

UNIVERSAL JURISDICTION AS AN INTERNATIONAL “FALSE CONFLICT” OF LAWS

*Anthony J. Colangelo**

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What makes universal jurisdiction so extraordinary—and extraordinarily controversial—is the way it authorizes and circumscribes a State’s power to make and apply law, or prescriptive jurisdiction.¹ Many people who like universal jurisdiction like it because they think it allows States to extend their laws without any limitation to activity anywhere on the globe involving anyone. Thus, tyrants and terrorists are not immune from prosecution just because their home States refuse to prosecute them. People who dislike universal jurisdiction tend to dislike it for these very same reasons: because any State in the world can claim to exercise it over acts committed anywhere by anyone, universal jurisdiction invites

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

easy manipulation for purely sensationalist or propagandist ends. Neither view is entirely correct.

This Essay proposes a framework for analyzing the concept of universal jurisdiction and evaluating its exercise by States in the international legal system. In brief, I argue that universal jurisdiction is unique among the bases of prescriptive jurisdiction in international law, and that its unique character gives rise to unique—and underappreciated—limiting principles. The main analytical device I use to make this argument is the notion of a “false conflict,” which I borrow from the private law field of conflict of laws, also known outside the United States as private international law.² I do not suggest that any particular permutation of false conflict (there are a few)³ in the private law sense can or should be seamlessly grafted onto the international legal system. Rather, my aim is to explore some general themes captured by the idea of a false conflict of laws and to craft a species of false conflict for the international legal system that can helpfully structure legal and policy thinking about universal jurisdiction in ways that accommodate both prevailing state sovereignty and individual rights concerns.

Part I of the Essay argues that universal jurisdiction is different from all other bases of jurisdiction in international law. Other bases of jurisdiction derive from distinct national entitlements to make and apply law, like entitlements over national territory or persons. These bases of national jurisdiction grant States great freedom to regulate whatever conduct they deem deserving of regulation in essentially whatever regulatory terms they choose. In this respect, international law circumscribes the geographic range of situations to which States may apply their laws, but without much restricting the content of the law a State seeks to apply once it has been determined that a situation falls within the State’s recognized prescriptive range.

In contrast, universal jurisdiction derives from a State’s *shared* entitlement—with all other States in the international legal system—to apply and enforce the international law against universal crimes. As a result, a State cannot unilaterally decide what conduct falls within its universal jurisdiction and cannot regulate that conduct in any terms it chooses (unlike when exercising national jurisdiction). Rather, the State exercising universal jurisdiction acts as a decentralized enforcer of international law on behalf of the international legal system. This is, in a sense, the opposite of the way national jurisdiction works. The geographic range is limitless, but international law places restrictions on the content of the law being applied.

2. SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 15 (2008).

3. See *infra* notes 48–50 and accompanying text.

Part II shows how the uniqueness of universal jurisdiction presents a species of false conflict for the international legal system. It examines the notion of false conflicts and concludes that, properly exercised, universal jurisdiction by its nature creates no conflict of laws among States. Because the State exercising universal jurisdiction merely enforces shared normative and legal commitments of all, no conflict of laws exists since the law being applied is the same everywhere. And, because the universal jurisdiction State is enforcing an otherwise applicable international norm that necessarily governs within all other States, including States with national jurisdiction, the latter can claim no sovereign interference. That is, they have no “sovereignty claim” under international law that, for instance, genocide, torture, or war crimes are legal within their borders. Hence, put in conflict of laws terms, there is a “false conflict” both *(i)* because the universal jurisdiction State applies a norm that by force of international law applies within the jurisdictions of all other interested States, and *(ii)* no other State can claim a legitimate sovereign interest in the choice of a domestic law contrary to that norm.

This is not to say, however, that territorial or national jurisdiction States have no legitimate interest in seeing the matter resolved at home in domestic courts, rather than abroad in foreign courts through principles of jurisdictional primacy. But that jurisdictional ordering is more a question of adjudicative, as opposed to prescriptive, jurisdiction. Put another way, it relates more to choice of forum, as opposed to choice of law. For the international law against, say, genocide, is in theory the same everywhere,⁴ and thus axiomatically would erase any “true conflict” of laws among States.

Accordingly, and couched within the topic of the present Symposium, I want to suggest that the prescriptive reach of universal jurisdiction is not really *extraterritorial* at all; but rather comprises a comprehensive territorial jurisdiction, originating in a universally applicable international law that covers the globe. Individual States may apply and enforce that law in domestic courts, to be sure, but its prescriptive scope encompasses all territory subject to international law, i.e., the entire world.

While Parts I and II set out to show that a false-conflict view of universal jurisdiction can provide a coherent account of the international legal concept, Part III uses the false-conflict view to articulate some important and under-recognized limiting principles.

4. I say “in theory” because I am working on a conceptual level here to frame the relevant empirical and epistemic questions about national implementation and enforcement of international law in the context of universal jurisdiction. I highlight those questions, and suggest how I think they should be addressed, in Part III.

First, States exercising universal jurisdiction must faithfully apply the international legal definitions of the crimes they seek to prosecute. There is both a state sovereignty and an individual rights dimension to this limiting principle. As to state sovereignty, if States do not faithfully apply the international law definitions of universal crimes, the exercise of jurisdiction contradicts the very international law upon which it purports to rely by arrogating to the State more jurisdiction than what is authorized under international law. This can become especially problematic where the exercise of jurisdiction applies a law contrary to the law of the State with national jurisdiction; that is, in cases of “true conflicts” of laws among States. In this respect, the State claiming an exorbitant universal jurisdiction may well interfere with the sovereignty of other jurisdictionally involved States—most notably, territorial and national States—through the unauthorized projection of domestic law into their territories or over their nationals.

