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## **DOUBLE JEOPARDY AND MULTIPLE SOVEREIGNS: A JURISDICTIONAL THEORY**

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### ABSTRACT

*This Article offers a coherent way of thinking about double jeopardy rules among sovereigns. Its theory has strong explanatory power for current double jeopardy law and practice in both U.S. federal and international legal systems, recommends adjustments to double jeopardy doctrine in both systems, and sharpens normative assessment of that doctrine.*

*The Article develops a jurisdictional theory of double jeopardy under which sovereignty signifies independent jurisdiction to make and apply law. Using this theory, the Article recasts the history of the U.S. Supreme Court's "dual sovereignty" doctrine entirely in terms of jurisdiction, penetrating the opacity of the term "sovereign" as it is often deployed by the Court and supplying a useful analytical predictor for future extension of the doctrine. The Article then applies the theory to the international legal system to explain the confused and seemingly dissonant body of modern international law and practice on double jeopardy, including the*

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*international law of human rights and extradition, international criminal tribunal statutes, and the exercise of universal jurisdiction.*

*The Article next explores the theory's implications for U.S and international law in light of two main double jeopardy concerns: the individual right to be free from multiple prosecutions, and the sovereign ability to enforce law. It argues that since the U.S. dual sovereignty doctrine originally derived and continues to derive justification from the sovereign's jurisdiction over the defendant, the Court's present analysis is incomplete and betrays the doctrine's own foundations by ignoring a basic, and necessary, constitutional inquiry: whether a successively prosecuting sovereign's exercise of jurisdiction satisfies due process. This inquiry would enrich present doctrine by incorporating individual rights concerns—concerns that are now completely absent from dual sovereignty analysis—and holds the potential to alter outcomes, especially in cases of successive prosecutions between U.S. states and by the federal government when it exercises jurisdiction extraterritorially. The theory similarly enriches international doctrine through a reasonableness evaluation of a successively prosecuting nation-state's jurisdiction that resembles U.S. due process tests. Finally, the Article suggests that where multiple sovereigns legitimately may exercise jurisdiction, it does not mean that they will; institutionalized comity mechanisms between enforcement authorities of different sovereigns can accommodate both the sovereign interest to enforce law and the individual interest to be free from multiple prosecutions by encouraging the representation of multiple sovereigns' interests in a single prosecution in a single forum.*

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## INTRODUCTION

Why can the U.S. federal government prosecute someone for a bank robbery when that person already has been prosecuted for the same bank robbery by the state of Illinois,<sup>1</sup> and vice versa?<sup>2</sup> Similarly, why can Alabama prosecute for a homicide that is already the subject of a final criminal judgment in Georgia?<sup>3</sup>

Now transpose these questions to the international arena where the political stakes may be far higher and the legal implications even more complex and controversial. If a U.S. national is alleged to have committed a crime in Egypt for which he is prosecuted in Egyptian courts, does international law have anything to say about whether the United States can prosecute him again for the same crime? What if the United States prosecutes first and it is Egypt that seeks a second prosecution? Suppose the crime alleged is torture, or a war crime. Would a prior conviction or acquittal in U.S. courts block a prosecution by Spain or Germany under a universal jurisdiction law over such crimes? Could a prosecution by one of these states block the United States from prosecuting its own national? What if instead the case were referred to an international tribunal, like the International Criminal Court? When would a prosecution in national court bar an international tribunal prosecution, and when would an international tribunal prosecution bar a prosecution in national court?

The language of double jeopardy permeates U.S. and international law. Yet we still don't have clear answers to why or when different "sovereigns" may prosecute for the same crime. These questions highlight a central tension between the very idea of sovereignty and the longstanding, widely held legal intuition that an individual should not be subject to multiple prosecutions for the same offense. The questions also implicate the basic power structure of legal systems like the U.S. federal and international system which purport to be comprised of distinct sovereigns—the several states of the United States and the world's nation-states, respectively.

How to, and how best to, answer these double jeopardy questions present legal and policy challenges that are only going to gain in frequency and importance in an increasingly globalized world with an increasing potential for jurisdictional overlap among sovereigns. Conventional

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1. *See, e.g.*, *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Lanza*, 260 U.S. 377 (1922).

2. *See, e.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959).

3. *Heath v. Alabama*, 474 U.S. 82 (1985).

accounts of how double jeopardy rules work in systems of multiple sovereigns not only fail descriptively to capture the complexity of existing law, but also fall flat as normative depictions of the high-stakes struggle of interests the rules necessarily imply. Now more than ever, lawyers and policy makers need a sophisticated way of thinking about, and resolving, the competing claims of sovereigns to enforce their laws; of defendants not to be prosecuted multiple times for the same crime; of victims to see justice done; and, not least, of the systems of sovereigns themselves to avoid destabilization through prosecutorial overreaching by some members to the affront and provocation of others.

In the U.S. context, the Supreme Court's facile resort to the doctrine of dual sovereignty functions mainly as an analysis-stopper. By labeling successively prosecuting entities separate sovereigns, the Court permits multiple prosecutions and ends all further discussion under the Constitution's Double Jeopardy Clause.<sup>4</sup> Yet how to determine what constitutes a "sovereign" within the meaning of the doctrine is far from clear. And while the doctrine has invited its fair share of criticism (indeed, it is hard to find any commentary that is not critical),<sup>5</sup> there has been little focused effort to peel back the label of "sovereign" and cleanly articulate what underlies its meaning in this jurisprudence.<sup>6</sup> We are left instead with a famously opaque doctrine<sup>7</sup> and a dearth of analytical tools for predicting its future extension.

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4. U.S. CONST. amend. V.

5. See Ronald J. Allen & John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 818 (1985); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 4–28 (1995); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); George C. Thomas III, *Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty*, 1 OHIO ST. J. CRIM. L. 345 (2003); see also Walter T. Fisher, *Double Jeopardy, Two Sovereigns, and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. REV. 1096 (1959); J. A. C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956) [hereinafter Grant, *Successive Prosecutions*]; J. A. C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932) [hereinafter Grant, *The Lanza Rule of Successive Prosecutions*]; Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 CASE W. RES. L. REV. 700 (1963).

6. See e.g., Allen & Ratnaswamy, *supra* note 5, at 817–19.

7. Much criticism leveled at the doctrine is that it is unprincipled, see generally *id.*, or simply the accident of peculiar historical moments. See, e.g., Thomas, *supra* note 5, at 345; Murchison, *supra* note 5, at 383.

The international legal context is even more perplexing. International instruments and state practice seem to point in so many directions at once that the international law of double jeopardy looks to be nothing more than a jumbled mess of partial and often inconsistent rules implying a general doctrinal incoherence. Human rights and humanitarian law instruments guarantee a right against double jeopardy, but only from successive prosecutions by a single state.<sup>8</sup> Extradition treaties guarantee protection from successive prosecutions between states, but only in certain circumstances.<sup>9</sup> State practice is literally all over the map, with some states providing near absolute double jeopardy protection based on a foreign prosecution, and others none at all.<sup>10</sup> At the same time, a clear and uniform international trend appears to be taking hold that would preclude prosecutions based on universal jurisdiction if the defendant has been (or in many cases will be) prosecuted by a state where the crime took place or whose nationals were directly involved.<sup>11</sup> Added to the mix are the statutes of international criminal tribunals, which protect against successive prosecutions as between states and tribunals in some cases but not in others.<sup>12</sup> Perhaps because of this doctrinal disarray, commentary has tended to concentrate on discrete double jeopardy issues,<sup>13</sup> with no work tackling head-on the larger question of whether this apparently discordant body of law and practice might be explicable through a unifying, explanatory theory.<sup>14</sup>

This Article sets out to develop such a theory. The Article then uses the theory to explain, critique, and offer improvements to double jeopardy rules among sovereigns in the U.S. and international legal systems. To be clear from the start, I do not intend to suggest that these two systems are identical; they aren't. Or that double jeopardy rules work exactly the same way in U.S. and international law; they don't. But I do want to use the heuristic and analogical value of each system for the other to come up with

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8. See *infra* Part IV.A.

9. See *infra* Part IV.B.

10. See *infra* Part IV.C.

11. See *infra* Part IV.D.

12. See *infra* Part IV.E.

13. See, e.g., Michele N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 *NORDIC J. INT'L L.* 261 (1995) (discussing application of the double jeopardy principle to the Draft Statute of the ICC, Draft Code of Crimes and the ICTY Statute); Christine Van den Wyngaert & Guy Stessens, *The International Non bis in Idem Principle: Resolving Some of the Unanswered Questions*, 48 *INT'L & COMP. L.Q.* 779 (1999).

14. One author proposes a "core" double jeopardy rule either as a future customary rule or general principle, but does not resolve tensions in present international law and practice. See Gerard Conway, *Ne bis in Idem in International Law*, 3 *INT'L CRIM. L. REV.* 217 (2003).

an innovative and persuasive theory that explains double jeopardy rules in both. I then evaluate those rules and, ultimately, show how they can be improved by the present theory.

My basic premise will be that “sovereignty” for double jeopardy purposes really means the legal concept of jurisdiction—and, more specifically, independent jurisdiction to prescribe, or to make and apply, law. This prescriptive jurisdiction in turn authorizes independent jurisdiction to enforce that law through a separate prosecution.

Part I combines the Supreme Court’s dual sovereignty language with international concepts of jurisdiction to articulate this basic premise. Part II then recasts the history of dual sovereignty in the U.S. federal context using the concepts introduced in Part I. It explains that the doctrine originated out of concurrent federal and state jurisdiction in the U.S. federal system, and that throughout its evolution the Court has consistently justified the doctrine’s application in terms of jurisdiction—and, more specifically, in terms of independent jurisdiction to prescribe and enforce law. The theory therefore both opens up analysis of how and why the Court has employed the dual sovereignty doctrine in the past and provides a helpful predictor of how the Court will extend it in the future.

Parts III and IV apply the jurisdictional theory to the international legal system. Using the theory, Part III derives a few baseline rules of international double jeopardy. It argues that: (1) a state with an independent basis of national jurisdiction deriving mainly from entitlements over national territory and persons is an independent lawgiver, or “sovereign,” for double jeopardy purposes that retains the ability to apply and enforce its own laws through prosecution in the face of prior prosecutions by other states; and (2) the state may do so whether the crime is a national offense (like homicide) or is also an international offense (like genocide); but (3) where a state’s jurisdiction derives solely from a *shared* entitlement with all other states to apply and enforce the international law against universal crimes, it should be blocked from prosecuting again if another state already has prosecuted for the crime in question. Part III concludes by showing that these same rules of international double jeopardy were enunciated in a U.S. Supreme Court opinion from 1820, the same year the Court began to develop the jurisdictional reasoning that underpins the dual sovereignty doctrine in the U.S. federal system today.

Part IV demonstrates that these rules continue to explain modern international law and practice. They explain, for example, why human rights and humanitarian law instruments limit their double jeopardy coverage to successive prosecutions by one state, why extradition treaties

so narrowly and self-consciously construe an exception to the default rule permitting double jeopardy among states, why no general principle of law has developed to prevent double jeopardy among states, and why the one situation in which states overwhelmingly if not uniformly refrain from pursuing successive prosecutions is where their only basis of jurisdiction is the universal nature of the crime under international law. Part IV also uses a jurisdictional analysis to explain double jeopardy protections in international tribunal statutes. Taking as its primary examples the Yugoslavia and Rwanda tribunals (ICTY and ICTR, respectively) and the International Criminal Court (ICC), it describes how the double jeopardy protections in the different tribunal statutes are integrally tied to their jurisdictional provisions, and how these provisions largely create a shared jurisdiction—through either primacy or complementary jurisdiction—between tribunals and national courts, such that when one exercises jurisdiction it extinguishes the jurisdiction of the other, leading to double jeopardy protection between them. Where tribunal statutes do allow for successive prosecutions, it is because the double jeopardy provision in question has reserved a portion of jurisdiction to either the state or the tribunal, upon which that entity successively may prosecute.

Next, the theory not only advances current double jeopardy conversation by making sense of a confused doctrine in highly charged areas, it also facilitates clarity in assessing that doctrine and recommends adjustments to it. Part V accordingly shifts focus to engage some of the theory's more important implications for U.S. and international law as measured against an axial tension in double jeopardy rules among sovereigns: the tension between the individual's right to be free from multiple prosecutions and the sovereign's power to enforce law over activity harmful to its interests. Part V argues that a jurisdictional theory improves conventional analysis in both U.S. and international law to better accommodate this tension. Specifically, the theory brings into an otherwise simplistically one-dimensional sovereignty doctrine not only the interests of other sovereigns and the larger systems they comprise, but also, importantly, the interests of individual defendants.

First, since under the theory a prosecuting entity's "sovereignty" within the U.S. dual sovereignty doctrine derives from the entity's jurisdiction over the defendant, it follows that the exercise of that jurisdiction by either federal or state government must satisfy due process under the Fifth or Fourteenth Amendments to the U.S. Constitution.<sup>15</sup> The Supreme Court's

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15. U.S. CONST. amends. V, XIV.



obtuse dual sovereignty analysis presently ignores this basic constitutional inquiry—a decidedly nuanced, fact-sensitive evaluation geared toward ensuring that a sovereign’s exercise of jurisdiction is not “arbitrary or fundamentally unfair.”<sup>16</sup> The result is an incomplete doctrine divorced from its own intellectual and constitutional roots, and one that completely ignores individual rights. I explain that while a due process evaluation of a successively prosecuting sovereign’s jurisdiction likely would not impact dual sovereignty rulings regarding successive federal/state prosecutions—the original justification for the dual sovereignty doctrine—it does hold potential to change outcomes regarding successive prosecutions between U.S. states or by the federal government when it exercises extraterritorial jurisdiction. And it does so in ways that directly include fairness concerns otherwise wholly omitted by present analysis to the exclusion of individual rights.

Second, international law contains a reasonableness limitation on nation-states’ exercise of jurisdiction that bears strong resemblances to U.S. due process constraints, and that incorporates many of the same considerations.<sup>17</sup> Conceptualizing sovereignty as jurisdiction under this limitation demonstrates the normative appeal of the baseline international double jeopardy rules articulated in Part III and, in particular, of the rule precluding successive prosecutions based solely on universal jurisdiction. A central purpose of universal jurisdiction is to vindicate the rights of victims and the international legal system as a whole through the enforcement of international law where states with close ties to the crimes are either unwilling or unable to prosecute. Human rights interests thus weigh on both sides of the double jeopardy question: on one side is the right of the defendant not to be prosecuted again and again for the same crime, but on the other are the rights of victims to see justice done. The double jeopardy rules I develop for the international system balance effectively the interests of sovereigns, defendants, victims, and the system as a whole.

Lastly, I explore how best to reduce successive prosecutions by those states that *may* successively prosecute so as to protect individuals from multiple prosecutions while still allowing states to act against those who cause direct harm to national interests. I suggest that one way to accomplish this goal is through comity mechanisms that promote communication and coordination among different sovereigns’ enforcement

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16. See *infra* notes 367–73 and accompanying text.

17. See *infra* notes 407–13 and accompanying text.

authorities from the outset of investigatory or prosecutorial efforts. These mechanisms enable states with direct interests in prosecution to represent those interests from the start of a given enforcement action, increasing the likelihood that a single enforcement action in a single forum will vindicate interests of all states with legitimate claims to prosecute. The comity mechanisms tend also to create efficiencies and ease friction for the system at large by encouraging states to internalize *ex ante* the effects of their own enforcement actions on other jurisdictionally interested states. The result is a reduced need for, and probability of, multiple prosecutions for the same crime.

### I. DECONSTRUCTING “SOVEREIGNTY”

#### A. *Double Jeopardy and the Problem of Sovereignty*

The idea that an individual cannot be prosecuted multiple times for the same offense has a long and storied pedigree<sup>18</sup> reaching back to ancient Greece and Rome.<sup>19</sup> It was adopted early on in Church canon law,<sup>20</sup> perpetuated through the Dark Ages,<sup>21</sup> and gained the status of “universal maxim of the common law” in England.<sup>22</sup> At early common law, the plea at bar took two forms, *auterfois acquit de même felonie*—already acquitted of the same offense,<sup>23</sup> and *auterfois convict de même felonie*—already convicted of the same offense.<sup>24</sup> The term double jeopardy itself comes from the U.S. Constitution’s Fifth Amendment guarantee: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>25</sup> Civil law systems<sup>26</sup> and international legal instruments<sup>27</sup> often refer to the principle by its Latin name, *non bis in idem* or *ne bis in idem*—

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18. See *Bartkus v. Illinois*, 359 U.S. 121, 151–55 (1958) (Black, J., dissenting).

19. *Id.* at 151–52 & n.3 (citing sources).

20. *Id.* at 152 & n.4 (citing sources).

21. *Id.*

22. *Id.* at 153 & n.6; WILLIAM BLACKSTONE, 4 COMMENTARIES \*335.

23. *Id.* at \*335–36; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 240–55 (Professional Books Ltd. 1987) (1736).

24. *Id.*

25. U.S. CONST. amend. V.

26. See, e.g., Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Mar. 7, 1987, 75 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.), available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=570](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=570); see discussion *infra* notes 233–35 and accompanying text.

27. See, e.g., A.P. v. Italy, Communication No. 204/1986, Report of the Human Rights Comm., 43d Sess., supp. No. 40, U.N. Doc. A/43/40 (1988) (interpreting the International Covenant on Civil and Political Rights); see also discussion *infra* notes 204–09 and accompanying text.

“not twice for the same thing,”<sup>28</sup> deriving from the Roman maxim *nemo bis vexari pro una et eadem causa*, “a man shall not be twice vexed or tried for the same cause.”<sup>29</sup> “Nobody disputes the justice or the obligation of the rule of former jeopardy in the abstract,”<sup>30</sup> Charles Batchelder famously observed, “the difficulty is in deciding where it shall be applied.”<sup>31</sup>

A fundamental question for any double jeopardy protection is whether different sovereigns successively may prosecute for the same criminal activity. The U.S. Supreme Court has resolved the issue in the context of U.S. federalism by developing the dual sovereignty doctrine. The doctrine “is founded on the . . . conception of crime as an offense against the sovereignty of the government.”<sup>32</sup> It holds that “[w]hen a defendant in a single act violates the (peace and dignity) of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’”<sup>33</sup> No violation of the prohibition on double jeopardy results from successive prosecutions by different sovereigns, according to the Court, because “by one act [the defendant] has committed two offences, for each of which he is justly punishable.”<sup>34</sup> The defendant, in other words, is not being prosecuted twice for the same “offence”<sup>35</sup> if another sovereign successively prosecutes for the same act—even if the second sovereign prosecutes using a law identical to that used in the first prosecution.<sup>36</sup>

By permitting multiple sovereigns to pursue multiple prosecutions for the same criminal activity, the dual sovereignty doctrine immediately raises the follow-up question: how do we tell whether a successive prosecution is truly by another sovereign? Simply invoking the label “sovereign” is not very helpful; standing alone the word reduces to a tautology. It cannot tell us on its own whether a given entity—be it a nation-state, a sub-national state, a territory, or a municipality—is truly a sovereign.<sup>37</sup> Rather, “sovereign” signifies the result or description of some allocation of power, not the reason for that allocation of power.<sup>38</sup>

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28. BLACK'S LAW DICTIONARY 1077 (8th ed. 2004).

29. Conway, *supra* note 14, at 217 & n.1.

30. Charles E. Batchelder, *Former Jeopardy*, 17 AM. L. REV. 735, 749 (1883).

31. *Id.*

32. *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

33. *Id.* (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

34. *Id.* (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852)).

35. U.S. CONST. amend. V.

36. *See Heath*, 474 U.S. at 87–88.

37. Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, et cetera*, 68 FORDHAM L. REV. 1 (1999).

38. Allen & Ratnaswamy, *supra* note 5, at 818.

The Supreme Court has tried to pour some content into the word for purposes of the dual sovereignty doctrine. The key to ascertaining dual sovereigns, according to the Court, “turns on whether the two [prosecuting] entities draw their authority to punish the offender from distinct sources of power.”<sup>39</sup> Thus “the sovereignty of two prosecuting entities for [double jeopardy] purposes is determined by the ultimate source of the power under which the respective prosecutions were undertaken.”<sup>40</sup> If there are two “ultimate sources of power,” there are two sovereigns, and consequently there can be two prosecutions without violating the prohibition on double jeopardy.<sup>41</sup>

But what does “ultimate source of power” mean? The Court doesn’t quite explain. It does however tell us what the *features* of such power are: “Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.”<sup>42</sup> Or to rephrase it with a bit more detail, “each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each is exercising its own sovereignty, not that of the other.”<sup>43</sup> Thus an entity is “sovereign” when it has the power—*independently*—(1) to determine what shall be an offense, and (2) to punish such offenses.<sup>44</sup> And when it exercises these powers, it exercises its own sovereignty, not that of other sovereigns.<sup>45</sup> Multiple prosecutions attend multiple sovereigns because “[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.”<sup>46</sup>

In what follows I argue that the power to determine and enforce law is really the legal concept of jurisdiction, and that “ultimate source of power” is really an autonomous lawgiver with independent jurisdiction to prescribe and enforce law—the hallmarks of “sovereignty” within the meaning of the dual sovereignty doctrine.

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39. *Heath*, 474 U.S. at 88.

40. *Id.* at 90 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)) (internal quotations omitted).

41. *Id.*

42. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

43. *Heath*, 474 U.S. at 89–90 (quoting *Wheeler*, 435 U.S. at 320) (internal quotations omitted).

44. *Id.* at 89.

45. *Id.* at 89–90.

46. *Id.* at 93.

### B. *Sovereignty Means Jurisdiction*

Jurisdiction both functionally and conceptually informs the notion of sovereignty. Functionally, it is a legal term for power.<sup>47</sup> If a court or legislature has no jurisdiction over you, it has no power over you. Here is where international law helps out the analysis. International law regularly divides jurisdiction into three types: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.<sup>48</sup> Jurisdiction to prescribe, or prescriptive jurisdiction, is the power to make and apply law to persons or things.<sup>49</sup> Generally speaking, this power is typically, though not always, exercised by a legislative body,<sup>50</sup> such as the Congress in the United States (or a state legislature in one of the several U.S. states). Jurisdiction to adjudicate, or adjudicative jurisdiction, is the power to subject an individual to adjudicative process.<sup>51</sup> This power is typically, though again not always, exercised by the judiciary.<sup>52</sup> And jurisdiction to enforce, or enforcement jurisdiction, is self-evidently the power to enforce law, which is often carried out through prosecution backed up by police force.<sup>53</sup> Importantly, adjudicative and enforcement jurisdiction must rely upon some prescriptive jurisdiction.<sup>54</sup> Thus if a prosecuting entity has no prescriptive jurisdiction over a particular activity, it has no power to subject the parties to that activity to judicial process and enforcement.<sup>55</sup>

Framed in the Supreme Court's dual sovereignty language, prescriptive jurisdiction represents (1) the power "to determine what shall be an offense,"<sup>56</sup> and adjudicative and enforcement jurisdiction represent (2) the power "to punish such offenses."<sup>57</sup> Where an entity has an independent prescriptive jurisdiction, it is functionally a "sovereign" as envisaged by the dual sovereignty doctrine: it independently may determine what shall be an offense, and may marshal its adjudicative and enforcement jurisdiction to punish that offense.

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47. See BLACK'S LAW DICTIONARY, *supra* note 28, at 867.

48. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

49. *Id.* § 401(a).

50. *Id.* § 401 & intro. note.

51. *Id.* § 401(b).

52. *Id.* § 401 & intro. note.

53. *Id.* § 401(c) & intro. note.

54. *Id.* § 431 cmt. a.

55. *Id.*

56. *Heath v. Alabama*, 474 U.S. 82, 89–90 (1985).

57. *Id.*

### C. *Ultimate Source of Power Means Lawgiver*

Conceiving of sovereignty as independent jurisdiction to prescribe law is moreover conceptually and etymologically faithful to the term jurisdiction, which derives from the Latin *jus* or *juris* (law) plus *dicere* (speak).<sup>58</sup> At its root, jurisdiction means “the speaking of law.”<sup>59</sup> For any given community the law-speaker is manifest in the body—and, even more specifically, in the mouth—of the sovereign. This was quite literally the case in absolute monarchies, where the King or Queen pronounced the law.<sup>60</sup> It is abstractly captured in theocracies, where God speaks through earthly interpreters of religious texts. And it can be generalized to democratic rule, where “popular sovereignty” prevails and government mobilizes when “the people have spoken.” As the literal or figurative mouthpiece of the law, the sovereign is what we might think of as the lawgiver for those within its jurisdiction—those for whom it “speaks law.” The sovereign’s unique lawgiving voice is what gives rise to its power independently to determine offenses and to punish them; in other words, what makes it sovereign within the meaning of the dual sovereignty doctrine.

To cast this all in the Supreme Court’s terminology then, “ultimate source of power”<sup>61</sup> represents the law-speaker or lawgiver; the lawgiver has the power “independently to determine what shall be an offense”<sup>62</sup>—or to exercise prescriptive jurisdiction, which authorizes its power “to punish such offenses”<sup>63</sup>—or to exercise adjudicative and enforcement jurisdiction.

## II. AS APPLIED TO THE U.S. FEDERAL SYSTEM

This Part traces the origins and development of the dual sovereignty doctrine in the U.S. system and explains the doctrine’s entire history in terms of jurisdiction. My purpose is threefold: to look through the term “sovereign” to understand what is really motivating the Court’s analysis; to lay some analogical groundwork for the international system discussed

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58. SHORTER OXFORD DICTIONARY ON HISTORICAL PRINCIPLES 1472 (William R. Trumbull & Angus J. Stevenson eds., 5th ed. 2002).

59. Costas Douzinas, *The Metaphysics of Jurisdiction*, in JURISPRUDENCE OF JURISDICTION 21, 22 (Shaun McVeigh ed., 2007).

60. JEAN-LUC NANCY, THE BIRTH TO PRESENCE 132 (Brian Holmes et al. trans., Stanford Univ. Press 1993).

61. *Heath*, 474 U.S. at 90.

62. *Id.* at 89–90.

63. *Id.*

in the next two Parts; and to set the stage for a critique of present U.S. dual sovereignty doctrine in Part V.

The dual sovereignty doctrine took shape in early Supreme Court jurisprudence addressed to the question of concurrent jurisdiction between federal and state governments. Justice Johnson began setting the doctrine's foundation in his 1820 concurrence in *Houston v. Moore*.<sup>64</sup> *Houston* upheld Pennsylvania's ability to try a militiaman for failing to report for federal service.<sup>65</sup> Justice Washington issued the judgment of the Court, concluding that the state court martial could enforce federal law.<sup>66</sup> For Justice Washington, the question presented was whether the state court could exercise concurrent adjudicative jurisdiction with federal courts to enforce federal law, which he answered affirmatively.<sup>67</sup> As David Currie has noted, "Washington, however, cannot be said to have spoken for the Court in *Houston*,"<sup>68</sup> because of the disagreement on the reasoning for the judgment.<sup>69</sup> Justice Johnson was clear on this, explaining at the end of his concurrence that "there is no point whatever decided, except that the fine was constitutionally imposed" by the state court,<sup>70</sup> and that "[t]he course of reasoning by which the judges have reached this conclusion are [sic] various, coinciding in but one thing, viz., that there is no error in the judgment [below]."<sup>71</sup>

For Johnson, the case had more to do with concurrent prescriptive jurisdiction. According to Johnson, Houston's complaint was "that his offence was an offence against the laws of the United States, [and] that he is liable to be punished under [federal] laws, and cannot, therefore, be constitutionally punished under the laws of his own State."<sup>72</sup> Johnson rejected this argument, and asked rhetorically: "Why may not the same offence be made punishable both under the laws of the States, and of the United States?"<sup>73</sup> He answered himself that "[e]very citizen of a State owes a double allegiance; he enjoys the protection and participates in the

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64. 18 U.S. (5 Wheat.) 1 (1820).

65. *Id.*

66. *Id.* at 25–32.

67. *Id.*

68. David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 702 (1982).

69. *Id.* at 705 (explaining that Washington "noted that while all but two Justices agreed that the judgment should stand, 'they do not concur in all respects in the reasons which influence my opinion.' What is peculiar is that except for Johnson, who wrote a long concurrence, we do not know the grounds on which the other Justices voted." (citing *Houston*, 18 U.S. at 32–47)).

70. *Houston*, 18 U.S. at 47 (Johnson, J., concurring).

71. *Id.*

72. *Id.* at 32–33.

73. *Id.* at 33.

government of both the State and the United States.”<sup>74</sup> Johnson observed that the “exercise of this concurrent right of punishing is familiar,”<sup>75</sup> giving the example of robbing the mail on the highway, “which is unquestionably cognizable as highway-robbery under the State laws,” but also a federal offense under U.S. law.<sup>76</sup>

Johnson then addressed a main counterargument to such concurrent federal and state jurisdiction; namely “if the States can at all legislate or adjudicate on the subject” of federal regulation, “they may . . . embarrass[] the progress of the general government.”<sup>77</sup> That is, if state jurisdiction overlaps with federal jurisdiction, the states could thwart the federal government’s ability to carry out federal lawmaking and enforcement functions. One obvious way for the states to do this, of course, would be to acquit an individual in state court so as to insulate him from prosecution in federal court for the same act. Or, as Johnson put it, “[i]t is true, if we could admit that an acquittal in the State Courts could be pleaded in bar to a prosecution in the Courts of the United States, the evil might occur.”<sup>78</sup> Yet such a reading of double jeopardy doctrine, in Johnson’s view, would be wrong:

But this is a doctrine [prior acquittal as a bar to double jeopardy] which can only be maintained on the ground that an offence against the laws of the one government, is an offence against the other government; and can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the State Courts by statutory provisions of the United States. . . . [C]rimes against a government are only cognizable in its own Courts, or in those which derive their right of holding jurisdiction from the offended government.<sup>79</sup>

Because the state government and the federal government—as distinct lawgivers—enjoy distinct jurisdictions to make and apply distinct laws, distinct prosecutions would be permissible.

Indeed, the only circumstance in which double jeopardy protection against a successive federal prosecution could arise, according to Johnson, would be where state courts acted on behalf of the federal government in

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74. *Id.*

75. *Id.* at 34.

76. *Id.*

77. *Id.* at 35.

78. *Id.*

79. *Id.*



applying *federal law*, i.e., where “jurisdiction is vested in the State Courts by statutory provisions of the United States.”<sup>80</sup> In this limited circumstance, state courts would act as the adjudicative and enforcement agents not of state law, but of federal law. They would “derive their right of holding jurisdiction”<sup>81</sup> not from the state’s lawgiving authority to prescribe offenses, but from the federal government’s, and would therefore be constrained to apply not state, but federal law.<sup>82</sup> A successive federal court prosecution in these circumstances would lead to double jeopardy problems since the doctrine prohibits successive prosecutions under the same law—here, federal law.<sup>83</sup>

A few mid-nineteenth century cases entrenched Johnson’s concurrent jurisdiction reasoning in *Houston* and foreshadowed its evolution into the dual sovereignty doctrine. In *Fox v. Ohio*,<sup>84</sup> the defendant challenged her state conviction for passing counterfeit coin on the grounds that only the federal government had jurisdiction over that offense. The Court disposed of the challenge by distinguishing counterfeiting, which was an offense exclusively within the power of Congress to proscribe, from passing counterfeit coin, which was a fraud punishable under state law.<sup>85</sup>

The Court then discussed the possibility, raised by the defendant<sup>86</sup> and by Justice McLean in dissent,<sup>87</sup> that because of concurrent federal and state jurisdictions a defendant could be prosecuted and punished twice “for acts essentially the same.”<sup>88</sup> The Court conceded the possibility, but hedged that “the benignant spirit in which the institutions both of the State and federal systems are administered” would make such double jeopardy exceptional as a policy matter.<sup>89</sup> The Court was careful to point out, however, that if the policy were the other way around—if instead of being the exception, double jeopardy by state and federal prosecutions were the regular practice—such practice would be entirely permissible. Immediately after speculating that successive prosecutions likely would

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80. *Id.*

81. *Id.*

82. *See* *Bartkus v. Illinois*, 359 U.S. 121, 130 (1958).

83. Washington’s opinion, which viewed the state court in *Houston* as enforcing federal law, *see supra* note 67, contemplated this type of double jeopardy bar. *See Houston*, 18 U.S. at 31 (explaining that “if the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other”).

84. 46 U.S. 410, 433 (1847).

85. *Id.* at 433–34.

86. *Id.* at 428.

87. *Id.* at 439–40 (McLean, J., dissenting).

88. *Id.* at 435.

89. *Id.*

only “occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor,”<sup>90</sup> the Court explained:

But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.<sup>91</sup>

Thus even if successive prosecutions by state and federal governments were the norm, it still would not undermine the power of each government to prohibit, prosecute, and punish “offences falling within the competency,” or jurisdiction, “of [these] different authorities,”<sup>92</sup> or lawgivers. And because passing counterfeit coin was “clearly within the rightful power and jurisdiction of the State [of Ohio],” the case raised no constitutional problem.<sup>93</sup> Three years later in *United States v. Marigold*,<sup>94</sup> the Court affirmed *Fox*’s concurrent jurisdiction holding, explaining that the states and Congress each had independent jurisdiction to prosecute and punish uttering false currency.<sup>95</sup>

Just two years later, *Moore v. Illinois*<sup>96</sup> solidified the jurisdictional foundation laid by *Houston*, *Fox*, and *Marigold*. *Moore* involved a challenge to a state court conviction under an Illinois law outlawing harboring fugitive slaves.<sup>97</sup> Advancing what by now should be a familiar pair of arguments, *Moore* contended that the federal Fugitive Slave Act preempted the Illinois statute such that he could not be prosecuted under state law and raised the related objection that if the Court ruled the Illinois statute valid then he impermissibly could be subject to multiple prosecutions for the same offense.<sup>98</sup> In response to the first contention, the Court found no federal preemption but rather that Illinois had an independent jurisdiction to prohibit the activity in question; that is, the statute was “but the exercise of the power which every State is admitted to possess, of defining offences and punishing offenders against its laws.”<sup>99</sup>

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. 50 U.S. 560 (1850).

95. *Id.* at 569–70.

96. 55 U.S. 13 (1852).

97. *Id.*

98. *Id.* at 17.

99. *Id.* at 18.

And in response to the double jeopardy concern, the Court announced the dual sovereignty doctrine:

An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.<sup>100</sup>

The Supreme Court repeated *Moore's* concurrent jurisdiction reasoning in a number of opinions<sup>101</sup> before finally confronting a true case of multiple prosecutions in its 1922 decision *United States v. Lanza*.<sup>102</sup> Given

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100. *Id.* at 19–20.

101. *See, e.g.*, *United States v. Lanza*, 260 U.S. 377 (1922). The only relevant opinion during this period that arguably did not affirm the dual sovereignty doctrine was *Nielson v. Oregon*, 212 U.S. 315 (1909). There, a Washington resident appealed his Oregon conviction for purse net fishing on the Columbia River, the common boundary between Oregon and Washington. *Id.* The activity was explicitly permitted under Washington law but prohibited under Oregon law. *Id.* at 321. By legislation Congress had granted both states a shared jurisdiction over the river in order “to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel.” *Id.* at 320. The Court ruled that Oregon could not punish that which Washington permitted within its own territory (including the river). *Id.* at 321. In reaching its decision the Court noted in dicta that

where an act is . . . prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other.

*Id.* at 320. Some commentators have seized upon this passage as supporting a double jeopardy bar among different sovereigns. *See, e.g.*, Grant, *Successive Prosecutions*, *supra* note 5, at 1–2; Murchison, *supra* note 5, at 386.

Yet under a theory that equates sovereignty with independent prescriptive jurisdiction, it is possible to make sense of the *Nielson* dicta, especially in light of the Court's holding. The key is to remember that the shared jurisdiction of Washington and Oregon over the river was a product of congressional legislation authorizing that shared jurisdiction. *Neilson*, 212 U.S. at 320. If sovereignty is independent jurisdiction to prescribe law, and Oregon and Washington share jurisdiction such that neither can prohibit something that the other permits, *id.* at 319, then neither state really can be said to have independent prescriptive jurisdiction over the river, i.e., sovereignty. The reason a conviction or acquittal in the courts of one state for an offense punishable by the laws of both would bar successive prosecution by the other is that there is only one prescriptive jurisdiction—granted by Congress—that both states share over the river, albeit one that each may enforce in its own courts. But this single, shared jurisdiction to prescribe a particular offense cannot be enforced multiple times.

102. *Lanza*, 260 U.S. at 377. *See United States v. Cruikshank*, 92 U.S. 542, 550–51 (1875)

this history, the reasoning inspiring *Lanza* should come as no surprise. Upholding a successive federal prosecution under the prohibition-era Volstead Act after a state court conviction for the same acts, the Court explained: “Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State.”<sup>103</sup> The independent judgment to determine and enforce law, the Court elaborated, “is an inseparable incident of independent legislative action in distinct jurisdictions.”<sup>104</sup> Thus in the first true application of the dual sovereignty doctrine, the Court explicitly employed the concept of jurisdiction—and, more specifically, independent prescriptive jurisdiction to determine offenses—to justify its holding.

The Court would go on to use the dual sovereignty doctrine to uphold successive federal court prosecutions following state court convictions for the same acts;<sup>105</sup> successive state court prosecutions (and convictions) following acquittal of the same acts in federal court;<sup>106</sup> successive federal court prosecutions following conviction for the same acts in Indian Tribal Courts;<sup>107</sup> and successive prosecutions in different state courts for the same act where the defendant pleaded guilty in the first case to avoid the death penalty but was sentenced to death in the second.<sup>108</sup>

On the other hand, where the Court has been unwilling to find a dual sovereignty exception to double jeopardy, it has stressed the absence of an independent prescriptive jurisdiction by each prosecuting entity and has emphasized that both entities draw their jurisdiction from the same lawgiving source. In *Grafton v. United States*, for example, the Court held that a homicide prosecution by military court martial foreclosed a successive prosecution for the same homicide by the civil justice system in the then-U.S. territory of the Philippines.<sup>109</sup> The Articles of War, through

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(observing that because the states and the federal government “have separate jurisdictions . . . it may sometimes happen that a person is amenable to both jurisdictions for one and the same act,” consequently “[h]e owes allegiance to two sovereignties, and claims protection from both”; “[h]e owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to *its laws*. In return, he can demand protection from each within its own jurisdiction.”).

103. *Lanza*, 260 U.S. at 381.

104. *Id.*

105. *Abbate v. United States*, 359 U.S. 187 (1959).

106. *Bartkus v. Illinois*, 359 U.S. 121 (1959).

107. *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2003).

108. *Heath v. Alabama*, 474 U.S. 82 (1985).

109. 206 U.S. 333 (1907).

which Congress had established court martial jurisdiction, conferred upon courts martial a general peacetime “jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public.”<sup>110</sup> The Court explained that this authorization was limited to those crimes “in violation of public law enforced by the civil power” in the territory where the court martial sat.<sup>111</sup> Based on this general authorization, the court martial prosecuted Grafton for “the crime of homicide as defined by the Penal Code of the Philippines.”<sup>112</sup> Because the court martial applied the civil law definition of homicide, the Court found that the successive civil court prosecution at issue in the case was “for the identical offense.”<sup>113</sup>

The Supreme Court then turned to the argument that, notwithstanding the court martial use of the Filipino criminal code definition of homicide, the military and civil authorities in a U.S. territory constituted distinct sovereigns—each with an independent power to prescribe offenses and to prosecute—and consequently no double jeopardy barrier arose to block a successive civil court prosecution for the same acts.<sup>114</sup> The Court rejected this argument and resolved the issue entirely in terms of jurisdiction.<sup>115</sup>

Because Congress had exclusive prescriptive jurisdiction over the territories, and created the territorial courts and authorized their adjudicative jurisdiction, the courts were capable of applying only U.S. law.<sup>116</sup> The Court found “[t]he jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount.”<sup>117</sup> It followed that “[i]f . . . a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States.”<sup>118</sup> Since both the military court martial and the territorial civil court derived jurisdiction from the U.S. government, and thus necessarily prosecuted for a crime against the laws of the United

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110. *Id.* at 351.

111. *Id.* at 348. Indeed, “[t]he act done is a civil crime, and the trial is for that act.” *Id.* at 347. The only reason the trial would take place in military court, and not civil court, is that the military court had personal jurisdiction over the accused (although the civil courts also could prosecute if they were to first gain custody). *Id.*

112. *Id.* at 349.

113. *Id.*

114. *Id.* at 351.

115. *Id.* at 352.

116. *Id.* at 354–55.

117. *Id.*

118. *Id.* at 352.

States, “a second trial of the accused for that crime in the same or another court, civil or military, of the same government” violated double jeopardy.<sup>119</sup>

The origins and development of the dual sovereignty doctrine thus clearly show that the term “sovereign” as it has been used by the Supreme Court is best understood as the legal concept of jurisdiction and, more specifically, independent jurisdiction to prescribe law. Parts III and IV show how this understanding fits international law and practice, and Part V uses it to expose constitutional deficiencies in the Supreme Court’s present dual sovereignty analysis.

### III. AS APPLIED TO THE INTERNATIONAL LEGAL SYSTEM

This Part adapts to the international legal system the argument that sovereignty in the double jeopardy context really means independent jurisdiction to prescribe law. I discern two kinds of prescriptive jurisdiction in international law. One kind I label “national jurisdiction”; the other I label “international jurisdiction.” National jurisdiction derives from what we typically think of as sovereignty in international law and relations. It springs from independent entitlements of each individual state vis-à-vis other states in the international system to make and apply its own law—principally, from entitlements over national territory and persons. We might think of national courts exercising national jurisdiction and applying national law in the international system as roughly analogous to U.S. state courts applying their own state’s law in the U.S. federal system.

What I will refer to as international jurisdiction, on the other hand, derives from a state’s shared entitlement—along with all other states as members of the international system—to enforce international law. At the risk of stretching an analogy beyond its natural breaking point, we might think of national courts exercising international jurisdiction, and thus applying and enforcing international law, as roughly analogous to U.S.

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119. *Id.* On this logic, the Court later found that a municipality is not a distinct sovereign from a state because, like Congress’s power over the territories, the state legislature had the power “to establish, and to abolish, municipalities[,] to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.” *Waller v. Florida*, 397 U.S. 387, 393 (1970) (internal quotations omitted). This comports with “the traditional view . . . that . . . the constitutional status of local governments [rests] entirely on the theory that a local government is merely an administrative arm of the state, utterly lacking in autonomy or in constitutional rights against the state that created it.” Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 85 (1990); see also *id.* at 7–8.

federal courts geographically sitting in different U.S. states but applying and enforcing the same federal law.

In short, two different kinds of entitlements authorize two different kinds of jurisdiction, and ultimately come to represent two different kinds of lawgivers or “sovereigns” for double jeopardy purposes: one national and the other international. This analysis produces three basic double jeopardy rules for the international legal system that will be illustrated below.

### A. National Jurisdiction

If sovereignty really means jurisdiction within the meaning of the dual sovereignty doctrine, translating the doctrine to the international realm creates an instant linguistic circularity. The reason is that the term sovereignty is often invoked to imply that which authorizes a nation-state’s jurisdiction in the first place, to wit: State A has jurisdiction over State A territory because State A is “sovereign” over its territory. Hence the regularly invoked combination: “sovereign jurisdiction.” And hence the circularity: sovereign = jurisdiction = sovereign again within the meaning of the dual sovereignty doctrine.

Our first step is to unpack this circularity. We can begin by breaking out what we mean by the first “sovereign” in the equation; that is, by considering what authorizes an individual state’s jurisdiction under international law. Here the first “sovereign” is shorthand, again containing no real independent analytic force,<sup>120</sup> for an established list of state entitlements<sup>121</sup> recognized by international law that, taken together, essentially define the state as a “state.”<sup>122</sup> For example, principal among these entitlements is power over a certain piece of geographic territory.<sup>123</sup> To avoid too much confusion, instead of calling these entitlements “sovereign” entitlements we can call them “national” entitlements. Thus State A has jurisdiction over State A territory because of State A’s national entitlement, as recognized by international law, over its territory. And

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120. See *supra* Part I.A.

121. I borrow the “entitlement” terminology here from Anthony D’Amato. See Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1113 (1982) [hereinafter D’Amato, *Human Rights*]; Anthony D’Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293, 1308 (1984) [hereinafter D’Amato, *Is International Law Really “Law”?*]. For a recent interesting and persuasive discussion of the universal jurisdictional entitlement to prosecute, see Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389 (observing the inefficiencies and obstacles universal jurisdiction poses to international peace-making).

122. D’Amato, *Is International Law Really “Law”?*, *supra* note 121, at 1308.

123. *Id.*

instead of calling this State A's "sovereign jurisdiction" we can call it State A's "national jurisdiction." Accordingly, national entitlement = national jurisdiction = sovereign within the meaning of the dual sovereignty doctrine.

The list of entitlements recognized by international law authorizing a state's national jurisdiction is fairly intuitive. As already mentioned, a state legitimately may claim jurisdiction over activity that occurs, even in substantial part, within its territory.<sup>124</sup> This is called subjective territoriality.<sup>125</sup> A state also may claim jurisdiction over activity that does not occur but that has an effect within its territory, or what is called objective territoriality.<sup>126</sup> Furthermore, a state may claim jurisdiction over activity that involves its nationals.<sup>127</sup> Where the acts in question are committed by a state's nationals, the state may claim active personality jurisdiction.<sup>128</sup> And where the acts victimize a state's nationals, the state may claim passive personality jurisdiction.<sup>129</sup> Additionally, under the protective principle a state may claim jurisdiction over activity that is directed against the state's security and/or its ability to carry out official state functions, such as its exclusive right to print state currency.<sup>130</sup>

Each of these entitlements relates distinctly back to the particular state claiming jurisdiction—whether to its territory, to punishing or protecting its nationals, or to affirming its very statehood.<sup>131</sup> And because international law recognizes multiple national entitlements, there may well be multiple states with national jurisdiction over a given activity. Thus Germany may claim jurisdiction over acts committed by a German national in the United States,<sup>132</sup> but clearly so too may the United States.<sup>133</sup> In such cases there are overlapping or concurrent national jurisdictions.<sup>134</sup>

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124. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

125. *See id.*; *see also* Harvard Research in Int'l Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 484–87 (1935) [hereinafter Harvard Research Draft].

126. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c); *see also* Harvard Research Draft, *supra* note 125, at 487–94.

127. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2).

