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Defining the "Sovereign" in Dual Sovereignty: Does the Protection Against Double Jeopardy Bar Successive Prosecutions in National and International Courts?

Daniel A. Principato[†]

Introduction

On January 23, 2012 the International Criminal Court ("ICC") confirmed charges against Kenyan President Uhuru Muigai Kenyatta accusing him of committing crimes against humanity.[1] Article 7 of the Rome Statute, which established the ICC, defines crimes against humanity as specific "acts . . . committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[2] President Kenyatta was accused of committing crimes against humanity for acts of

† J.D., Cornell Law School, 2014. I would like to thank Professor Ndulo for all his help in creating this Note. I would also like to thank my family for their unending support in all of my endeavors.

1. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges, ¶ 428 (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf.

2. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2178 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

murder, deportation or forcible transfer of population, rape, persecution, and other inhumane acts.[3]

President Kenyatta is alleged to have participated in widespread and systematic attacks for the purpose of keeping the Party of National Unity in power.[4] Specifically, he is alleged to have taken part in planning and executing attacks on a civilian population perceived as supporting the Orange Democratic Movement in Nakuru and Naivasha between November 2007 and January 2008.[5] The attacks resulted in rape, severe physical injuries, mental suffering, destruction of property, the displacement of thousands of people, and "a large number of killings."[6]

The ICC set a provisional trial commencement date of February 5, 2014.[7] As the trial date drew closer, however, it became clear that there were weaknesses in the prosecution's case. Accordingly, on December 19, 2013, the prosecution moved for an adjournment to "undertake additional investigative steps."[8] In response, the defense filed a motion to adjourn and terminate the proceedings based on insufficiency of the evidence.[9] On January 23, 2014, the ICC adjourned the case indefinitely in order to consider the requests of the parties.[10]

The ICC's considerations revolved around the principle of *ne bis in idem*,[11] otherwise known as double jeopardy. The ICC invited written submissions by the parties after the defense raised the issue during a status conference.[12] The prosecution argued that any consideration of double jeopardy was premature, stating that "[t]he principle could conceivably come into play only if the charges were withdrawn, and the case is not at that state yet."[13] The defense responded that in light of the prosecution's weak evidence, "[t]he Accused must be formally acquitted . . . and protected from further trial before the Court with respect to the alleged conduct that has formed the basis of the charges pursuant to principle of *ne bis*

3. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, *supra* note 1, at ¶ 428. The constituent acts of crimes against humanity that are specified in the Rome Statute include murder (Article 7(1)(a)), deportation or forcible transfer of population (Article 7(1)(d)), rape (Article 7(1)(g)), persecution (Article 7(1)(h)), and other inhumane acts (Article 7(1)(k)).

4. ICC, Case Information Sheet: Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta*, (Feb. 4, 2014), *available at* http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf.

5. *Id.*

6. *Id.*

7. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Order Vacating Trial Date, ¶ 1 (Jan. 23, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1716620.pdf.

8. *Id.* ¶ 2.

9. *Id.* ¶ 3.

10. *Id.* ¶ 6.

11. Translates to "not twice for the same."

12. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Prosecution Submissions on the *ne bis in idem* Principle, ¶ 3–4, (Feb. 10, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1724937.pdf.

13. *Id.* ¶ 2.

in idem."[14]

Ne bis in idem is enshrined in Article 20 of the Rome Statute.[15] Although the ICC ultimately rejected the defense's request, the consequences would have been great if the reverse occurred; the ICC would have been barred from any subsequent prosecution of President Kenyatta.[16] What is unclear, however, is whether a state or a different international tribunal would also be barred from prosecution. Double jeopardy concerns in international criminal law can be viewed through different dimensions, namely (1) whether prosecution by a state bars prosecution by another state; (2) whether prosecution by an international tribunal bars prosecution by another international tribunal; and (3) whether prosecution in an international tribunal bars subsequent prosecution by a state.[17] This Note will focus on the latter question.

Part I will discuss the principles and underlying concerns of *ne bis in idem* and double jeopardy. It will outline the dual sovereign exception to double jeopardy. Part II will discuss double jeopardy under the Rome Statute. Part III of this Note will argue that the international legal personality of international tribunals derived from state sovereignty bars state prosecution of a defendant after a prosecution by an international tribunal.

I. Double Jeopardy

A. The Underlying Policy of the Protection Against Double Jeopardy

The protection against double jeopardy can be traced back to ancient Roman law.[18] The rule against double jeopardy is "a 'cardinal' principle that lies 'at the foundation of criminal law,'" and is "viewed as one of the central principles underpinning both the protection of individual human rights and the fair administration of justice."[19] Double jeopardy, at its core, is "the idea that a person should not be tried more than once for the same offense."[20] This basic idea is found in the Fifth Amendment of the United States Constitution, which provides that "no person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb."[21]

14. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Defense Response to the 'Prosecution Submissions on the *ne bis in idem* Principle,' ¶ 11, (Feb. 17, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1734226.pdf.

