscalias/el-juzgado-y-la-fiscalia-recogen-en-espana-pruebas-por-los-crimenes-del-franquismo/; Ramiro González: 'El viaje a España fue muy positivo para la investigación', 7 June 2014, available at www.fiscales.gov.ar/fiscalias/ramiro-gonzalez-el-viaje-a-espana-fue-muy-positivo-para-la-investigacion/; Interview with Castex, *supra* note 63.

⁶⁸ See CFP 4591/2010 'N.N. s/genocidio', *supra* note 62, at 155ff.

⁶⁹ CFP 4591/2010 'Galvan Abascal Celso', *supra* note 67, at 156ff.

of Buenos Aires granted an appeal by Martín Villa – former minister of labour and former minister of the interior of Spain who sought to testify before the Argentine judge without being detained – and reversed the arrest warrant against him. But Judge Servini de Cubría issued a new arrest warrant against him.⁷⁰ In 2018, Judge Servini de Cubría sent a rogatory letter to Spain to take testimony to Martín Villa in that country in October 2018, but her request was rejected by a Spanish court.⁷¹ Also in 2018, Judge Servini de Cubría widened her inquiry to include sexual assault, forced abortion and child theft in response to a new complaint presented by the NGO Women’s Link Worldwide.⁷²

Although Spanish courts rejected the extradition requests regarding the individuals against whom arrest warrants were issued by arguing that the statute of limitations applied to these cases under Spanish law,⁷³ and Spanish authorities have resisted the Argentine investigation in multiple ways over the years,⁷⁴ the investigation has resulted in concrete progress in plaintiffs’ efforts to seek redress for crimes committed by Franco-era officials. Indeed, in addition to compiling a documentary record of alleged crimes and giving a venue where the complainants could testify for the first time before a public authority,⁷⁵ requests from the Argentine investigation apparently led Spanish courts to permit the uncovering of a series of mass graves in Spain and have led to

⁷⁰ ‘La juez Servini ordena otra vez detener a Martín Villa para que declare’, *El País* (18 July 2017), available at https://elpais.com/politica/2017/07/18/actualidad/1500387066_677290.html.

⁷¹ Interview with Castex, *supra* note 63 (explaining that the same Spanish court also rejected Servini de Cubría’s request for documentation related to the killing of the poet Federico García Lorca in Spain). See also A. Delicado, ‘La jueza argentina que investiga crímenes franquistas sigue sin recibir respuesta de España para interrogar a Martín Villa’, *Público* (10 October 2018), available at www.publico.es/politica/jueza-argentina-investiga-crimenes-franquistas-sigue-recibir-respuesta-espana-interrogar-martin-villa.html.

⁷² Fundación Women’s Link Worldwide, *Promovemos Ampliación de Querrela* (2016); ‘Judge to Investigate Franco-era Crimes against Spanish Women’, *The Guardian* (26 October 2018), available at www.theguardian.com/world/2018/oct/26/judge-investigate-franco-era-crimes-against-spanish-women-sexual-assault-forced-abortion-child-theft.

⁷³ Interview with Castex, *supra* note 63. See also, e.g., Audiencia Nacional, *Sala de lo Penal, Sección n. 3, Rollo de Sala 62/13, Procedimiento de Origen: Extradición 21/13*, Auto no. 14, 24 April 2014 (rejecting extradition of Jesús Muñecas Aguilar); Audiencia Nacional, *Sala de lo Penal, Sección 002, 20107 N.I.G.: 28079 27 2 2013 0006553, Rollo de Sala: Extradición 0000045/2013*, Auto no. 14/2014, 30 April 2014 (rejecting extradition of Antonio González Pacheco); F. Pérez, ‘La justicia argentina revoca la orden de detención a Martín Villa por los sucesos de Vitoria de 1976’, *El País* (14 July 2017), available at https://politica.elpais.com/politica/2017/07/14/actualidad/1500036117_316975.html?rel=mas.

⁷⁴ See, e.g., Fiscalía General del Estado, *N/Ref.: S.T. 412/216.A, Madrid*, 30 September 2016 (concluding, among other arguments, that the statute of limitations and the Amnesty Law of 1977 apply to the cases under investigation by the Argentine court and instructing Spanish prosecutors to oppose any requests to Spanish courts by Servini de Cubría’s court and to appeal any decision by Spanish courts granting these requests); ‘Depende de la política Española que se avance en la causa del franquismo’, *Público* (23 July 2017), available at www.publico.es/politica/maria-servini-cubria-depende-politica-espanola-avance-causa-franquismo.html; C.G. Calero, ‘Nos cuesta horrores seguir investigando los crímenes del franquismo’, *ctxt*, available at <https://ctxt.es/es/20180801/Politica/21138/Argentina-franquismo-Maria-Servini-de-Cubria-juicio-Cesar-G-Calero.htm>.

⁷⁵ Interview with Castex, *supra* note 63; phone interview with Adriana Fernández (private prosecutor in the case in Argentina for the killing of her grandfather in Spain), 4 October 2018.

the identification of people buried in these mass graves, a move that would otherwise have been unlikely as the Spanish government had cut governmental funding of such exhumations.⁷⁶

Besides the Spanish case, other universal jurisdiction complaints have been filed before Argentine courts for alleged crimes committed in China against Falun Gong members, in Gaza against Palestinians and in Paraguay against indigenous people and other victims of the Stroessner regime.⁷⁷ On 26 November 2018, the NGO Human Rights Watch filed a complaint against Saudi crown prince, deputy prime minister and minister of defence Mohammed bin Salman, among other alleged crimes, for torture committed against Saudi female activists and against journalist Jamal Khashoggi in the Saudi consulate in Istanbul, Turkey, and for war crimes committed in Yemen.⁷⁸ Before deciding whether formal proceedings should be opened, investigating judge Ariel Lijo requested the Argentine Ministry of Foreign Affairs to inform on the diplomatic status of bin Salman, asked the ICC, Saudi Arabia and Yemen whether they are investigating the crimes mentioned in the complaint and asked Human Rights Watch for clarification on some of the allegations.⁷⁹ The National Office of the Prosecutor of Argentina has created a Working Group on Universal Criminal Jurisdiction within the Crimes against Humanity Prosecution Unit to support the work of prosecutors on the interpretation and application of universal jurisdiction, among other tasks.⁸⁰

⁷⁶ 'Spanish Archeologists Uncover Mass Graves with Victims of Franco's Regime', *Euronews*, 16 June 2017, available at www.euronews.com/2017/06/16/spanish-archaeologists-uncover-mass-graves-with-victims-of-franco-s-regim; 'Depende de la política', *supra* note 74.