128. *See id.*; *see also* BARTON LEGUM, INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 211 (American Bar Association 2005); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: U.S. LAW AND PRACTICE 346–49 (3d ed. 1996).

129. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) cmt. g.

130. *Id.* § 402(3) cmt. f.

131. *See* Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168 (Stephen Macedo ed., 2004).

132. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(2).



Yet the list of national entitlements also circumscribes the jurisdiction of states. While the entitlements authorize the projection of one state's laws to activity taking place in other states, for example where activity abroad affects the first state's territory or involves its nationals, such extraterritorial prescriptive jurisdiction still requires some measurable and objective nexus to the first state's national entitlements.<sup>135</sup> For instance, absent some nexus, Germany may not apply its racial hate speech laws to speech by U.S. nationals, speaking only in the United States and having no connection to Germany.

Finally, within the parameters of its national jurisdiction a state enjoys a relatively free hand under international law to exercise its lawgiving power however it chooses. With the notable exception that it may not prescribe laws contrary to fundamental norms of international law<sup>136</sup>—for example, a state may not, under international law, legislatively endorse or permit genocide<sup>137</sup>—international law leaves states at great liberty to regulate whatever conduct they deem deserving of regulation in essentially whatever regulatory terms they like. Thus the United States claims jurisdiction over acts that occur in the United States or involve U.S. nationals, and Germany claims jurisdiction over acts that occur in Germany or involve German nationals. And both the United States and Germany may pass whatever laws they like, in pretty much whatever terms they like, criminalizing pretty much whatever activity they like, where that activity takes place within their geographic borders or involves their nationals.

To sum up then, international law contains multiple bases of national jurisdiction. These bases of jurisdiction, or sources of lawgiving power, derive from a state's independent national entitlements as recognized by international law; namely, the state's entitlement over its territory, its entitlement to punish and protect its nationals, and its entitlement to secure itself as a state. Moreover, when states seek to regulate activity falling within the compass of their national jurisdiction, they largely are free to

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133. *See id.* § 402(1)(a).

134. *See, e.g.*, Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30-1 (Sept. 7).

135. *See* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 169-75 (2007).

136. *Cf.* Marcel Brus, *Bridging the Gap between State Sovereignty and International Governance: The Authority of Law*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 24 (Gerard Kreijen ed., Oxford 2004).

137. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

employ their domestic lawgiving apparatus however they see fit by defining offenses according to their own individual—and independent—lawgiving prerogatives. It follows that when a state prescribes an offense against its laws and exercises its adjudicative and enforcement jurisdiction by prosecuting the perpetrator of that offense, the state is exercising its own national entitlements. Or, we might say—to borrow the Supreme Court’s phrase—it “is exercising its own sovereignty, not that of . . . other [sovereigns].”<sup>138</sup>

### *B. International Jurisdiction*

While each base of national jurisdiction just described relies upon some nexus to a national entitlement of the state claiming jurisdiction, which authorizes and circumscribes the reach of that state’s national lawgiving authority in relation to other states, there is another base of jurisdiction in international law that requires no nexus at all. That base is universal jurisdiction.<sup>139</sup> According to this doctrine, the very commission of certain crimes denominated universal under international law engenders jurisdiction for all states irrespective of where the crimes occur or which state’s nationals are involved.<sup>140</sup> The category of universal crime began long ago with piracy,<sup>141</sup> expanded in the wake of World War II, and is now generally considered to include serious international human rights and humanitarian law violations like genocide, crimes against humanity, war crimes, torture, and, most recently, certain crimes of terrorism.<sup>142</sup>

Instead of deriving from a state’s independent national entitlements, universal jurisdiction derives from the commission of the crime itself under international law. It is the international nature of the crime—its very substance and definition under international law—that gives rise to jurisdiction for all states. Thus while a state may not, without a nexus to its national entitlements, extend its national prescriptive reach into the territories of other states, international law extends everywhere and

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138. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

139. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

140. *See id.*; Leila Nadya Sadat, *Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 246 (2001).

141. *See United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820).

142. *See, e.g., United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)); *see also* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION Principle 2(1) (Stephen Macedo ed., 2001), available at [http://www.law.depaul.edu/centers\\_institutes/ihri/downloads/Princeton%20Principles.pdf](http://www.law.depaul.edu/centers_institutes/ihri/downloads/Princeton%20Principles.pdf).

without limitation the international prohibition on universal crimes.<sup>143</sup> Universal jurisdiction consequently has nothing to do with any particular state's independent *national* jurisdiction; rather it is a base of *international* jurisdiction: it authorizes states not to enforce any distinctly national entitlement but to enforce a shared international entitlement to suppress universal crimes as prescribed by international law.<sup>144</sup>

For instance, justifying Israel's jurisdiction in the famous *Eichmann* case over war crimes and crimes against humanity committed before the state of Israel even existed, the Israeli Supreme Court explained: "[I]nternational law [enforces itself] by authorizing the countries of the world to mete out punishment for the violation of its provisions, which is effected by putting these provisions into operation either directly or by virtue of municipal legislation which has adopted and integrated them."<sup>145</sup> More recently, Spain's Constitutional Court made the point emphatically when it upheld universal jurisdiction over crimes committed in Guatemala by Guatemalans against Guatemalans, and having no link to Spain: "The international . . . prosecution which the principle of universal justice seeks to impose is based exclusively on the specific characteristics of the crimes which are subject to it, where the damage (as in the case of genocide) transcends the specific victims and affects the International Community as a whole."<sup>146</sup> The Court emphasized that "the prosecution and punishment of [universal crimes] constitute not just a shared commitment but also a shared interest of all States, and the legitimacy of this [jurisdiction], as a consequence, does not depend on particular interests of each of the States

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143. This argument is spelled out in more detail in Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149 (2007).

144. Professor Sadat distinguishes between "universal international jurisdiction," exercised by the international community through international tribunals, and "universal inter-state jurisdiction," exercised by individual states through national courts. Sadat, *supra* note 140, at 246–47; Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 412 (2000); Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 974–75 (2006). This helpfully explains the difference between international adjudicative jurisdiction, created by international tribunal statutes, and national adjudicative jurisdiction, created by national law. My argument here is that as a matter of prescriptive jurisdiction individual states exercising universal jurisdiction are acting as decentralized enforcers of international law. By their very nature, universal prescriptions—whether adjudicated by international tribunals or national courts—derive from the same source of lawgiving authority: international law. The adjudicative bodies that apply this law may be creatures of either international treaty or national legislation, but they are enforcing the same—international—law.

145. *Israel v. Eichmann* [1962] IsrSC 16(1) 2033, *reprinted in* 2 LEON FRIEDMAN, *THE LAW OF WAR* 1664 (Fred L. Israel & William Hansen eds., 1972).

146. *Guatemala Genocide*, STC, Sept. 26, 2005 (No. 237), *available at* <http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html> (English translation on file with author).

... [and] is not configured around links of connection founded on particular state interests.”<sup>147</sup>

The upshot is that while states collectively through their common and coordinated practice contribute to international lawmaking, including the law of universal jurisdiction, a single state cannot *unilaterally* and subjectively determine what crimes are within its universal jurisdiction—that is a matter of international, not national, law.<sup>148</sup> For example, Germany cannot just decide on its own that racial hate speech is now a universal crime over which it might assert jurisdiction around the world, including racial hate speech in the United States involving U.S. nationals and having no connection to Germany. Of course, states control whether and to what degree their courts may enforce universal jurisdiction. Depending on how their domestic laws view international law, states often must legislatively implement or “transform” this international legal power of universal jurisdiction into their national laws so that they might exercise it in domestic courts.<sup>149</sup> But what is important is that Germany, or any other state, cannot unilaterally define its universal jurisdiction in relation to other states, that is to say, the crimes giving rise to such jurisdiction—again, that is exclusively a matter of international law.

Because the crime itself generates jurisdiction, courts must use the definition of that crime, as prescribed by international law, when prosecuting on universal jurisdiction grounds; otherwise there is no jurisdiction. Thus the exercise of universal adjudicative jurisdiction by states (through their courts) depends fundamentally on the application of the substantive law of universal prescriptive jurisdiction. And this substantive law, or the definitions of universal crimes, is a matter of international law. Where courts invent or exaggerate the definition of the crime on which they claim universal jurisdiction, their jurisdiction conflicts with “the very international law upon which it purports to rely.”<sup>150</sup> Although universal jurisdiction is a customary international law, the most accurate and readily available definitions of universal crimes appear in treaties, which largely embody the customary definitions.<sup>151</sup>

The takeaway for the present thesis is that universal jurisdiction is foundationally different from national jurisdiction. Its jurisdictional anchor for states, or source of lawgiving power, is distinctly *international*—i.e.,

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147. *Id.*

148. Colangelo, *supra* note 143, at 161.

149. *See infra* notes 172–73.

150. Colangelo, *supra* note 143, at 153.

151. *Id.* at 169–82.

the international legal system's interest in suppressing certain international crimes no matter where they occur and whom they involve. Furthermore, when individual states wish to implement their universal jurisdiction through domestic legislation and enforce it in domestic courts, they are constrained to determine the crimes they adjudicate as the crimes are determined under international law. A state may not—as it may when exercising its *national* jurisdiction—criminalize essentially any activity it likes in any terms it likes according to its own independent lawgiving prerogative. The primary lawgiver, rather, is the international legal system, and individual states exercising universal jurisdiction merely act as decentralized enforcement vehicles for that lawgiver.

### *C. Three Rules of International Double Jeopardy*

Based on the foregoing analysis of the international law of jurisdiction, I want to lay down three basic rules of international double jeopardy:

Rule (1): a national prosecution applying and enforcing a national law does *not* erect a bar to successive prosecutions by other states with national jurisdiction over the crime in question; similarly,

Rule (2): a national prosecution applying and enforcing a national law that incorporates an international legal prohibition on a universal crime does *not* erect a bar to successive prosecutions by other states with national jurisdiction over the crime in question; *however*,

Rule (3): a national prosecution applying and enforcing a national law that incorporates an international legal prohibition on a universal crime *does* erect a bar to successive prosecutions that rely only upon international (i.e., universal) jurisdiction—that is, to successive prosecutions that lack a recognized national basis for jurisdiction or nexus to the crime and would be prohibited in the absence of universal jurisdiction.

To illustrate, suppose a U.S. national is alleged to have committed torture in Egypt. Clearly Egypt may exercise prescriptive jurisdiction and may apply Egyptian law proscribing torture to activity committed in its territory.<sup>152</sup> Under international law, the United States also may exercise prescriptive jurisdiction and may apply U.S. law proscribing torture to activity committed by its national.<sup>153</sup> Thus we easily have two states that potentially may claim jurisdiction under international law. But that is not

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152. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

153. See *id.* § 402(2).

all. For Spain, among other states,<sup>154</sup> has a universal jurisdiction law that allows Spanish courts to prosecute for torture, wherever it occurs and whomever it involves.<sup>155</sup> So it too conceivably could exercise jurisdiction on these facts.<sup>156</sup>

Now suppose the United States prosecutes this particular individual for torture using the federal code provision implementing the international Convention Against Torture<sup>157</sup> (which explicitly provides for jurisdiction over torture committed outside the United States where, *inter alia*, “the alleged offender is a national of the United States”<sup>158</sup>). Is there a double jeopardy bar to a successive prosecution by Egypt for the same torture? How about to a successive prosecution by Spain? How about by any other state in the world with a universal jurisdiction law prohibiting torture?

According to a jurisdictional theory of double jeopardy, if the United States prosecutes under a U.S. law that incorporates the international prohibition on torture, Egypt still may prosecute—for the same act of torture—on an Egyptian law that also incorporates the international prohibition on torture.<sup>159</sup> The reason, as we know, is that Egypt is an independent lawgiver with an independent national jurisdiction to apply its laws to acts taking place within its territory. Hence we have (1) an application of U.S. law prohibiting torture, and (2) an application of Egyptian law prohibiting torture. No problem; that is what dual sovereignty is all about.

What about Spain? Unlike Egypt, it has no national jurisdiction on these facts. If the crime were instead an “ordinary” crime, say a robbery in an Egyptian marketplace by a U.S. national, Spain could not apply and

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154. See Austria’s Strafgesetzbuch [StGB] [Penal Code] § 64(1) ¶ 6 (Austria), *translated in* LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 94 (2003); Belgium’s Code de procédure pénale, titre préliminaire, article 12 bis, *translated in* REYDAMS, *supra*, at 105; Denmark’s Straffeloven [Strfl] § 8(1)(5), *translated in* REYDAMS, *supra*, at 127; Germany’s Strafgesetzbuch [StGB] [Penal Code] § 6, *translated in* REYDAMS, *supra*, at 142; Wet Internationale Misdrijven (International Crimes Act), Staatsblad van het Koninkrijk der Nederlanden [Stb.] 270 (Netherlands).

155. Ley Orgánica del Poder Judicial [L.O.P.J.] 6/1985, B.O.E. 1985, 157.

156. This was precisely Spain’s jurisdictional justification for its famous extradition request for Pinochet.

157. 18 U.S.C. § 2340 (2000); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter *Torture Convention*].

158. 18 U.S.C. § 2340A(b)(1).

159. Egypt is also a state party to the Torture Convention. See OFFICE OF THE ASSISTANT LEGAL ADVISOR FOR TREATY AFFAIRS, U.S. DEP’T OF STATE, *TREATIES IN FORCE* (2006), *available at* <http://www.state.gov/documents/organization/66286.pdf>. Therefore, it has an obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” *Torture Convention*, *supra* note 157, art. 2.

enforce Spanish *national* law over that crime. Rather, for Spain to prosecute, it must rely uniquely upon its international jurisdiction over the universal crime of torture. And that is indeed what states claim to do when they exercise universal jurisdiction.<sup>160</sup> The Spanish national law used to prosecute is therefore really just a shell, with no self-supporting national jurisdictional basis, through which Spain applies and enforces international law. My contention is that because Spain has no independent national jurisdiction to apply its own national law, but must rely uniquely on a shared international jurisdiction to apply international law, Spain would be blocked from prosecuting by the prior U.S. prosecution on a jurisdictional theory of double jeopardy.

If we were to stop right here, the argument might not be entirely convincing—especially to those who tend to favor increased use of universal jurisdiction and who support international criminal tribunals that purport to apply, and base their jurisdiction in, international law<sup>161</sup> (a phenomenon I will discuss in light of my thesis in the next Part<sup>162</sup>). Such a reader might respond that even if Spain has no national jurisdiction, it surely has an international jurisdiction to prosecute for the torture in question. After all, that is what universal jurisdiction is all about. Put another way, why can't we have: (1) an application of U.S. law prohibiting torture; (2) an application of Egyptian law prohibiting torture; and (3) an application of international law (by Spanish courts) prohibiting torture? There seem to be three separate laws deriving from three separate sources of lawgiving power, and that would justify three separate prosecutions under a jurisdictional theory.

Yet such a response would not be quite right, for the reason that by prosecuting under a U.S. law that incorporates the international prohibition on torture, the United States simultaneously applies and enforces *both* U.S. national law *and* international law. And this application and enforcement of international law operates to block the Spanish proceedings since Spain is jurisdictionally constrained to apply and enforce *that same law*, i.e., international law. We are left, in other words, with the paradigmatic double jeopardy protection: you cannot be prosecuted for the same offense, under the same law, twice.<sup>163</sup>

But my argument still may look lacking to the rigorous supporter of what I have labeled international jurisdiction, whether it is exercised by

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160. See *supra* notes 145–47.

161. Sadat, *supra* note 140, at 251.

162. See *infra* Part IV.D.

163. See, e.g., *Grafton v. United States*, 206 U.S. 333, 352 (1907).

universal jurisdiction courts or international tribunals. Indeed we already have posited that the U.S. law is identical to the Egyptian law, and we would allow Egypt to prosecute successively. So why not allow Spain (or an international tribunal) to prosecute using international law? That is to say, we still seem to have three separate laws—(1) U.S., (2) Egyptian, and (3) international—so why not allow three separate prosecutions? Who's to say that the United States *necessarily* applies and enforces international law in addition to its national law so as to block the Spanish proceedings?

We seem to be stuck in a sort of metaphysical quagmire with no apparent way out apart from academic fiat. Either the United States applies and enforces international law along with its national law or it does not. I can say it does as much as I like, but that would just be my saying so with no principled reason supporting my conclusion. To pull ourselves out of this quagmire we must return to what we mean by the term “sovereign” in the double jeopardy context; namely, the sovereign as independent lawgiver.

We are clear that within this meaning of sovereign the United States is one sovereign and Egypt is another. Each has an independent jurisdiction to prescribe law with respect to certain national entitlements, primary among them entitlements over national territory and persons. Moreover, each has some centralized legislative or lawgiving body that formally performs this function. Because we have independent lawgivers, we have independent laws that proscribe independent offenses, even if facially the laws and the offenses look the same. As a result, an individual may be prosecuted under an identical-looking law for an identical-looking offense multiple times because the two offenses are, by virtue of the multiple sources of lawgiving authority proscribing them, in fact separate—each against a different sovereign.<sup>164</sup>

But now we turn to international law. Where is the sovereign, the lawgiver? It is certainly nothing so formal and centralized as the U.S. Congress or the Egyptian parliament. There is no overarching international legislature that hands down laws for all the world to obey. Rather, the international lawmaking process occurs mainly by aggregating the interactions of single actors in the international system—individual nation-states.<sup>165</sup> It is made either through treaty, whereby individual states create and bind themselves to rules by signing and ratifying international legal

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164. *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

165. *See, e.g.*, HANS KELSEN, *PURE THEORY OF LAW* 323 (1967).



instruments,<sup>166</sup> or through custom, which, to borrow one popular definition, “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>167</sup> Now the United States, like every state, is part of the international lawmaking collective. It is also part of the international law-applying and law-enforcing collective.<sup>168</sup> Thus when the United States prosecutes a torturer, and that prosecution incorporates international law, the United States applies and enforces international, as well as national, law. There is, in other words, no independent “international sovereign” in the way that there would be an independent national sovereign in the government of Egypt. Rather the “sovereignty,” or lawgiving and applying power, of the international legal system is invariably bound up in the individual states that make and apply international law in decentralized fashion, of which the United States is one.

Where the United States applies the international prohibition on torture in its courts, Spain cannot then come along and claim itself to be the international law-enforcer if the United States already has performed that function. It is conceptually no different than someone being prosecuted in the Second Circuit under a federal law, and then the same person being prosecuted in the Ninth Circuit for the same offense under the same federal law. Such a prosecution plainly would be barred by the prohibition on double jeopardy,<sup>169</sup> and the doctrine of dual sovereignty cannot pretend to save it.

A final question perhaps of more practical than theoretical concern is how to tell whether a national court has, in fact, applied and enforced international law so as to block future universal jurisdiction prosecutions by other states. Assuming for the moment a good faith prosecution and a fair procedure designed to achieve justice,<sup>170</sup> I would submit that where the law upon which a national prosecution is based reflects the core international substance and definition of the crime—and again, treaty law ordinarily will supply the best marker<sup>171</sup>—the national prosecution enforces international law. Depending on how states view international law, some may claim to apply it directly through their courts while others will implement it via national legislation into a domestic rule of decision.

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166. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102(3), 301 (1987).

167. *Id.* § 102(2).

168. KELSEN, *supra* note 165, at 323.

169. *Grafton v. United States*, 206 U.S. 333, 352 (1907).

170. I deal with the possibility of sham trials *infra* Part V.E.

171. See *supra* note 151.

Thus in the U.S. context we can be fairly confident that where a federal code provision implements U.S. treaty obligations to criminalize at the national level certain internationally proscribed conduct, and that code provision tracks faithfully the definition of the crime as set forth in the treaty (which U.S. code provisions tend to do),<sup>172</sup> a good faith prosecution under the code in U.S. court will have applied the international legal prohibition to the conduct in question. Civil law countries, by contrast, often have more general enabling clauses that allow courts to apply and enforce international law more directly.<sup>173</sup>

The reflexive objection that there inevitably will be variation from state to state on the precise definition of, say, torture or crimes against humanity, fails to appreciate fully the decentralized and organic nature of the international legal system. There will of course be variation, but some margin of appreciation<sup>174</sup> in enforcing international law is probably unavoidable given how decentralized enforcement of international law actually works: through states' national laws and procedures. Indeed, even in the far more centralized U.S. system, if there is a circuit split as to the definition of a federal offense with different circuits adopting different interpretations, it does not follow that a defendant may be prosecuted multiple times for that same offense by different courts sitting in disagreeing circuits.<sup>175</sup> And while there is no ultimate appeals court in the international system like the U.S. Supreme Court to resolve definitional disagreements,<sup>176</sup> states have other ways of resolving international legal conflicts,<sup>177</sup> the outcome of which will only help further to determine the definition in dispute as a matter of customary international law.<sup>178</sup>

In fact, and as I will explain in more depth in the next Part,<sup>179</sup> this sort of national enforcement of international law appears to be exactly what the

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172. See Colangelo, *supra* note 143, at 189–201.

173. See, e.g., Belgium's Code de procédure pénale, titre préliminaire, article 12 bis, *translated in* REYDAMS, *supra* note 154, at 105; Colangelo, *supra* note 135, at 175–77 & nn.82–91.

174. The margin of appreciation doctrine was first developed by the European Court of Human Rights and accords leeway to national governments in implementing international legal obligations. *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. B) at 408 (1960–1961). For discussion of its application to international criminal law, see Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 30–31 (2005).

175. For an example of such a split, compare *United States v. Ressam*, 474 F.3d 597 (9th Cir. 2007), with *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir. 1986) (differing interpretations for whether a conviction under 18 U.S.C. § 844(h)(2) requires that explosives be carried not only “during” a felony as per the statute, but also “in relation to” that felony).

176. See *United States v. Ressam*, 128 S. Ct. 1858 (2008) (resolving circuit split *supra* note 175).

177. Colangelo, *supra* note 143, at 183–85.

178. *Id.*

179. See *infra* Part IV.D.

double jeopardy provisions of international tribunal statutes have in mind. The provisions protect an individual from a successive tribunal prosecution where that individual previously has been tried in good faith for the same criminal act in national court.<sup>180</sup> The prior national court prosecution already would have enforced international law over the act in question, thus precluding the tribunal from enforcing that same law again. But there is an exception to this double jeopardy bar, one that is very telling in light of the discussion above: the tribunal may well prosecute again where “the act for which [the individual] was tried was characterized as an *ordinary crime*”<sup>181</sup>—in other words, where the national prosecution did not use the international substance and definition of the crime, and thus did not enforce international law.

Before showing how the rules above explain international law and practice, I want to drive home the argument with a frequently misunderstood international law opinion by the Supreme Court from 1820, the same year the concurrent jurisdiction language relating to federal and state prosecutions first appeared in Court’s jurisprudence. *United States v. Furlong*<sup>182</sup> has been misread and miscited by leading commentators as contrary to the dual sovereignty doctrine of double jeopardy.<sup>183</sup> Yet *Furlong* in fact supports the doctrine under a certain explanatory theory—specifically, the jurisdictional theory just articulated.

The relevant portion of the opinion addresses in dicta the question of double jeopardy in respect of the international crime of piracy on the one hand and the parochial crime of murder on the other. Piracy, as a result of a legal fiction of the time, was outside the national jurisdiction of any state;<sup>184</sup> by its very definition no state had national jurisdiction over piracy

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180. See *infra* Part IV.D.

181. See *infra* note 295 (quoting the ICTY and ICTR statutes) (emphasis added).

182. 18 U.S. (5 Wheat.) 184 (1820).