Of equal if not greater importance, the false-conflict view implies strong individual rights limits that affect both victims and defendants. This key piece of the universal jurisdiction puzzle is often overshadowed by sovereignty concerns, yet its elaboration helps throw into sharper relief the contours and ramifications of the limiting principles inherent in the concept. To begin with, a false-conflict view protects the rights of victims to see justice done by extinguishing defendants’ objections to expansive assertions of extraterritorial jurisdiction, whether such objections are styled *ex post facto*, legality, or due process. The accused cannot claim lack of notice of the illegality of his conduct or, indeed, of the applicable law—international law.

Yet correspondingly, the false-conflict view also protects the rights of defendants. If the State exercising universal jurisdiction departs from international law through an exorbitant claim of jurisdiction over activity that does not qualify as a universal crime under international law and that lacks a recognized jurisdictional link to the forum, the defendants’ individual rights claims may have traction. Here the accused may well be subject to a law of which he had no notice, thus potentially violating principles of legality, due process, and non-retroactivity of the criminal law. This limiting principle is significant because the rights of defendants not to be unfairly subject to laws of which they had no notice too often go unmentioned or under-treated in conversations about universal jurisdiction, and indeed, about extraterritorial jurisdiction generally. Legal and policy debate that centers only on highly charged sovereignty clashes among governments, while ignoring the rights of defendants is ironic, since, as noted above, a major objective of universal jurisdiction is vindication of individual rights—those of victims. But anytime a State

exaggerates the definition of a crime upon which it bases universal jurisdiction, it potentially exposes the defendant to a law of which he had no notice, triggering strong individual rights objections.

Another potential limitation on universal jurisdiction is that, at present, international law precludes its exercise by States over certain public officials of other States through doctrines of immunity. In this circumstance, international law does grant States a form of “sovereignty claim,” or recognized state interest, against the decentralized application of its prohibitions by other States through universal jurisdiction. However, once the accused leaves office no immunity attaches for international crimes. Moreover, no rule of international law currently requires a State exercising universal jurisdiction to respect an amnesty granted by another State. And therefore, any claim against the exercise of universal jurisdiction based on such an amnesty is substantially weaker than an immunity claim, if not nonexistent under international law.

Finally, and perhaps most controversially, I suggest that a State may not successively prosecute based on universal jurisdiction when another State already has prosecuted in good faith the crime in question. The first prosecution already would have enforced the international law against that crime, leaving the universal jurisdiction State seeking successive prosecution no law upon which to prosecute again. The Essay concludes that a false-conflict approach can provide a workable and desirable international legal framework for evaluating the exercise of universal jurisdiction.

II. THE UNIQUENESS OF UNIVERSAL JURISDICTION

This Part discerns two kinds of prescriptive jurisdiction in international law in order to demonstrate the uniqueness of universal jurisdiction. One kind I label “national jurisdiction;” the other I label “international jurisdiction.”⁵ 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.

5. The discussion of national versus international jurisdiction is taken substantially from my most recent article, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 791–97 (2009) [hereinafter Colangelo, *Double Jeopardy and Multiple Sovereigns*].

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

A. National Jurisdiction

Under international law, certain “sovereign” or national interests authorize States to apply their national laws to activity affecting those interests. These national interests, in other words, underlie national bases of prescriptive jurisdiction, or what might be called national entitlements,⁶ recognized by international law, to make and apply law. For example, principal among these entitlements is jurisdiction over a certain piece of geographic territory.⁷ Thus State A has prescriptive jurisdiction over State A territory because of State A's national entitlement, as recognized by international law, over its territory.

The list of national entitlements recognized by international law authorizing a State's prescriptive jurisdiction is fairly intuitive. As already mentioned, a State legitimately may claim jurisdiction over activity that occurs, even in part, within its territory.⁸ This is called subjective territoriality.⁹ 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.¹⁰ Furthermore, a State may claim jurisdiction over activity that involves its nationals.¹¹ Where the acts in question are committed by a State's nationals, the State may claim active personality jurisdiction. And where the acts victimize a State's nationals, the State may claim passive personality jurisdiction.¹² Additionally, under the protective prin-

6. 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 (2008).

7. See D'Amato, *Is International Law Really “Law”?*, *supra* note 6, at 1308.

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

9. *Id.*

10. *Id.* § 402(1)(c).

11. *Id.* § 402(2).

12. *Id.* § 402(2) cmt. g.

ciple 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.¹³

All of these national entitlements relate distinctly back to the particular State claiming jurisdiction—whether to its territory, to punishing or protecting its nationals, or to affirming its very statehood.¹⁴ And because international law recognizes multiple national entitlements, there may 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,¹⁵ but clearly so too may the United States.¹⁶ In such cases there are overlapping or concurrent national jurisdictions.¹⁷

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.¹⁸ 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. Thus, through the limited list of national entitlements, international law effectively limits the geographic range of situations to which States may make and apply their laws.

But although the geographic range of its national jurisdiction may be limited, within the parameters of that 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 law¹⁹ (for example, a State may not, under international law, legislatively endorse or permit

13. *Id.* § 402(3).

14. 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 94 (Stephen Macedo ed., 2004).

15. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

16. See *id.* § 402(1)(a).

17. See, e.g., S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30–31 (Sept. 7).

18. 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) [hereinafter Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*].

19. Cf. Marcel Brus, *Bridging the Gap Between State Sovereignty and International Governance: The Authority of Law*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 3, 4 (Gerard Kreijen ed., Oxford 2004) (discussing the concept of global governance).

genocide),²⁰ 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 largely whatever terms they like criminalizing largely whatever activity they like where that activity takes place within their geographic borders or involves their nationals. Consequently, while international law limits the geographic range of States' national jurisdiction, once a situation falls within that range, States enjoy great freedom to regulate the situation how they see fit. International law places few restrictions on the content of the State's law.

