

Universal Jurisdiction is not Disappearing

The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction

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1. Introduction

Under universal jurisdiction, any state may prosecute a crime without having any territorial, national or national-interest link with the crime when the crime was committed.¹ The assertion of jurisdiction is often based on the nature of the crime. In the last 30 years, universal jurisdiction has been used to prosecute core international crimes, such as genocide, crimes against humanity, war crimes and torture.² The recent history of universal jurisdiction has often been depicted as one of its rise and fall, with universal jurisdiction rising to its peak with the arrest of Augusto Pinochet in London in 1998, and the fall coming with the amendments of Belgium’s universal jurisdiction regulations in 2003, or with the amendments of Spain’s universal jurisdiction regulations in 2009 and 2014.³ In a number of these ‘rise and fall’ accounts, litigants played a crucial role in the fall of universal jurisdiction by irresponsibly or for political reasons bringing too many cases against too powerful

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¹ See e.g. *Restatement (Third) of the Foreign Relations Law of the United States* (1987) at §§ 402, cmts. c–g, 404 and cmts. a–b, 423.

² Though torture is often not included among the core international crimes, I include it in this category because it has been a central human rights crime in the universal jurisdiction regime. In addition, its prosecution based on universal jurisdiction presents similar issues as the other three crimes. On the use of universal jurisdiction in the last 30 years to prosecute core international crimes, see M. Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105 *American Journal of International Law (AJIL)* (2011) 1–49.

³ See e.g. I. de la Rasilla del Moral, ‘The Swan Song of Universal Jurisdiction in Spain’, 9 *International Criminal Law Review* (2009) 777–808; C. Genovese and C. Barral Diego, ‘The Slow Death of Universal Jurisdiction: The Case of Spain’, *ALIBI* blogpost, 10 October 2014, available at www.alibionline.nl/the-slow-death-of-universal-jurisdiction-the-case-of-spain (visited 1 February 2015); E.L. Hwang, ‘China: The Growth of a new Superpower and the Extinction of Universal Jurisdiction’, 32 *Wisconsin International Law Journal* (2014) 334–354; L. Reydam, ‘The Rise and Fall of Universal Jurisdiction’, in W. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (2011), at 337.

defendants, which in turn led to the substantial restriction or repeal of universal jurisdiction statutes.⁴

In this short piece, I would like to propose an alternative view of the recent history of universal jurisdiction over core international crimes.⁵ My argument is that universal jurisdiction's history has not been one of 'rise and fall', but rather of an ongoing competition between two conceptions of the role of states in the universal jurisdiction regime. Under one conception, which I call 'global enforcer' universal jurisdiction, states may exercise universal jurisdiction because they have a role in preventing and punishing core international crimes committed anywhere in the world. Under another conception, which I call 'no safe haven' universal jurisdiction, a state may exercise universal jurisdiction in order not to be a refuge for participants in core international crimes.

Human rights litigants and advocates have overwhelmingly preferred the 'global enforcer' universal jurisdiction conception over the 'no safe haven' one because it implies a stronger anti-impunity rationale and agenda and makes universal jurisdiction an active, rather than a reactive, tool to prevent and punish core international crimes.⁶ Human rights litigants and advocates have done very important work trying to advance the 'global enforcer' universal jurisdiction conception. However, these human rights litigants and advocates have also involuntarily contributed to a substantial number of universal jurisdiction states adopting the 'no safe haven' conception. This has not so much occurred because of litigation (as the 'rise and fall' perspectives on universal jurisdiction may suggest), but through the use of 'no safe haven' rhetoric that likely facilitated the states' adoption of this conception and through a legalistic approach to the regulation of universal jurisdiction, which have contributed to creating a backlash against the regulations of the most emblematic 'global enforcer universal jurisdiction' states.

⁴ See e.g. D. Vandermeersch, 'Prosecuting International Crimes in Belgium', 3 *Journal of International Criminal Justice (JICJ)* (2005) 400–421, at 410: 'in the absence of filtering safeguards to ascertain that those complaints were *a priori* founded and not frivolous, certain alleged victims gave the appearance of availing themselves Belgian justice (sic) by abusing procedures to pursue political objectives that did not include justice In addition, the proliferation of complaints filed by civil petitioners prevented prosecutors from formulating a coherent and responsible criminal policy in the area, and bogged the judicial system down with a body of complaints that it simply did not have the resources to deal with.'