183. See Allen & Ratnaswamy, *supra* note 5, at 809 & n.55 (citing *Furlong* when stating that “federal courts were not to try an individual for a crime for which that individual already had been prosecuted by another sovereign”); Amar & Marcus, *supra* note 5, at 26–27 & n.141 (citing *Furlong* when stating that “[i]f England would allow a French judgment to bar retrial, so should America”); Franck, *supra* note 5, at 1098–99. One notable exception is Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 144 (2004), who reads the double jeopardy language in the opinion to apply, in my view correctly, to prosecutions over piracy based on universal jurisdiction.

184. See *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820); Colangelo, *supra* note 135, at 144; see, e.g., *Schooner Exch. v. M’Faddon*, 11 U.S. (7 Cranch) 116 (1812). To ensure that pirates were prosecuted wherever they were found and assertions of jurisdiction over them occasioned no interference with the sovereignty of other states, pirates were deemed outside of any state’s national jurisdiction; see also Justice Scalia’s more recent description in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 748 (2004) (Scalia, J., dissenting in part). Absent the fiction, prosecution of a pirate in custody for acts occurring outside the prosecuting state’s territory theoretically could infringe another state’s

since the perpetrators were stateless individuals on stateless vessels (ominously flying the black flag instead of a national flag).<sup>185</sup> According to the Court, pirates “were persons on board vessels which throw off their national character by cruising piratically and committing piracy on other vessels.”<sup>186</sup> Piracy was not “committed against the particular sovereignty of a foreign power; but . . . against all nations, including the United States.”<sup>187</sup> All states had jurisdiction over piracy not as a matter of their national jurisdiction, but under a “universal jurisdiction” (the Court’s term) resulting from the crime’s prohibition under the law of nations, which all states could enforce.<sup>188</sup> Murder, by contrast, was an ordinary crime over which each state had national jurisdiction where the crime occurred in its territory or, in some cases, where it involved the state’s nationals at sea.<sup>189</sup>

Just as in the federal system, the existence of double jeopardy protection in the international system with respect to these two crimes rested explicitly on concepts of jurisdiction. The Court explained that piracy “is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* [already acquitted] would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.”<sup>190</sup> A number of commentators have taken this language to suggest that double jeopardy among sovereigns was prohibited under U.S. and international law back in 1820 before the full development of the dual sovereignty doctrine in Supreme Court jurisprudence.<sup>191</sup> But in so doing they must have failed to read the very next sentence of the opinion, which continues: “Not so with the crime of murder.”<sup>192</sup> For murder, unlike piracy, was not an offense under international law “within th[e] universal jurisdiction” of all states, but rather was an offense against each state’s national law<sup>193</sup>: “It is punishable under the *laws of each State*,

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sovereignty; specifically, the state (or state’s vessel) where the act occurred because, at the time, jurisdiction was strictly territorial in nature and the exercise of extraterritorial jurisdiction was seen as interfering with the sovereignty of the state where the crime occurred.

185. See generally DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES (1995).

186. *Klintock*, 18 U.S. at 153; see also *United States v. Holmes*, 18 U.S. 412, 417–19 (1820).

187. *Klintock*, 18 U.S. at 152.

188. *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820).

189. *Id.*

190. *Id.*

191. See *supra* note 183.

192. *Furlong*, 18 U.S. at 197.

193. *Id.*

and [therefore] an acquittal in [the defendant's] case would *not* have been a good plea in the Court of Great Britain."<sup>194</sup>

The Court went on to explain that the United States had what we have been calling national jurisdiction over murder committed by U.S. citizens at sea: "[A]s to our own citizens . . . [U.S.] laws follow[] them every where";<sup>195</sup> and that the Constitution's Double Jeopardy Clause protected these individuals from successive prosecutions by the U.S. government: "[I]n our own Courts they are secured by the constitution from being twice put in jeopardy of life or member . . ." <sup>196</sup> However, the protection did not shield them against successive prosecutions by other states with national jurisdiction over the offense: "[I]f [the accused] are also made amenable to the laws of another State, it is the result of their own act in subjecting themselves to those laws."<sup>197</sup>

Thus as long ago as 1820, the Supreme Court articulated a theory of international double jeopardy moored in doctrines of jurisdiction and the autonomous lawgiving power of the sovereign. Under this theory, to continue the Court's hypothetical, where the United States and Great Britain had independent bases of national jurisdiction over a particular act, multiple prosecutions were permissible. But where no distinctly national jurisdiction authorized prosecution, where the United States sought to prosecute upon its universal jurisdiction to enforce the international law against piracy, a double jeopardy plea would have been available in the courts of another state exercising that same, shared universal jurisdiction to enforce that same international prohibition.<sup>198</sup> In the next Part I show that this theory continues to explain modern international law and practice.

#### IV. INTERNATIONAL LAW AND PRACTICE

This Part uses the jurisdictional theory to explain the existence and contours of double jeopardy protections in various areas of international law and practice. It evaluates double jeopardy protections in the international law of human rights and humanitarian law, extradition and cooperation, the statutes of international criminal tribunals, and the practice of universal jurisdiction by states. The discussion will show that the three rules of international double jeopardy articulated above

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194. *Id.* (emphasis added).

195. *Id.*

196. *Id.*

197. *Id.* at 197–98.

198. *Id.*

persuasively explain modern international law and practice relating to double jeopardy.

### A. *Human Rights and Humanitarian Law*

A main justification, if not *the* main justification, for double jeopardy protection is to guarantee the rights of individuals to be free from successive prosecutions for the same crime.<sup>199</sup> It is not surprising, therefore, that international human rights law contains double jeopardy protections, as does the related field of international humanitarian law, which protects the rights of individuals in situations of armed conflict. However, double jeopardy protection in these areas has a notably limited scope: it attaches only to multiple prosecutions or punishments within a single state. In other words, the relevant international human rights and humanitarian law instruments permit a state to prosecute an individual for a crime for which that individual already has been prosecuted and punished in another state. The jurisdictional theory explains this lack of international double jeopardy protection among different states since, under the theory, each state as an independent lawgiver may exercise its national jurisdiction to apply and enforce its own laws.

#### 1. *Universal Human Rights Instruments*

Article 14(7) of the United Nations International Covenant on Civil and Political Rights (ICCPR) guarantees: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”<sup>200</sup> As the language of the provision seems to suggest, the prohibition on double jeopardy applies only within “each” state’s judicial system.<sup>201</sup> The drafting history of the provision explicitly supports this interpretation,<sup>202</sup> and the quasi-judicial Human Rights Committee, whose job it is to interpret and implement the Convention,<sup>203</sup> has made clear that

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199. See *infra* Part V.A.

200. International Covenant on Civil and Political Rights, art. 14(7), *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

201. At least one court has adopted such a plain language reading of the article. See *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000).

202. See MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 316 (1987) (“It was pointed out that a State would be free to try, in accordance with its laws, persons already sentenced for the same offence by the courts of another country.”).

203. See Optional Protocol to the International Covenant on Civil and Political Rights, *opened for*

the scope of Article 14(7)'s double jeopardy protection is limited to multiple prosecutions by one state.<sup>204</sup>

The leading Committee ruling on the issue involved a complaint by an Italian citizen who had been convicted in Switzerland of money laundering and was then prosecuted for the same offense in Italy. The complaint alleged that the successive Italian prosecution violated Article 14(7)'s double jeopardy bar.<sup>205</sup> The Italian government rejected this idea of "international *non bis in idem*" and argued that Article 14(7) instead "must be understood as referring exclusively to the relationships between judicial decisions of a single State and not between those of different States."<sup>206</sup> The Committee agreed, and in language mirroring that used to articulate the jurisdictional theory presented above, explained that "article 14, paragraph 7, of the Covenant . . . does not guarantee *non bis in idem* [sic] with regard to the *national jurisdictions* of two or more States. . . . [T]his provision prohibits double jeopardy only with regard to an offence adjudicated in a given State."<sup>207</sup> Subsequent Human Rights Committee decisions have affirmed this interpretation,<sup>208</sup> and it has been adopted as well by cases in national courts interpreting the Covenant.<sup>209</sup>

## 2. Regional Human Rights Instruments

Regional human rights instruments containing a bar on double jeopardy likewise limit its application to multiple prosecutions by a single state. Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Freedoms, for example, restricts double jeopardy protection as follows: "No one shall be liable to be tried or punished again in criminal proceedings *under the jurisdiction of the same State* for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure *of that State*."<sup>210</sup> And if the language itself were not adequately clear that double jeopardy protection

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signature Dec. 16, 1966, 999 U.N.T.S. 302.

204. A.P. v. Italy, Communication No. 204/1986, Report of the Human Rights Comm., 43d Sess., supp. No. 40, U.N. Doc. A/43/40 (1988); A.R.J. v. Australia, Communication No. 692/1996, Human Rights Comm., U.N. Doc. CCPR/C/60/D/692/1996 (July 28, 1997)..

205. A.P. v. Italy, U.N. Doc. A/43/40, ¶ 1-2.3.

206. *Id.* ¶ 5.3.

207. *Id.* ¶ 7.3 (emphasis added).

208. See A.R.J. v. Australia, U.N. Doc. CCPR/C/60/D/692/1996, ¶ 6.4.

209. See *United States v. Duarte-Acero*, 208 F.3d 1282, 1286-89 (11th Cir. 2000); *United States v. Benitez*, 28 F. Supp. 2d 1361, 1363-64 (S.D. Fla. 1998).

210. Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Nov. 22, 1984, Europ. T.S. 117 (entered into force Nov. 1, 1988) (emphasis added).

does not extend to prosecutions by multiple national jurisdictions, the Council of Europe's Explanatory Report erases all doubt: "The words 'under the jurisdiction of the same State' limit the application of the article to the national level."<sup>211</sup> Again, it is the concept of jurisdiction that demarcates double jeopardy protection: where there are multiple national jurisdictions, there may be multiple prosecutions.<sup>212</sup>

### 3. *Humanitarian Law Instruments*

International humanitarian law also contains rules limiting double jeopardy. Article 86 to the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War directs that "No prisoner of war may be punished more than once for the same act or on the same charge."<sup>213</sup> Although the article was approved "unanimously without comment,"<sup>214</sup> its language suffers from a number of lacunae. Does it protect only against multiple punishments and not trials? And more importantly for this Article, does it apply only to multiple punishments doled out by one state party or does it attach across multiple states?

The drafting history suggests that the provision applies only to multiple punishments by one state, explaining that it was included "to prevent any recurrence of certain abuses committed during the Second World War in penal matters."<sup>215</sup> The "abuses" are referenced in an additional paragraph proposed by the Sub-Committee on Penal and Disciplinary Sanctions, elaborating that "[t]he punishment inflicted at the first trial shall not be increased as the result of an appeal or a similar procedure."<sup>216</sup> Thus it appears that Article 86 was intended to protect against additional punishment being heaped on as a result of exercising one's right to "appeal or petition from any sentence," a right which is guaranteed by

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211. Council of Europe, Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/en/Reports/Html/117.htm> (last visited Feb. 26, 2009); see also P. VAN DIJK AND G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 513 (1990).

212. The American Convention on Human Rights also contains a double jeopardy prohibition. See American Convention on Human Rights art. 8(4), Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123.

213. Geneva Convention Relative to the Treatment of Prisoners of War art. 86, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

214. Commentary to Convention (III) Relative to the Treatment of Prisoners of War (Aug. 12, 1949), available at <http://www.icrc.org/ihl.nsf/COM/375-590105?OpenDocument>.

215. *Id.*

216. *Id.*; see 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 326, 501 (Hein 2004).



Article 106.<sup>217</sup> Consequently, the provision relates only to multiple punishments exacted by one state party.

Subsequent international instruments more directly spell out the scope of double jeopardy protection in modern humanitarian law and expressly cabin it to multiple prosecutions by the same state party. Article 75(4)(h) to the 1977 Additional Protocol I to the Geneva Conventions guarantees that “[n]o one shall be prosecuted or punished by the *same Party* for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under *the same law and judicial procedure*.”<sup>218</sup> The narrowness of this protection is consistent with that afforded by Article 14(7) of the ICCPR. Indeed, according to the Additional Protocol’s Official Rapporteur, “The provision on *ne bis in idem* [in Protocol I] is drawn from the United Nations Covenant on Civil and Political Rights.”<sup>219</sup>

Thus, while human rights and humanitarian law instruments create rights against double jeopardy, the instruments self-consciously limit the scope of those rights to prohibit only multiple prosecutions by a single state. The jurisdictional theory explains why.

### *B. International Cooperation*

One area of international law in which individuals clearly are protected from successive prosecutions by different states, at least in some circumstances, is the law of extradition and cooperation in criminal matters. If the legal instruments in this area reflect a general prohibition on international double jeopardy they would cut against a jurisdictional theory of double jeopardy whereby states with independent jurisdiction to prescribe law always retain the independent ability to enforce that law through a separate prosecution in their courts.

#### *1. Extradition*

Extradition treaties uniformly contain mandatory grounds for refusal of extradition where the requested individual already has been convicted or acquitted of the offense that serves as the basis of the extradition request in

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217. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 213, art. 106.

218. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75(4)(h), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) (emphasis added).

219. YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 884 (1987).

the state to which the request is directed. For example, the European Convention on Extradition states that “[e]xtradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested.”<sup>220</sup> The United Nations Model Treaty on Extradition similarly provides that extradition “shall not be granted . . . [i]f there has been a final judgment rendered against the person in the requested State in respect of the offence for which the person’s extradition is requested.”<sup>221</sup> In fact, “[w]ith two exceptions, all United States extradition treaties negotiated since World War II contain provisions prohibiting the extradition of persons convicted, acquitted, or being tried in the requested country for the same acts or offenses for which their extradition is requested.”<sup>222</sup>

The consistency of these provisions throughout the majority of modern extradition treaties brings the international lawyer to a bit of a dilemma. The dilemma centers on the role of treaties in the international legal schema. On the one hand, treaties may be either generative or declarative of an underlying international law;<sup>223</sup> on the other hand, they may carve out an exception to that law for the particular states parties to the treaty. For instance, the Genocide Convention establishes the international law against genocide—a law that applies generally to all states;<sup>224</sup> while a treaty setting up a trade regime like the WTO creates rights and obligations only for those specific states parties to the treaty—against the background of a far more relaxed or even disinterested general international law that by and large permits states to trade how they see fit.

The question we must answer is whether the double jeopardy provisions in extradition treaties are generative of an international law prohibiting double jeopardy across the board, i.e., across state borders, or whether these treaties merely carve out an exception for states parties to the treaties against an otherwise permissive international law that allows multiple prosecutions by different states. Two possible arguments, only one of which withstands scrutiny, tend to support the answer that the protection contained in the treaties is the exception, not the rule.

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220. European Convention on Extradition art. 9, Dec. 13, 1957, 359 U.N.T.S. 274.

221. See U.N. Model Treaty on Extradition, G.A. Res. 45/116, art. 3(d) U.N. GAOR, 45th Sess., 68th plen. mtg., U.N. Doc. A/RES/45/116 (Dec. 14, 1990).

222. MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES § 3-2(19), at 113–14 (2004).

223. See, e.g., North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20).

224. See D’Amato, *Human Rights*, *supra* note 121, at 1128–48.

The first argument, and the one that in my view ultimately must fail, takes extradition treaties as a class and contends that because they are designed to create exceptions, the rules they contain are also exceptional. Extradition treaties depart from the general international rule that states have no obligation to extradite.<sup>225</sup> In fact the domestic laws of many states, including the United States, prohibit extradition in the absence of an extradition treaty.<sup>226</sup> Thus the entire purpose of an extradition treaty is to hew an exception; to create obligations and rights for states parties that they otherwise would not have under international law. One could argue that the exceptional character of the treaty's overall object and purpose might make awkward the conclusion that a specific provision incidental to that object and purpose—such as a provision relating to double jeopardy—somehow extends to non-party states as a general rule of international law. If the overall obligation to extradite is non-generalizable, neither are its incidentals.

But this type of intrapolation from the overall character of extradition treaties runs into a strong human rights objection. The reason for the double jeopardy bar ostensibly would be to protect the individual from states contracting away her rights through the treaty; “from combining to do together what each could not . . . do on its own.”<sup>227</sup> Thus if extradition is the exception to the general rule, human rights are the exception to the exception: states may create whatever rules they like amongst themselves, except rules that violate fundamental human rights. Hence the Torture Convention's firm command: “No State Party shall . . . extradite a person to another State where substantial grounds exist for believing that he would be in danger of being subjected to torture.”<sup>228</sup>

This brings us to the second, more persuasive reason why the double jeopardy protection contained in extradition treaties is the exception, not a generalizable international rule. Unlike the Torture Convention's absolute prohibition on extradition where there is good reason to believe that the requested individual will be tortured upon transfer, extradition treaties by their own terms restrict the double jeopardy bar to states parties.<sup>229</sup> And

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225. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 475 cmt. 1 (1987).

226. *Id.* § 475 cmt. b.

227. *Heath v. Alabama*, 474 U.S. 82, 102 (1985) (Marshall, J., dissenting).

228. Torture Convention, *supra* note 157, art. 3(1). For its part, the European Court of Human Rights has observed that extradition where substantial grounds exist to believe that the extradited individual will be subject to torture gives rise to state liability under the European Convention's prohibition on torture. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 91 (1989).

229. See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND

even here it applies only to one narrow set of circumstances in the vast majority of the treaties<sup>230</sup>: extradition shall be refused, it will be recalled, only where there has been a final judgment rendered against the individual in the “*requested State*.”<sup>231</sup>

But what about where the individual already has been convicted or acquitted in the *requesting state*, and is likely to be subject to yet another prosecution for the same offense upon return? Or has already been convicted or acquitted in a *third state*? The overwhelming majority of extradition treaties are manifestly silent<sup>232</sup>, and the silence is not accidental. Rather it evinces two interrelated points about the treaties: (1) they do not purport to establish an unqualified right to be free from double jeopardy—often even among states parties; and (2) their double jeopardy provisions certainly were not intended to be generalizable to states outside the treaty.

The German Constitutional Court addressed precisely these points when a fugitive in Germany challenged his pending extradition to Turkey on the grounds that he had already been convicted, and had served his time, for the offense in question in Greece.<sup>233</sup> Surveying the relevant international instruments and evaluating state practice on the point, the Court concluded categorically:

There is presently no general rule of public international law that states that a person who has been sentenced to imprisonment in a third state and has also served this sentence is unable to be retried or reconvicted for the same offence in another state. . . . Similarly, there is presently no general rule of public international law opposing the permissibility of extradition when the person sought has already been imprisoned for the same offence in a third state and this time is not accounted for or taken into consideration by the state seeking extradition.<sup>234</sup>

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PRACTICE 693 & n.332 (4th ed. 2004); Van den Wyngaert & Stessens, *supra* note 13, at 785.

230. See sources cited *supra* notes 220–22.

231. See, e.g., U.N. Model Treaty on Extradition, *supra* note 221; European Convention on Extradition, *supra* note 220, art. 9.

232. See BASSIOUNI, *supra* note 229, at 693 & n.332; Van den Wyngaert & Stessens, *supra* note 13, at 785.

233. See Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Mar. 7, 1987, 75 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.), available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=570](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=570).

234. *Id.* at C (intro.).

The Court continued (the emphasis is in the original):

[T]he principle of *ne bis in idem* is a general rule of public international law . . . which prevents the renewed conviction of a person sought for the same offence *in the same* state. On the other hand, there are currently no general rules of public international law . . . according to which no one may be tried or punished by the courts of one state for an offence for which he has already been convicted or acquitted by another state or that a sentence served abroad must be accounted for in the former state or be taken into consideration in sentencing.<sup>235</sup>

The double jeopardy provisions in extradition treaties do not evidence a general international prohibition on double jeopardy as among different states. Instead these provisions merely carve out an exception to the general rule allowing double jeopardy among multiple sovereigns. This exception, viewed with even a modest degree of skepticism given its particularly narrow coverage, may not have much to do at all with the individual's rights when compared with another, apparently more salient motivation: the requested state's sovereign interest in not seeing its own proceedings repeated, questioned, or overturned by foreign courts.

## 2. *Other Cooperation Conventions*

The survey of law in this area would not be complete without discussing a few attempts among European states to set up regimes of mutual respect of criminal judgments and coordination in criminal matters. Each of the agreements behind these regimes contains some form of double jeopardy protection. But these too recognize that the (limited) protection they afford is the exception and not the rule. The Council of Europe's 1970 Convention on the International Validity of Criminal Judgments<sup>236</sup> and 1972 Convention on the Transfer of Proceedings in Criminal Matters<sup>237</sup> provide a double jeopardy protection based on a final judgment in another member state's courts.<sup>238</sup> The Explanatory Report to

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235. *Id.* at C(2)(a)(3).

236. European Convention on the International Validity of Criminal Judgments, Europ. T.S. No. 70 (entered into force May 28, 1970).

237. European Convention on the Transfer of Proceedings in Criminal Matters, Europ. T.S. No. 73 (entered into force May 15, 1972).

238. *See* European Convention on the International Validity of Criminal Judgments, *supra* note 236, art. 53; European Convention on the Transfer of Proceedings in Criminal Matters, *supra* note 237, art. 35.

the Judgments Convention observes that the protection afforded is—and was intended to be—an exception to the general permissibility of international double jeopardy. It notes that while national systems generally prohibit double jeopardy, “[a]t the international level, on the other hand, the principle of *ne bis in idem* is not generally recognised.”<sup>239</sup>

Moreover, the Council of Europe deliberately included the international double jeopardy clause in a convention dealing with cooperation between states parties as opposed to incorporating it by protocol into the European Convention for the Protection of Human Rights and Fundamental Freedoms. It did so out of concern that placing it in the latter would signal, wrongly, a wider application to non-party states unsupported by international law.<sup>240</sup> And even this watered-down double jeopardy protection failed to take hold because most Council of Europe members did not ratify the conventions.<sup>241</sup> More recently (and more successfully), the European Union put into effect the 1990 Schengen Convention<sup>242</sup> in anticipation of lifting the internal border controls in 1993.<sup>243</sup> But like the two Council of Europe conventions above, the Schengen Convention is an instrument of cooperation intended to carve out an exception to the general rule.

Finally, the scope of the protection itself in these instruments makes clear that it is exceptional and, moreover, aligns strongly with a jurisdictional theory in which national jurisdiction is based on distinct national entitlements. The bar on successive prosecutions in each of the cooperation conventions notably does *not* extend to prosecutions by states having jurisdiction on the basis of either territoriality or a variation of the protective principle.<sup>244</sup> Under the conventions, a state on whose territory the offense occurred or against whose public institutions or persons the offense was directed always retains the power to prosecute in the face of a foreign judgment.<sup>245</sup> Thus even while carving out an exception to

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239. Council of Europe, Explanatory Report on the Convention on the International Validity of Criminal Judgments pt. III, § 1, available at <http://conventions.coe.int/Treaty/en/Reports/Html/070.Htm> (last visited Feb. 26, 2009).

240. *Id.*

241. Van den Wyngaert & Stessens, *supra* note 13, at 787.

242. Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders, June 19, 1990, 30 I.L.M. 84 [hereinafter Schengen Convention].