To sum up then, international law contains multiple bases of national jurisdiction. These bases of jurisdiction 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 employ their domestic law-giving apparatus however they see fit by defining offenses according to their own individual—and independent—prescriptive prerogatives.

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 range of that State's national prescriptive jurisdiction 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. 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.²¹ The category of universal crime began long ago with piracy,²² expanded in the wake of World War II, and is now generally considered to include serious international human rights

20. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

21. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 246 (2001) [hereinafter Sadat, *Redefining Universal Jurisdiction*].

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

and humanitarian law violations like genocide, crimes against humanity, war crimes, torture, and, most recently, certain crimes of terrorism.²³

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 without limitation the international prohibition on universal crimes.²⁴ 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.²⁵ Recently, Spain's Constitutional Court made the point emphatically when it upheld universal jurisdiction over crimes committed in Guatemala by Guatemalans against Guatemalans: "the principle of universal jurisdiction . . . is based exclusively on the particular characteristics of the crimes covered thereby, whose harm (paradigmatically in the case of genocide) transcends the specific victims and affects the international community as a whole."²⁶ "Consequently," the Court explained,

23. 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, 423 (1987)); see also PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION princ. 2(1) (Stephen Macedo ed., 2001) [hereinafter PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION].

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

25. 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. See Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 974–75 (2006) [hereinafter Sadat, *Exile, Amnesty and International Law*]; Sadat, *Redefining Universal Jurisdiction*, *supra* note 21, at 246–47; Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 412 (2000). 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.

26. STC, Sept. 26, 2005 (S.T.C. No. 237, § II), *available and translated at* http://www.tribunalconstitucional.es/jurisprudencia/Stc_ing/STC2007-237-2005.html (last visited June 6, 2006) [hereinafter Guatemala Genocide Case].

the[] repression and punishment [of universal crimes] constitute not only a commitment, but also a shared interest among all [S]tates, whose legitimacy in consequence does not depend on the ulterior individual interests of each of them. In that regard, the concept of universal jurisdiction in current international law is not based on points of connection founded on the individual interests of a [S]tate . . . [but] on the particular nature of the crimes being prosecuted.²⁷

Or, as a recent Joint Separate Opinion in the International Court of Justice put it, “those States . . . who claim the right . . . to assert a universal criminal jurisdiction . . . invoke the concept of acting as ‘agents for the international community.’”²⁸

States, through their common and coordinated practice, collectively contribute to international lawmaking, including the law of universal jurisdiction—whether that law is made through entrance into treaties affirming the serious nature of the crime under international law and every State’s attendant obligation to prosecute it as such, even absent domestic links,²⁹ or through a practice of domestic legislation and judicial decisionmaking which emphasize the universal nature of the crime under international law and the ensuing authority to act as an agent of the international legal system in exercising jurisdiction.³⁰ But the upshot is that a single State cannot *unilaterally* and subjectively determine what crimes are within its universal jurisdiction—that is a matter of international, not national, law.³¹ 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.³² But what is important is that Germany, or any other

27. *Id.*

28. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 78 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal).

29. I address why I think treaty law can lead to universal jurisdiction as a matter of customary law in Part III.A.

30. *See supra* notes 26–28.

31. Colangelo, *The Legal Limits of Universal Jurisdiction*, *supra* note 24, at 161.

32. *See, e.g.*, Code de procédure pénale, titre préliminaire, article 12 bis (Belg.); Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*, *supra* note 18, at 175–77. Such municipal legislative authorization for the exercise of universal jurisdiction also may reflect modern antipathy toward common law creation and evolution of crimes.

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.

And 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. In this respect, international law places restrictions on the content of the law being applied in situations of universal jurisdiction. 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.³³ Hence the symbiotic relationship between universal prescriptive jurisdiction (the power to apply law to certain persons or things) and universal adjudicative jurisdiction (the power to subject certain persons or things to judicial process): the international legal definitions of universal crimes define not only the crimes themselves as a matter of States' prescriptive jurisdiction, but also the judicial competence for all courts wishing to exercise universal jurisdiction.

I address below more concrete legal questions of how to tell whether a crime is universal under international law, and whether a State faithfully applies that international law through its domestic legal apparatus.³⁴ The takeaway for now is that universal jurisdiction is foundationally different from national jurisdiction. Its jurisdictional anchor for States, or source of prescriptive authority, is distinctly *international*—i.e., the international legal system's interest in suppressing certain international crimes no matter where they occur and whom they involve. And, 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 prescriptive prerogative. In short, if the international legal definition and substance of a crime authorizes universal jurisdiction as States claim,³⁵ then States

33. Colangelo, *The Legal Limits of Universal Jurisdiction*, *supra* note 24, at 153.

34. *See infra* Part III.A.

35. *See, e.g., supra* notes 26–28.

must base their exercise of jurisdiction in that international legal definition and substance.

III. UNIVERSAL JURISDICTION AS A FALSE CONFLICT

The unique nature of universal jurisdiction yields an analytically helpful correspondence to the notion of false conflicts in the conflict of laws or private international law field. This Part introduces two prominent conceptions of false conflict and recasts universal jurisdiction as a species of international false conflict of laws. The remainder of the Essay then maps the false-conflict model onto the use of universal jurisdiction by States to discern some limiting principles inherent in the concept under the view presented so far.