⁵ This article analyses universal jurisdiction in criminal cases. The analysis of universal jurisdiction in civil cases is beyond the scope of this piece.

⁶ See e.g. Amnesty International, *Universal Jurisdiction. A Preliminary Survey of Legislation Around the World* (2012), at 11 (mentioning as an obstacle for universal jurisdiction its limitation to persons who are residents or who subsequently become residents or nationals of the prosecuting state).

2. Two Conceptions of the Role of Universal Jurisdiction States

There is no question that the *Pinochet* case is the most well-known contemporary example of an assertion of universal jurisdiction over core international crimes; no universal jurisdiction case has had such notoriety and impact since.⁷ It is also true that, as I have documented in my own work, Belgium and Spain had very broad universal jurisdiction regulations that were reduced or virtually eliminated because powerful states put pressure on them after Belgium and Spain opened universal jurisdiction formal proceedings against nationals of these states.⁸

But the ‘rise and fall’ universal jurisdiction narrative does not capture the trajectory of universal jurisdiction in the last three decades. Since the arrest of Pinochet in 1998, substantially more, rather than fewer, states have passed statutes giving universal jurisdiction to their courts.⁹ Also, universal jurisdiction complaints or cases considered by authorities by their own motion were presented against 211 individuals between 2004 (the year after Belgium’s statute was twice amended) and 2009.¹⁰ This average of 35.17 complaints or cases considered by authorities by their own motion per year is not substantially lower than the average number of 39.71 complaints or cases considered by authorities by their own motion per year between 1983 and 2003, and we should also notice that from 1 July 2002, the International Criminal Court (ICC) presented a new venue for complaints (‘communications’) on core international crimes,¹¹ and that before 2004 there were a number of massive

⁷ See e.g. N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, 2006).

⁸ Langer, *supra* note 2.

⁹ See e.g. B. Van Schaack and Z. Perovic, ‘The Prevalence of “Present-In” Jurisdiction’, 107 *Proceedings of the Annual Meeting (American Society of International Law)* (2013) 237–242, at 239: ‘it remains accurate to say that there is a marked upward trend in the degree to which states are incorporating atrocity crimes into their domestic codes and empowering their courts to exercise various forms of extraterritorial jurisdiction. Much of this trend is likely attributed to the ratification of the Rome Statute, even though technically that treaty does not require domestic incorporation of ICC crimes.’ See also Amnesty International, *supra* note 6, at 22 *et seq.* (listing in its Annex II the date of the legislation in each country of the world that may authorize the exercise of universal jurisdiction).

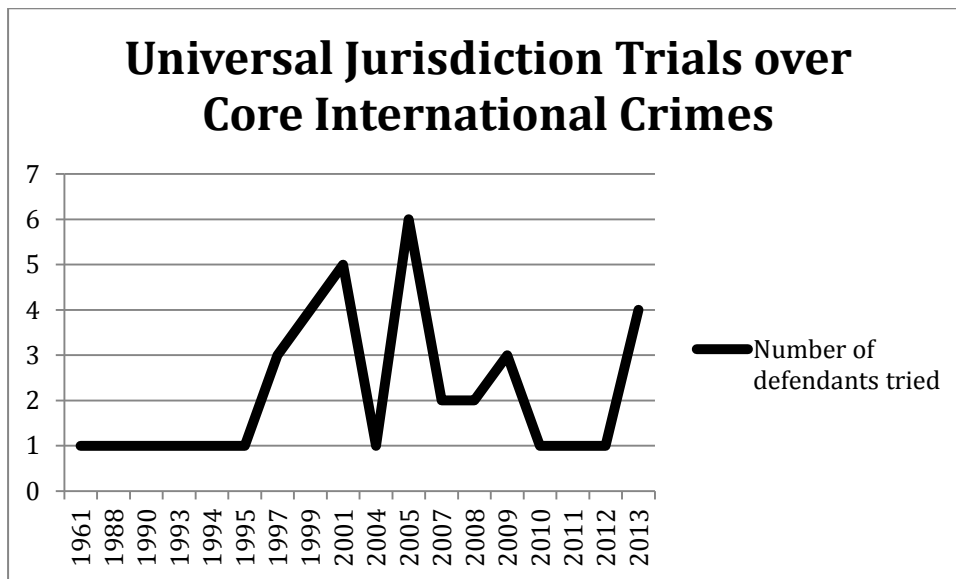
¹⁰ These data are taken from my own database on universal jurisdiction complaints that cover the period 1961–2009 [database on file with author]. For the years 1983 to 2009, the database includes data on whether complaints (or cases considered by authorities on their own motion) against 1045 defendants were presented before or after 2004. For a description of how this global survey was carried out, see Langer, *supra* note 2, at 7.