⁷⁷ L.A. Henaio, 'Argentina Judge Asks China Arrests over Falun Gong', *Reuters* (22 December 2009), available at www.reuters.com/article/us-argentina-china-falungong-idUSTRE5BM02B20091223; A Delicado, 'Ciudadanos argentinos presentan la primera querrela contra Israel por "genocidio" en Gaza', *Público* (6 September 2014), available at www.publico.es/internacional/ciudadanos-argentinos-presentan-primera-querrela.html; M.S.A. Cáceres *et al.*, *60 años de impunidad – Paraguay: Los crímenes del stronismo en el ámbito de la Justicia Universal* (2014).

⁷⁸ 'G20: Saudi Crown Prince Faces Legal Scrutiny', *Human Rights Watch* (26 November 2018), available at www.hrw.org/news/2018/11/26/g20-saudi-crown-prince-faces-legal-scrutiny; C. Ini, 'La justicia argentina define una denuncia contra el príncipe saudita', *La Nación* (27 November 2018), available at www.lanacion.com.ar/2196874-la-justicia-argentina-define-manana-denuncia-principe; D. Politi and D.G. Kirkpatrick, 'Argentine Prosecutors Consider Charges against Saudi Crown Prince ahead of G-20', *New York Times* (26 November 2018), available at www.nytimes.com/2018/11/26/world/americas/argentina-crown-prince-mohammed-saudi-arabia.html.

⁷⁹ *Fiscalía no. 7, Dictamen no. 24.375*, 28 November 2018 (requesting the investigating judge to determine the diplomatic status of prince Mohammed bin Salman and whether there are ongoing investigations in Saudi Arabia and Yemen for the alleged crimes included in the complaint); P. Rodríguez Niell, 'Piden informes al exterior del príncipe saudita, pero no quedará detenido', *La Nación* (28 November 2018), available at www.lanacion.com.ar/2197143-desestiman-detencion-del-principe-saudita-piden-informes.

⁸⁰ Procuraduría General de la Nación, *Resolución PGN 698/16*, 29 March 2016; phone interview with Carolina Varsky, Crimes against Humanity Prosecution Unit, National Prosecution Office, 2 October 2018.

2 Formal Proceedings Ongoing in South Africa.

In March 2007, the Zimbabwean police took more than 100 people into custody after raiding the headquarters of the main opposition party, the Movement for Democratic Change, detaining and allegedly torturing them as part of a widespread and systematic attack on officials of this party.⁸¹ In March 2008, the Southern African Litigation Centre (SALC), an NGO based in South Africa, filed a complaint requesting that the Priority Crimes Litigation Unit of the National Prosecuting Authority of South Africa investigate these alleged acts of torture. Although the alleged crimes were committed in Zimbabwe by Zimbabweans against Zimbabweans, the SALC argued that because the rule of law had allegedly collapsed in Zimbabwe, and Zimbabwean authorities were thus unlikely to hold the perpetrators accountable, South African law enforcement agencies were legally obliged to investigate these alleged offences under South Africa's Implementation of the Rome Statute of the International Criminal Court Act (ICC Act).⁸² In support of its complaint, the SALC presented evidence of alleged torture in the form of 23 sworn written statements by alleged victims and other actors.⁸³

After a delay of over a year, the acting national director of public prosecution finally responded to the complaint in June 2009, stating that the acting national commissioner of the South African Police Service had decided that they were unable to initiate an investigation because the matter had been inadequately investigated by the SALC and that further investigations would be impractical, legally questionable and virtually impossible.⁸⁴ After the SALC and the Zimbabwe Exiles' Forum questioned this decision, the High Court set the decision aside and held that it was inconsistent with South Africa's Constitution and international obligations.⁸⁵ After the Supreme Court of South Africa partially upheld this decision, the National Commission of the South African Police Service asked for leave to appeal before the South African Constitutional Court. On 30 October 2014, the Constitutional Court held that South African authorities are not only entitled to exercise universal jurisdiction over the alleged crimes against humanity of torture but also have a duty to do so under customary international law and other international obligations.⁸⁶ The Constitutional Court also stated that the requirement of presence in the territory of South Africa of the exercise of universal jurisdiction under section 4(3)(c) of the ICC Act applies only to the prosecution of a crime in a South African court and is not a requirement for launching an investigation in South Africa.⁸⁷

⁸¹ *National Commission of the South African Police v. Southern African Human Rights Litigation Centre and Another*, [2014] ZACC 30, para. [4].

⁸² *Ibid.*, para. [6]. Implementation of the Rome Statute of the International Criminal Court Act, Act 27, 18 July 2002.

⁸³ *National Commission*, *supra* note 81, para. [5].

⁸⁴ *Ibid.*, paras [8]–[10].

⁸⁵ *Ibid.*, paras [11]–[13].

⁸⁶ *Ibid.*, paras [15]–[24], [40]–[51].

⁸⁷ *Ibid.*, paras [31]–[39].

The Constitutional Court also determined that the principle of subsidiarity is a first limitation to the exercise of universal jurisdiction but that it 'was very unlikely that the Zimbabwean police would have pursued the investigation with the necessary zeal in view of the high profile personalities to be investigated'.⁸⁸ According to the Constitutional Court, a second limitation is that before a country 'assumes universal jurisdiction it must consider whether embarking on an investigation into an international crime committed elsewhere is reasonable and practicable in the circumstances of each particular case'.⁸⁹ After analysing the case, the Constitutional Court concluded that the decision by the South African Police Service was wrong in law and ordered it to investigate the complaint.⁹⁰ There have not been any public announcements about this investigation since then.