243. Van den Wyngaert & Stessens, *supra* note 13, at 787.

244. See European Convention on the International Validity of Criminal Judgments, *supra* note 236, art. 53(2), (3); European Convention on the Transfer of Proceedings in Criminal Matters, *supra* note 237, art. 35(2), (3); Schengen Convention, *supra* note 242, art. 55.

245. See *supra* note 244; see also Council of Europe, Explanatory Report on the Convention on

international double jeopardy that prevents successive prosecutions by different states, the power to make, apply, and enforce law with respect to some entitlements—namely, those relating to national territory and security—was too valuable for states parties to give up.

In all, extradition treaties and other international cooperation agreements self-consciously operate within a jurisdictional theory of double jeopardy. These instruments deliberately carve out limited exceptions for states parties to a general international rule allowing multiple prosecutions by multiple lawgivers with independent power to make and apply law.

### *C. General Principles of International Law*

Even where states have not affirmatively undertaken to establish a double jeopardy protection at the international level through treaty law, their domestic practices may, to borrow a phrase from the Statute of the International Court of Justice, give rise to “[a] general principle[] of law recognized by civilized nations.”<sup>246</sup> General principles constitute “supplementary rules of international law.”<sup>247</sup> While international courts and tribunals have on numerous occasions looked to general principles to “fill in the gaps” left by the primary source law like treaties and custom,<sup>248</sup> the proper formulation and application of these principles is much contested.<sup>249</sup> We need not wade too far into the complexity of exactly when and how a principle common among domestic legal systems may be recruited into a general principle of international law in order to conclude that no such generally accepted principle exists with respect to double jeopardy among states.

#### *1. The Hierarchy of Sources Hurdle*

Before we get to the domestic practice, any general principle in this area faces a preliminary stumbling block. Their main role as gap-fillers in the international jurisprudence could suggest that general principles cannot

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the International Validity of Criminal Judgments, *supra* note 239.

246. Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 3 Bevens 1179; 59 Stat. 1055; T.S. No. 993.

247. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) (1987).

248. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50–55 (1991); *see also* Prosecutor v. Erdemovic, Case No. IT-96-22-A Judgment (Oct. 7, 1997); BIN CHENG, GENERAL PRINCIPLES AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1993).

249. *See* SCHACHTER, *supra* note 248, at 50–55.

supplant an inconsistent rule established by primary international law sources like treaties. Primary sources represent the affirmative and deliberate consent of states to a rule that binds them on the international plane. By contrast, a general principle taken from the domestic practices of states has no such international imprimatur. As a matter of the hierarchy of sources, the fact that the relevant primary source instruments purposefully limit their provisions so as *not* to create a generally applicable double jeopardy rule among states at the international level tends to undermine the proposition of this same rule arising (and overriding the primary source rule) through a supplemental rule of international law, and one that derives from the practices of states in their domestic spheres to boot. One might think of the treaties as having “occupied the field”<sup>250</sup> here in a way that cabins quite conspicuously the rule so as not to prohibit international double jeopardy. Indeed, apart from stating flatly, “[t]here is no general protection from double jeopardy among different states”—which the drafting history and decisional law actually do—it is not clear what else the treaties themselves might have done to limit the scope of double jeopardy protection to successive prosecutions by a single state.

There is, however, a rejoinder. By extending double jeopardy protection beyond the single state scenario to reach multiple prosecutions by different states, the general principle has played precisely its role: it has “supplement[ed],”<sup>251</sup> not displaced, the primary source rule. And moreover, this practice is, by definition, not limited solely to the domestic practices of states; recognizing and enforcing an international double jeopardy protection in domestic courts is tantamount to recognizing and enforcing the criminal judgments of foreign states,<sup>252</sup> so there is some international dimension here indicative of custom.

Yet the fact remains that an international rule covering exactly this multiple-state scenario was expressly considered—and rejected—by the primary international lawmaking instruments directly addressed to the issue, leading to the conclusion that the states involved, even while engaged in the very business of crafting human rights,<sup>253</sup> did not want to be bound by a double jeopardy rule at the international level. In any event,

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250. This is a term of art used by the United States Supreme Court in evaluating the federal government’s power to preempt the states in areas of federal lawmaking. *See, e.g., Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

251. *See supra* note 247 and accompanying text.

252. On the civil side, the doctrine of *res judicata* appears to have been accepted for some time as a general principle of international law. *See Chorzow Factory (Ger. v. Pol.)*, 1929 P.C.I.J. (ser. A) No. 19, at 27 (July 26) (Judge Anzilotti) (cited in CHENG, *supra* note 248, at 336).

253. *See supra* notes 200–19.



and whatever one thinks about the right answer to the sources conundrum, domestic practice on the point is so mixed that no principle responsibly can be deduced.

## 2. *International Double Jeopardy Protections in National Law*

Without doubt, most states' domestic laws contain some type of double jeopardy protection,<sup>254</sup> whether through constitutional guarantee<sup>255</sup> or by statutory or common law rule.<sup>256</sup> Our question is whether the protection attaches in light of prior prosecutions by foreign courts.

### a. *Common Law Countries*

Practice in common law countries is sharply divided. U.S. law on the point is clear: the double jeopardy clause of the Fifth Amendment covers only multiple prosecutions by the same sovereign,<sup>257</sup> thus different prosecutions by different sovereigns, including foreign states, are permissible.<sup>258</sup> As one court succinctly put it, "[t]he Constitution of the United States has not adopted the doctrine of international double jeopardy."<sup>259</sup> On the other hand, common law countries like Canada<sup>260</sup> and England<sup>261</sup> offer a more comprehensive protection that shields defendants from international double jeopardy in most cases<sup>262</sup> where judgment

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254. See *Bartkus v. Illinois*, 359 U.S. 121, 154, 155 n.2 (Black, J., dissenting).

255. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 289 & n.262 (1993).

256. See JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 125 (1969); Gary di Bianco, *Truly Constitutional? The American Double Jeopardy Clause and its Australian Analogies*, 33 AM. CRIM. L. REV. 123 (1995).

257. *Bartkus*, 359 U.S. at 131–33.

258. See *Chua Han Mow v. United States*, 730 F.2d 1308, 1313 (9th Cir. 1984); *United States v. Richardson*, 580 F.2d 946 (9th Cir. 1978); *United States v. Martin*, 574 F.2d 1359 (5th Cir. 1978); *United States v. Rashed*, 83 F. Supp. 2d 96 (D.D.C. 1999); *United States v. Benitez*, 28 F. Supp. 2d 1361 (S.D. Fla. 1998), *aff'd*, 208 F.3d 1282 (11th Cir. 2000).

259. *Martin*, 574 F.2d at 1360.

260. See, e.g., *R. v. Leskiw, Morgan and Eedy*, [1986] 26 C.C.C. (3d) 166. The Canadian Supreme Court has left the issue open. See also *R. v. Van Rassel*, [1990] 1 S.C.R. 225 (Can.) (giving the arguments for and against an international double jeopardy prohibition, but concluding that "it is not necessary to decide in this case which of these two positions should prevail").

261. See *Treacy v. Dir. of Pub. Prosecutions*, [1971] A.C. 537, 562 (H.L.) (Judgment of Lord Diplock).

262. For an exception, see *R. v. Thomas (Keith)*, [1985] Q.B. 604, in which a British court of appeals acknowledged the international prohibition on double jeopardy but refused to apply it to a defendant who had been convicted in absentia in Italy and could not be extradited to Italy on the grounds that he was never (and would never be) truly twice in "jeopardy."

already has been handed down by a foreign “court of competent jurisdiction.”<sup>263</sup>

*b. Civil Law Countries*

The practice of civil law countries runs the gamut between these two poles of total international double jeopardy protection or none at all. Some states like Germany<sup>264</sup> and Italy<sup>265</sup> appear to fall into the U.S. camp and provide no international double jeopardy protection,<sup>266</sup> while Dutch law operates similarly to that of England and Canada in that a valid foreign judgment broadly shields the accused from a successive Dutch prosecution for the same offense.<sup>267</sup>

The rest of civil law practice is somewhere in between. Apart from the Netherlands, no civil law country appears to permit a double jeopardy claim where the offense takes place within its territory.<sup>268</sup> Thus, as with the double jeopardy provisions in the cooperation conventions discussed above,<sup>269</sup> if John commits crime X on State A’s territory, he will always be subject to prosecution in State A, even if he already has been convicted or acquitted of X in the courts of State B. Again, this practice should not be all that surprising. A state’s entitlement to exercise jurisdiction over its territory is one of the most important and jealously guarded in the package of entitlements that makes the state a state.<sup>270</sup> Furthermore, in addition to preserving their territorial jurisdictions, many states retain the unconditional power to prosecute where the offense takes place extraterritorially and affects an important national interest or governmental function under the protective principle.<sup>271</sup> For example, if John counterfeits French currency he will always be subject to prosecution in France, even if he perpetrated the act in the United States and was already prosecuted for it in U.S. courts.<sup>272</sup>

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263. See *R. v. Leskiw, Morgan and Eedy*, 26 C.C.C. (3d) 172.

264. See Case 45/69, *Boehringer Mannheim GmbH v. Commission*, 1972 E.C.R. 1281, 1293–95.

265. *Id.* at 1296.

266. See Van den Wyngaert & Stessens, *supra* note 13, at 784.

267. *Id.* at 783 & n.18.

268. *Id.* at 782.

269. See *supra* Part IV.B.2.

270. See *supra* Part III.B.

271. See Van den Wyngaert & Stessens, *supra* note 13, at 784; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) cmt. f (1987); I. CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 84–89 (1994).

272. See Van den Wyngaert & Stessens, *supra* note 13, at 784.

Outside of the absolute retentions of jurisdiction over crimes affecting territory and nationhood, some civil law countries do afford defendants a degree of double jeopardy protection based on a foreign prosecution. For instance, Belgium offers double jeopardy protection where the offense takes place entirely outside Belgium and the state on whose territory the offense occurs has rendered a final judgment.<sup>273</sup> Thus Belgium essentially respects the strength of the other state's jurisdictional entitlement if Belgium's own entitlement is not as strong. In John's case, if Belgium is State *B* (the state exercising extraterritorial jurisdiction) and John already has been convicted or acquitted in State *A* (the territorial state), Belgium will respect State *A*'s judgment and afford double jeopardy protection to John.<sup>274</sup>

The splintered practice among the world's domestic legal systems confirms the Opinion of Advocate General Mayras in the European Court of Justice, who, after surveying the domestic laws and practices of a number of European states, concluded that state practice was against a general principle of international double jeopardy and therefore "the *non bis in idem* rule, which is stated and applied in domestic law, is far from being accepted as a general principle of law in international relations."<sup>275</sup> The absence of a general principle of international law prohibiting successive prosecutions by different states is consistent with a jurisdictional theory under which different states with independent national jurisdiction retain the general ability to prosecute successively for the same crime.

#### *D. International Criminal Tribunal Statutes*

Double jeopardy provisions also appear in the statutes of international criminal tribunals. To take some well-known examples, the statutes creating the ICTY and ICTR as well as the Rome Statute for the ICC all provide for what could be viewed as double jeopardy protection at the international level. That is, they all offer some type of shield from successive prosecutions as between international tribunals and national

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273. *Id.*

274. In reality, this protection is not so easily assured since the concept of territoriality has been enlarged to include a broad range of activity including offenses exhibiting only a tangential relation to the forum state. See Colangelo, *supra* note 135, at 128–29. Prosecutors often take advantage of this to "convinc[e] courts to localise offences on the territory of their own State." Van den Wyngaert & Stessens, *supra* note 13, at 784.

275. Case 45/69, *Boehringer Mannheim GmbH v. Commission*, 1972 E.C.R. 1281, 1296.

courts.<sup>276</sup> The double jeopardy protections contained in the statutes are complicated and varied, but their very existence appears to generate discord for double jeopardy rules in international law: no general double jeopardy protection among states, but double jeopardy protection between states and international tribunals.

This Part uses concepts of jurisdiction to resolve the discord and untangle the double jeopardy protections in the statutes. It draws upon the manner of creation of the tribunals and their jurisdictional provisions to explain how states and international tribunals largely share jurisdiction over the activity proscribed by the tribunal statutes. Thus when either a state or a tribunal exercises jurisdiction it usually extinguishes the jurisdiction of the other, leading to double jeopardy protection between them. Where tribunal statutes do allow a successive prosecution, it is because the double jeopardy provision in question has reserved a portion of either national or international jurisdiction to the state or tribunal, respectively, upon which that entity may prosecute.

### 1. ICTY and ICTR

The United Nations Security Council established the ICTY and ICTR pursuant to its Chapter VII powers under the U.N. Charter to respond to threats to international peace and security in the former Yugoslavia and Rwanda.<sup>277</sup> Toward this end, it delegated to the tribunals a certain amount of subject matter, geographic and temporal jurisdiction to prosecute for serious violations of international law.<sup>278</sup> While the jurisdictional

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276. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 10, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 9, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, art. 20, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998) [hereinafter ICC statute]; see also Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 9, Jan. 16, 2002, available at <http://www.specialcourt.org/documents/Agreement.htm> [hereinafter SC Agreement]; Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, art. 5, U.N. Doc. S/RES/1757 (May 30, 2007).

277. See U.N. Charter, art. 39; ICTY Statute, *supra* note 276, pmb1.; ICTR Statute, *supra* note 276, pmb1.; Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 29 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

278. U.N. Charter, art. 39; see also ICTY Statute, *supra* note 276; ICTR Statute, *supra* note 276. See Prosecutor v. Tadic, Case No. IT-94-1-AR72, ¶ 29. The “competence” (competence being another word for jurisdiction), of the tribunals, as set for in Article 1 of each statute, exists along three dimensions: (1) subject matter, (2) geography, and (3) timeframe. Common Article 1 commands that the tribunals “shall have the power to prosecute persons responsible for [(1)] serious violations of international humanitarian law [(2)] committed in [a] territory” defined by the statutes (the former

provisions of the statutes establish concurrent jurisdiction between national courts and international tribunals,<sup>279</sup> the tribunals enjoy “primacy over national courts.”<sup>280</sup> The tribunals are accordingly the primary enforcers of the international legal prohibitions contained in their statutes. As part of this jurisdictional dynamic, “[a]t any stage of the procedure, the International Tribunal [] may formally request national courts to defer to its competence.”<sup>281</sup>

Through its Chapter VII powers, the Security Council altered the ordinary rules of international jurisdiction to give the tribunals primacy over a special piece of jurisdiction, thereby creating a shared jurisdiction between the tribunals on one hand and states on the other. By exercising jurisdictional primacy, the tribunal overtakes the sovereignty, or national entitlements, of all states to exercise their national jurisdictions. In the famous *Tadic* case (which actually resulted from a transfer of national proceedings to the ICTY),<sup>282</sup> *Tadic* directly challenged the ICTY’s jurisdiction over him on this basis. He objected specifically to this transfer of “State sovereignty” to the tribunal,<sup>283</sup> contending that the ICTY’s “primacy over domestic courts constitutes an infringement upon the sovereignty of the State directly affected.”<sup>284</sup> The ICTY Appeals Chamber acknowledged that Article 2 of the U.N. Charter prevented the U.N. from “interven[ing] in matters which are essentially within the domestic jurisdiction of any State.”<sup>285</sup> But it responded by citing “the commanding restriction at the end of the same paragraph [of Article 2]: ‘but this principle shall not prejudice the application of enforcement measures under Chapter VII,’”<sup>286</sup> and explained that “[t]hose are precisely the provisions under which the International Tribunal has been established.”<sup>287</sup>

The Appeals Chamber went on to uphold the primacy of ICTY jurisdiction over national courts quoting the Trial Chamber’s conclusion that “[o]f course, this involves some surrender of sovereignty by the

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Yugoslavia and Rwanda), and (3) occurring within a time period defined by the statutes. ICTY Statute, *supra* note 276, art. 1; ICTR Statute, *supra* note 276, art. 1. The statutes then spell out the international crimes within their subject matter jurisdiction, including genocide, crimes against humanity, and war crimes amounting to grave breaches of the Geneva Conventions. ICTY Statute, *supra* note 276, arts. 2, 3, 4, 5; ICTR Statute, *supra* note 276, arts. 2, 3, 4.

279. ICTY Statute, *supra* note 276, art. 9(2); ICTR Statute, *supra* note 276, art. 8(2).

280. *Id.*

281. *Id.*

282. Prosecutor v. *Tadic*, Case No. IT-94-1-AR72, ¶ 50.

283. *Id.* ¶ 50, 55.

284. *Id.* ¶ 50.

285. *Id.* ¶ 55, 56; *see also* U.N. Charter, art. 2.

286. Prosecutor v. *Tadic*, Case No. IT-94-1-AR72, ¶ 56; *see also* U.N. Charter, art. 2.

287. Prosecutor v. *Tadic*, Case No. IT-94-1-AR72, ¶ 56.

member nations of the United Nations, but that is precisely what was achieved by the adoption of the Charter.”<sup>288</sup> By granting the ICTY and ICTR primacy of jurisdiction, the Security Council granted the tribunals the power to transfer to themselves the sovereign entitlements, or jurisdiction of states, to prosecute for acts falling within the tribunals’ subject matter, geographic and temporal jurisdiction. It is not by accident that these jurisdictional provisions immediately precede, and justify, the statutes’ double jeopardy provisions.<sup>289</sup>

With respect to the latter, the statutes provide that “[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.”<sup>290</sup> Since the tribunals overtake the jurisdiction of states to prosecute for the acts in question, they leave national courts no residual jurisdiction upon which to prosecute. Thus while national courts have concurrent jurisdiction, their jurisdiction vanishes once the ad hoc tribunal prosecutes. And because national courts have no jurisdiction left upon which to prosecute, double jeopardy protection from national court prosecution obtains.

The double jeopardy shield runs the other way too in the statutes, and protects individuals from successive tribunal prosecution where the individual already has been subject to prosecution by national courts.<sup>291</sup> There are, however, two exceptions. One is practical: the national proceedings must have been impartially, independently, and diligently prosecuted.<sup>292</sup> The other is more significant for the jurisdictional theory: the individual “may be subsequently tried by the International Tribunal only if the act for which he or she was tried [in national court] was characterized as an *ordinary crime*.”<sup>293</sup>

For example, if Jane kills some people based on their ethnic identity with the intent to destroy that ethnic group in whole or in part,<sup>294</sup> and a national court prosecutes Jane for the international crime of genocide, the ad hoc tribunals may not then prosecute Jane a second time for genocide. This provision makes sense under the jurisdictional theory presented by

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288. *Id.* ¶ 63 (quoting the trial court).

289. See ICTY Statute, *supra* note 276, arts. 9, 10; ICTR Statute, *supra* note 276, arts. 8, 9.

290. See ICTY Statute, *supra* note 276, art. 10(1); ICTR Statute, *supra* note 276, art. 9(1).

291. See ICTY Statute, *supra* note 276, art. 10(2); ICTR Statute, *supra* note 276, art. 9(2).

292. ICTY Statute, *supra* note 276, art. 10(2)(b); ICTR Statute, *supra* note 276, art. 9(2)(b).

293. See ICTY Statute, *supra* note 276, art. 10(2)(a) (emphasis added).

294. See Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; see also ICTY Statute, *supra* note 276, art. 4(2)(a)(2); ICTR Statute, *supra* note 276, art. 2(2)(a).

this Article. Since states are constituents of the international legal system, the national court that prosecutes Jane for genocide would have enforced both national and international law over the crime of genocide. The tribunal therefore would have no jurisdiction upon which to prosecute Jane a second time for that crime.

On the other hand, if the national court prosecutes Jane not for the international crime of genocide, but for the “ordinary crime” of homicide, the international tribunal may still prosecute Jane for that same act under the international law proscribing genocide.<sup>295</sup> This too would make sense under the jurisdictional theory. Because the prior national court proceedings did not apply and enforce international law, but prosecuted only for “ordinary crimes” under national law, the national court did not act as the decentralized “international sovereign.” That is, the national prosecution did not apply and enforce international law. The international tribunal, therefore, could continue to represent a distinct lawgiver (the international legal system) applying and enforcing a distinct law (international law) in respect of a distinct crime (an international crime) arising from acts for which an individual already was prosecuted in national court.

## 2. ICC

While transfers of jurisdiction to the ICTY and ICTR were essentially forced upon states through the Security Council’s Chapter VII measures creating those tribunals, transfers of jurisdiction by states to the ICC are for the most part more voluntary in nature. States parties created the ICC directly through international agreement, the final version of which is embodied in its statute.<sup>296</sup> The ICC, in turn, draws its authority from that agreement.<sup>297</sup> The Rome Statute defines the scope and sets the terms of states’ transfers of jurisdiction to the ICC, which winds up defining the scope and setting the terms of the exercise of the ICC’s jurisdiction.

Under the statute the ICC may exercise jurisdiction in three ways. First, it may exercise jurisdiction where a state party on whose territory the

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295. ICTY Statute, *supra* note 276, art. 4(2)(a)(2); ICTR Statute, *supra* note 276, art. 2(2)(a). Michele N. Morosin points out that the argument for a successive international tribunal prosecution under this type of provision “is strengthened if the country [in which the national court proceedings occur] has a statute addressing genocide and did not charge the defendant with this crime.” Morosin, *supra* note 13, at 265.

296. See ICC Statute, *supra* note 276, pmb. (“The States Parties to this Statute . . . [h]ave agreed as follows . . .”).

297. *Id.* art. 1.

crime occurred or whose national is alleged to have committed the crime refers prosecution to the ICC.<sup>298</sup> The referral constitutes a fairly straightforward transfer of state party jurisdiction over territory and nationals to the ICC. Second, the prosecutor may initiate an investigation if the crime is alleged to have occurred in the territory of a state party or if the person accused of the crime is a national of a state party.<sup>299</sup> Again, the ICC borrows the jurisdiction of a state party over its territory and nationals in order to prosecute. In both of these situations, ICC jurisdiction is limited to the national jurisdictions—based on entitlements over territory and persons—of its member states.<sup>300</sup>

Third, the ICC is allowed to reach beyond the national jurisdictions of member states where crimes are “referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”<sup>301</sup> Here we are back to the same transfer of jurisdiction effectuated by the Security Council that underpinned the creation of the ICTY and ICTR. Instead of the Security Council having to establish new ad hoc tribunals every time international peace and security so require, the ICC stands in as a Chapter VII organ when needed.

In contrast to the ICTY and ICTR, however, the ICC’s power to exercise jurisdiction is subject to its own special jurisdictional dynamic. It enjoys only “complementary” jurisdiction to national courts.<sup>302</sup> Under this dynamic, the ICC complements national courts by reinforcing “the primary obligation of States” to prosecute for conduct constituting serious international crimes.<sup>303</sup> Only where states fail to fulfill this obligation does the ICC step in to “fill the gap.”<sup>304</sup>

The preamble to the Rome Statute and Article 1 set forth the ICC’s complementary jurisdiction,<sup>305</sup> and Article 17 lays out its central operation. With exceptions for sham,<sup>306</sup> biased,<sup>307</sup> or unjustifiably delayed

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298. *Id.* arts. 13(a), 12(2)(a),(b); cf. Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *LAW & CONTEMP. PROBS.* 67, 110–17 (2001).

299. ICC Statute, *supra* note 276, arts. 13(c), 12(2)(a),(b).

300. The “applicable law” provisions of the Rome Statute further confirm that the ICC uses states’ national jurisdiction to prosecute, explicitly directing that the ICC may rely upon “the national laws of States that would normally exercise jurisdiction over the crime.” ICC Statute, *supra* note 276, art. 21(1)(c).