¹¹ On the relationship between universal jurisdiction domestic prosecutions and the ICC, see M. 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* (forthcoming 2015).

investigations against Nazis in Australia, Canada and the United Kingdom, against former Yugoslavs in Germany, and against the Argentine military in Spain.¹²

Figure 1 shows that universal jurisdiction trials over core international crimes did not diminish either after the amendments to the Belgian statute in 2003 and to the Spanish statute in 2009.

Figure 1: Defendants Tried in Universal Jurisdiction Trials over Core International Crimes by Verdict Date 1961–2013



Source: Own Database on Universal Jurisdiction Complaints¹³

After the Belgian amendments in 2003, courts heard 21 of the 39 universal jurisdiction trials over at least one core international crime in the period 1961–2013. In other words, in the ten-year period between 2004–2013, 53.8% of all universal jurisdiction trials over core international crimes were held.¹⁴ In 2005, verdicts were issued regarding six defendants, the most universal jurisdiction trial verdicts during the period of 1961–2013. 2013 was the third year with the most universal jurisdiction trial finished, with four trials. In addition, while between 1994 and 2003 there was at least one universal jurisdiction trial verdict every other year, between 2004 and 2013 there was at least one universal jurisdiction trial verdict every year except for 2006.

¹² On the massive investigations of Nazis in the United Kingdom, of former Yugoslavs in Germany and of Argentine military in Spain, see Langer, *supra* note 2.

¹³ Though the data base goes up to the year 2009 regarding complains, I have updated it regarding trials until the year 2013 for the purposes of this piece.

¹⁴ I am excluding from these numbers the three universal jurisdiction trials already finished in 2014 because we still do not have total numbers for this year since I write this piece in November of 2014. The percentage of trials held after the Belgian amendments would be even higher if I included this year.

The ‘rise and fall’ narrative thus does not capture accurately the trajectory of universal jurisdiction in criminal cases in the last 30 years. In some respects, universal jurisdiction has been expanding, not decreasing in recent years; there have been more universal jurisdiction statutes and trials. In other senses, as with the average number of complaints, universal jurisdiction has declined but not substantially after the amendments to the Belgian statute in 2003.

How, then, should we analyse the trajectory of universal jurisdiction over time? An alternative perspective that I articulate here is to analyse this trajectory as a competition between two different conceptions of the role states do and should play in the universal jurisdiction regime over core international crimes. As defined earlier, under the ‘global enforcer’ universal jurisdiction conception, states may exercise jurisdiction because they have a role in preventing and punishing core international crimes committed anywhere in the world. Under the ‘no safe haven’ universal jurisdiction conception, states may exercise universal jurisdiction to avoid becoming a refuge for participants in core international crimes.

The distinction between ‘global enforcer’ universal jurisdiction and ‘no safe haven’ universal jurisdiction does not track the distinction between universal jurisdiction and the ‘representation principle’.¹⁵ In ‘no safe haven’ universal jurisdiction, the prosecuting state does not represent another state more directly involved in the crime (such as the territorial state), but rather represents the international community.¹⁶ Unlike the representation principle, which assumes that the crime affected the territorial state or the defendant’s state of nationality, both ‘global enforcer’ and ‘no safe haven’ universal jurisdiction conceptions assume that core international crimes are established in international law and affect the international community. In addition, the exercise of ‘no safe haven’ universal jurisdiction does not necessarily require that the prosecuted crime be an offence in the territorial state, or that the defendant be a fugitive of another state, or that another state make a request to extradite or take over criminal proceedings, or that another state confirm that it will

¹⁵ On the representation principle, see e.g. L. Reydams, *Universal Jurisdiction* (Oxford University Press, 2003), at 21 *et seq*; Reydams, *supra* note 3, at 10–12.