B Trials

1 *The Trial of Hissène Habré in Senegal*

In this part, we will discuss the first ever completed trial of core international crimes based on universal jurisdiction to be conducted outside Europe, the developed Commonwealth and Israel.

Hissène Habré was the president of Chad from 1982 to 1990. During his rule, arbitrary arrests, torture, enforced disappearances, extrajudicial executions and other abuses were committed against political opponents and members of different ethnic groups. When Habré was deposed in 1990, he fled to Senegal. The arrest of Augusto Pinochet, the former dictator of Chile, in London in 1998 directed attention towards Habré and inspired different legal efforts to have Habré tried in Senegal under the principle of universal jurisdiction for crimes committed in Chad against Chadians during his rule. On 25 January 2000, seven Chadian nationals, together with an association of victims, filed a complaint before an investigating judge in Senegal, with a civil party application. On 4 July 2000, the Appeals Chamber in Senegal held that Senegalese courts did not have jurisdiction over the case given that the Senegalese Criminal Procedure Code did not provide for universal jurisdiction.⁹¹ In 30 November 2000, a group of victims filed another complaint against Habré in Belgium based on the principle of universal jurisdiction.⁹² In 2001, victims filed a case against Senegal with the United Nations Committee against Torture that called Senegal to keep Habré there.⁹³

On 19 September 2005, the Belgian investigating judge issued an arrest warrant against Habré for torture, genocide, crimes against humanity and war crimes and requested his extradition from Senegal. On 25 November 2005, the Appeals Chamber of

⁸⁸ *Ibid.*, para. [52].

⁸⁹ *Ibid.*, para. [63].

⁹⁰ *Ibid.*, paras [55]–[71], [84].

⁹¹ See, e.g., *Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 22, para. 17.

⁹² See, e.g., *ibid.*, para. 19.

⁹³ R. Brody, *Victims Bring a Dictator to Justice: The Case of Hissène Habré* (2017), at 9 (updated edition after the final April 2017 verdict).

Senegal held that it could not extend its jurisdiction to matters relating to the investigation or prosecution of a former head of state for acts allegedly committed during the exercise of his functions. The day after the delivery of this judgment, Senegal referred to the African Union the issue of the institution of proceedings against this former head of state.⁹⁴ In early 2006, the United Nations Committee against Torture ruled that Senegal had violated the Convention against Torture by failing to extradite or prosecute Habré.⁹⁵ In July 2006, the African Union's Assembly of Heads of State and Government 'decid[ed] to consider the Hissène Habré case as falling within the competence of the African Union, ... mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees of a fair trial' and 'mandate[d] the Chairperson of the [African] Union ... to provide Senegal with the necessary assistance for the effective conduct of the trial'.⁹⁶

In 2007, Senegal amended its laws to give universal jurisdiction to its courts over core international crimes and to establish the rest of the legal framework to be able to try Habré in Senegal.⁹⁷ In 2010, Senegal negotiated with donors to pay a budget of €8.6 million for the costs of the trial.⁹⁸ In the meantime, Belgium instituted proceedings against Senegal in 2009 before the International Court of Justice (ICJ), and, on 20 July 2012, the ICJ ruled that Senegal had the duty to prosecute or extradite the case under the Convention against Torture.⁹⁹ Only four days later, Senegal and the African Union agreed to establish the 'Extraordinary African Chambers in the Senegalese Courts'.¹⁰⁰ The Statute of the Extraordinary African Chambers, annexed to the agreement, established that the official capacity of the accused did not relieve him of criminal responsibility.¹⁰¹ On 30 May 2016, the Trial Chamber composed by two Senegalese judges and a judge from Burkina Faso convicted Habré for the crimes against humanity of rape, forced slavery, murder, summary executions, enforced disappearance, torture and inhumane acts; for the independent crime of torture; for the war crimes of wilful killing, torture, inhumane treatment and illegal detention; and for the war crimes of murder, torture and cruel treatment.¹⁰² It sentenced him to life imprisonment. On 27 April 2017, the Appeals Chamber – a body composed of three judges, one from the Republic of Mali and two from Senegal – confirmed most of the convictions against Habré issued by the Trial Chamber and further ordered Habré to pay 82.290 million West African francs (€123 million) in compensation to victims.¹⁰³

⁹⁴ See, e.g., *Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 22, paras 21–23.

⁹⁵ Brody, *supra* note 93, at 9. Convention against Torture, *supra* note 54.

⁹⁶ See, e.g., *Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 22, para. 23.

⁹⁷ *Ibid.*, para. 28.

⁹⁸ Brody, *supra* note 93, at 9.

⁹⁹ *Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 22.

¹⁰⁰ Brody, *supra* note 93, at 9.

¹⁰¹ Art. 10.3, Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990 (Statute of the Extraordinary African Chambers) 2013, 52 ILM 1024 (2013).

¹⁰² Chambre Africaine Extraordinaire d'Assises, *Ministère Public c. Hissène Habré*, Judgment, 30 May 2016.

¹⁰³ Brody, *supra* note 93, at 9. Chambre Africaine Extraordinaire d'Assises d'Appel, *Situation en République du Tchad, Le Procureur Général c. Hissène Habré*, 27 April 2017.

C Explanatory Factors

Many of the factors that may have contributed to the numerical expansion of universal jurisdiction may also have contributed to its geographical expansion to prosecuting states in Africa and Latin America. For instance, just as the adoption of statutes implementing the ICC regime and other statutory reforms seem to have facilitated the opening of formal investigations in European states, similar legislative changes seem to have contributed to the opening of new universal jurisdiction-based proceedings in Argentina, Senegal and South Africa. Similarly, just as institutional learning among NGOs and state agencies has led to more numerous and more effective efforts at extra-territorial prosecutions of international crimes in some established universal jurisdiction states, a similar process of institutional learning seems to have been at work in the Habré trial, with the NGOs and state agencies involved successfully opening formal proceedings and trial against the former dictator only after an extended process of trial and error.