Before getting into the meat of the false-conflict analysis, however, and since the project makes a decidedly prescriptive turn at that point, I would like to smooth the bridge between explaining what universal jurisdiction is, and now prescribing how I think it should work based on that explanation. The false-conflict view I propose is not just the top-down superimposition of a conceptual model onto the legally-relevant bottom-up practice of States. Rather, it flows from that practice. Indeed, it takes States at their word. If the international legal justification advanced for the exercise of universal jurisdiction is that the State acts as a decentralized enforcer of a predominant set of international norms on behalf of the system, then the false-conflict view follows from that justification. That is, States must then actually apply and enforce international law—and the result is the false-conflict view outlined immediately below and the set of limiting principles identified and elaborated in Part III.

A. *False Conflicts*

The conflict of laws discipline addresses situations in which more than one State's laws potentially apply to the same set of facts; that is, cases of overlapping prescriptive jurisdictions.³⁶ "False conflicts" come in a variety of flavors,³⁷ with the meaning of the term in any given case often tied to the choice of law methodology adopted to resolve that case. As one commentator has noted, "[t]he concept of 'false conflicts' enjoys protean facility for justifying everyman's choice-of-law theory. Members

36. See generally SYMEONIDES, *supra* note 2.

37. See DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 64 (1965); see also Peter Kay Westen, Comment, *False Conflicts*, 55 CAL. L. REV. 74, 76–78 (1967) (enumerating seven types of false conflict).

of the choice of law guild who discover a rational solution for a conflicts problem, tend to characterize the problem as a ‘false conflict.’”³⁸

The concept of false conflicts is generally regarded to have originated as part of Brainerd Currie’s governmental interest approach to choice of law questions (though Currie himself referred to false conflicts situations as “false problems”).³⁹ According to Currie, courts deciding choice of law questions “should first of all determine the governmental polic[ies]” expressed by the laws of the involved states and whether “the relationship of the . . . state to the case at bar . . . is such as to bring the case within the scope of the state’s governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.”⁴⁰

From this interest analysis, three main conflicts categories emerge: false conflicts, true conflicts, and un-provided-for cases.⁴¹ False conflicts occur when only one involved State has an interest in applying its law.⁴² Because only one State is interested in applying its law, there is no conflict of laws and the sole interested State’s law applies.⁴³ True conflicts, by contrast, occur when more than one involved State has an interest in applying its law.⁴⁴ And un-provided-for cases occur when no involved State has an interest in applying its law.⁴⁵ While questions of whether and when precisely governmental interests exist have generated much commentary,⁴⁶ “the concept of a false conflict . . . has become an integral part of all modern policy based [choice of law] analyses.”⁴⁷

38. Westen, *supra* note 37, at 78.

39. *Id.* at 76; see also Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); Brainerd Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

40. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958) [hereinafter Currie, *The Constitution and the Choice of Law*].

41. *Id.* Also, “[i]n his later work, Currie recognized a fourth category, what he called an ‘apparent conflict,’ which is something between a false and a true conflict.” Symeon C. Symeonides, *The American Choice-of-Law Revolution in Courts: Today and Tomorrow*, 298 RECUEIL DES COURS 1, 44 (2002).

42. See Currie, *The Constitution and the Choice of Law*, *supra* note 40, at 10 (“When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied.”).

43. *Id.*

44. EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 28 (4th ed. 2004).

45. *Id.*

46. See *id.* at 25–38; Westen, *supra* note 37, at 80.

47. SCOLES ET AL., *supra* note 44, at 29.

Another popular variety of false conflict in judicial decisions⁴⁸ and academic literature⁴⁹ occurs when the laws of the involved States are the same, such that there is effectively no conflict of laws. As Robert Leflar put it, “if the laws of [all involved] states, relevant to the set of facts, are the same . . . then there is no real conflict of laws at all, and the case ought to be decided under the law that is common to [the] states.”⁵⁰

These two permutations of false conflict—where only one State is interested in applying its laws and where the laws of all involved States are the same—can offer a heuristically rich foundation for crafting a false-conflict framework for exercises of universal jurisdiction in the international legal system. The anthropomorphized “interested State” can capture sovereignty concerns that continue to pervade and organize the system, while the notion of the “same law” across jurisdictions can capture the coercive harmonization of norms against certain crimes deemed universal by international custom.⁵¹

48. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 838 n.20 (1985) (Stevens, J., concurring) (“‘[F]alse conflict’ really means ‘no conflict of laws.’ If the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them.” (quoting ROBERT LEFLAR, *AMERICAN CONFLICTS LAW* § 93, 188 (3d ed. 1977))); *Wachsman ex rel. Wachsman v. Islamic Republic of Iran*, 537 F. Supp. 2d 85, 94 (D.D.C. 2008); *Gulf Group Holdings, Inc. v. Coast Asset Mgmt. Corp.*, 516 F. Supp. 2d 1253, 1271 (S.D. Fla. 2007); *Greaves v. State Farm Ins. Co.*, 984 F. Supp. 12, 14 (D.D.C. 1997); *Brenner v. Oppenheimer, Inc.*, 44 P.3d 364, 372 (Kan. 2002); 16 AM. JUR. 2D *Conflict of Laws* § 85 (2008). *But cf.* *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 229–30 (3d Cir. 2007) (noting, but ultimately rejecting, previous court decisions suggesting that instances where the laws of two states do not differ should be characterized as “false conflicts”).

49. See, e.g., Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 583 n.116 (2007); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT’L L.J. 47, 70 (1993); Leigh Anne Miller, Note, *Choice-of-Law Approaches in Tort Actions*, 16 AM. J. TRIAL ADVOC. 859, 866 (1993); see also Michael S. Gill, *Turbulent Times or Clear Skies Ahead?: Conflict of Laws in Aviation Delict and Tort*, 64 J. AIR L. & COM. 195, 227 (1998) (noting that prior to Currie’s development of his notion of “false conflicts,” the “conventional thinking was that a false conflict arose when the content of the substantive laws . . . were the same”).

50. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 290 (1966). Leflar also suggested that false conflicts exist where different states’ laws, although not the same, would produce the same result. See *id.* However, as Peter Westen points out, this view of a false conflict runs into trouble when the court “splits” the case into separate issues and “the law of one contact state is invoked to resolve one issue . . . and the law of another state is applied to a different issue, so that combined they produce a result contrary to the common one which would obtain if the entire law of only one state were applied.” Westen, *supra* note 37, at 114. Along with Currie’s version of a false conflict—i.e., where only one state has an interest—these two versions of false conflicts—i.e., where the laws are the same, and where the laws would, although different, produce the same result—probably make up the three most common varieties of false conflict in domestic conflict jurisprudence.

51. Again, I am not suggesting that a false-conflict analysis would work exactly the same way in the international system as in the U.S. interstate system (indeed, there is no such thing as universal jurisdiction in the latter), but rather that false conflicts provide a helpful and

B. *As Applied to Universal Jurisdiction*

1. The Same Law

The second type of false conflict mentioned above presents obvious semblance to the concept of universal jurisdiction and probably offers a conceptually cleaner place to start than a governmental interest analysis. The idea of the “same law” across jurisdictions holds immediate appeal for universal jurisdiction because “[u]niversal jurisdiction . . . is a result of universal condemnation” of the international crimes that generate it.⁵² As explained above, when a State exercises universal jurisdiction, it acts as the adjudicative and enforcement mechanism for the international law against the universal crime at issue.⁵³ And that law is, in theory, the same everywhere. Thus, there is no conflict of laws as to, say, the international legal prohibition on genocide. In this respect, the exercise of universal jurisdiction always produces a species of international false conflict since, by definition, it leads to the application and enforcement of a law common to all States: international law.

2. State Interests

A governmental interest analysis of false conflicts poses a somewhat trickier yet perhaps more provocative tie to universal jurisdiction. We have already said that a State’s universal jurisdiction springs not from any distinct national interest or entitlement in applying its national prescriptive jurisdiction to a dispute, but from a shared entitlement and commitment—with all other States—to suppress certain international crimes deemed universal. In other words, universal jurisdiction stems from the nature and substance of the crime under international law, as opposed to any national connecting link.

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.⁵⁴ 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.⁵⁵ Thus we have two States that potentially may claim jurisdiction, under international law, based on state

coherent way to structure thinking about the exercise of universal jurisdiction in the international system.

52. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987).

53. *See supra* Part I.B.

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

55. *See id.* § 402(2).

interests. But that is not all. For Spain, among other States,⁵⁶ has a universal jurisdiction law that allows Spanish courts to prosecute for torture, wherever it occurs and whomever it involves.⁵⁷ So it too conceivably could exercise jurisdiction on these facts.⁵⁸

But unlike the United States and Egypt, Spain's interest is not linked to any distinctly national jurisdictional entitlement. If the crime were instead an "ordinary" crime,⁵⁹ say a robbery in an Egyptian marketplace by a U.S. national, Spain could not apply and 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. 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. Yet Spain surely has an "interest" in exercising jurisdiction. It may not be an interest related distinctly to national entitlements like national territory and persons, but it is an interest nonetheless (and one that Spain shares with all other States): the application and enforcement of international law against universal crimes.⁶⁰

The real question for interest analysis, then, is whether any other jurisdictionally involved State can claim a *contrary* interest in its laws. And the answer here has to be no. While Currie's approach frames false conflicts as multi-jurisdictional situations in which only one state has an interest in applying its laws,⁶¹ and true conflicts as situations in which more than one state has an interest in applying its laws,⁶² that analysis presupposes conflicting interests expressed in the laws of different

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

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

58. This was precisely Spain's jurisdictional justification for its famous extradition request for Pinochet.

59. 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].

60. See Guatemala Genocide Case, *supra* note 26, § II. The Spanish Constitutional Court rejected the argument that universal jurisdiction existed in Spanish courts over genocide abroad only where the victims were Spanish because such a limitation "contradicts the very nature of the crime and the shared objective that it be combated universally." *Id.*

61. See *supra* notes 39–40.

62. See *supra* note 44.

states.⁶³ But when it comes to the application of international legal prohibitions on universal crimes, by force of international law no State has a legitimate contrary interest in its laws.

This argument conceivably can function on two distinguishable but related levels given the underlying international legal principle at play. The first is that, empirically speaking, States' laws publicly will not express interests contrary to international legal prohibitions on universal crimes. Indeed, such widespread consensus by States regarding the international prohibition on a crime presumably gave rise to universal jurisdiction over it in the first place as a matter of customary international law, which is made up of state practice and *opinio juris* (the belief or intent that the practice arises from a sense of legal obligation).⁶⁴ Thus as a practical matter, when a State exercises universal jurisdiction, other States simply will not have laws expressing interests contrary to the international legal prohibitions expressed in the universal jurisdiction law, therefore mooted interest analysis and creating a false conflict.

Second, as a legal matter, there is a strong argument that even if they wanted to, other States *cannot* have laws expressing interests contrary to the international legal prohibitions on universal crimes. This is because crimes subject to universal jurisdiction generally are considered the most serious offenses under international law,⁶⁵ such that States cannot lawfully commit or sanction them through domestic law. Some experts have identified prohibitions on universal crimes with *jus cogens*, or peremptory norms of international law, from which States may not derogate,⁶⁶

63. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 182 (1963) (explaining that in a true-conflict situation courts should apply the forum's law since "assessment of the respective values of the *competing* legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.") (emphasis added); see also *id.* at 184 ("If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its *contrary* policy . . .") (emphasis added).

64. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

65. PRINCETON PRINCIPLES OF UNIVERSAL JURISDICTION, *supra* note 23, princ. 2; see also Sadat, *Exile, Amnesty and International Law*, *supra* note 25, at 970–74, 1025–26; Donald Francis Donovan & Anthea Roberts, Note and Comment, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 159 (2006) ("By definition, universal jurisdiction applies to norms whose enforcement has been made imperative by the international community."):

66. For a good examination of this topic, see Sadat, *Exile, Amnesty and International Law*, *supra* note 25, at 970–74. The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as a "peremptory norm of general international law [that] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

though approaches to this proposition vary.⁶⁷ But whatever else it may stand for,⁶⁸ a central justificatory tenet of modern universal jurisdiction is that States cannot, under international law, legitimately endorse or permit universal crimes through national legislation.

It may be worth taking a step back here. The basic rationale for the doctrine, as we know, is to provide a basis of jurisdiction over crimes international law considers so harmful that even absent a national link to the crime, all States may prosecute the perpetrators.⁶⁹ But one could ask why this should be. If universal crimes are in fact prohibited by all States, then there should be no need for the doctrine at all, except perhaps with regard to piracy—the original crime of universal jurisdiction—perpetrated on the high seas by stateless actors.⁷⁰ As to all other universal crimes, every State would prosecute them when committed within its territory or by its nationals; and consequently, creating such expansive jurisdiction in *all other* States would be nothing more than a needlessly dangerous recipe for sovereign interference contrary to the dictates of the U.N. Charter.⁷¹

Yet one reason such expansive jurisdiction is needed is precisely because authorities in territorial and national jurisdiction States may themselves be the perpetrators of universal crimes.⁷² Universal jurisdic-

67. See Donovan & Roberts, *supra* note 65, at 145, who note that:

[C]ommentators often link the principle [of universal jurisdiction] with *jus cogens* norms and *erga omnes* obligations, though many express divergent views on their relationship. In one view, these concepts directly support one another, as *jus cogens* norms give rise to *erga omnes* obligations and also require or permit [S]tates to exercise universal jurisdiction. In another view, *jus cogens* norms and *erga omnes* obligations are primarily or exclusively concerned with state responsibility, while universal jurisdiction deals primarily or exclusively with individual responsibility, so that the former concepts provide analogous support for the latter. In yet another view, universal jurisdiction should extend to all serious crimes under international law, not just *jus cogens* norms.

68. For a thoughtful and compelling account of universal jurisdiction's normative underpinnings, see Adeno Addis, *Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction*, 31 HUM. RTS. Q. 129, 132 (2009) (arguing that universal jurisdiction has a "constitutive function . . . through which the international community imagines its identity").

69. See *supra* notes 21–23.

70. For a discussion of piracy and its relationship to modern doctrines of universal jurisdiction, see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 210 (2004).

71. See U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

72. This non-accountability argument has trouble explaining on its own, however, why certain crimes are subject to universal jurisdiction and others are not. See Addis, *supra* note 68, at 141 ("[A]s a descriptive matter, the likelihood of non-prosecution as a rationale for the kind of crimes we consider as properly subject to universal jurisdiction is under-inclusive. Many crimes go unpunished in a particular country, but that alone can never be the basis for

tion thus functions as a mechanism for overriding national laws contrary to predominant international norms. This principle has been built into the international legal system since at least the prosecution of Nazi war criminals by the International Military Tribunal at Nuremberg, which, as Leila Sadat explains, “clearly affirmed the primacy of international law over national law” with regard to serious international crimes.⁷³ Indeed, “[t]he [London] Charter . . . was explicit in rejecting municipal law as a defense to an international crime.”⁷⁴ And that principle holds irrespective of whether the adjudicatory organ applying international law is a multi-lateral tribunal like the IMT or a national court, since, as the Tribunal itself noted, the signatories to the London Charter were merely “do[ing] together what any one of them might have done singly.”⁷⁵

But suppose there had been no World War II or IMT, and suppose further that the Nazi final solution had been implemented only inside Germany and only against Germans. No other State would have national jurisdiction on these facts. Thus absent universal jurisdiction, those committing horrible atrocities under the color of German law at the time effectively could be insulated from the reach of international law because of jurisdictional principles bounded by national connecting links. This situation of impunity is remedied through the mechanism of universal jurisdiction, whereby international law empowers all States to apply and enforce its proscriptions. As I’ve stated elsewhere,

[universal jurisdiction] purports to refuse [S]tates a degree of exclusivity in the prescriptive authority they generally enjoy within their territories. That is, under the doctrine, [S]tates cannot legislatively endorse universal crimes; where they do so, international law (often operating through the laws of other [S]tates) effectively reaches into the territory of the offending [S]tate to proscribe the acts as criminal irrespective of domestic law.⁷⁶

All of this is to say that under an interest analysis, where one State exercises universal jurisdiction, no other State will have a legitimate contrary interest expressed in its laws. Either other States simply will not have laws contrary to the international norms proscribing universal crimes as

asserting universal jurisdiction. If the purpose is to ensure against legal gaps (no ‘law-free zones’), then one would have to show that dealing with these and not other offenses is the proper way to fill the gaps.”)

73. Sadat, *Exile, Amnesty and International Law*, *supra* note 25, at 1025.

74. *Id.* at 1026.

75. International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT’L L. 172, 216 (1947).

76. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*, *supra* note 18, at 134.

a practical matter; or they cannot as a legal matter. The result, in either case, is a false conflict of laws.