¹⁶ On possible implications for the legitimacy requirements of universal jurisdiction that follow from the assumption that universal jurisdiction states act on behalf of the international community, see M. Langer, ‘Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code’, 11 *JICJ* (2013) 737–762.

not require extradition, or that the extradition of the defendant to another state would be impossible.

Furthermore, the distinction between ‘global enforcer’ and ‘no safe haven’ universal jurisdiction does not track the distinction between ‘pure’ and ‘custodial’ universal jurisdiction that was discussed in separate opinions in the *Yerodia* case at the International Court of Justice.¹⁷ 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.¹⁸ While formal requirements such as 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 with no connection to the prosecuting states when they were committed.

‘Global enforcer’ and ‘no safe haven’ universal jurisdiction are extremes that define a spectrum; universal jurisdiction states, statutes and proceedings may present elements of both. In addition, characterizing universal jurisdiction statutes and proceedings as more like one or the other conception may require not only analysis of statutes and prosecutorial and judicial decisions, but also of the rationales and perceptions and contextual understanding of those who participate in the system.¹⁹

Still, distinguishing between ‘global enforcer’ and ‘no safe haven’ universal jurisdiction is helpful positively and normatively to enable us to identify a central tension within the practice of universal jurisdiction. From a positive perspective, it

¹⁷ See e.g. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 ICJ Reports 3 (Feb. 14) (hereinafter *Arrest Warrant*) (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal); and *ibid.* (Separate Opinion Judge Guillaume).

¹⁸ On the discussion between ‘pure’ and ‘custodial’ universal jurisdiction as a discussion on the requirements of enforcement, not prescriptive, jurisdiction, see R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *JICJ* (2004) 735–760.

¹⁹ For instance, 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 provision for trials *in absentia*. For a recent 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, §§ 41–49 (arguing that presence of the suspects is required for prosecution, but not for investigation of international crimes on the basis of universal jurisdiction).

enables us to better analyse the practice and trajectory of universal jurisdiction over core international crimes. Scholars, policy-makers and the public generally think about ‘global enforcer’-type cases like *Eichmann* in Israel, *Pinochet* in Spain and *Sharon et al.* in Belgium when they discuss universal jurisdiction. But ‘no safe haven’ cases have actually been more numerous throughout the contemporary history of universal jurisdiction over core international crimes. For instance, the Nazi cases of the 1980s and early 1990s in Australia, Canada and the United Kingdom can be understood as ‘no safe haven’ cases.²⁰ The same is true of most cases against former Yugoslavs in the 1990s in Europe, before and after the *Pinochet* case in Spain. And the practice of universal jurisdiction trials has been mostly in ‘no safe haven’ cases.

In addition, if more states have universal jurisdiction statutes now than at the time of Pinochet’s arrest in London, the trajectory of universal jurisdiction cannot be characterized as ‘falling’. But the question of whether these statutes respond to a ‘global enforcer’ or a ‘no safe haven’ rationale remains. In this respect, the ‘no safe haven’ conception seems to have made important inroads in recent years because a substantial number of statutes from the most active universal jurisdiction states now require the defendant to become a resident of the prosecuting state before that state may exercise universal jurisdiction over him.²¹ Similarly, even if the number of universal jurisdiction trials has not diminished, most defendants tried did reside in the prosecuting state. This means that, rather than supporting a ‘rise and fall’ story, an argument can be made that universal jurisdiction instead has been moving away from a ‘global enforcer’ conception toward a ‘no safe haven’ conception since the Belgian amendments in 2003 and the Spanish amendments in 2009 and 2014. ‘Global enforcer’ universal jurisdiction has not disappeared, however, as exemplified by Belgium’s case against Hissène Habré for torture,²² by the Argentine investigation and arrest warrants

²⁰ On these prosecutions, see e.g. D. Fraser, *Law After Auschwitz* (Carolina Academic Press, 2005).