15. Rome Statute, *supra* note 2, art. 20.

16. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Prosecution's Application for a Finding of Non-Compliance Pursuant to Article 87(7) and for Adjournment of the Provisional Trial Date, ¶ 99 (Mar. 31, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf.

17. The third question can be stated conversely as whether domestic state prosecution bars subsequent prosecution by an international tribunal.

18. Lorrain Finlay, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute*, 15 U.C. DAVIS J. INT'L L. & POL'Y 221, 223 (2009).

19. *Id.* at 222–23.

20. *Id.* at 223.

21. U.S. CONST. amend. V.

The rule against double jeopardy serves two main functions: to protect the individual and to ensure the integrity of the justice system. Justice Black explained the double jeopardy rule's role in protecting the individual in *Green v. United States*.[22] He observed,

> [T]he 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 sense of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[23]

The risk is that with repeated prosecutions, a defendant faces a higher likelihood of being convicted, even if he or she is innocent. The defendant's increased probability of being convicted has two primary sources. First, the defendant may not have the stamina or resources to maintain a continued defense. Furthermore, the government also would gain the tactical advantage of learning the defendant's theories and evidence at the first trial.[24]

Additionally, the double jeopardy rule enhances the integrity of the judicial system. Specifically, the rule reflects the importance of finality and helps protect against inconsistent results.[25] In this sense, "the doctrine plays a role in upholding public confidence in the justice system and respect for judicial proceedings, with the additional practical benefit of conserving judicial resources."[26] The rule also ensures the need for thorough investigations and prosecutions by the state because it will only have one shot at conviction.[27]

B. Double Jeopardy in the International Context

These basic policies are at the foundation of double jeopardy rules across the world. Over fifty national constitutions recognize the basic protection against double jeopardy.[28] Even states that do not have a constitutional protection against double jeopardy often have a statutory or common law rule barring successive prosecutions by the state.[29] Nevertheless, although there is widespread acceptance of the principle, "its precise scope and application varies considerably across jurisdictions."[30]

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22. Green v. United States, 355 U.S. 184 (1957).
23. *Id.* at 187–88.
24. Jennifer E. Costa, *Double Jeopardy and* non bis in idem*: Principles of Fairness*, 4 U.C. DAVIS J. INT'L L. & POL'Y 181, 185 (1998) ("With each new trial, the prosecution gets more practice with the case. Also, there is a risk that innocent individuals will wear down and tire of fighting to prove their innocence, if forced to prove it again and again.").
25. Finlay, *supra* note 18, at 223.
26. *Id.* at 223.
27. *Id.* at 223–24.
28. 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, 292 (1993).
29. Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 817 (2009).
30. Finlay, *supra* note 18, at 225.

The double jeopardy protection in the United States is more limited in scope than in other common law countries.[31] Canada and England, for example, have a broader protection against double jeopardy, where successive prosecutions are barred if a foreign "court of competent jurisdiction" has already tried a defendant[32] The United States, by contrast, would not bar a subsequent prosecution.[33]

Civil law countries, where double jeopardy is referred to as *ne bis in idem*, are similarly split.[34] Germany and Italy fall closer to the United States in not prohibiting successive prosecutions based on foreign adjudication, whereas Dutch law applies the rule found in Canada and England.[35] No country except the Netherlands, however, permits a claim of double jeopardy where the act has taken place within the country's territory.[36] Some states, such as Belgium, will consider its interest in prosecuting the crime when determining whether to allow a double jeopardy claim.[37] While all countries seem to embrace the core principle of protection against double jeopardy, the exact contours of each jurisdiction's treatment of the principle vary significantly.

Treaties paint a clearer picture. The protection against double jeopardy has been enshrined in a number of universal human rights agreements, including the United Nations International Covenant on Civil and Political Rights (ICCPR).[38] It is also found in various regional human rights agreements, including the European Convention for the Protection of Human Rights and Freedoms (ECHR),[39] the American Convention on Human Rights,[40] and the revised Arab Charter on Human Rights.[41] In addition, the protection against double jeopardy exists in international humanitarian law, such as in the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War.[42] Finally, protection against double jeopardy is found in international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY),[43] the Interna-

31. Colangelo, *supra* note 29, at 817–18.
32. *Id.*
33. *Id.* at 773.
34. Costa, *supra* note 24, at 182.
35. Colangelo, *supra* note 29, at 818.
36. *Id.*
37. *Id.* at 819.
38. 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) [hereinafter ICCPR].
39. 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) [hereinafter ECHR].
40. American Convention on Human Rights, art. 8(4), July 18, 1978, 1144 U.N.T.S. 123.
41. Arab Charter on Human Rights, art. 19, Aug. 5, 1990.
42. Geneva Convention Relative to the Treatment of Prisoners of War, art. 86, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].
43. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (May 25, 1993).

tional Criminal Tribunal for Rwanda (ICTR),[44] and the ICC.[45]

These treaties show that, at the very least, states agree that the protection against double jeopardy protects against successive prosecutions by a single sovereign.[46] Article 14(7) of the ICCPR states, "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."[47] Professor Colengelo observed that "the language of the provision seems to suggest [that] the prohibition on double jeopardy applies only within 'each' state's judicial system," and thus "the scope of Article 14(7)'s double jeopardy protection is limited to multiple prosecutions by one state."[48] Focusing not on the treaty's limits but its objectives, the ICCPR is an endorsement of the idea that a single sovereign may only prosecute a defendant for an offense once.