That said, there are a number of potential causal factors that are unique to the timing and circumstances of universal jurisdiction's geographic spread to the global South. The first is that these investigations and trial all occurred at a moment in which the European states that had previously been host to ambitious international justice cases had begun to be more exclusive in the cases they were accepting, opening a gap that could be filled only with the emergence of a new set of venue states. During this period, the understanding of universal jurisdiction in most European states gradually shifted away from the interventionist 'global enforcer' model – described by Langer as one in which states have a role in preventing and punishing the commission of core international crimes committed anywhere in the world¹⁰⁴ – and towards a 'no safe haven' model in which resources were almost exclusively devoted to prosecutions involving defendants who were residents, asylum seekers or people otherwise present in their territories. In the wake of this policy shift, then, the willingness of Argentine and South African courts to open investigations into the actions of suspects not present or residing in their territories made them attractive venues for victims and NGOs seeking new venues in which to bring universal jurisdiction complaints.¹⁰⁵

Second, the opening of the universal jurisdiction-based proceedings in Argentina, South Africa and Senegal may have been spurred on, or at least facilitated, by the political and structural legacies that colonialism left in each of these states. In the Habré case, the politics and pressures of post-colonial Africa provided an impetus to try the former dictator in Africa. Although Belgium had requested Habré's extradition, a growing suspicion of, and resistance to, European efforts to enforce international criminal norms in Africa led both to allegations that universal jurisdiction was a neo-colonial tool of political interference (a line of argument that we briefly discuss later in Part 5) and to the African Union pressuring Senegal to prosecute Habré and ultimately providing much of the funding and institutional expertise for the trial. A similar

¹⁰⁴ Langer, *supra* note 9.

¹⁰⁵ On the 'global enforcer' and 'no safe haven' conceptions of universal jurisdiction, see *ibid.*

set of post-colonial pressures seems to have been at play in the South African case. Although South African leaders and officials have long expressed ambivalence about the international criminal justice system,¹⁰⁶ the state has sought to project an image of itself as a regional human rights and political leader in Africa – an image reinforced by the decision to take on the responsibility of investigating alleged abuses committed by officials in a neighbouring African state.

Although the post-colonial trajectory of Argentina is quite different, and much less immediate, than that of Senegal or South Africa, the legacies of that state's colonial past may still have played a role in its recent spate of universal jurisdiction cases. Argentina's status as a former Spanish colony, and as a haven in which many Spanish nationals sought refuge from the violence of Spain's civil war/coup and the repression of the subsequent Franco regime, provided a unique set of linguistic and political conditions in which relationships between victims, human rights groups and criminal justice advocates from both countries could develop and flourish.

And, finally, the formal investigation in Argentina could be linked to a third explanatory factor. This investigation into alleged crimes committed by the Spanish Franco regime could be interpreted as an 'extraterritorial backfire effect' against Spain's own attempts to hold universal jurisdiction proceedings for international crimes committed outside its territory, including in Argentina, while not being willing to reckon with its own past of international crimes committed during its own civil war (or 'coup') and the ensuing decades of authoritarian rule under Franco. In other words, by exercising universal jurisdiction over other states, Spain opened the door and implicitly legitimized the exercise of universal jurisdiction by one of these states – Argentina – for crimes committed in Spain.¹⁰⁷

4 Why So Quiet?

The last two sections have shown that universal jurisdiction has been expanding in a number of ways in recent years. However, this change has been unnoticed even by some of the most sophisticated experts working on the issue. Why has this expansion gone under the radar?

¹⁰⁶ South Africa's decision not to arrest Sudanese President al Bashir and its decision to withdraw from the ICC – a decision that a subsequent administration later revoked – both illustrate this ambivalence. See, e.g., Decision under Article 87(7) of the Rome Statute, *The Prosecutor v. Al Bashir (non compliance by South Africa)* (ICC-02/05-01/09), Pre-Trial Chamber II, 6 July 2017.

¹⁰⁷ See, e.g., Cámara Federal de Casación Penal, *Sala 4, CFP 4591/2010/7/CFC2*, Registro no. 656/18, 11 June 2018, s. VI, Opinion by Judge Hornos (invoking precedent by the Spanish Constitutional Court to argue that Argentina has universal jurisdiction over alleged crimes committed in 1936 in the Spanish Protectorate in Marruecos). The 'extraterritorial backfire effect' that we articulate is different from the boomerang effect identified by M.E. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998), under which local NGOs and civil society groups recruit the support of foreign NGOs and state authorities to put pressure on their own local government. Keck and Sikkink's boomerang effect has also operated in the complaints in Argentina to the extent that local Spanish NGOs and civil society groups have used the Argentine investigation to put pressure on Spanish authorities. But Keck and Sikkink's boomerang effect does not refer to situations in which the initial extraterritorial exercise of jurisdiction by a state may lead to the extraterritorial use of jurisdiction by other states for alleged crimes committed in the initial state.

1 Low Cost Defendants

A first point to notice in this regard is that universal jurisdiction trials have concentrated on defendants whose prosecutions do not impose substantial diplomatic and other costs to the political branches of the prosecuting state. The cost of prosecuting a given defendant is determined by a number of factors, one of which is the ability (and willingness) of the defendant's home state to impose diplomatic costs on the prosecuting state in retaliation for the prosecution of one of its nationals.¹⁰⁸ Figure 4 shows universal jurisdiction trials by defendant's nationality.¹⁰⁹

As we can see, many of the defendants against whom a universal jurisdiction verdict has been issued have come from states that were unable to exert pressure on prosecuting states because they were still in the midst of conflict at the time of trial. In the remaining cases, the defendant's nationality state either had insufficient influence over the prosecuting state to exert such pressure, was unwilling to do so or even supported the prosecution. Thus, if we take nationality as a proxy for how politically costly prosecuting a defendant is for the prosecuting state, universal jurisdiction trials have concentrated on low-cost defendants.¹¹⁰ Since most low-cost defendants are also low-level defendants, most trials have thus not brought substantial media attention.

2 Language Barriers and Lack of Publicity

Another reason that the expansion of universal jurisdiction cases has gone unnoticed is that, in many cases, prosecuting states have not made even the most minimal outreach efforts in relation to these trials.¹¹¹ For example, a good number of recent trials have been conducted in states whose official language is not readily accessible to English-speaking media or media writing in other languages widely spoken in the international (legal) community. Despite this, many prosecuting states have not made efforts to translate these trials or their judgments (simultaneously or after the fact) into these languages or to provide the international press with detailed or even minimal description of their content.¹¹² Similarly, in many recent cases, prosecuting states have made little effort to advertise the fact that they were conducting a

¹⁰⁸ Langer, *supra* note 6.