301. *Id.* art. 13(b).

302. *Id.* art. 1.

303. John T. Holmes, *The Principle of Complementarity*, in *INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 41, 73–74 (Roy S. Lee ed., 1999).

304. *Id.*

305. ICC Statute, *supra* note 276, pmb., art 1.

306. *Id.* art. 17(2)(a).



prosecutions in national courts,<sup>308</sup> the ICC may not exercise jurisdiction where a state with jurisdiction is investigating or prosecuting the crime,<sup>309</sup> has investigated the crime and decided not to prosecute,<sup>310</sup> or has already tried the accused.<sup>311</sup>

Thus, like the ICTY and ICTR statutes, the Rome Statute contains a jurisdictional dynamic between national courts and international tribunals establishing a shared jurisdiction between them. But unlike the ICTY and ICTR, the ICC's complementary jurisdiction places jurisdictional primacy in the hands of *states*, not the tribunal. Where states exercise national jurisdiction, they extinguish the jurisdiction of the ICC. As the flip side of primacy of jurisdiction, the ICC's complementary jurisdiction explains the Rome Statute's double jeopardy provisions.

Like the ad hoc tribunal statutes, the Rome Statute also protects individuals from successive prosecutions as between the ICC and national courts. But unlike the ICTY and ICTR, the ICC's double jeopardy provisions grant broader power to states, not the tribunal. In fact, just as the ICTY and ICTR reserve a portion of international jurisdiction for the tribunals to exercise after a national court prosecution for an ordinary crime, the Rome Statute appears to reserve for states a portion of national jurisdiction to exercise after an ICC prosecution for an international crime. I shall explain in more detail.

Article 20 of the Rome Statute provides: "No person who has been tried by another court for *conduct* also proscribed under article 6, 7, or 8 [articles which lay out conduct constituting crimes within the ICC's subject matter jurisdiction] shall be tried by the Court with respect to the same *conduct*"<sup>312</sup> unless the other court's proceedings were designed to shield the individual<sup>313</sup> or were otherwise flawed so as not to achieve justice.<sup>314</sup> Since the ICC has only complementary jurisdiction, once a state properly exercises national jurisdiction over the conduct in question, the ICC has no jurisdiction left upon which to prosecute. The result is double jeopardy protection from a successive ICC prosecution for that conduct.

Reversing the double jeopardy shield to address the situation of a prior ICC prosecution and a successive national court prosecution, Article 20

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307. *Id.* art. 17(2)(c).

308. *Id.* art. 17(2)(b).

309. *Id.* art. 17(1)(a).

310. *Id.* art. 17(1)(b).

311. *Id.* art. 17(1)(c).

312. *Id.* art. 20(3) (emphasis added).

313. *Id.* art. 20(3)(a).

314. *Id.* art. 20(3)(b).

provides: “No person shall be tried by another court for a *crime* referred to in article 5 [the article setting forth crimes within the ICC’s jurisdiction] for which that person has already been convicted or acquitted by the Court.”<sup>315</sup> Notice here use of the term “crime,” instead of “acts” or “conduct.” The use is deliberate on the face of the statute since, as quoted above, Article 20 frames the double jeopardy protection flowing from national courts to the ICC as a protection from prosecution for the “same conduct.”<sup>316</sup> Moreover, the Article 20 protection prohibiting a successive prosecution in national courts for the same “crime” already adjudicated in the ICC references Article 5 of the Rome Statute, which sets forth the “Crimes within the jurisdiction of the Court.”<sup>317</sup> By contrast, the Article 20 protection prohibiting a successive ICC prosecution for “conduct” already adjudicated in national courts references Articles 6, 7, and 8—articles which lay out conduct that forms the basis of the crimes listed in Article 5.<sup>318</sup>

The scope of the double jeopardy protections in the Rome Statute is therefore the opposite of that contained in the ICTY and ICTR statutes. While the ICTY and ICTR have primacy over acts constituting serious violations of international law and can extinguish national court jurisdiction over those acts when they prosecute, national courts have primacy over conduct constituting the crimes enumerated in the Rome Statute and can extinguish ICC jurisdiction over that conduct when they prosecute.

Further, just as the ICTY and ICTR might vindicate *international* law by prosecuting an individual for acts constituting international crimes, even though national courts already have prosecuted the same individual for those same acts as “ordinary” crimes under national law, the Rome Statute leaves open the possibility that a national court might vindicate *national* law by prosecuting an individual for conduct constituting an ordinary crime, even though the ICC already has prosecuted the same individual for that same conduct, but as an international crime. The national court just cannot successively prosecute for the same “crime” as the ICC, i.e., an international crime. Thus if Jane is prosecuted for the international crime of genocide by the ICC, a national court may not

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315. *Id.* art. 20(2).

316. *Id.* art. 20(3) (emphasis added). Similarly, Article 20’s prohibition on successive prosecutions in the ICC states that “no person shall be tried before the Court with respect to *conduct which formed the basis of crimes* for which the person has been convicted or acquitted by the Court.” *Id.* art. 20(1) (emphasis added).

317. *Id.* arts. 20(2), 5.

318. *Id.* arts. 20(3), 6, 7, 8.

prosecute her again for genocide, but may prosecute her for the ordinary crime of homicide. And this all makes sense under the jurisdictional theory since the national court would be enforcing a different law—national law—than that enforced by the ICC.

This Part has shown how the complex of double jeopardy provisions contained in international tribunal statutes becomes explicable through concepts of jurisdiction. An exercise of jurisdiction by a tribunal usually extinguishes an exercise of that same jurisdiction by states, and vice versa. The result is double jeopardy protection. Where the statutes allow a successive prosecution, they do so by reserving a portion of either national or international jurisdiction to the state or tribunal, respectively. In sum, the provisions make perfect sense under a jurisdictional theory of double jeopardy.

#### *E. Universal Jurisdiction*

The analysis so far has shown international law to be largely consistent with a jurisdictional theory of double jeopardy in that states with national jurisdiction generally retain the power to prosecute in the face of prior prosecutions by other states. Rules (1) and (2) of the three double jeopardy rules set out in Part III explain this baseline rule. The analysis also has shown how the theory helps to explain the operation of double jeopardy rules in the special context of international tribunals where states and tribunals share jurisdiction. What remains is to explain international law and practice relating to exercises of universal jurisdiction under Rule (3), which holds that a state with only universal jurisdiction cannot prosecute again where a state with national jurisdiction already has prosecuted for the same crime.

Since states have begun only recently to explore in earnest universal jurisdiction over activity occurring in the territories of other states,<sup>319</sup> it is probably premature to conclude that state practice and *opinio juris* (that the practice results from a sense of legal obligation)<sup>320</sup> already have combined definitively to establish that a prosecution by a state with national jurisdiction bars prosecutions by states with only universal jurisdiction. Yet the clear international trend appears overwhelmingly to favor this double jeopardy rule. The jurisdictional theory indicates why.

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319. See REYDAMS, *supra* note 154, at 1.

320. See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES 75 (2002).

To take one high-profile example, Spain's universal jurisdiction law contains an express double jeopardy bar to this effect. Codified at Article 23.4 of the Organic Law of the Judicial Branch, it limits the exercise of universal jurisdiction to situations where "the accused has not been absolved, pardoned, or sentenced in another country, or in the last case, that the sentence has not been completed."<sup>321</sup> Spanish courts have elaborated the jurisdictional rationale of this double jeopardy limitation. The Spanish Supreme Court observed in the Peruvian Genocide case involving universal jurisdiction claims over former Peruvian Prime Minister Alberto Fujimori that "the necessity of judicial intervention pursuant to the principle of universal jurisdiction remains excluded when [the] territorial jurisdiction is effectively prosecuting the crime of universal character in its own country."<sup>322</sup> In keeping with this Article's theory, the Court explained that this principle of jurisdictional exclusion "is derived from the very nature . . . of universal jurisdiction."<sup>323</sup> Because Peru, the national jurisdiction state, had initiated its own prosecution against the accused, Spanish jurisdiction was "excluded" and the case dismissed.<sup>324</sup> More recently, in the Guatemala Genocide Case, the Constitutional Court called upon Article 23.4's double jeopardy limitation to respond to concerns about competition among jurisdictions resulting from universal jurisdiction.<sup>325</sup> The Court explained that since a prosecution by a state with national jurisdiction precludes universal jurisdiction by Spain, no competition would result.<sup>326</sup>

What is perhaps even more interesting is that Spain seems to have a relatively permissive law as compared to other countries with universal jurisdiction laws on the books. While explicitly referencing Article 23.4's double jeopardy bar as a limitation on the exercise of universal jurisdiction in the Guatemala Genocide case, the Constitutional Court refused to apply a principle of subsidiary jurisdiction.<sup>327</sup> Under the particular subsidiary principle at issue in the case, the party bringing the universal jurisdiction

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321. Peruvian Genocide, STS, May 20, 2003 (J.T.S. No. 712), *reprinted in* 42 I.L.M. 1200, 1205 (2003). Also, states with laws generally prohibiting successive prosecutions for extraterritorial acts where the accused already has been prosecuted abroad necessarily include a prohibition on successive universal jurisdiction prosecutions. *See, e.g.*, Strafgesetzbuch [StGB] [Penal Code] § 65(4) (Austria), *translated in* REYDAMS, *supra* note 154, at 94; *see also* Van den Wyngaert & Stessens, *supra* note 13, at 784.

322. Peruvian Genocide, 42 I.L.M. 1200, 1205.

323. *Id.*

324. *Id.* at 1206.

325. Guatemala Genocide, *supra* note 146.

326. *Id.*

327. *Id.*

action would have needed affirmatively to show inaction on the part of the state with national jurisdiction in order for Spanish courts to exercise jurisdiction.<sup>328</sup> The Court felt that this was too high a burden to place on plaintiffs.<sup>329</sup> Its discussion raises the far more common reason why any instances of successful successive prosecution based solely on universal jurisdiction are so hard to find.<sup>330</sup>

The major reason why states appear not to prosecute successively on universal jurisdiction grounds is that these cases never appear to be brought in the first place, or never seem to reach any meaningful stage of procedure. States do not confront the double jeopardy issue in cases of universal jurisdiction because they tend broadly to defer to states with national jurisdiction, and only take up universal jurisdiction prosecutions where it can be shown—and the burden is usually on the parties trying to initiate suit to show it—that states with national jurisdiction are either unable or unwilling to prosecute, or that the prior prosecution was a sham designed to shield the accused. Thus a main situation in which states have been willing to exercise universal jurisdiction in the past has been where the national jurisdiction state simply does not have a functioning legal system.<sup>331</sup>

In this sense universal jurisdiction appears to function as a kind of subsidiary or complementary jurisdiction to national jurisdiction, whereby states with national jurisdiction have “first dibs” and can, through a good faith prosecutorial effort, foreclose the possibility of a successive universal jurisdiction prosecution in a manner similar to a national court foreclosing a successive international tribunal prosecution.<sup>332</sup> To be sure, some states’ universal jurisdiction laws specifically provide for only complementary jurisdiction precisely because the laws implement obligations under the ICC’s Rome Statute.<sup>333</sup> Thus, as in the tribunal statutes, the double jeopardy question becomes consequentially linked to the question of jurisdictional priority. States do not exercise universal jurisdiction because

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328. *Id.*; see also Naomi Roht-Arraiza, *International Decision: Guatemala Genocide Case*, 100 AM. J. INT’L L. 207, 210 (2006).

329. Guatemala Genocide, *supra* note 146.

330. Research has uncovered no instance of a successive prosecution based only on universal jurisdiction.

331. See Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes*, 36 GEO. J. INT’L L. 537, 551–57 (2005) (discussing cases).

332. See *supra* Part IV.E.

333. See, e.g., Völkerstrafgesetzbuch [VStGB] [German Code of Crimes Against Int’l Law] June 30, 2002, BGBl. I at 2254 (F.R.G.). An English translation is available at the homepage for the Max Planck Institute for Foreign and International Criminal Law, <http://www.iuscrim.mpg.de/shared/data/pdf/vstgbengl.pdf> (last visited Feb. 26, 2009).

they give primacy to states with national jurisdiction, and the result is a shield from successive universal jurisdiction prosecution. The Republic of the Congo recently argued in a case pending before the International Court of Justice that this principle of subsidiary jurisdiction already has attained international legal force, and therefore foreclosed French universal jurisdiction proceedings against Congolese nationals because a Congolese prosecution for the same offenses against the same individuals already had commenced.<sup>334</sup> After canvassing state practice in this regard, I explain that this rule of priority finds further support in international treaty law.

### *1. Jurisdictional Priority in National Laws*

The determination by states with universal jurisdiction laws to give primacy to states with national jurisdiction occurs through a number of devices, including the law itself, judicial construction of the law, and prosecutorial discretion (which is often purposely incorporated into the universal jurisdiction law to guarantee such primacy).

#### *a. Legislative and Judicial Determinations*

Some states have built into their laws a jurisdictional hierarchy that grants primacy to states with national jurisdiction. For instance, the Austrian Supreme Court has interpreted Austrian Penal Code § 65(1)(2), which allows extraterritorial jurisdiction only if the accused cannot be extradited,<sup>335</sup> to condition Austrian exercises of universal jurisdiction on an inability to extradite to the state with territorial jurisdiction because that state's legal system is not functional.<sup>336</sup> Similarly, Dutch law recognizes a hierarchy of jurisdiction which gives priority to states with territorial jurisdiction over the exercise of universal jurisdiction by Dutch courts.<sup>337</sup> In deciding whether to exercise universal jurisdiction, Austrian,<sup>338</sup>

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334. Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. 107 (June 16); Application Instituting Proceedings, On Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. Pleadings IV(A)(1), ¶ 2 (Apr. 11, 2003), available at <http://www.icj-cij.org/docket/files/129/7067.pdf>. The Court has not yet issued an opinion. Like Spain, France's universal jurisdiction law prohibits universal jurisdiction proceedings against individuals who have been finally acquitted or convicted abroad. See French Code de procédure pénale [C. PR. PÉN.], art. 692 (Fr.).

335. Strafgesetzbuch [StGB] [Penal Code] §§ 64(1)(6), 65(1)(2) (Austria).

336. ARIANA PEARLROTH, REDRESS, UNIVERSAL JURISDICTION IN THE EUROPEAN UNION: COUNTRY STUDIES 3 (2003), <http://www.redress.org/conferences/country%20studies.pdf> (summarizing the Cvjetkovic Case).

337. *Id.* at 26.

338. REYDAMS, *supra* note 154, at 99.

Danish,<sup>339</sup> German,<sup>340</sup> and Belgian<sup>341</sup> courts all appear to have first determined that states with national jurisdiction were either unwilling or unable to prosecute. As the Bavarian Supreme Court explained its exercise of universal jurisdiction over a Bosnian national for crimes committed in the former Yugoslavia, “since the . . . competent territorial State do[es] not wish to take over the proceedings, Germany has an interest not to be perceived by the international community as a haven for international criminals.”<sup>342</sup>

*b. Prosecutorial Discretion*

More recently, prosecutorial discretion has become a popular device to block universal jurisdiction exercises through jurisdictional primacy determinations before a case even gets to the courts. This discretion is often incorporated directly into the universal jurisdiction law, and is often an exceptional power unique to universal jurisdiction complaints. One of the major overhauls of the much-ballyhooed Belgian universal jurisdiction legislation was the addition of absolute prosecutorial discretion over universal jurisdiction claims.<sup>343</sup> Previously, as is typical in civil law countries, private victims could initiate suit through *constitution de partie civile* before an investigating judge.<sup>344</sup> The Belgian law was amended twice in 2003 to give the public prosecutor the sole and unreviewable discretion to move forward with a universal jurisdiction case,<sup>345</sup> and to refuse to proceed if “this matter should be brought . . . before a tribunal in the place where the acts were committed, or before the tribunals of a State in which the offender is a national or where he may be found, and as long as this tribunal is competent, independent, impartial and fair.”<sup>346</sup> It was precisely this type of prosecutorial discretion provision—again, incorporated right into the universal jurisdiction law itself—that prevented a recent case against former U.S. Secretary of Defense Donald Rumsfeld

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339. *Id.* at 127–29.

340. *Id.* at 151–52.

341. *Id.* at 109–11, 114.

342. *Id.* at 151.

343. Steven R. Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AM. J. INT’L L. 888, 890 (2003).

344. Christine Van den Wyngaert, *Belgium*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 1, 16–18 (Christine Van den Wyngaert et al. eds., 1993).

345. *U.S. Reaction to Belgian Universal Jurisdiction Law*, 97 AM. J. INT’L L. 984, 986–87 (2003).

346. Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l’article 144 *ter* du Code judiciaire, Apr. 23, 2003, M.B., May 7, 2003, translated in 42 I.L.M. 749 (2003); see also Ratner, *supra* note 343, at 891 n.12.

and others from going forward in German courts.<sup>347</sup> The prosecutor explained the power to prosecute universal crimes was subject to “a certain hierarchy,” under which German universal jurisdiction was not available unless it could be shown that “the primarily competent jurisdictions,” namely, “the state of the scene of the crime and the state whose nationals the perpetrators and victims are” were either unwilling or unable to prosecute.<sup>348</sup>

## 2. *Jurisdictional Priority in Treaty Law*

The primary competence of national jurisdiction states over states with only universal jurisdiction finds further support in treaty law. Close examination of the jurisdictional provisions of a wide range of treaties covering international crimes reveals, or at least strongly indicates, a jurisdictional hierarchy according to which states with national jurisdiction have priority over states with only universal jurisdiction. Two sets of jurisdictional provisions tend toward this conclusion.

The first set is made up of provisions setting forth states parties with jurisdiction over the crime that is the subject of the treaty. These provisions routinely contain a series of paragraphs directing states to establish jurisdiction.<sup>349</sup> States with what we have been calling national jurisdiction—that is, states having some connection to the crime based on territoriality, nationality, or national defense—are grouped together in paragraphs above separate, lower paragraphs that contemplate jurisdiction by states with no such link.<sup>350</sup>

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347. See Scott Lyons, *German Criminal Complaint Against Donald Rumsfeld and Others*, AM. SOC'Y INT'L L. INSIGHT, Dec. 14, 2006, <http://www.asil.org/insights/2006/12/insights061214.html>.

348. Letter and Memorandum from the Gen. Prosecuting Attorney of the Fed. Court to Wolfgang Kaleck (Feb. 10, 2005), available at <http://www.brusselstribunal.org/pdf/RumsfeldGermany.pdf>.

349. See *infra* note 350.

350. See Torture Convention, *supra* note 157, art. 5(1); Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4(1), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hijacking Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 5(1), Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Convention]; International Convention Against the Taking of Hostages, art. 5(1), Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 6(1),(2), Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter Maritime Navigation Convention]; International Convention for the Suppression of Terrorist Bombings, art. 6(1),(2), Dec. 15, 1997, S. TREATY DOC NO. 106-6, 2149 U.N.T.S. 284 [hereinafter Bombing Convention]; International Convention for the Suppression of the Financing of Terrorism, art. 7(1), (2), Dec. 9, 1999, 39 I.L.M. 270 [hereinafter Financing Convention]; International Convention for the Suppression of Acts of Nuclear Terrorism, art. 9(1),(2), annexed to G.A. Res. 59/240, U.N. Doc. A/RES/59/240 (Feb. 24, 2005), 44 I.L.M. 815 (2005) [hereinafter Nuclear Terrorism Convention]; United Nations Convention Against Corruption, art. 12(1),(2), G.A. Res. 58/4 (Oct. 31, 2003), 43



These lower paragraphs, which are becoming increasingly common in treaties covering international crimes,<sup>351</sup> provide for the establishment of “jurisdiction over the[] crimes in cases where the alleged offender is present in [the state’s] territory and it does not extradite him . . . to any of the states [with national jurisdiction].”<sup>352</sup> The lower paragraph, in short, provides for a treaty-based equivalent of universal jurisdiction among states parties based on the presence of the accused<sup>353</sup> and for the exercise of this type of jurisdiction where the accused is not extradited to a state with national jurisdiction.

Article 5 of the Torture Convention is emblematic. Paragraph 1 lists the states with national jurisdiction and paragraph 2 provides for the treaty-based equivalent of universal jurisdiction among states parties based on the presence of the accused, which jurisdiction is to be exercised where the accused is not extradited to a state with national jurisdiction:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its

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I.L.M. 37 (2004) [hereinafter Corruption Convention]; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art 9(1), G.A. Res. 44/34, art. 10, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter Mercenary Convention]; International Convention for the Protection of All Persons from Enforced Disappearance, art 9(1), U.N. Doc. E/CN.4/2005/WG.22/WP.1/REV.4 (Sept. 23, 2005) [hereinafter Enforced Disappearance Convention].

351. Older treaties covering international crimes do not provide for jurisdiction by states with no territorial or national link to the crime. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 294, art. 6.

352. *See* Torture Convention, *supra* note 157, art. 5(2); Hijacking Convention, *supra* note 350, art. 4(2); Montreal Convention, *supra* note 350, art. 5(2); Hostage Convention, *supra* note 350, art. 5(2); Maritime Navigation Convention, *supra* note 350, art. 6(4); Bombing Convention, *supra* note 350, art. 6(4); Financing Convention, *supra* note 350, art. 7(4); Nuclear Terrorism Convention, *supra* note 350, art. 9(4); Corruption Convention, *supra* note 350, art. 3(5); Mercenary Convention, *supra* note 350, art. 9(2); Enforced Disappearance Convention, *supra* note 350, art. 9(2).

353. For elaboration of this point, see Colangelo, *supra* note 135, at 166–69.

jurisdiction and it does not extradite him . . . to any of the States mentioned in paragraph 1 of this article.<sup>354</sup>

The paragraph 2 catch-all thus seems designed to supplement the national jurisdiction in the first paragraph by closing a jurisdictional loophole among states parties, ensuring that the accused has no safe haven within their combined territories. The simple placement of this treaty-based equivalent of universal jurisdiction into separate, “secondary” paragraphs—ones that come after the list of states with “primary” national jurisdiction—is significant,<sup>355</sup> and the absolute uniformity of this hierarchy across treaties covering international crimes suggests that states consider jurisdiction without territorial or national links to the crime to be a subordinate basis of jurisdiction to jurisdiction based on such links, which ordinarily takes priority.

The second set of treaty provisions indicating that national jurisdiction states have priority over universal jurisdiction states are the prior notice provisions. These provisions require a state party with custody over the accused to “immediately notify” the states with national jurisdiction, and, if the circumstances warrant a preliminary inquiry into the case, to “promptly report its findings to the said [national jurisdiction] States and [to] indicate whether it intends to exercise jurisdiction.”<sup>356</sup> The provisions consequently signal which states have strong jurisdictional interests, i.e., states with national jurisdiction, and offer the opportunity to those states to request extradition before another, universal jurisdiction state exercises jurisdiction. It should be noted also that dicta in a Joint Separate Opinion from a recent case in the International Court of Justice involving a claim of universal jurisdiction further supports the view that states with national jurisdiction take priority over states with only universal jurisdiction.<sup>357</sup>

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354. Torture Convention, *supra* note 157, art. 5.

355. There are a few treaties that contain more than one paragraph listing states with national jurisdiction, *see, e.g.*, Corruption Convention, *supra* note 350, art. 42. What is important for my argument is that the treaty-based equivalent of universal jurisdiction comes after these national jurisdiction provisions, and that it is included in a separate paragraph. *See id.* This is uniformly true in the treaties. *See supra* note 350.