3. Choice of Forum

Although States with territorial or national jurisdiction would have no legitimate choice of law objection under international law to the exercise of universal jurisdiction by other States, they may have a *choice of forum* objection. That is, territorial or national States may claim an adjudicative jurisdictional primacy to prosecute in their own courts universal crimes committed in their territories or by their nationals. Since States have begun only recently to explore in earnest universal jurisdiction over activity occurring in the territories of other States,⁷⁷ it is probably premature to conclude that state practice and *opinio juris* already have combined to definitively establish that a State with territorial or national jurisdiction has adjudicative priority over States with only universal jurisdiction. Nonetheless, a legal trend appears to be developing in this direction.

I have conducted elsewhere an extensive empirical canvassing of state practice in this regard—including examination of national judicial opinions, national legislation, and use of prosecutorial discretion, all of which provides national jurisdiction States with adjudicative priority to prosecute universal crimes.⁷⁸ The survey also observes that this type of hierarchy finds support in jurisdictional provisions of the vast majority of recent multilateral treaties covering international crimes, as well as in a Joint Separate Opinion from the International Court of Justice.⁷⁹ This Symposium piece is not the place to recapitulate that wide-ranging study, but suffice it to say that with the increase of national legislation authorizing universal jurisdiction has emerged a trend of giving the courts of States with territorial or national links to the crimes priority to prosecute.

Yet that jurisdictional priority concerns not so much the law being applied and enforced over universal crimes—again, that is in principle the same everywhere—but rather the forum in which that law is applied and enforced. For any number of philosophical and practical reasons, giving States with closer links to universal crimes priority to adjudicate makes good sense.⁸⁰ Perhaps an appropriate model here, and the one that

77. See REYDAMS, *supra* note 56, at 1.

78. See Colangelo, *Double Jeopardy and Multiple Sovereigns*, *supra* note 5, at 830–32.

79. *Id.* at 832–35.

80. For example, the authors of the Princeton Principles on Universal Jurisdiction note “the longstanding conviction that a criminal defendant should be tried by his ‘natural judge.’” PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 23, at 53. They further note “societies that have been victimized by political crimes should have the opportunity to bring

appears to be gaining traction in practice, is a complementary jurisdiction similar to that contained in the Rome Statute for the International Criminal Court,⁸¹ which precludes jurisdiction by the ICC where States with territorial or national links to the crime prosecute in good faith.⁸² I will return to this jurisdictional dynamic in Part III when I discuss double jeopardy or *non bis in idem* rules governing the exercise of universal jurisdiction for successive prosecutions by different States.

III. LIMITING PRINCIPLES

This Part uncovers and explores three limiting principles inherent in the concept of universal jurisdiction as conceived by the false-conflict framework advanced so far. First, States must faithfully apply the international legal definitions of the crimes they seek to prosecute when exercising universal jurisdiction. Second, international law at present prevents the exercise of universal jurisdiction where the defendant's home State has a valid immunity claim. Third, a State may not prosecute on the basis of universal jurisdiction where the crime in question already has been prosecuted by another State.

A. Faithful Application of International Law

If universal jurisdiction presents no conflict of laws because at bottom it merely authorizes the application of a law that is “the same” around the globe—i.e., the international law against universal crimes—and to which other States cannot legitimately object based on conflicting domestic laws, then a State exercising universal jurisdiction must apply that “same” law common to all: international law. If the State exercising universal jurisdiction does not, it risks a true conflict of laws with other States. Such a true conflict can have both troubling state sovereignty and individual rights consequences for the international legal system.

the perpetrators to justice,” and “the exercise of territorial jurisdiction will often also satisfy several of the other factors . . . such as the convenience to the parties and witnesses, as well as the availability of evidence.” *Id.*

81. 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. *See, e.g.*, Volkerstrafgesetzbuch [VStGB] [International Criminal Code] June 30, 2002, Bundergesetzblatt, Teil I [BGBl.I] 2254, *translated at* <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (last visited June 6, 2009).

82. Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

1. State Sovereignty

The state sovereignty argument is simple: by not applying faithfully the international law against the universal crime in question, the State claiming universal jurisdiction over that crime could interfere with the sovereignty of other States by arrogating to itself more prescriptive jurisdiction than what is authorized under international law. For example, suppose State *A* claims universal jurisdiction over *X*, a national of State *B*, for committing the crime of torture in State *B* against other State *B* nationals. But imagine that instead of using the internationally agreed-upon definition of torture to prosecute,⁸³ State *A* defines torture as taking someone to Dallas Cowboys playoff games. However disturbing watching the Cowboys may be, it clearly does not constitute torture under international law. I use this example not to make light of the extreme gravity of universal crimes, but simply to highlight in the starkest possible terms the fundamental problem with exercises of universal jurisdiction based on idiosyncratically defined offenses masquerading as “universal” in national legislation through headings like “torture,” “genocide,” “war crimes,” or, for that matter, “terrorism.”⁸⁴ Namely, that by idiosyncratically defining universal crimes however it likes, a State theoretically could declare its entire body of national law applicable inside the territory of every other State in the world.

This becomes especially problematic where the State into whose territory or over whose nationals the universal jurisdiction is claimed has no law prohibiting the conduct in question—indeed, it may be explicitly protected by domestic law, perhaps even constitutionally protected. That is, it becomes problematic in cases of “true conflicts” of laws. Suppose for instance that the underlying substance of the crime involved speech or expression outlawed on human dignity or religious grounds in the State claiming jurisdiction, but protected under the first amendment to the U.S. Constitution. If the foreign State redefined “genocide” to include racially or religiously offensive speech so as to claim jurisdiction over U.S. nationals for remarks spoken in the United States to other U.S. nationals, and having no effect in the forum State, the United States might well claim sovereign interference.