¹⁰⁹ For the purposes of this dataset, we treat Nazis as a nationality. Alleged perpetrators of international crimes committed during World War II in Germany and territories occupied by Germany have included people of several nationalities, including Belorussian, former Yugoslav, German, Hungarian, Latvian, Polish and Ukrainian. Despite their different nationalities, they committed these crimes as Nazis or Nazi collaborators, which is why it makes sense to include them in this single category.

¹¹⁰ On why the structure of incentives for the political branches (that is, the executive branch and the legislature) of prosecuting states regarding universal jurisdiction cases lead to the trial of low-cost defendants, see Langer, *supra* note 6.

¹¹¹ See Langer, 'Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code', 11 *JICJ* (2013) 737; Langer, 'Das Völkerstrafgesetzbuch und die Prinzipien der Beteiligung und Rechenschaft gegenüber der internationalen Gemeinschaft', in F. Jeßberger and J. Geneuss (eds), *10 Jahre VStGB: Bilanz und Perspektiven eines 'deutschen Völkerstrafrechts'*, translated by Julia Geneuss (2013) 253; HRW, *supra* note 18.

¹¹² See Langer, 'Universal Jurisdiction', *supra* note 111.

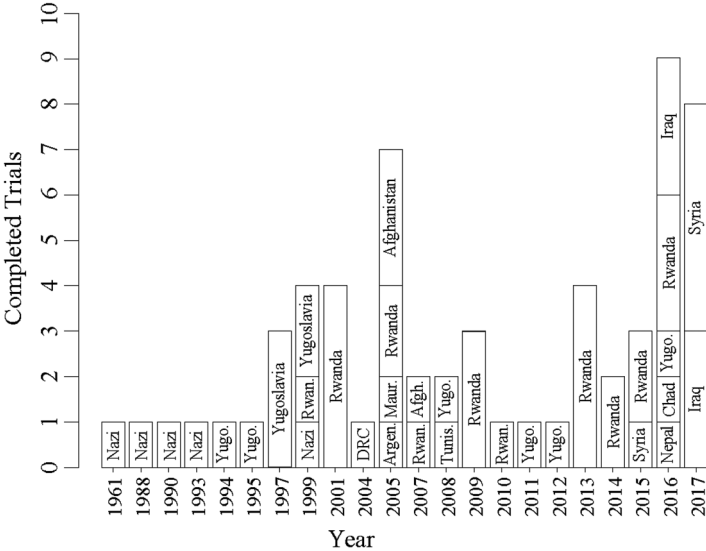


Figure 4: Completed universal jurisdiction trials by year and defendant nationality

universal jurisdiction case to international audiences. Indeed, it seems that the prosecuting officials in several of these cases have treated them more or less like any other domestic trial.

Also related with the issue of publicity, state officials of newly created specialized international crime units of police, prosecutors and even investigating judges not only lack the incentives to publicize their work but also are often prevented by professional or legal regulations from publicly discussing ongoing investigations. In addition, a number of NGOs involved in this litigation have learned to strategically ‘keep quiet’. NGOs, victims and private individuals arguably have an incentive to publicize the filing and content of any universal jurisdiction-based complaints they are involved in since such publication allows private parties to increase the impact of their litigation through public shaming, and, for NGOs involved in universal jurisdiction litigation, publicity offers a means to advertise their own effectiveness. However, these incentives are by no means universal or static, and there is some evidence that some NGOs involved in these cases have been reluctant to publicize the existence or content of the cases they have been involved in in order to avoid jeopardizing the success of the case.¹¹³

¹¹³ See M. Simons, ‘9 Syrian Officials Are Accused of Torture in Spanish Court’, *New York Times* (2 February 2017), available at www.nytimes.com/2017/02/02/world/europe/spain-syria-torture-case.html. In other cases, NGOs talk with people about potential or actual cases only under the condition that they do not share the information with anyone. See, e.g., presentation by D. Mandel-Anthony, Senior Policy Advisor, Office of Global Criminal Justice at US State Department, ‘The Role of Foreign Courts in Transitional Justice’, Conference on Times of Reckoning, Kline School of Law, Drexel University, Philadelphia, 12 October 2018.

3 Salience of Unrepresentative Events

In addition, publicly salient universal jurisdiction developments of recent years, such as the amendments to the Belgian and Spanish universal jurisdiction statutes, have suggested a retraction, rather than an expansion, of universal jurisdiction. And there have not been recent spectacular and surprising abductions or arrests like Eichmann's and Pinochet's possibly because prosecuting states are more cautious and have concentrated on people already residing in their territory and because non-resident defendants have been aware of universal jurisdiction and taken precautionary measures not to be arrested when considering travelling to universal jurisdiction states.¹¹⁴ Consequently, observers have often assumed a retraction of universal jurisdiction.

5 Assessing the Quiet Expansion of Universal Jurisdiction

A The Expansion of Universal Jurisdiction

Part 2 demonstrated that there have been 34 universal jurisdiction trial verdicts on crimes against humanity, genocide, torture and war crimes in the decade 2008–2017. This means an increase of 88.88 per cent in the number of universal jurisdiction trials over core international crimes if we take as the base the number of trials in the decade 1998–2007 and an increase of 425 per cent if we take as the base the number of trials in the decade 1988–1997. While the overall count may be considered still low, the rate at which the occurrence of these cases has been increasing is astonishing for all of the reasons discussed by Langer.¹¹⁵ This expansion is no less impressive if we compare the rate of universal jurisdiction trials to the pace of trials in the other permanent regime for the extraterritorial enforcement of core international crimes – the ICC – when no state with a relevant link to the crimes prosecutes them.¹¹⁶ If we use the seven verdicts (five trial judgments and two mid-trial terminations) on core international crimes issued by the ICC between 2008 and 2017 as an alternative baseline,

¹¹⁴ See, e.g., the precautions taken by Tzipi Livni in response to an arrest warrant issued for her arrest in the United Kingdom (UK) in 2009. When alerted to the existence of this warrant, Livni cancelled a scheduled appearance in London and did not travel to the UK. See I. Black, 'UK to Review War Crimes Warrants after Tzipi Livni Arrest Row', *The Guardian* (15 December 2009), available at www.theguardian.com/world/2009/dec/15/israel-tzipi-livni-arrest-warrant. In advance of a planned visit to London in 2014, the Israeli government sought and received assurances from the UK that Livni would be granted 'temporary diplomatic immunity' from arrest and prosecution on the grounds that she was taking part of a 'special diplomatic mission'. See H. Sherwood, 'Israeli Minister Tzipi Livni Given Diplomatic Immunity for UK Visit', *The Guardian* (13 May 2014), available at www.theguardian.com/world/2014/may/13/israel-tzipi-livni-diplomatic-immunity-uk.