356. Torture Convention, *supra* note 157, art. 6(4).

357. Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Cong. v. Belg.), 2002 I.C.J. 121, ¶ 59 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal). Among other guidelines, the Judges prescribed that the state wishing to assert universal jurisdiction “must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.” *Id.* Given my reliance on treaty law, I want to draw some attention to where I think the opinion errs. The opinion distinguishes between “a classical assertion of [universal jurisdiction] exercised where the accused is not present on the state’s territory, *id.* ¶ 21, and the types of treaty provisions I have referred to above which, according to the opinion, have “come to be referred to as ‘universal jurisdiction,’ though this is really an obligatory territorial jurisdiction over persons albeit in

In all, state practice accompanied by what appears to be an emerging sense of *opinio juris* indicates that states consider a good faith prosecutorial effort by a national jurisdiction state to foreclose the possibility of a successive prosecution by states with universal jurisdiction. Again, the jurisdictional theory explains why. Moreover, there appears a strong trend among states with universal jurisdiction laws to give primacy to states with national jurisdiction. In this respect, universal jurisdiction operates as a subsidiary or complementary jurisdiction to national jurisdiction. The trend of prioritizing national jurisdiction over universal jurisdiction is further supported by jurisdictional provisions contained in multilateral treaties, was recently argued in a case pending before the ICJ, and was approved by dicta in a recent ICJ opinion. Such a trend is highly significant to international double jeopardy protections because if the state with national jurisdiction prosecutes first for the crime at issue, the state with universal jurisdiction cannot successively prosecute—at least under a jurisdictional theory of double jeopardy.

#### V. IMPLICATIONS FOR U.S. CONSTITUTIONAL AND INTERNATIONAL LAW

So far I have argued that a jurisdictional theory of double jeopardy supplies a useful analytical vehicle for understanding the corpus of Supreme Court dual sovereignty jurisprudence and also brings coherence to what otherwise looks like an unintelligible grab bag of international rules and practice. In this respect, my arguments until now have been largely descriptive. While the theory's explanatory force may be able to stand on its own as a helpful contribution, it also recommends important

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relation to acts committed elsewhere," *id.* ¶41. The opinion's distinction between "classical" and "treaty-based" universal jurisdiction may well hold for universal adjudicative, or in personam, jurisdiction: the presence of the accused within a state's territory gives that state's courts personal jurisdiction, under the treaty, irrespective of where the crime occurred. Yet the distinction becomes more difficult to sustain with respect to prescriptive jurisdiction, or the state's initial power to apply its laws to the conduct in question. The crime did not occur on the state's territory and thus, as the opinion concedes, it is not that the state is exercising territorial jurisdiction over the crime itself. Rather, the opinion seems to be suggesting that once the defendant is in the state's territory, the state has jurisdiction to prescribe as to that defendant. But if the presence of the accused—at some later point—is all that is giving the state prescriptive power, the exercise of that power inevitably raises serious *ex post facto* problems if the state did not already have that power to begin with *at the time the crime was committed* (when the state had no link to the defendant). It would betray bedrock criminal law notions of legality to say, for instance, "We had no power to apply our law prohibiting X to you *at the time you committed X*; but now that you're in our territory we are empowered retroactively to apply our prohibition to you." Only if X were *already prohibited* under a universal international legal prohibition—that the state subsequently enforces once it obtains personal jurisdiction over the defendant—can the prescriptive jurisdiction stand.

doctrinal developments for double jeopardy law and practice in both the U.S. and international systems.

In this Part I explore some of the more significant implications of the theory in this regard. To frame the discussion I begin by flagging an inherent normative tension between state sovereignty and individual rights in double jeopardy rules among sovereigns. In light of this tension, I argue that a jurisdictional theory can enrich both U.S. constitutional and international legal evaluation of double jeopardy by importing more nuanced analysis into conventional doctrine to better accommodate the competing interests at stake—particularly, individual rights interests; and therefore, the theory promises a sounder doctrine of double jeopardy in both systems. Specifically, the theory can enrich U.S. doctrine by calling for a due process analysis of a successively prosecuting sovereign's jurisdiction—an analysis that holds the potential to change outcomes in cases of either U.S. state or federal extraterritorial jurisdiction. The theory similarly can enrich international doctrine through a reasonableness analysis of a successively prosecuting sovereign's jurisdiction—an analysis that reflects the doctrinal and normative correctness of the double jeopardy rules articulated in Part III.

Lastly, I engage the situation where multiple sovereigns legitimately have jurisdiction to pursue multiple prosecutions even under the revised constitutional and international tests proposed below. I suggest that this does not mean that these sovereigns necessarily *will* exercise that power to vindicate their interests. In fact, comity mechanisms already built into both the U.S. and international systems aim to facilitate a single prosecution in a single forum so as to satisfy the interests of multiple sovereigns, thus increasing efficiency and reducing friction for the system while simultaneously advancing the individual's interest not to be prosecuted multiple times for the same crime.

#### *A. Normative Stakes*

The central normative tension in double jeopardy rules among sovereigns is between the ability of sovereigns to protect their interests through the enforcement of their criminal laws and the rights of individuals to be free from multiple prosecutions for the same criminal activity. The former ability self-evidently motivates the U.S. dual sovereignty doctrine as well as current international rules allowing states with independent jurisdiction successively to prosecute for acts that harm important entitlements over national territory and persons.

The “underlying idea” of double jeopardy protection from the individual rights perspective, on the other hand,

is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>358</sup>

Taking this language at face value one might observe that the dual sovereignty doctrine and corresponding rules of international law appear to avoid the injunction against successive prosecutions since it is not the same “State” repeatedly attempting to convict. Justice Black’s reply to this observation in his dissent in *Bartkus* (a decision upholding on dual sovereignty grounds multiple prosecutions for the same robbery by federal and state authorities) goes far toward erasing that comfort:

Looked at from the standpoint of the individual who is being prosecuted, this [dual sovereignty] notion is too subtle for me to grasp. . . . [I]t hurts no less for two “Sovereigns” to inflict [double jeopardy] than for one. . . . In each case, inescapably, a man is forced to face danger twice for the same conduct.<sup>359</sup>

The same reasoning would seem to apply in the international context.<sup>360</sup> From the defendant’s perspective it does not matter all that much whether he is prosecuted twice by Germany, or whether he is prosecuted first by Italy and then by Germany.<sup>361</sup> In both cases the same individual is “inescapably . . . forced to face danger twice for the same conduct.”<sup>362</sup>

The salient normative question for double jeopardy rules among sovereigns therefore is how best to accommodate the sovereign’s right to enforce its laws and the individual’s right not to be prosecuted multiple times for the same criminal act. Conventional doctrine appears to offer a rather blunt binary choice: either we ought to allow multiple sovereigns to enforce their laws leading possibly to as many prosecutions as sovereigns with jurisdiction, or we ought to prohibit sovereigns from prosecuting successively in order absolutely to safeguard defendants’ rights.

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358. *Greene v. United States*, 355 U.S. 184, 187–88 (1957).

359. *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting).

360. Van den Wyngaert & Stessens, *supra* note 13, at 781.

361. *Id.*

362. *Bartkus*, 359 U.S. at 155.

This choice certainly dominates prevailing double jeopardy doctrine as far as the U.S. Supreme Court is concerned (and we know which way the Court comes out).<sup>363</sup> The Court openly views dual sovereignty as an either/or proposition: either the successively prosecuting entity is a separate sovereign, in which case the prosecution is permissible, or it is not, in which case the prosecution is barred under the Double Jeopardy Clause. Indeed, noting that a “balancing of interests approach . . . cannot be reconciled with the dual sovereignty principle,” the Court has flatly observed: “If the States are separate sovereigns, as they must be under the definition of sovereignty which the Court has consistently employed, the circumstances of the case are irrelevant.”<sup>364</sup> The lines are perhaps less clearly drawn for the international system. The law in some areas appears to make this type of broad distinction: either the human right against double jeopardy attaches to multiple prosecutions by multiple states, or it doesn’t. Yet practice seems more hued with some states undertaking a species of interest analysis to determine whether successively to prosecute, especially in cases of extraterritorial jurisdiction.<sup>365</sup> I will now show how the theory enriches both U.S. and international doctrine.

*B. Implications for U.S. Constitutional Doctrine: “Due Process”*

As Part II of this Article demonstrated, the “sovereign” ability under the U.S. dual sovereignty doctrine successively to prosecute originates in the ability independently to make and apply law to the defendant, or to exercise jurisdiction. Nearly one hundred years ago the Supreme Court emphasized that although dual sovereignty was “thoroughly established,” it “relate[s] only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction.”<sup>366</sup> But if that is right, and the genesis and history of the doctrine strongly indicate that it is, the Court’s current dual sovereignty jurisprudence routinely ignores a critical constitutional inquiry: whether the successively prosecuting sovereign’s exercise of jurisdiction satisfies due process.

All U.S. law students will recognize that a state’s exercise of jurisdiction cannot be “arbitrary or fundamentally unfair” under the Due Process Clause of the Fourteenth Amendment,<sup>367</sup> and that neither can the

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363. See *Heath v. Alabama*, 474 U.S. 82, 91–94 (1985).

364. *Id.* at 92.

365. See *supra* Parts IV.C.1.b, IV.E.

366. *S. Ry. Co. v. R.R. Comm’n of Ind.*, 236 U.S. 439, 445 (1915).

367. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 311 (1981).

federal government's under the Due Process Clause of the Fifth Amendment.<sup>368</sup> U.S. law students also know that—in stark contrast to the Supreme Court's present dual sovereignty analysis—such a due process evaluation is a highly nuanced, fact-sensitive inquiry. A state's exercise of prescriptive jurisdiction must satisfy constitutional tests that consider, among other things, the degree of contacts between the forum, the parties and the occurrence,<sup>369</sup> the interests of the forum,<sup>370</sup> and the reasonable expectations of the parties,<sup>371</sup> in order both to protect defendants and to ensure that states “do not reach out beyond the limits imposed on them by their status as coequal sovereigns.”<sup>372</sup> Also relevant to the calculus are the efficient resolution of controversies, orderly administration of law, and shared substantive policies within a system of multiple sovereigns.<sup>373</sup>

The Supreme Court's present dual sovereignty analysis contains none of this. A due process inquiry into the successively prosecuting state's jurisdiction therefore not only seems required for dual sovereignty purposes given the jurisprudential origins and history of that doctrine, but also healthily complicates what is, at present, an unreflective doctrine that utterly excludes one of the two main normative considerations implicated by double jeopardy rules among sovereigns: individual rights. Moreover, as a pure matter of constitutional interpretation, the move to incorporate due process into double jeopardy doctrine has a certain structural appeal; the Double Jeopardy Clause and the Due Process Clause protections against federal power appear in the same amendment,<sup>374</sup> and the Fourteenth Amendment's Due Process Clause incorporates the Fifth Amendment's double jeopardy protection against the states.<sup>375</sup>

Significantly, a due process inquiry into a successively prosecuting sovereign's jurisdiction likely would not alter dual sovereignty outcomes for successive prosecutions between federal and state governments—the original justification for the doctrine. Rather its bite would be on

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368. *See, e.g.*, *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990).

369. *See Hague*, 449 U.S. at 318 & n.24; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

370. *Id.*

371. *Id.*

372. *Hague*, 449 U.S. at 334 (Powell, J., dissenting) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–94 (1980)).

373. *World-Wide Volkswagen*, 444 U.S. at 294; *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113–15 (1987). I realize that citing these cases adds to the prescriptive jurisdiction analysis adjudicative and, particularly, personal jurisdiction considerations. However, as Justice Black has pointed out, “both inquiries are closely related and to a substantial degree depend upon similar considerations.” *Shaffer v. Heitner*, 433 U.S. 186, 224–25 (1977).

374. U.S. CONST. amend. V.

375. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

successive prosecutions between U.S. states or by the U.S. federal government when it exercises extraterritorial jurisdiction. I address each scenario in turn.

### 1. *Federal/State*

Certain features of U.S. federalism indicate that a due process analysis likely would not alter the dual sovereignty doctrine's preservation of separate federal and state prosecutorial power. Federal and state governments have overlapping territorial jurisdiction with respect to certain criminal acts and the defendant who commits them. Thus the defendant has clear notice, and simultaneously enjoys the benefits and protections, of both sets of laws. It is also likely that the laws aim to achieve different substantive policies, making their enforcement non-redundant.

Recall the very first articulation of the dual sovereignty doctrine: "Every citizen of the United States is also a citizen of a State. . . . He may be said to owe allegiance to two sovereigns. and [sic] may be liable to punishment for an infraction of the laws of either."<sup>376</sup> The Court also expounded early on that every citizen "owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction."<sup>377</sup>

It would not be unfair, under this original reasoning, to apply two sets of laws to the individual defendant because he both benefits from their concurrent protections and knows—he has notice and a reasonable expectation—that he is subject to two sets of laws and in fact may be held to account for breaking each of them. Moreover, each sovereign has a distinct interest—one federal and the other local—in enforcing its own distinct law, each of which tends to confer its own distinct benefits. This early reasoning is at the heart of a due process gauge that evaluates a sovereign's exercise of jurisdiction pursuant to the benefits conferred by that sovereign's laws upon the defendant, notice, and the efficient administration of law.<sup>378</sup> It thus squarely addresses both of the normative considerations mentioned above.

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376. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852).

377. *United States v. Cruikshank*, 92 U.S. 542, 551 (1875).

378. *See supra* notes 368–73.



## 2. *State/State*

The situation is different in the inter-state context where jurisdiction arguably is exercised extraterritorially and the interests of the states in enforcing local law are substantially similar. Take the case of *Heath v. Alabama*.<sup>379</sup> Heath had hired two men in Georgia to kidnap and kill his wife, which they did—in Georgia.<sup>380</sup> He was prosecuted for homicide in Georgia and pleaded guilty in exchange for a life sentence to avoid the death penalty.<sup>381</sup> Alabama then prosecuted him for the same homicide, convicting him and sentencing him to death.<sup>382</sup>

Heath argued to the Supreme Court that virtually all of the activity relating to the crime took place in Georgia.<sup>383</sup> Thus, he contended, “the facts of this case strongly suggest that Alabama overreached its constitutional authority in exercising jurisdiction over these events that occurred in another state.”<sup>384</sup> This was especially so, Heath argued, since unlike a successive federal/state prosecution scenario, Alabama and Georgia had the same interest in prosecution—the enforcement of local law against homicide.<sup>385</sup> The Court refused to consider his jurisdictional objections, however, because Heath had failed to raise them on appeal in Alabama state court.<sup>386</sup> And, finding Georgia and Alabama to be separate “sovereigns” with a perfunctory nod to the “ultimate source of power” of each, the Court upheld the successive prosecution.<sup>387</sup>

But under a jurisdictional theory the Court would have *had* to consider Heath’s objections to Alabama jurisdiction over him—for it was *that very jurisdiction*, the ability to apply Alabama law to him, that made Alabama a “sovereign” with the meaning of the dual sovereignty doctrine. Who knows how the Court ultimately would have come out on the issue (there was evidence that at least some steps leading up to the homicide occurred in Alabama);<sup>388</sup> but a due process analysis would have supplied a richer, more rights-sensitive approach by evaluating, *inter alia*, whether Heath reasonably could have known he was subjecting himself to Alabama law,

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379. 474 U.S. 82, 82 (1985).

380. *Id.*

381. *Id.* at 84.

382. *Id.*

383. Brief of Petitioner at 27, *Heath*, 474 U.S. 82 (No. 84-5555).

384. *Id.*

385. *Id.* at 48.

386. *Heath*, 474 U.S. at 87.

387. *Id.* at 87–90.

388. Brief of Petitioner at 27, *Heath*, 474 U.S. 82 (No. 84-5555).

and whether he had availed himself of that law<sup>389</sup> and might be forced to defend himself in Alabama,<sup>390</sup> the strength of Alabama's interest in a successive prosecution given the prior Georgia conviction under a nearly identical law,<sup>391</sup> and Alabama's prosecution in relation to the efficient administration of the law in a federal system.<sup>392</sup> Such a nuanced inquiry capable of bringing into the fold of its analysis both the sovereign's and the individual's interests would be far preferable to the current one-dimensional approach employed by the Court—an approach that, again, completely excludes individual rights.

A due process approach also reinforces what the Supreme Court already has suggested about the extraterritorial application of state criminal law. U.S. states have for the most part adopted statutes, based on the Model Penal Code,<sup>393</sup> that enlarge their territorial jurisdiction to encompass conduct within the state that leads to<sup>394</sup> or is intended to lead to<sup>395</sup> a harmful result outside the state, as well as to conduct outside the state that leads to<sup>396</sup> or is intended to lead to<sup>397</sup> a harmful result inside the state.<sup>398</sup> While the Court has stated that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [the defendant] had been present at the effect,”<sup>399</sup> it has also found troubling under the Fourteenth Amendment a state's criminalization of a status inside its borders without an act in its borders.<sup>400</sup> Rather than engaging in fictions about territoriality, a due process inquiry into a state's jurisdiction supplies established analytical machinery for determining whether a given trans-border crime meets the constitutional threshold for the application of a state's criminal law. Firing a gun from State *A* across the border into State *B* and killing someone there may present a fairly clear case of State *B* criminal

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389. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985).

390. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–94 (1980).

391. *Id.*

392. *Id.*

393. See 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 16.4(c) (3d ed. 2007).

394. MODEL PENAL CODE § 1.03(1)(a) (1985).

395. *Id.* § 1.03(1)(b), (c).

396. *Id.* § 1.03(1)(a).

397. *Id.* § 1.03(1)(b), (c).

398. The constitutionality of this legislation has been held not to violate due process “[b]ecause such legislation adheres to the territorial principle.” LAFAVE ET AL., *supra* note 393, § 16.4(c).

399. Strassheim v. Daily, 221 U.S. 280, 285 (1911).

400. Robinson v. California, 370 U.S. 660, 667 (1962) (“We hold that a state law which imprisons a person thus afflicted [by drug addiction] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts cruel and unusual punishment in violation of the Fourteenth Amendment.”).

jurisdiction.<sup>401</sup> But what about poisoning a person in State *A*, who then travels to State *B* and dies there—or perhaps boards a plane to State *Q*, three thousand miles away. Should the latter States have jurisdiction to prosecute? What if the defendant had reason to know the victim would travel to State *Q*? What if the defendant did *not* have reason to know the victim would travel to State *Q*? Would it make a difference if State *A*, the State with clearly stronger links to the act, prosecutes first? The advent of the internet and cybercrime only adds to the complexity and urgency of these questions. A due process analysis that measures the connection between the criminal activity and the forum, as well as the interests of the forum, the defendant, and the larger system of co-equal states provides a ready and sophisticated framework for answering such complex jurisdictional and, under the theory presented here, double jeopardy questions for the domestic inter-state system. And it does so in a way that explicitly considers individual rights.

### 3. *Federal Extraterritorial*

Just as a state may not exercise extraterritorial jurisdiction contrary to Fourteenth Amendment due process, the federal government may not exercise extraterritorial jurisdiction contrary to Fifth Amendment due process. While the courts of appeals appear to use slightly varying tests to determine whether an extension of federal jurisdiction abroad violates due process, all courts to have considered the matter have found that the Fifth Amendment prohibits the exercise of such jurisdiction from being arbitrary or fundamentally unfair.<sup>402</sup> Elsewhere I have argued that the proper test—and the test that most courts employ even if they may not always come out and say so—incorporates jurisdictional principles of international law.<sup>403</sup> By incorporating international law, Fifth Amendment due process affords the federal government a more expansive jurisdictional reach in the international context than the Fourteenth Amendment affords the states in the domestic context. For instance, while a state must have some link to the activity it seeks to regulate under the Fourteenth Amendment,<sup>404</sup> the Fifth Amendment's incorporation of the

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401. *See Strassheim*, 221 U.S. at 285.

402. Colangelo, *supra* note 135, at 158–88 (discussing cases).

403. *Id.*

404. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

international law of universal jurisdiction allows the federal government to apply its laws to conduct having no nexus to the United States.<sup>405</sup>

Finally, although the Supreme Court has not yet addressed directly the issue of Fifth Amendment due process limits on federal extraterritoriality, it has said in the related context of extraterritorial adjudicative jurisdiction by states over foreign defendants that due process not only considers the defendant's interests, but also "calls for [consideration of] the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction," requiring "a careful inquiry into the reasonableness of jurisdiction in the particular case"<sup>406</sup>—a move that leads right into the international rule described next.

### *C. Implications for International Legal Doctrine: "Reasonableness"*

Like its importation of due process analysis into U.S. double jeopardy jurisprudence, the jurisdictional theory enriches international doctrine by inviting a reasonableness analysis of a successively prosecuting nation-state's jurisdiction. The oft-quoted test set forth by the Restatement on Foreign Relations Law provides that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."<sup>407</sup> Chief among the factors for determining reasonableness are: "the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has a substantial, direct, and foreseeable effect upon or in the territory;"<sup>408</sup> "connections, such as nationality, residence, or economic activity, between the regulating state and the person . . . responsible for the activity to be regulated [the defendant], or between that state and those whom the [regulated activity] is designed to protect [the plaintiff/victim];"<sup>409</sup> the "importance of regulat[ing]" that particular activity to regulating state;<sup>410</sup> the "justified expectations that might be protected or hurt by the

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405. Colangelo, *supra* note 135, at 170–76.

406. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 115 (1987).

407. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987); *see also* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818–19 (1993) (Scalia, J., dissenting).

408. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a).

409. *Id.* § 403(2)(b).

410. *Id.* § 403(2)(c).

regulation;<sup>411</sup> the interests of, and “likelihood of conflict” with, other states;<sup>412</sup> and traditions of the international system.<sup>413</sup>

These factors look very much like factors U.S. courts use to evaluate jurisdiction under a due process inquiry; and in fact we have seen that the Supreme Court “typically describe[s] [due process] in terms of ‘reasonableness.’”<sup>414</sup> The factors similarly move past a simplistic sovereignty/individual rights choice to a more contextual, nuanced evaluation of a successively prosecuting state’s jurisdiction. Here I show how a reasonableness analysis provides a realistic and desirable way for international law to evaluate double jeopardy rules among sovereigns in light of the framework articulated and substantiated in Parts III and IV.

### *I. General Application*

Parts III and IV demonstrated that international law presently allows different sovereigns successively to prosecute for the same crime if they have independent bases of national jurisdiction over that crime.<sup>415</sup> A competing normative view might hold that double jeopardy protection ought to apply across all states to guarantee the defendant’s individual right against successive prosecutions. Strict adherence to either one of these views tends to preclude the other. Jurisdictional analysis provides a middle route: consideration of not only whether a state has a basis of national jurisdiction to prosecute successively, but also whether the exercise of that jurisdiction is *reasonable* given the factors above, reveals more balanced and realistically acceptable rules of international double jeopardy.

To address the strict individual rights view first, any hard-and-fast rule prohibiting double jeopardy among national jurisdictionally interested states is, at present, highly improbable. States have strong sovereign interests in retaining the power to prosecute individuals who inflict serious harm on national territory and persons and whose actions threaten the security of the state itself. It is highly unlikely that states would be willing absolutely to surrender that power just because another state already has prosecuted. And frankly, nor is it clear that they should. If Osama bin Laden is caught traveling through Europe and is prosecuted by Spanish

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411. *Id.* § 403(2)(d).