Professor Colengelo argued further that "[r]egional human rights instruments containing a bar on double jeopardy likewise limit its application to multiple prosecutions by a single state."[49] Article 4 of Protocol 7 to the ECHR states, "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."[50] The Council of Europe's Explanatory Report has made clear that Article 4 applies to successive prosecutions by a single sovereign.[51] The treaties therefore all consistently stand for the proposition that the protection against double jeopardy prohibits successive prosecutions by a single sovereign.

Likewise, there is similar agreement in international humanitarian law. Adopted unanimously, Article 86 to the Geneva Convention III states, "No prisoner may be punished more than once for the same act of the same charge."[52] The drafting history shows that Article 86 was meant to address the abuses committed during World War II, when states would increase punishment in response to a defendant exercising his or her right to appeal or petition a sentence.[53] Viewed within the circumstances of its adoption, Article 86 is meant to bar successive prosecutions by a single sovereign.[54]

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44. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (June 29, 1995).

45. Rome Statute, *supra* note 2, art. 20.

46. *See* Colangelo, *supra* note 29, at 774 ("Human rights and humanitarian law instruments guarantee a right against double jeopardy, but only from successive prosecutions by a single state.").

47. ICCPR art. 14(7).

48. Colangelo, *supra* note 29, at 806–07.

49. Colangelo, *supra* note 29, at 807.

50. ECHR, art. 4.

51. 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 Oct. 18, 2014).

52. Geneva Convention III, art. 86.

53. 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.

54. Colangelo, *supra* note 29, at 808–09.

C. The Dual Sovereignty Exception to Double Jeopardy

An important exception to the protection against double jeopardy is the doctrine of dual sovereignty. Under the dual sovereignty doctrine even if a defendant has already been convicted or acquitted the defendant may be tried again for the same offense. Two separate sovereigns may each prosecute a defendant for an act that violates the laws of both.[55] In the United States, "the dual sovereignty doctrine denies [double jeopardy] protection in three circumstances: (1) successive prosecutions of an individual by multiple state governments; (2) successive prosecutions of an individual by a state and the federal government; and (3) successive prosecutions of an individual by a state or the federal government and a foreign government."[56] The justification for the dual sovereignty exception is that each entity derives its sovereignty from an independent source and must be permitted to protect its interests through enforcement of its criminal law.[57]

The dual sovereignty exception was recognized by the United States Supreme Court to protect principles of federalism. The Supreme Court was concerned that an expansive reading of the Double Jeopardy Clause would bar either the federal government or individual state governments from enforcing their respective criminal laws.[58] The Court in *Moore v. Illinois* explained,

> 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.[59]

Thus, a defendant may be convicted and punished by both the federal government and a state government for the same act.

The doctrine of dual sovereignty also allows successive prosecutions by different states for the same act. The Supreme Court stated in *Heath v. Alabama* that "[t]he States are no less sovereign with respect to each other than they are with respect to the Federal Government."[60] The Court went on to observe that a "State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws."[61] The dual sovereignty doctrine in the United States, therefore, can be understood to allow both horizontal prosecutions between states and vertical prosecutions between a state and the federal government.

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55. Bartkus v. Illinois, 359 U.S. 121, 136 (1958).

56. Erin M. Cranman, Comment, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT'L L. REV. 1641, 1642 (2000).

57. *Id.*

58. *Id.* at 1654.

59. Moore v. Illinois, 55 U.S. 13, 20 (1852).

60. Heath v. Alabama, 474 U.S. 82, 89 (1985).

61. *Id.* at 93 (emphasis omitted).

By contrast, the Supreme Court has held that successive prosecutions for the same offense by the same sovereign are prohibited by the protection against double jeopardy.[62] This idea is consistent with the consensus of international agreements prohibiting successive prosecutions by the same sovereign. The Court has said that this rule is absolute, and the Double Jeopardy Clause protects a defendant even if a judge has ruled incorrectly.[63]

Because the protection against double jeopardy only bars successive prosecutions by the same sovereign, it is important to define the term "sovereign." The Supreme Court has stated that the question of whether two entities are separate sovereigns "turns on whether the two [prosecuting] entities draw their authority to punish the offender from distinct sources of power."[64] The Court explained that "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 taken."[65] Thus, whether the dual sovereign exception applies will turn on whether two entities have the same "ultimate source of power."