²¹ See e.g. *Code d’Instruction Criminelle* (C.I.Cr.), Art. 6.1bis (Belgium)(on crimes against humanity, genocide and war crimes); *Code de procédure pénale* (C.pr.pén.) Art. 689–611 (on crimes against humanity, genocide and war crimes)(France); *Ley Orgánica del Poder Judicial* (L.O.P.J.) (Law on the Judiciary) Art. 23.4 (a)(Spain)(on crimes against humanity, genocide and war crimes); International Criminal Court Act 2001, Arts 51 and 68 (England and Wales). Even when statutes do not require residence of the defendant as a prerequisite for universal jurisdiction, public officials may understand that not being a safe haven is the goal of universal jurisdiction regulations. See e.g. Human Rights Watch, *The Legal Framework for Universal Jurisdiction in the Netherlands* (2014), at 4: ‘Prosecutors also consider whether the case will help achieve the overarching goal of keeping the Netherlands from becoming a safe haven for war criminals.’

²² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, International Court of Justice, General List No. 144, judgment of 20 July 2012. On the *Hissène Habré* case, see the contribution of Reed Brody in this issue of the *Journal*.

issued regarding international crimes committed during the Franco era in Spain,²³ and by the order of the South African Constitutional Court that the South African Police Service must investigate a complaint for allegations of torture committed in Zimbabwe by and against Zimbabwean nationals.²⁴

From a normative perspective, ‘global enforcer’ universal jurisdiction is more attractive for human rights advocates and litigators because it assumes a larger role for states in addressing core international crimes. Without it, only the UN Security Council has true global reach over core international crimes through the creation of ad hoc international criminal tribunals and referral to the ICC of situations that involve any state in the world, including non-ICC party states.²⁵ In contrast, ‘no safe haven’ universal jurisdiction is more attractive for those who think that ‘global enforcer’ universal jurisdiction equates with ‘global vigilantism’, causes too much tension in international relations, is too costly for prosecuting states, or assumes a dangerous idealism that would interfere with political solutions to authoritarianism and war.

3. The Role of Human Rights Advocates and Litigators in the Competition between the Two Conceptions

Human rights advocates and litigators have played a crucial role in the establishment and spread of contemporary universal jurisdiction over core international crimes. For example, during the drafting of the Torture Convention, Amnesty International played a key role in persuading states to accept the proposed provision providing a basis for universal jurisdiction and which would later be used in cases like Pinochet’s prosecution.²⁶ Human rights NGOs played a critical role in the drafting and spreading of the Statute of the ICC, which has also fostered the spread of universal jurisdiction

²³ ‘La Argentina pidió la captura de 20 imputados por crímenes del franquismo’, Página 12, 31 October 2014, available at www.pagina12.com.ar/diario/ultimas/20-258820-2014-10-31.html (visited 1 February 2015).

²⁴ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30. In § 80 the decision by the South African Constitutional Court says in passing that ‘(w)e dare not be a safe haven for those who commit crimes against humanity’. But despite this language, the reasoning of the decision by the Court seems to reflect a ‘global enforcer’ universal jurisdiction conception since it orders the South African Police Service to investigate these crimes even if none of the defendants is present or their presence is not anticipated in South African territory (see e.g. §§ 41–49, 81) and it also contemplates the possibility of getting a hold on the defendants through extradition (see e.g. §§ 48–49).

²⁵ On the jurisdictional gaps and institutional and political constraints of the ICC, see Langer, *supra* note 11.

²⁶ On Amnesty International’s role in the drafting of the Torture Convention, see e.g. K. Sikkink, *Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton, 2011), at 100–104.

statutes among member states, even though the Rome Statute itself does not mention this type of jurisdiction.²⁷

Human rights advocates and groups have lobbied states to adopt universal jurisdiction statutes and to adopt special units within the police, prosecutors offices and courts to work on universal jurisdiction cases.²⁸ These groups have also reported on the number of states that have passed universal jurisdiction statutes, thus challenging the idea that universal jurisdiction over core international crimes is radical or exceptional.²⁹ In addition, human rights advocates and groups have played a crucial role in the litigation of universal jurisdiction cases by presenting universal jurisdiction complaints, bringing evidence before the investigating judge or prosecutor and becoming civil parties or private prosecutors in universal jurisdiction proceedings.³⁰