412. *Id.* § 403(2)(h).

413. *Id.* § 403(2)(e).

414. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

415. *See id.*

courts for the September 11, 2001, bombings in New York City, should the United States really then have no power to prosecute him? Even if he is prosecuted in Afghanistan, a state with territorial links to the crimes, it is far from obvious that the United States ought thereafter to be blocked from exercising its own sovereign power to enforce its own criminal laws for acts that murdered approximately three thousand U.S. citizens on U.S. soil. Nor does it seem appropriate for a Spanish or German or Dutch prosecution of a serious human rights violator like Augusto Pinochet to foreclose a prosecution for torture in Chile, the locus of both the crime and the victim community. Yet a strict rule against international double jeopardy would seem to compel such results.

The better, and far more realistic, approach would be to use a reasonableness analysis that considers—like due process—the defendant’s connections with the forum and reasonable expectations, the forum’s interest in prosecution, and the impact on other jurisdictionally interested states as well as the system generally. Under this approach the United States should be able successively to prosecute bin Laden, and Chile should be (or should have been) able successively to prosecute Pinochet.

At the same time, we can imagine situations where an exercise of jurisdiction to prosecute successively might seem unreasonable. Suppose a Turkish national is accused of sinking a Norwegian-flag cruise ship docked in Turkish waters. Down with the ship goes the Norwegian crew as well as one hundred passengers of different nationalities, including one Brazilian, one Japanese and one U.S. citizen. Even if Turkey prosecutes for the crime it might still seem reasonable for Norway to exercise jurisdiction for successive prosecution purposes. The ship was “a floating piece of Norway,” creating a variation of territorial linkage in addition to the national links Norway would have to the drowned crew members. But what about Brazil, or Japan, or the United States? These countries may well have national jurisdiction based on passive personality.<sup>416</sup> But their connections to the crime are surely more attenuated than those of Norway. Now, it may be perfectly reasonable for any of these three states to prosecute if the defendant has not already been prosecuted by another state. Even if only one of their nationals is killed that could create a strong enough interest to see justice done to make prosecution reasonable under international law. Where things might veer into the *unreasonable*, however, is if the individual already has been prosecuted, and by those states with the strongest links to the crime and in the best position to

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416. *See supra* note 129.

evaluate the case, including evidence and witness testimony. Indeed, suppose Turkey and Norway both hold full and fair trials and each acquits the accused finding the whole thing to be a case of mistaken identity. A successive prosecution of this same individual by the United States certainly would seem unreasonable to the defendant, perhaps other interested states (most notably, Turkey and Norway), and the international system at large because of the conflicting judgments and potential frictions it might generate.

## 2. *Universal Jurisdiction Application*

Of course the international basis of jurisdiction with the least links to the crime, and that therefore threatens to be the least reasonable, is universal jurisdiction. But we already know that states with universal jurisdiction laws actually engage in a type of reasonableness analysis by giving primacy to national jurisdiction states and by refusing to prosecute successively where the latter already have prosecuted in line with Rule (3).<sup>417</sup> The doctrinal soundness of this rule should now be plain.

If we can all agree that multiple prosecutions for the same crime generally should be disfavored absent a competing reason, I will submit without much more that where a state with national jurisdiction prosecutes for an international crime, a state with only universal jurisdiction—that is, a state with no connection at all to the crime—ought not to be able to prosecute the same individual again for the same crime. Universal jurisdiction's normative justification is protecting the interests of the international legal system and of victims of grave international crimes through decentralized enforcement of international law.<sup>418</sup> Where a state with national jurisdiction already has prosecuted, the universal jurisdiction state has no distinct national interest in prosecuting again, and the interests of the international legal system (which underpin its universal jurisdiction to begin with) already have been vindicated. A good faith prosecution by a national jurisdiction state also vindicates the victims' interests to see justice done. Indeed, a state with national or territorial links to universal crimes likely is going to be in a better position to vindicate victims' rights than a state with no links to the crimes since it is more likely that the former also has stronger links to the victims.<sup>419</sup> Hence the reason for

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417. *See supra* Part IV.E.1.

418. *See supra* Part III.B and sources cited therein.

419. This is not to say that the universal jurisdiction state will have no link to the victims. Indeed, it may have been the victims who initiated the proceedings or brought their claims to the state's

giving priority to national jurisdiction states over universal jurisdiction states.

We might work in an exception where the first prosecution is a sham designed to insulate the accused, and as we saw, states already have incorporated such an exception through principles of complementarity.<sup>420</sup> The burden of proving a sham is generally high under these principles, and will mostly fall to the party seeking the exercise of universal jurisdiction.<sup>421</sup> There is, naturally, always the chance that some court or prosecutor will dub a good faith foreign trial a sham in order to make a political point through a successive universal jurisdiction prosecution. But for better or worse, universal jurisdiction is probably here to stay. The challenge is to figure out how best to regulate its exercise. The very existence of the limits identified by this Article's theory should assuage those skeptical of universal jurisdiction. For the alternative would be that any state that decides to pass a universal jurisdiction law might feel itself free to prosecute anyone, anytime.

As it stands, the clear international legal trend is that a prosecution by a state with national jurisdiction precludes a successive prosecution by a state with only universal jurisdiction. In my view, this trend is theoretically compelled. Added onto this first trend is another trend, whereby states contemplating an exercise of universal jurisdiction give primacy to states with national jurisdiction. The combination of these two trends is the preclusion of universal jurisdiction prosecutions so long as territorial or national states are able and willing to prosecute in good faith.

#### *D. Further Reducing Successive Prosecutions: Enforcement Comity*

One big question remains: is there anything else in the U.S. and international systems that might suppress multiple prosecutions by different sovereigns whose exercise of jurisdiction is permissible—even under our revised tests? Indeed, just because successive prosecutions by different sovereigns are permitted does not mean that they are *required*. Both U.S. constitutional and international law set baselines. In the double jeopardy context both sets of laws as I have described them merely provide that different sovereigns *may* prosecute successively for the same

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attention for prosecution. *See, e.g.*, Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 THEORETICAL INQ. L. 199, 214 (2004) (describing Rwandan victims bringing proceedings in Belgium against Rwandans for crimes committed in Rwanda).

420. *See supra* notes 335–48.

421. *See supra* note 345.



crime where they have independent jurisdiction, not that they must—or that successive prosecutions are even a good idea. The law simply reserves for sovereigns the power of successive prosecution should they choose to exercise it. There may be very good political or policy reasons why they might choose not to. And in fact, consideration of some of these reasons has been systemically built into both U.S. and international law through doctrines of comity.

Like other habitual terms unavoidably implicated by this Article's argument,<sup>422</sup> "comity" carries with it a mess of definitional baggage.<sup>423</sup> Whatever else it may stand for, the common idea behind modern comity doctrines seems to be that sovereigns should, and perhaps even have an obligation to, consider the interests of other sovereigns when deciding whether to exercise their own sovereign power; but that they are not bound, in a legal sense, to defer to those foreign interests.<sup>424</sup> This is the broad sense in which I want to use the term here.

We can think of comity as layering onto the "hard" legal baseline rules of double jeopardy softer policy considerations of how other jurisdictionally interested states (perhaps most particularly, states that already have prosecuted) might view a successive prosecution; and thus, as helping states contemplating successive prosecutions to internalize the impact of their exercise of sovereign power before pursuing such prosecutions. At the same time, because states are not bound to defer to the foreign interests they consider, comity offers flexibility for politically acceptable results.

Like the three types of jurisdiction outlined in Part I of this Article—prescriptive, adjudicative, and enforcement—comity can be classified into three types for the present double jeopardy discussion—prescriptive, adjudicative, and enforcement.<sup>425</sup> Prescriptive comity implies a voluntary legislative limitation upon the reach of a state's own laws out of deference to foreign interests. Adjudicative comity is the decision by a state's courts not to apply the state's laws out of deference to foreign interests. And enforcement comity is the decision of the state's law-enforcer not to act

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422. See, e.g., *supra* Parts II, III.A (discussing the problem of defining "sovereignty").

423. For a synopsis of the meanings courts and commentators have given to the term, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 5 (1991). For a critique of U.S. courts invoking comity without defining it, see Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893 (1998).

424. An oft-quoted formulation of the doctrine comes from the Supreme Court. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) ("Comity . . . is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.").

425. *Cf. id.* at 164.

out of deference to foreign interests. Of these, enforcement comity in particular holds strong potential for accommodating the two competing normative considerations highlighted above. After explaining why this is, I will illustrate with real-world examples from the U.S. and international systems.

A key advantage of enforcement comity is that it can facilitate strong and elastic “networks”<sup>426</sup> among different sovereigns through their national enforcement agencies. Through these networks, agencies can represent their state’s interests from the beginning of an investigatory or prosecutorial effort by other states, thus lessening the need for, and probability of, successive prosecutions.

Both adjudicative and prescriptive comity envisage domestic governmental actors, whether courts or legislatures, acting in relative isolation from foreign states when making their determinations about whether to pursue successive prosecutions. In the adjudicative comity scenario, the prosecution already has been brought, and the judge makes the unilateral determination whether the prosecution comports with whatever that judge’s notions of comity might be. In the legislative comity scenario, the legislature prescribes generally applicable rules governing all cases going forward. Perhaps the legislature could communicate with representatives of foreign states and take into account foreign interests in this general *ex ante* lawmaking process, but it has no ordinary institutional ability to change the rules based on contemporaneous communications with other states for each successive prosecution case that happens to arise.

By contrast, a state’s enforcement agencies *can* communicate and cooperate contemporaneously with other states from the outset of a prosecutorial effort and leave open the communication and cooperation channels throughout the prosecution. The more communication and cooperation between enforcement agencies from the start, the higher the likelihood that a single prosecution will vindicate the interests of those agencies and the governments they represent, consequently lowering the likelihood of successive prosecutions. This not only creates efficiencies and eases friction for systems of multiple sovereigns, it also advances the individual’s interest not to be prosecuted multiple times.

A few examples illustrate how enforcement comity can, and does, work in the both the U.S. and international systems: the U.S. Department of

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426. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007).

Justice's *Petite* policy; the U.S.-E.C. Positive Comity Agreement; and prior notice and consultation provisions in multilateral treaties covering international crimes.

1. *Enforcement Comity in the U.S. System: The Petite Policy*

The U.S. Justice Department's *Petite* policy<sup>427</sup> builds an institutional policy barrier against successive federal prosecution where the defendant already has been tried in state court for the same criminal activity.<sup>428</sup> The federal prosecution must meet both substantive and procedural prerequisites.

Substantively, "the matter must involve a substantial federal interest" and "the prior prosecution must have left that . . . interest demonstrably unvindicated."<sup>429</sup> Determination of whether the matter involves a substantial federal interest is "made on a case-by-case basis"; and determination of whether the federal interest is left unvindicated is subject to a presumption that the prior state prosecution—regardless of outcome—adequately vindicated the federal interest.<sup>430</sup> This presumption may be defeated by exceptions for sham or incompetent trials or inadequate sentences.<sup>431</sup> It also may be overcome where "the alleged violation involves a compelling federal interest, particularly one implicating an enduring national priority" and "the alleged violation involves egregious conduct . . . or the impairment of the functioning of an agency of the federal government or the due administration of justice."<sup>432</sup>

The *Petite* policy is, in sum, an advanced and formalized version of enforcement comity as I have defined it above, here between the U.S. federal and state governments. It represents an institutionalized policy governing the exercise of prosecutorial discretion that requires deference to a prior state prosecution "even where a prior state prosecution would not legally bar a subsequent federal prosecution under the Double Jeopardy Clause because of the doctrine of dual sovereignty."<sup>433</sup> Yet the

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427. The policy was named after *Petite v. United States*, 361 U.S. 529 (1960).

428. "The policy applies whenever there has been a prior state or federal prosecution resulting in an acquittal, a conviction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the merits after jeopardy has attached." DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.031(C) (Dual and Successive Prosecution Policy ("Petite Policy")) [hereinafter U.S. ATTORNEYS' MANUAL].

429. *Id.* § 9-2.031(D).

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* § 9-2.031(B).

federal government retains its “sovereign” ability to overcome the presumption where the prior state prosecution did not adequately vindicate federal interests, either because the proceedings were faulty or their outcome was unsatisfying or the federal interest in prosecution is just so strong.<sup>434</sup> As the Second Circuit has explained, the *Petite* policy “is not a limitation on the government’s sovereign right to vindicate its interests and values, and nothing prevents a federal prosecution whenever the state prosecution has not adequately protected the federal interest.”<sup>435</sup>

Additionally, as a procedural matter, “the [successive federal] prosecution must be approved by the appropriate Assistant Attorney General.”<sup>436</sup> This procedural requirement ensures accountability and “that the power to bring dual prosecutions is exercised selectively and that the substantive standards are carefully and consistently applied.”<sup>437</sup> Moreover, in line with the argument set forth above:

whenever a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question.<sup>438</sup>

The overall purposes of the *Petite* policy therefore are to institutionalize deference to prior prosecutions for the same activity by other sovereigns but to retain the power to vindicate overriding federal interests while protecting defendants from having to endure multiple prosecutions unless those interests are compelling.<sup>439</sup> A final purpose that helps achieve all of these other purposes is “to promote coordination and cooperation between federal and state prosecutors.”<sup>440</sup> According to Harry

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434. *Id.* § 9-2.031(D).

435. *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990).

436. U.S. ATTORNEYS’ MANUAL, *supra* note 428, § 9-2.031(A).

437. Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 76 (1996).

438. U.S. ATTORNEYS’ MANUAL, *supra* note 428, § 9-2.031(A).

439. *Id.*

440. *Id.* This is not to say that increased federal coordination and communication with state government does not potentially give rise to other problems. See Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures To Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 760 (2002) (describing how federal commandeering of state police through cooperative measures “obscures the boundaries of political responsibility and accountability, undermines the confidence constituents have in their officials, and erodes the authority of local and state institutions.”). For example, cooperating prosecuting entities may use a first prosecution as a dry run for a second, or may use the threat of prosecution by multiple sovereigns to

Litman and Mark Greenberg, the *Petite* policy has limited successive federal prosecutions to only “a minuscule fraction of the total number of state prosecutions in which federal jurisdiction is available.”<sup>441</sup> And the American Bar Association found that because of the policy, “federal reprosecutions for the same conduct are rare and are usually undertaken to vindicate interests most citizens would find compelling.”<sup>442</sup>

## 2. *Enforcement Comity in the International System*

Enforcement comity in the international system can function much the same way it does in the U.S. system. It offers a means through which deference to foreign interests, communication, and cooperation may accommodate the interests of different sovereigns while preserving sovereignty and, as a practical matter, protect individuals from multiple prosecutions. Although the substantive and procedural mechanisms of enforcement comity in international relations might not be as advanced and formalized as the *Petite* policy, the building blocks are there and the seeds for future maturation have been sown.

### a. *U.S.-E.C. Positive Comity Agreement*

In some areas of international regulation the movement toward more formal avenues of enforcement comity has already begun to take hold through agreements with fairly specific communication and coordination rules. To take a well-known example, the so-called “Positive Comity” Agreement between the European Communities and the United States addresses situations of potential concurrent jurisdiction over anticompetitive activities taking place in the territory of one party but adversely affecting interests of the other party.<sup>443</sup> Under the Agreement, competition authorities of one party may request the competition authorities of the other party to take enforcement action against

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extract a more favorable plea bargain. Thus cooperation, especially unregulated cooperation, is not a panacea. My point is only that for the purpose of reducing double jeopardy, ex ante cooperation can help to ensure that a single prosecution fully vindicates the interests of all sovereigns, thereby obviating the need for multiple prosecutions.

441. Litman & Greenberg, *supra* note 437, at 77–78.

442. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, FINAL REPORT OF AD HOC TASK FORCE ON DOUBLE JEOPARDY (1994), *reprinted in* ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS 378 (2001).

443. Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., June 4, 1998, 37 I.L.M. 1070, 1070–75.

anticompetitive activities taking place in the latter's territory but affecting the interests of the former.<sup>444</sup> A primary purpose of the agreement is to "[e]stablish cooperative procedures to achieve the most effective and efficient enforcement of competition law."<sup>445</sup>

Like the *Petite* policy, the Agreement creates a presumption that under certain circumstances "[t]he competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party."<sup>446</sup> The presumption in favor of a single enforcement action is triggered by the fulfillment of certain criteria.

First, the anticompetitive activities either do not have "direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party's territory"<sup>447</sup> or "the anticompetitive activities do have such an impact on the Requesting Party's consumers, [but] they occur principally in and are directed principally towards the other Party's territory."<sup>448</sup> In other words, a party's deferral or suspension of enforcement action is presumed where the other party has clearly stronger jurisdictional links to the activities in question. Next, "the adverse effects on the interests of the Requesting Party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of the Requested Party."<sup>449</sup>

Last are communication and cooperation provisions requiring that the competition authorities of the Requested Party agree that in conducting their enforcement activities they will: devote adequate resources to the enforcement activities;<sup>450</sup> use best efforts to pursue all sources of information, including those suggested by the Requesting Party;<sup>451</sup> inform, and provide information to, the authorities of the Requesting Party on the status of the enforcement activities;<sup>452</sup> "notify the . . . authorities of the Requesting Party of any change in their intentions with respect to investigation or enforcement";<sup>453</sup> and use best efforts to quickly pursue

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444. *Id.* art. III.

445. *Id.* art. I.

446. *Id.* art. IV(2).

447. *Id.* art. IV(2)(a)(i).

448. *Id.* art. IV(2)(a)(ii).

449. *Id.* art. IV(2)(b).

450. *Id.* art. IV(2)(c)(i).

451. *Id.* art. IV(2)(c)(ii).

452. *Id.* art. IV(2)(c)(iii).

453. *Id.* art. IV(2)(c)(iv).

completion of an investigation and to obtain remedies.<sup>454</sup> The requested party's authorities also must "fully inform" the requesting party's authorities "of the results of their investigation and take into account the views" of the requesting party's authorities "prior to . . . settlement, initiation of proceedings, adoption of remedies, or termination of the investigation,"<sup>455</sup> as well as "comply with any reasonable request that may be made" by the Requesting Party's authorities.<sup>456</sup> These communication provisions clearly intend to see to it that the Requesting Party's interests are satisfied by the Requested Party's enforcement action, thus disposing of the need for multiple enforcement actions.

The Agreement also provides that "[t]he competition authorities of the Requesting Party may defer or suspend their own enforcement activities if fewer than all of the conditions set out" above are satisfied,<sup>457</sup> but that "[n]othing in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstating such activities."<sup>458</sup> The Requesting Party therefore may always decide to defer to the other party's enforcement action—and there is a presumption that it will when the listed criteria are present; but it still retains the sovereign power to pursue its own action should it feel that its interests remain unsatisfied.

*b. Prior Notice and Consultation Provisions*

The *Petite* policy and the U.S.-E.C. Positive Comity Agreement are examples of relatively mature enforcement comity regimes with well-developed, formalized rules of communication and cooperation. Less well-developed are prior notice and coordination provisions, referenced earlier,<sup>459</sup> contained in multilateral treaties covering transnational and international crimes. Yet these provisions contemplate precisely the same sort of communication and cooperation opportunities among interested states as the *Petite* policy and Positive Comity Agreement.

To take one notorious area of characteristically multi-jurisdictional crime, the major anti-terrorism treaties of the past forty years uniformly mandate prior notice to other jurisdictionally interested states.<sup>460</sup> The

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454. *Id.* art. IV(2)(c)(v).

455. *Id.* art. IV(2)(c)(vi).

456. *Id.* art. IV(2)(c)(vii).

457. *Id.* art. IV(3).

458. *Id.* art. IV(4).

459. *See supra* note 356.

460. *See* Hijacking Convention, *supra* note 350, art. 6(4); Montreal Convention, *supra* note 350,

treaties all contain similar, if not identical, provisions directing that any state making a “preliminary inquiry” or “investigation” into the facts of an offense set forth in the treaty “shall promptly report its findings to [other directly jurisdictionally interested states as designated by the treaty, i.e., national jurisdiction states] and shall indicate whether it intends to exercise jurisdiction.”<sup>461</sup>

Coordination provisions additionally promote cooperation and *ex ante* resolution of jurisdictional disputes. For example, along with its prior notice provision, the Convention for the Suppression of Financing Terrorism provides that “[w]hen more than one State Party claims jurisdiction over the offences set forth [herein], the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.”<sup>462</sup> The Convention against Transnational Organized Crime similarly directs “that [where] one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.”<sup>463</sup> This same provision applies to the Convention’s three Protocols regarding human and weapons trafficking.<sup>464</sup> And the Corruption Convention contains an identical provision.<sup>465</sup> One result of these communication and coordination obligations hopefully would be agreement among interested states on a single forum for prosecution, and the representation and vindication of those states’ interests in that single forum’s prosecution.

Indeed, an even stronger prior consultation (compared to prior notice) obligation explicitly geared toward arriving at a single forum for prosecution has started to appear in conventions dealing with almost

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art. 6(4); Hostage Convention, *supra* note 350, art. 6(6); Maritime Navigation Convention, *supra* note 350, art. 7(5); Bombing Convention, *supra* note 350, art. 7(6); Financing Convention, *supra* note 350, art. 9(6); Nuclear Terrorism Convention, *supra* note 350, art. 10(6).

461. *See supra* note 460.

462. Financing Convention, *supra* note 350, art. 7(5).

463. United Nations Convention Against Transnational Organized Crime, art. 15(5), G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

464. Protocol to Prevent, Suppress and Punish Trafficking of Persons, Especially Women and Children, art. 1(2), G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/55/49 (Dec. 25, 2003); Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, art. 1(2), G.A. Res. 55/25, Annex III, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Jan. 8, 2001); Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, art. 1(2), G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (July 3, 2005).

465. United Nations Convention against Corruption, *supra* note 350, art. 42(5).



definitionally multi-jurisdictional activity. For example, Article 22 of the Convention on Cybercrime states: “When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.”<sup>466</sup> Article 4 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions contains an identical provision.<sup>467</sup>

Enforcement comity currently represents both a feasible and helpful mechanism through which jurisdictionally interested states can reduce successive prosecutions for multi-jurisdictional crimes. It preserves states’ sovereign flexibility to prosecute for acts seriously harming national interests while easing friction and enhancing efficiency by inviting states to internalize *ex ante* the effects of successive prosecutions on other states and encouraging communication and cooperation from the outset of investigatory and prosecutorial efforts. The result, beneficial to both sovereigns and defendants, is a single enforcement action in a single forum in which all relevant states’ interests are represented.

#### CONCLUSION

Double jeopardy rules among sovereigns throw into sharp relief fundamental tensions between some of our most basic legal intuitions concerning individual rights and the very idea of sovereignty. And they do so against a backdrop loaded with questions about the proper distribution of power in two of the world’s major legal systems. Resolution of these tensions in a coherent and practical fashion poses a central challenge for both U.S. and international law.

This Article has attempted to meet that challenge head on. It offers a theory that not only explains an otherwise opaque domestic doctrine and seemingly incoherent mix of international rules and practice, but also recommends adjustments to each body of law that better accommodate the competing interests at stake—including those of multiple sovereigns, the systems they comprise, and those of individual defendants.

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466. Convention on Cybercrime, art. 22(5), Nov. 23, 2001, C.E.T.S. No. 185.

467. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 4(3), Dec. 17, 1997, OECD Doc. DAF/IME/BR(97)20, 37 I.L.M. 1.