The Supreme Court has elaborated on the definition of the "ultimate source of power." Two entities are separate sovereigns when "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."[66] The Court further stated that "[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."[67] Professor Colangelo explained that "an entity is 'sovereign' when it has the power—independently—(1) to determine what shall be an offense, and (2) to punish such offenses. And when it exercises these powers, it exercises its own sovereignty, not that of other sovereigns."[68]

This definition of sovereignty has led to some important limitations to the dual sovereign doctrine. Importantly, for double jeopardy purposes, a state and its municipalities are considered the same sovereign.[69] A state and its municipality cannot benefit from the dual sovereignty doctrine, and are barred from prosecuting an individual for the same offense.[70] In holding that states and municipalities are the same sovereign for double jeopardy purposes, the Court emphasized that "[p]olitical subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate government instrumentalities created by the State to assist

62. Ball v. United States, 163 U.S. 662, 669 (1896).
63. Sanabria v. United States, 437 U.S. 54, 68–69 (1978).
64. *Heath*, 474 U.S. at 88.
65. *Id.* at 90.
66. *Id.* at 89–90.
67. *Id.* at 93.
68. Colangelo, *supra* note 29, at 780.
69. Waller v. Florida, 397 U.S. 387, 394–95 (1970).
70. *Id.*

in the carrying out of state governmental functions."[71] Thus, in considering whether the dual sovereignty doctrine applies, the Court has placed a particular emphasis on whether a prosecuting entity is only a subordinate instrumentality created to facilitate governmental functions.

Likewise, the federal government and its territories are considered the same sovereign for double jeopardy purposes.[72] In finding that the Philippines and the federal government could not benefit from the dual sovereignty doctrine, the Court observed that "[t]he government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by the authority of the United States."[73] These cases make clear that if an entity derives its sovereignty from another entity, then those entities are likely to be considered the same sovereign for double jeopardy purposes.

The dual sovereignty doctrine is similar in the international context. Successive prosecutions by independent sovereign states are analogous to the successive prosecutions by states under the horizontal dual sovereignty doctrine in the United States. As discussed above, some countries continue to engage in successive prosecutions despite a conviction or acquittal by a foreign court.[74] State practice shows the absence of an international double jeopardy rule and that "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."[75]

Application of human rights treaties has reinforced the validity of the horizontal dual sovereignty exception to double jeopardy. The Human Rights Committee, which is responsible for interpreting and implementing the ICCPR,[76] considered the dual sovereignty doctrine in *A.P. v. Italy*.[77] In that case, an Italian citizen was charged with money laundering in both Switzerland and Italy.[78] The Committee agreed with Italy's argument that Article 14(7)'s double jeopardy provision "must be understood as referring exclusively to the relationships between judicial decisions of a single State and not between those of different States."[79] The dual sovereignty exception to the protection against double jeopardy is thus applicable in both the domestic and international context. Of particular importance is the application of the protection against double jeopardy in the ICC.

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71. *Id.* at 392 (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)).

72. Grafton v. United States, 206 U.S. 333 (1907).

73. *Id.* at 354.

74. Colangelo, *supra* note 29, at 817–19.

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

76. Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 302.

77. 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).

78. *Id.*

79. *Id.*

II. The ICC

A. Double Jeopardy Criticism

The establishment of the ICC was highly controversial. Critics were concerned that the ICC could be used to pursue politically motivated cases while failing to provide adequate due process protections.[80] One of the main due process concerns was the protection against double jeopardy. One critic stated:

> Virtually all the organizations, whether international, governmental, or non-governmental, that have rallied to the ICC cause go to great pains to stress that the Rome Statute offers all the due process protections of the American Constitution and, more specifically, that it provides protection against double jeopardy. This is simply and obviously not so. Indeed, if the expression 'double jeopardy' is understood in the ordinary sense of American law and, more generally, the common law tradition, then not only does the statute not provide protection against double jeopardy; it also positively sanctions exposing defendants to double jeopardy.[81]

While the Rome Statute does provide a degree of protection against double jeopardy, it has been the subject of much criticism.

B. Statutory Framework

The double jeopardy protection in the Rome Statute is found in Article 20 "*Ne bis in idem*," which provides:

> 1. Except as provided in this Statute, 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.
> 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
> 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by the international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[82]

Article 20(1) provides the most straightforward application of the double jeopardy rule. It provides that a person who has already been tried before the ICC may not be tried again before the ICC for the same conduct.[83] Interestingly, the 1994 Draft Statute did not include this provision because it was "understood to be a self-evident principle."[84] This seems to

80. Finlay, *supra* note 18, at 222.
81. John Rosenthal, *A Lawless Global Court: How the International Criminal Court Undermines the U.N. System*, 123 POL'Y REV. 29, 33 (2004).
82. Rome Statute, *supra* note 2, art. 20.
83. *Id.* at 20(1).
84. Finlay, *supra* note 18, at 228–29.

strengthen the proposition that the double jeopardy rule consistently bars successive prosecutions by the same sovereign.