¹¹⁵ Langer, *supra* note 6.

¹¹⁶ For a conceptualization of the relationship between universal jurisdiction domestic prosecutions and the ICC as the two permanent extraterritorial regimes for the enforcement of international crimes whenever the territorial, active nationality, passive personality and national interest states do not prosecute, see Langer, *supra* note 25.

the 34 universal jurisdiction trials conducted during this same period seem all the more striking.¹¹⁷

The expansion in the number of universal jurisdiction trials would be a welcomed development for defenders of universal jurisdiction to the extent that the more universal jurisdiction trials, the more accountability for participants in core international crimes.¹¹⁸ The geographical expansion of universal jurisdiction complaints and proceedings by states like Argentina and South Africa and the trial of Habré in Senegal could also be considered a positive development for universal jurisdiction as somewhat of a counter-argument against criticisms that universal jurisdiction is an imposition of Western states over their former colonies, especially against African leaders.¹¹⁹ In this respect, as indicated by Figure 5, it is also worth noting that, unlike the trials at the ICC, universal jurisdiction trials have not been concentrated exclusively on Africa.¹²⁰ These numbers indicate that it is not only that the list of states holding universal jurisdiction formal investigations and trials has started to expand beyond Western Europe and the developed Commonwealth but also that the trials in Western Europe and the developed Commonwealth have not been exclusively against African defendants.

As Figure 5 shows, out of the total number of universal jurisdiction trials, 45.9 per cent have been against African defendants, 26.2 per cent against European defendants, 18 per cent against Middle Eastern defendants, 8.2 per cent against Asian defendants and 1.6 per cent against Central and South American defendants. In the last decade of 2008–2017, the percentage of African trial defendants has gone up to 52.9 per cent, but there has still been 32.4 per cent of concluded trials against Middle Eastern defendants and 11.8 per cent of concluded trials against European defendants. Rather than being concentrated exclusively on African defendants, two

¹¹⁷ We are including in this count of seven trial verdicts the early termination of the trials against Ruto and Sang for crimes against humanity in the situation in Kenya, even if this termination would not prevent a new prosecution for these offences in the future. Otherwise, the number of verdicts by the ICC would be five. We are not including in this count the five defendants that the ICC convicted for crimes against the administration of justice because these are not core international crimes.

¹¹⁸ For possible justifications of the principle of universal jurisdiction, see, e.g., A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (2011); Hovell, 'The Authority of Universal Jurisdiction', 29 *EJIL* (2018) 427; Langer, *supra* note 25; Luban, 'A Theory of Crimes against Humanity', 29 *Yale Journal of International Law* (2004) 85; Reeves, 'Liability to International Prosecution: The Nature of Universal Jurisdiction', 28 *EJIL* (2017) 1047.

¹¹⁹ For description and analysis of these criticisms, see, e.g., Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', 21 *Criminal Law Forum* (2010) 1; Jeßberger, "'On Behalf of Africa" towards the Regionalization of Universal Jurisdiction?', in Gerhard Werle *et al.* (eds), *Africa and the International Criminal Court* (2014) 155; Menneke, 'The African Union and Universal Jurisdiction', in C.C. Jalloh and I. Bantekas (eds), *The International Criminal Court and Africa* (2017); Council of the European Union, African Union-European Union Technical ad hoc Expert Group, Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09REV1 (2009), para. 14.

¹²⁰ It is still too early to tell whether the opening of an investigation on the situations in Georgia, the ICC Prosecutor's request to open an investigation on the situation in Afghanistan and the recent ruling by Pretrial Chamber I on the jurisdiction of the Court over the deportation of Rohingya from Myanmar to Bangladesh will change the geographical pattern of ICC trials. On the relationship between Africa and the ICC, see, e.g., G. Werle *et al.*, *Africa and the International Criminal Court* (2014); K.M. Clarke *et al.* (eds), *Africa and the ICC: Perceptions of Justice* (2016); Jalloh and Bantekas, *supra* note 119.

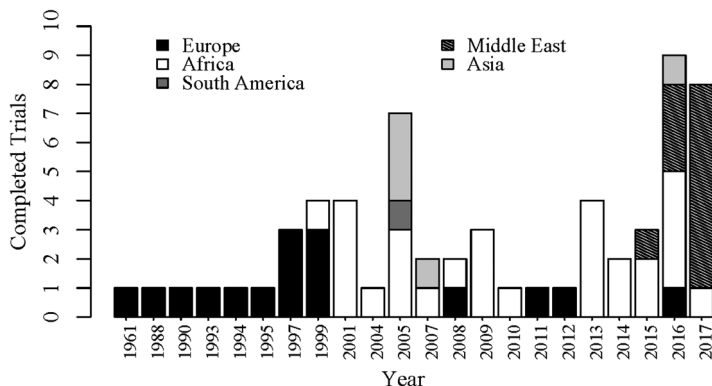


Figure 5: Completed universal jurisdiction trials by region of defendant's nationality state

other geographical patterns come out regarding defendants of which region universal jurisdiction complaints and trials have been held. The first of these patterns is that universal jurisdiction complaints and trials have concentrated on situations not under formal investigation by the ICC; among other possible reasons because, unlike in the cases of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the ICC and the United Nations Security Council have not encouraged universal jurisdiction prosecutions on situations under investigation by the ICC.¹²¹

In addition but still related, the pattern of universal jurisdiction trials does not seem to follow a geographical region but, rather, migration patterns, probably combined with concern in the prosecuting states for the commission of international crimes in certain places, including Iraq and Syria, in recent years.¹²² Figure 6 shows that universal jurisdiction trials in recent years have almost exclusively involved defendants who were not only present in the prosecuting state when proceedings were initiated against them but also residing in the prosecuting state.