Despite these essential contributions, a number of commentators and policy makers have argued that human rights litigators have contributed to the demise of universal jurisdiction by bringing cases that engendered backlash and led to the restriction or derogation of universal jurisdiction statutes.³¹ These criticisms typically have been articulated within the ‘rise and fall’ perspective on universal jurisdiction that I reject in this piece. Putting this ‘rise and fall’ perspective aside, we can translate this criticism to our framework: have human rights advocates and litigators been (partially) responsible for the decline of ‘global enforcer’ universal jurisdiction and the advancement of ‘no safe haven’ universal jurisdiction in recent years?

I argue that, though the litigation of specific cases led to restriction or repeal of ‘global enforcer’ universal jurisdiction statutes like the ones from Belgium and Spain, the litigation of these cases was just the trigger and not the underlying cause of this outcome. The root cause was the structure of incentives for the executive and legislative branches of prosecuting states in universal jurisdiction cases. As I have explained elsewhere, this incentive structure encourages the executive and legislative

²⁷ See e.g. M.C. Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’, 32 *Cornell International Law Journal* (1999) 443–469; M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge, 2005); J. Van der Vyver, ‘Civil Society and the International Criminal Court’, 2 *Journal of Human Rights* (2003) 425–439.

²⁸ See e.g. Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* (2014).

²⁹ See e.g. Amnesty International, *supra* note 6.

³⁰ On the role of NGOs in the litigation of cases in several European countries, see e.g. Langer, *supra* note 2.

³¹ See e.g. Vandermeersch, *supra* note 4.

branches of prosecuting states to concentrate on ‘low-cost defendants’ — i.e. defendants who have little or no political power to impose international relations or other types of costs upon the prosecuting state — because in these cases the incentives to prosecute defendants surpass the disincentives for the executive branch and the legislature.³² The litigation of universal jurisdiction cases in Belgium and Spain against ‘high-cost defendants’ triggered the structure of incentives that led the executive and legislative branches of those countries to amend or repeal their ‘global enforcer’ universal jurisdiction statutes and regulations because the costs of universal jurisdiction prosecutions against ‘high-cost defendants’ were too high.³³ Human rights advocates and groups did not create this structure of incentives.

One could argue that even if human rights groups did not create this structure of incentives, human rights litigators should have coordinated their actions to bring fewer or no cases against high-cost defendants in order to preserve ‘global enforcer’ universal jurisdiction. But leaving aside that such a selection of cases could be a hard sell to human rights groups committed to the equal application of the law, this coordination strategy was not truly available in this context given that it is relatively easy and cheap to present universal jurisdiction complaints in many countries. In other words, even if the main global human rights litigators and advocates had agreed not to present or support complaints against high-cost defendants in ‘global enforcer’ states, others would have likely spoiled that coordination strategy. For instance, the complaints against American and Chinese officials that led to the two amendments of the Spanish ‘global enforcer’ universal jurisdiction statute in 2009 and 2014 were not presented by any of the main global human rights NGOs, but by groups such as the Association for the Dignity of Male and Female Prisoners in Spain (an association that did not even have its own website), the Tibet Support Committee, the Private Foundation House of Tibet and by members of Falun Gong.³⁴

³² Langer, *supra* note 2.

³³ The same incentives explain the amendment in England and Wales of the provision that enabled private individuals to apply directly for arrest warrants to be issued. Such a procedure led to the issuing of arrest warrants against a number of high-cost defendants; see Langer, *supra* note 2. As a consequence, the political branches passed Section 153 of the Police Reform and Social Responsibility Act of 2011, which restricted these procedures by requiring the prior consent of the director of public prosecutions before arrest warrants are issued for certain offences alleged to have been committed outside the United Kingdom. However, England has never been a ‘global enforcer’ of universal jurisdiction, at least not to the same degree that Belgium and Spain have been at different points in time.