The "same conduct" provision affords broad protection to an individual, while the Double Jeopardy Clause of the United States Constitution only protects against multiple prosecutions for the "same offense."[85] The basic test for whether two crimes constitute the "same offense" is to determine if either crime requires proof of a fact that the other does not.[86] Lesser and greater included offenses, therefore, constitute the same offense for double jeopardy purposes.[87] In other words, "[s]tatutory violations involving a single act are the same offense, unless each statute requires proof of an additional fact which the other does not."[88] By contrast, the same conduct test would protect against successive prosecutions regardless of the elements of the specific crimes charged, so long as the prosecutions were based on the same act.[89]

Article 20(2) has been subject to particularly harsh criticism. It is far weaker than the protection in Article 20(1) because it only provides double jeopardy protection for the type of "crime" referred to in Article 5.[90] It therefore "protects an individual who has been convicted or acquitted by the ICC from being subsequently placed on trial by another court only for the specific offenses for which he has already been convicted or acquitted by the ICC."[91] As such, after an individual is convicted or acquitted by the ICC, Article 20(2) does not prevent another court from subsequently charging that individual for an offense other than one specifically listed in Article 5.[92] Additionally, Article 20(2) does not prevent another court from charging an individual with a crime listed in Article 5 when he or she has been convicted or acquitted by the ICC for a different Article 5 crime.[93]

The crime-based approach provides significantly less protection than the conduct-based approach. The crimes listed in Article 5 require specific forms of intent with respect to the constitutive acts that make up the crime,[94] so "[i]mposing a conduct-based *ne bis in idem* prohibition under Article 20(2) would mean that an individual who is tried by the ICC and acquitted of genocide on the basis that the required intent was not proven

85. Helvering v. United States, 303 U.S. 391, 399 (1938).

86. Blockburger v. United States, 284 U.S. 299, 304 (1932).

87. Brown v. Ohio, 432 U.S. 161, 169 (1977).

88. Costa, *supra* note 24, at 187.

89. Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of* ne bis in idem, 8 SANTA CLARA J. INT'L L. 165, 178 (2010).

90. Rome Statute, *supra* note 2, art. 20(2). The crimes listed in Article 5 are genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute, *supra* note 2, art. 5.

91. Finlay, *supra* note 18, at 229.

92. *Id.* at 229–30 (explaining that "[t]his means . . . that an individual who is acquitted of genocide by the ICC may still be tried by a national court for the murders that formed the basis of the original genocide charge.").

93. *Id.* at 230 (explaining that "[i]t may be possible . . . for an individual who is charged with genocide before the ICC and acquitted to be subsequently tried by a national court (or any other international tribunal) for crimes against humanity.").

94. *Id.* at 231.

by the Prosecutor beyond a reasonable doubt would subsequently be immune from punishment for any individual acts of killing, rape, torture, kidnapping and the like."[95] Because Article 20(2) does not, however, provide for a conduct-based approach, an individual may still be subject to subsequent prosecution in national courts for any of the individual acts of an Article 5 crime after conviction or acquittal by the ICC. Although strong policy reasons support this limitation,[96] it exists at the expense of the individual's protection against double jeopardy.

Article 20(3) returns to the broader double jeopardy protection, once again employing the conduct-based test.[97] In effect, it provides that an individual tried at the national level may not be tried in the ICC for a crime based on the same underlying conduct.[98] The main idea behind this provision is that states should have primacy in conducting their own prosecutions.[99] In order to minimize abuse, however, Article 20(3) has two important exceptions.

First, Article 20(3)(a) provides that the ICC may still prosecute an individual when the national court proceedings "[w]ere for the purpose of shielding the person concerned from criminal responsibility."[100] This exception was created to deal with "sham trials" that imposed a nominal punishment on the accused in order to bar subsequent prosecution under the conduct-based test.[101] This exception permits the ICC to prosecute an individual for crimes against humanity if he or she was convicted of murder in a national court for the same conduct but received a relatively low sentence.

Second, the ICC may try an individual after a national court prosecution when those proceedings "were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[102] Like the first exception, Article 20(3)(b) is meant to permit the ICC to determine the adequacy of the prior proceedings and decide whether the "full measure" of justice has been done.[103]

III. International Law Bars Successive International and National Prosecutions

A. The Legal Personality of International Criminal Tribunals

Criticism of the ICC raises serious concerns about the double jeopardy protection that the court affords to individuals. Of particular concern

95. *Id.* at 232.
96. *Id.* at 232.
97. Rome Statute, *supra* note 2, art. 20(3).
98. *Id.*
99. Finlay, *supra* note 18, at 234.
100. Rome Statute, *supra* note 2, art. 20(3)(a).
101. Finlay, *supra* note 18, at 235.
102. Rome Statute, *supra* note 2, art. 20(3)(b).
103. Finlay, *supra* note 18, at 234.

is Article 20(2), which arguably allows states to subsequently try a defendant who has been convicted or acquitted by the ICC. Although risk of subsequent prosecution may be low, the potential for abuse cannot be ignored, "particularly given that investigation and prosecution by the ICC could itself potentially alter the political considerations that weigh upon a country's decision to take action in response to alleged crimes of this nature."[104] Commentators have suggested that Article 20(2) should employ the conduct-based approach.[105] Given, however, that Article 20(2) expressly uses a crime-based approach, relying on another rationale in order to bar successive prosecutions would be preferable.