This concentration of universal jurisdiction trials on residents may partially reflect that, in several states, universal jurisdiction statutes only authorize the exercise of universal jurisdiction against residents. It may also be a consequence of logistical considerations given that it is generally easier to investigate, prosecute and try people already residing in the prosecuting state. Concentrating on residents – as well as the statutory and legal requirements established to that effect – may also reflect a 'no safe haven' conception of the role of states in the universal jurisdiction regime. According to Langer, under the 'no safe haven' conception, the role of states is not to give refuge to participants in international crimes – in contrast with the alternative 'global enforcer' conception of the role of states in the universal jurisdiction regime under

¹²¹ On this pattern and possible reasons for it, see Langer, *supra* note 25, at 224–228.

¹²² On the importance of the availability of defendants and victims in the territory of the prosecuting state to explain patterns of universal jurisdiction prosecution and trials, see Langer, *supra* note 25, at 226–227; Langer, *supra* note 9.

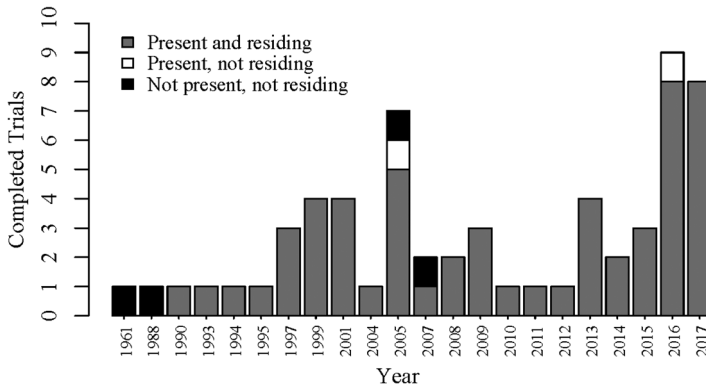


Figure 6: Presence and residence status of defendants completed universal jurisdiction trials

which states may prevent and punish core international crimes committed anywhere in the world.¹²³

B Quiet Expansion

The quiet character of this expansion of universal jurisdiction can also be considered a positive development. First, against predictions that universal jurisdiction would deeply disrupt international relations among states or interfere with transitions to democracy or to peace,¹²⁴ the quiet expansion of it suggests that it has not.¹²⁵ Similarly, against concerns that universal jurisdiction trials would engage in global vigilante justice that would infringe on the sovereignty of other states, the quiet expansion of universal jurisdiction also suggests that this has not happened either. However, the quiet expansion of universal jurisdiction also presents aspects that can be considered problematic. First, it is unclear how universal jurisdiction trials, convictions and punishments would advance goals such as deterrence and norm projection and norm cascades against core international crimes if they go relatively unnoticed in the universal jurisdiction-prosecuting states and internationally.¹²⁶ In order to address this issue, universal jurisdiction states could simultaneously or consecutively translate universal

¹²³ On the distinction between ‘no safe haven’ and ‘global enforcer’ conceptions of the role of states in the universal jurisdiction regime, see Langer, *supra* note 9.

¹²⁴ See, e.g., Goldsmith and Krasner, ‘The Pitfalls of Idealism’, 132 *Daedalus* (2003) 47, at 51–52, 55; Kissinger, *supra* note 7; Kontorovich, ‘The Inefficiency of Universal Jurisdiction’, 2008 *University of Illinois Law Review* (2008) 389; Snyder and Vinjamuri, ‘Trial and Errors’, 28 *International Security* (2004) 5.

¹²⁵ On the incentives for political branches of universal jurisdiction states that reduce the probability that universal jurisdiction proceedings and trials would deeply disrupt international relations or interfere with transitions to democracy or peace, see Langer, *supra* note 6.

¹²⁶ For critical analysis of the goals of international criminal law, see M.A. Drumbl, *Atrocity, Punishment, and International Law* (2007), at 149–180; M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997); R.G. Teitel, *Transitional Justice* (2000); Golash, ‘The Justification of Punishment in the International Context’, in Larry May (ed.), *International Criminal Law and Philosophy* (2009) 201; Luban, *supra* note 1. On norm cascades, see K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (2011).

jurisdiction proceedings and trials, or at least their most important decisions, into other languages so that they reach the communities affected by the commission of international crimes and international audiences, and they could have (more) communication strategies and outreach efforts to make these proceedings, trials and punishments more widely known.¹²⁷

In addition, the pattern of concentrating on residents of the prosecuting states that centrally explains their 'quiet' character has meant that universal jurisdiction trials have not concentrated on the most serious or widespread international crimes and their commissioners but, rather, that these cases have become targets of opportunity for universal jurisdiction states due to migration patterns. Consequently, universal jurisdiction trials have concentrated on international crimes committed in only certain states or situations in the world (what we would like to call 'the interstate or inter-situation distortive effects of universal jurisdiction') and on a subset of the international crimes committed within a state or situation (what we would like to call 'the intra-state or intra-situation distortive effects of universal jurisdiction'). For instance, while government officials have apparently committed the largest number of core international crimes in Syria, universal jurisdiction trials on Syria have concentrated on crimes committed by other actors in the situation, given that these actors have emigrated in larger numbers to universal jurisdiction states.¹²⁸ This pattern of universal jurisdiction trials can thus be considered a problem to the extent that these trials do not reflect the distribution and gravity of crimes committed by different groups even within a given situation. We refer to this phenomenon as 'the intra-state or intra-situation distortive effects of universal jurisdiction' because they are effects internal to a given situation of armed conflict or human rights violations.