³⁴ See e.g. Javier Fernández Estrada, *Decanato de los Juzgados Centrales de Instrucción de la Audiencia Nacional para el Juzgado Central de Instrucción que por Turno Corresponda*, 17 March 2009, at www.nodo50.org/csca/agenda09/palestina/pdf/QUERELLAVERSIONFINAL.pdf (complaint)

But it is possible that human rights groups involuntarily contributed to the advancement of ‘no safe haven’ universal jurisdiction to the detriment of ‘global enforcer’ universal jurisdiction in at least two ways. First, human rights groups themselves have articulated and made extensive use of ‘no safe haven’ rhetoric, at times making it their central message to states.³⁵ As a consequence, state officials may think or argue that not being a safe haven for participants in international crimes is the central, if not the only, role that states have to play in the universal jurisdiction regime.

In addition, human rights advocates have tended toward a legalistic view that rejects any role for political considerations in the universal jurisdiction regime. As a consequence, they have favored procedural regulations that eliminate or limit prosecutorial discretion.³⁶ Their ideal has been ‘investigating judges’, like those from Belgium and Spain, who are able to open formal proceedings without the support of prosecutors and who could do their own judicial investigation and issue their own arrest warrants. However, procedural regulations of this sort proved unmanageable for the countries whose political branches were strongly incentivized to restrict their universal jurisdiction statutes after formal criminal proceedings against high-cost defendants were opened.³⁷ As a consequence, Belgium and Spain went from being the iconic practitioners of ‘global enforcer’ universal jurisdiction to having ‘no safe haven’ universal jurisdiction regulations.³⁸

If human rights advocates and litigants want at least a few active ‘global enforcer’ states within the universal jurisdiction regime, they might have to revise their legalistic position. There is no question that universal jurisdiction trials have to be legalistic — i.e., they have to be true adjudicatory processes — in order to be

(visited 1 February 2015); Audiencia Nacional Madrid, Sala de lo Penal, Rollo de Apelación 196/05, Diligencias previas 237/05, Auto, 10 January 2006; J.C.I. No. 1, Audiencia Nacional Madrid, Diligencias previas 242/2008-10, Auto, 5 August 2008; Tribunal Constitucional, Sala Segunda No. 227/2007, 22 October 2007.

³⁵ Amnesty International’s No Safe Haven Series has been the most visible example of this type of rhetoric. The series has included reports on, among other countries, Bulgaria, Ghana, Germany, Mexico, Sierra Leone, Sweden, and Vanuatu.

³⁶ See e.g. Amnesty International, *supra* note 6, at 11 (mentioning as an obstacle for universal jurisdiction political control over decisions to investigate, prosecute or extradite); Human Rights Watch, *The Legal Framework for Universal Jurisdiction in Germany* (2014) (referring to prosecutorial discretion as a barrier to prosecution).

³⁷ See Langer, *supra* note 2.

³⁸ See C.I.Cr., Art. 6.1*bis* (Belgium); L.O.P.J., Art. 23.4 (a) (Spain).

legitimate.³⁹ But it is unrealistic to expect that states will exercise universal jurisdiction at all costs. Allowing for prosecutorial discretion in case selection, at least in some states, would enable those states to be global enforcers of core international crimes, while leaving room for the consideration of the cost and consequences of these prosecutions.

4. Conclusion

This article has introduced a conceptual distinction between ‘global enforcer’ and ‘no safe haven’ universal jurisdiction. This distinction enables us to better describe the practice and trajectory of universal jurisdiction. The history of universal jurisdiction over core international crimes has not been one of ‘rise and fall’, but rather of on-going competition between these two conceptions of what role states do and should play in the universal jurisdiction regime.

Human rights advocates and litigators would normally prefer the ‘global enforcer’ conception because it embraces a stronger and more active anti-impunity agenda. However, a number of these actors and litigators have contributed to the advancement of the ‘no safe haven’ conception at the expense of the ‘global enforcer’ conception by using ‘no safe haven’ rhetoric and by embracing an overly legalistic view of universal jurisdiction and the international order.

³⁹ On due process as a legitimacy requirement of universal jurisdiction, see D. Luban, ‘A Theory of Crimes against Humanity’, 29 *Yale Journal of International Law* (2004) 85–167. On additional legitimacy requirements universal jurisdiction regulations and proceedings should meet, see Langer, *supra* note 16.