The proposition that a national court may prosecute an individual after a conviction or acquittal in an international tribunal assumes that the dual sovereignty theory applies. This theory conceives of the relationship between national courts and international tribunals as one of vertical dual sovereignty, which accordingly allows for successive prosecutions. This assumption, however, ultimately raises questions regarding the "sovereign" status of the international tribunal: is the tribunal a separate sovereign from the nation for double jeopardy purposes, or is an international tribunal the same sovereign as the nation? Conceptually, the question is whether the relationship between an international tribunal and a nation is more like the relationship between the United States federal government and the individual states, or more like that between a state and a municipality. This section argues that because international tribunals derive their international legal personality from nations, the dual sovereignty exception does not apply to successive prosecutions by an international tribunal and a nation, and the protection against double jeopardy would thus apply.

First, it is important to determine how international law treats the relationship between international criminal tribunals and nations. Two main theories address the international legal personality of non-state entities. The first is the implied powers doctrine.[106] This doctrine provides that "states impliedly conferred on the organization the international legal personality needed to carry out the functions assigned to it consistent with the purposes and principles specified in the legal instrument creating it."[107] The second is the inherent powers doctrine. This doctrine maintains that once an entity is bestowed with international legal personality, it may act apart from those powers expressly or impliedly given to it by the states.[108] Under either theory, however, "the ultimate power over international organizations remains with states, if, for no other reason, than that states may always choose to dissolve an international organization that they have created."[109]

104. *Id.* at 232.
105. *Id.* 229–31.
106. James E. Hickey, Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL'Y SYMP. 1, 6 (1997).
107. *Id.* at 5.
108. *Id.* at 6.
109. *Id.*

There are various theories dealing with the source of a non-state's international legal personality. One of these is the legal traditionalist approach.[110] This theory holds that sovereign states have primacy over all other international actors.[111] The primacy of states "places full international legal personality, in the first instance, in states in the sense that states are the ultimate source for rights, duties, privileges and immunities under traditional international law."[112] In this sense, non-state entities derive their international legal personality from the sovereignty of the states.[113] The international legal personality "must be discernibly transferred from states to the non-state entity through some legal instrument."[114] Importantly, under this theory, international non-state entities are treated "no differently than non-state entities are treated under municipal law, at least as to the legal source of their rights and duties."[115] While there are other theories concerning the source of international legal personality, the source "for non-state entities in the twenty-first century ought to continue to be derived from states . . . ."[116]

The relationship between the legal traditionalist approach and international criminal tribunals is illuminating. First, following the crux of the doctrine, the source of any international criminal tribunal is the sovereign authority of the states to create the tribunal. The tribunal thus derives its power wholly from the states through some legal instrument, such as a treaty. Second, the powers of the tribunal are defined and limited by the scope of the agreement between states. Thus, an international criminal tribunal "is not the same thing . . . as a State, which it certainly is not, [nor are] its legal personality and rights and duties . . . the same as those of a State."[117] Likewise, an international criminal tribunal is limited to functions that are assigned to it by the state signatories of its founding treaty. Here, the Rome Statute, after establishing that the ICC has international legal personality, states in Article 4 that "[i]t shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."[118] This is, of course, a much more limited claim of power than would be granted to a state. Third, the states always maintain primacy over an international criminal tribunal because the states ultimately retain the option of dissolving a tribunal.

B. The "Sovereign" in Dual Sovereignty

The United States Supreme Court has stated that two entities are separate sovereigns if they derive their power to prosecute from distinct sources

110. *Id.* at 12.
111. *Id.*
112. *Id.* at 12–13.
113. *Id.* at 13.
114. *Id.*
115. *Id.* at 14.
116. *Id.* at 3.
117. Reparation for Injuries Suffered in the Service of the U.N., Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).
118. Rome Statute, *supra* note 2, art. 4(1).

of power.[119] To determine if two sources of power are distinct, the Court examines the entities' "ultimate source of power."[120] Sovereigns draw from separate ultimate sources of power when "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."[121] Accordingly, there are three requirements to obtaining the status of sovereign. First, the entity must be able to determine what an offense shall be. Second, the entity must be able to punish the offense. Finally, when an entity exercises these powers, it exercises its own sovereignty, not the sovereignty of another.[122]

An international criminal tribunal always derives its power from the sovereign states. Without a discernible legal instrument that explicitly or impliedly passes on international legal personality from a state to an international criminal tribunal, there can be no cognizable tribunal.[123] This is weakened somewhat if the inherent powers doctrine is followed, but not to a significant extent because states must still establish a tribunal before that tribunal can assume its inherent legal personality. In any case, the states could simply dissolve the tribunal, ensuring at least a requirement of tacit consent of the states to the tribunal's continued existence.[124]

The first prong of the Supreme Court's test for whether an entity qualifies as a sovereign is whether that entity can define offenses; no international legal tribunal has that power. With regards to the ICC, the parties to the Rome Statute defined all of the offenses over which it has jurisdiction during the drafting,[125] and there is nothing in the Rome Statute that grants the ICC the additional power to define an offense itself. The ICC thus fails the first element of the Supreme Court's test for sovereignty. Because it cannot define its own offenses, the ICC should not be viewed as a separate sovereign for double jeopardy purposes.