Even if trials *in absentia* are not permitted in many universal jurisdiction states for due process or practical reasons, universal jurisdiction states could consider different ways to address these distortive effects. For instance, jurisdictions could do more not only to identify possible perpetrators of international crimes among their residents and asylum seekers but also to document atrocities by relying on the information that victims and witnesses of international crimes that reside in their territory or are looking for asylum may provide. These states could thus use this information to write public reports or to launch a sort of transnational commission of truth on international crimes committed in a given situation or to make the elements of proof collected against non-present or non-resident perpetrators available to other states (including the territorial state) that may be willing to prosecute them. Or universal jurisdiction states that do not require the presence or residence of the defendant to launch an investigation could also identify crimes committed by groups that do not have a substantial number of residents or asylum seekers and publish the results of

¹²⁷ See Langer, 'Universal Jurisdiction', *supra* note 111, at 760.

¹²⁸ See, e.g., HRW, *supra* note 18, at 4, 36–37. On ongoing attempts to break this pattern by the German structural investigation on the situation in Syria by investigating even defendants who are not residing in Germany, see Kaleck and Kroker, 'Syrian Torture Investigations in Germany and beyond: Breathing New Life into Universal Jurisdiction in Europe?', 16 *JICJ* (2018) 165–191.

these investigations or even issue arrest warrants against non-present or non-resident perpetrators, as Germany has recently done regarding a Syrian official.¹²⁹ These are a few possible examples just to illustrate our point since providing fully elaborated proposals is beyond the scope of this article.

More fundamentally, universal jurisdiction-prosecuting states could reflect on whether they conceive their role in the universal jurisdiction regime as being limited to not being a refuge of perpetrators of core international crimes, as indicated by the ‘no safe haven’ conception of universal jurisdiction, or whether their role should also include the prevention and punishment of core international crimes committed anywhere in the world, as indicated by the ‘global enforcer’ conception of universal jurisdiction.¹³⁰ This discussion goes beyond the question of whether the presence of the defendant is required to launch an investigation or prosecution and does not track the distinction between ‘pure’ (or *in absentia*) and ‘custodial’ universal jurisdiction that was discussed in the separate opinions of the ICJ’s Yerodia case.¹³¹ The distinction between ‘pure’ and ‘custodial’ universal jurisdiction is about what is required of universal jurisdiction proceedings in order to be launched or about the requirements of adjudicative or enforcement jurisdiction more generally, whereas the distinction between ‘global enforcer’ and ‘no safe haven’ universal jurisdiction is about the role states should play in the universal jurisdiction regime.¹³² While formal requirements such as the presence of the defendant or another link with the prosecuting state may reflect a ‘global enforcer’ or ‘no safe haven’ conception of universal jurisdiction, they are epiphenomenal to the substantive discussion about the role that states should have in the extraterritorial enforcement of core international crimes.¹³³

¹²⁹ See, e.g., ‘Jörg Diehl, Deutschland jagt Assads Folterknecht’, *Spiegel Online* (8 June 2018), available at www.spiegel.de/politik/ausland/syrien-deutschland-jagt-baschar-al-assads-folterknecht-per-haftbefehl-a-1211888.html; ‘Arrest Warrant against Jamil Hassan is a Milestone and Good News for All Affected by Assad’s Torture System’, press release, 8 June 2018, available at www.ecchr.eu/nc/en/press-release/arrest-warrant-against-jamil-hassan-is-a-milestone-and-good-news-for-all-affected-by-assads-torture-system/.

¹³⁰ On this distinction, see again Langer, *supra* note 9. As indicated there, ‘global enforcer’ and ‘no safe haven’ universal jurisdiction are extremes that define a spectrum; the policy positions, statutes and proceedings in any given universal jurisdiction state may present elements of both. In this regard, the recent conceptualization of the German approach as ‘complementary preparedness’ by F. Jeßberger, ‘Towards a “Complementary Preparedness” Approach to Universal Jurisdiction: Recent Trends and Best Practices in the European Union’, briefing for the European Parliament’s Subcommittee on Human Rights (2018) (on file with the authors), can be considered as falling within this spectrum and being closer to the ‘global enforcer’ conception.

¹³¹ See, e.g., *Arrest Warrant of 11 April 2000*, *supra* note 64, at 63, Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal JJ; at 35, Separate Opinion of Guillaume J.

¹³² On the discussion between ‘pure’ and ‘custodial’ universal jurisdiction as a discussion on the requirements of enforcement, not prescriptive, jurisdiction, see O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *JICJ* (2004) 735.

¹³³ See Langer, *supra* note 9, at 250. E.g., as indicated in that piece, the requirement of presence of the defendant in the prosecuting state may be, in some contexts, a manifestation of a ‘no safe haven universal jurisdiction’ conception. But presence for prosecution can also be characterized as a due process requirement by a ‘global enforcer universal jurisdiction’ state that may not have trials in absentia. For an example of the latter, see *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another*, [2014] ZACC 30, paras 41–49 (arguing that the presence of the suspects is required for prosecution, but not for the investigation of international crimes on the basis of universal jurisdiction).

6 Conclusion

In this article, we have argued, counter to a widespread perception among international criminal law experts, that the practice of universal jurisdiction is not in decline but, rather, is actively expanding. Indeed, using the results of our global survey of universal jurisdiction complaints and trials, we have documented significant growth in the number of universal jurisdiction trials, in the frequency with which these trials take place year by year and in the geographic scope of universal jurisdiction litigation. After presenting these findings, we provided an account of the potential causes and practical consequences of this trend. In our positive analysis, we explored factors that may offer insight into why universal jurisdiction has been expanding as well as why this expansion has gone unnoticed among international criminal law experts. In our normative analysis, we have discussed whether this quiet expansion would be a welcome development for supporters and critics of universal jurisdiction.

Whether or not one agrees with our account of the potential causes or normative significance of this trend, the fact remains that – to paraphrase Mark Twain – reports of universal jurisdiction’s death have been greatly exaggerated. Indeed, as our survey indicates, the use of universal jurisdiction to investigate and prosecute individuals accused of taking part in international crimes is alive and well. With this in mind, it is perhaps time for judges, policy-makers, practitioners and scholars to come to grips with the quiet expansion we have documented in this article and to consider what normative and practical consequences it has for international criminal justice going forward.