The second element of the Supreme Court's test for sovereignty requires the entity to have the power to punish offenses; an important counterpoint, then, is that the ICC does seem to have some discretion and authority to punish the offenses over which it has jurisdiction. Article 13 lays out three situations where the ICC can punish offenses: (1) when state party refers the crime to the ICC; (2) when the Security Council refers the crime; and (3) when the prosecutor has initiated an investigation.[126] There are, however, important limits to the ICC's power to punish. First, the ICC

119. *Heath*, 474 U.S. at 88.
120. *Id.* at 90.
121. *Id.* at 89–90.
122. Colangelo, *supra* note 29, at 780.
123. *See* Hickey, *supra* note 106, at 13 (stating that "[w]ithout that transfer, non-state entities should not be taken to have either international legal personality or the consequent legal standing or legal capacity to assert international law rights and duties directly in international law fora.").
124. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331.
125. Rome Statute, *supra* note 2, arts. 6–8.
126. *Id.* at art. 13(a)–(c).

can only punish the defined offenses and its jurisdiction is "limited to the most serious crimes of concern."[127] This is unlike the typical power of a state to punish offenses, and is unlike the type of power to punish the Supreme Court had in mind. The most important limitation is in Article 17, which essentially states that if a state is investigating and prosecuting an individual, then the ICC may not exercise its jurisdiction.[128] This is a limitation that creates an impenetrable bar to the ICC's power to punish. In other words, there are situations where an individual has committed an offense defined under Article 5, and the ICC would not have the power to punish that individual. The ICC thus fails the second element of the Supreme Court's sovereignty test because there are conceivable instances in which the ICC may not punish an offense over which it otherwise has jurisdiction.

The Supreme Court's third prong in its sovereignty test is whether the entity is exercising its own sovereignty or that of another. Because the authority of the ICC to prosecute an individual is derivative of the state's authority, the ICC is ultimately exercising the sovereignty of another. Indeed, the ICC would not have any jurisdiction to prosecute any crime if not for the states' grant of authority. Even the prosecutions that the ICC undertakes may result from a specific request by a state to initiate an investigation. Here, the most important factor is the state referral. Article 14 allows the ICC to conduct an investigation and prosecute an offense if a state party refers the case.[129] There is no question that the state itself would have jurisdiction over these offenses. By asking the ICC to conduct the investigation and prosecution, however, the state is effectively asking the ICC to exercise the state's sovereignty on its behalf. In the first instance, the state confers the power to the ICC to prosecute crimes. In the second, the state asks the ICC to punish a crime that the state itself could properly punish. In this way, the ICC is acting essentially as an agent of the state in its exercise of sovereignty. For these reasons, the ICC also fails the third element of the Supreme Court's test for sovereignty.

C. Customary International Law

Even though the ICC and the member states should be considered the same sovereign for double jeopardy purposes, it does not necessarily follow that they are barred from successively prosecuting an individual for the same offense. Rather, there must be a principle in international law that would bar successive prosecutions by the same sovereign. In this case, customary international law does provide such a principle.

Aside from treaty law, customary international law is the primary form of international law.[130] It is defined as a "general consistent practice

127. *Id.* at art. 5(1).
128. *Id.* at art. 17.
129. *Id.* at art. 14.
130. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999).

of states followed by them from a sense of legal obligation."[131] Customary international law thus must meet two requirements: it must be (1) the widespread and uniform practice of nations that (2) nations must engage in out of a sense of legal obligation.[132] The second requirement is otherwise known as *opinio juris*,[133] and it distinguishes what is done voluntarily from what is done as the result of a legal obligation.[134]

The protection against double jeopardy satisfies both elements. First, the protection against double jeopardy is a widespread practice. It is incorporated into over fifty national constitutions.[135] Even states that do not have a constitutional rule are likely to have a statutory or common law rule protecting against double jeopardy.[136] As discussed above, the protection against double jeopardy is also found in universal human rights treaties, regional human rights instruments, and international humanitarian law. The core principle of the protection against double jeopardy is thus widespread and near universal.

Although the core principle of protection against double jeopardy is widespread, its exact contours vary widely, to the point where it may be difficult to formulate a universal rule. While it is true that the wide variety of state practices shows the absence of a uniform double jeopardy rule, there is a common core in every state's double jeopardy protection. State practice shows that there is generally no rule protecting against double jeopardy in a national court subsequent to a prosecution in another sovereign's national court. Indeed, this is the principle for which the dual sovereign exception stands. But the rule is different with respect to successive prosecutions by the same sovereign. The state practice of affording protection against double jeopardy when the same sovereign successively prosecutes an individual is widespread. Therefore, if an international criminal tribunal and a state are considered the same sovereign, then any successive prosecutions by either of them would thus be considered a violation of the protection against double jeopardy. While there is no customary international law norm prohibiting the application of the dual sovereignty exception, there is widespread state practice prohibiting the successive prosecutions of an individual by the same sovereign. Once two entities are found to be under the umbrella of a single sovereign, they are subject to the double jeopardy rule.

Even if each state accepts the general rule that a single sovereign may not successively prosecute an individual, some may argue that the way the rule is interpreted within each state varies too widely to form a general practice. This argument would suggest that there is no widespread practice because some jurisdictions follow the "same offense"[137] test and other

131. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (ALI 1987).
132. Goldsmith & Posner, *supra* note 130, at 1116.
133. *Id.*
134. *Id.*
135. Bassiouni, *supra* note 28, at 292.
136. Colangelo, *supra* note 29, at 817.
137. *Helvering*, 303 U.S. at 399.

jurisdictions follow the broader, conduct-based test.[138] This argument fails to recognize, however, that the two tests are reconcilable. Any double jeopardy protection that would be afforded by the "same offense" test would also be covered by the broader conduct-based test. It is helpful to think of the "same offense" test as a floor. It is a minimum standard that no country will go below when applying its protection against double jeopardy. Although state practice may differ statutorily, all states will at the very least protect against successive prosecutions that are covered by the "same offense" test. There is therefore a general practice among states that the double jeopardy rule protects an individual from successive prosecutions by a single sovereign for at least the "same offense," as defined by the Supreme Court.

The final issue is whether states follow this rule out of a sense of legal obligation. It is very likely that the protection against double jeopardy satisfies the *opinio juris* requirement given the ancient roots of the law and that it is "a 'cardinal' principle that lies 'at the foundation of criminal law,'" and is "viewed as one of the central principles underpinning both the protection of individual human rights and the fair administration of justice."[139] Indeed, such a bedrock principle of criminal law is integral to any justice system. This is why the 1994 Draft of the Rome Statute considered such a principle "self-evident";[140] any state would likely feel bound by such an important and self-evident principle. The core protection against double jeopardy is therefore a customary international law norm.

Conclusion

This Note has argued that successive prosecutions by international and national courts violate the protection against double jeopardy. First, it considered the underlying rationale for the double jeopardy rule. To that effect, it explained that the double jeopardy rule is important both as a protection for the individual and as a protection for the integrity of the justice system. Next, it discussed the double jeopardy rule in the international context and determined that there is an international commitment to the core principle of the double jeopardy rule. It then discussed the dual sovereignty exception to the protection against double jeopardy with respect to the laws of the United States and international laws.

This Note then considered double jeopardy in the ICC. The ICC has been subject to much criticism, especially in its treatment of double jeopardy. This Note has discussed that criticism and the statutory framework to which the criticism applies. The ICC has three main double jeopardy protections. The first and the third are the most expansive and provide the greatest protections to the individual.[141] The second protection, found in

138. Carter, *supra* note 89, at 178.
139. Finlay, *supra* note 18, at 222–23.
140. *Id.* at 228–29; *see also* Rome Statute, *supra* note 2, art. 20(1) (showing that the "self-evident" principle was that the ICC could not prosecute an individual that it had already acquitted or convicted).
141. Rome Statute, *supra* note 2, arts. 20(1), (3).

Article 20(2) of the Rome Statute, is the most problematic.[142] This Note discussed the particular criticism that Article 20(2) allows for a state to prosecute an individual after an acquittal or conviction by the ICC.

With that problematic context, this Note considered whether there was any other rule that would protect an individual from double jeopardy. To that end, it argued that the relationship between states and international tribunals was such that the dual sovereignty exception does not apply. This inquiry ultimately turns on the "sovereign" status of an international criminal tribunal. Because the source of an international criminal tribunal's international legal personality is derived from the sovereignty of the states, the dual sovereign exception does not apply. Applying the U.S. Supreme Court's definition of sovereignty to the dual sovereignty exception shows that a criminal tribunal and a state are the same sovereign for double jeopardy purposes. Specifically, in the context of the ICC, it cannot define its own crimes, does not have absolute power to punish offenses, and it exercises the sovereignty of another rather than its own.

Finally, this Note argued that, at the very least, there is a double jeopardy rule in customary international law that protects an individual from successive prosecutions by a single sovereign for the "same offense." It concluded that there is widespread practice among states, as evidenced by various national constitutions, statutory rules, common law rules, universal human rights treaties, regional human rights instruments, and international humanitarian law. It also concluded that states follow this general practice out of a sense of legal obligation. Individuals should therefore be protected from double jeopardy by successive prosecution by international and state courts—understood as the same sovereign—for the same offense.

142. *Id.* at 20(2).