Now, it should be understood that if the speech was uttered by one of the foreign State’s own nationals or had a substantial effect in the

83. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter *Convention Against Torture*].

84. For a discussion of universal jurisdiction in relation to terrorism, see Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*, *supra* note 18.

foreign State, that State might have its own sovereignty claim, based in its own national entitlements over national persons and territory,⁸⁵ to extend its laws to the conduct in question. In that case, there would be overlapping national prescriptive jurisdictions, deriving from different States' recognized national entitlements, or "sovereignties" under international law.

But once again, that is not the basis of universal jurisdiction, which requires no link at all to a State's sovereign entitlements, and therefore no limitation grounded in the State's own sovereignty to extend its laws vis-à-vis other, coequal sovereigns in the international system. Rather, the literally universal ambit of jurisdiction exists precisely *because* no State can claim a sovereign interest contrary to its applicable substantive prohibitions—as prescribed by *international*, not national, law. Divorcing the exercise of universal jurisdiction from the faithful application of the international law against the crime serving as the jurisdictional trigger not only contradicts the underlying legal principle, but also effectively guts any restriction on a State's ability to project any law, anywhere, to anyone—and in this respect would stamp an open invitation to arbitrary and unchecked interference with the sovereignty of other States.

Yet one could imagine thornier questions with real-world plausibility involving harsh interrogation techniques, crackdowns on political dissent, or elastic concepts of terrorism that may not fall strictly within the international definitions of universal crimes, but over which States nonetheless may claim universal jurisdiction. Further, any time the commission of a universal crime is measured by a standard—take for instance standards of proportionality and necessity governing military strikes that collaterally kill civilians and could therefore result in war crimes allegations—room for disagreement is large indeed.⁸⁶ The central challenge for the international legal system regarding universal jurisdiction is to devise a regime that allows States to exercise jurisdiction over serious international crimes, but not to manipulate the definition and scope of those crimes to claim an unwarranted authority to project domestic law onto the sovereign entitlements of other States in what are often highly charged and politically sensitive situations.

What this regime will look like and how it actually will operate are epistemic questions to which we do not yet have the necessary data, though we might be able to infer some basic lines of inquiry. In my

85. See *supra* notes 6–18 and accompanying text.

86. I have argued against the broad use of universal jurisdiction over war crimes in part for this reason, and for limiting its exercise only to grave breaches of the Geneva Conventions. See Colangelo, *The Legal Limits of Universal Jurisdiction*, *supra* note 24, at 191–95.

view,⁸⁷ the first would be to ask how States are to determine the international legal definitions of the universal crimes they seek to prosecute. Next would be to figure out a way for other States to evaluate whether the State claiming universal jurisdiction has departed from the international definition of the crime. And finally, we might ask how other interested States, that is, States on whose territories the crimes occurred and/or whose nationals are the subject of foreign universal jurisdiction proceedings, might enforce against definitional expansions of universal crimes by overzealous courts—courts that might even seek to exploit universal jurisdiction for purely political or sensationalist ends.

As to the first inquiry—how to determine the international legal definitions of universal crimes—I would submit that their core substantive elements are set forth quite explicitly in the various treaties and conventions prohibiting the crimes under positive international law. Because universal jurisdiction is a customary, not a treaty-based law,⁸⁸ treaties do not (and cannot) set forth definitively the customary definitions of the crimes; but they do provide the best evidence of what those definitions are.⁸⁹ The treaties represent a relatively broad consensus not only as to the prohibition on the crimes, but also as to their substance.⁹⁰ Thus, although state practice and *opinio juris* will continue to fill in, refine, and modify aspects of the customary definitions, for present purposes States wishing to exercise universal jurisdiction have a fairly clear and workable catalog of core definitions handy, in the treaty provisions, with which to prosecute universal crimes. National legislation enabling universal jurisdiction in fact tends to draw from treaty law to define the relevant offense⁹¹ and courts consequently use that definition

87. See generally *id.*

88. Like all bases of jurisdiction in international law, universal jurisdiction is a matter of customary law. *Id.* at 166. Indeed, otherwise it could not be truly universal (unless perhaps every State in the world was a party to the relevant treaty).

89. For the principle that treaties may embody customary norms, see *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 30 (Feb. 20); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (“International agreements create law for the [S]tates [P]arties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by [S]tates generally and are in fact widely accepted.”).

90. For a catalogue of the relevant international treaties covering universal crimes and the number of States Parties, see Colangelo, *The Legal Limits of Universal Jurisdiction*, *supra* note 24, at 186–98.

91. Some legislation expressly declares its purpose in this regard. The since-tamed Belgian War Crimes Act, under which Belgian courts have prosecuted a number of Rwandan war criminals for acts committed in Rwanda against Rwandans, had as its purpose “to define three categories of grave breaches of humanitarian law and to integrate them into the Belgian domestic legal order.” Stefaan Smis & Kim Van der Borght, *Introductory Note to Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 I.L.M.

to prosecute universal crimes,⁹² thus reinforcing the customary law definitions.

Because treaties largely evidence the core definitions of universal crimes, we might respond to the second inquiry—how to determine when States claiming universal jurisdiction deviate from the customary definitions—by initially distinguishing between “easy cases” and “hard cases.”⁹³ Where a court claiming universal jurisdiction clearly departs from the subject crime’s core definition (as evidenced by the treaty) absent a showing that customary law has evolved to justify such a departure, its jurisdictional overreach should be easily identifiable. Particularly subject to easy-case categorization are universal crimes with rule-based elements. A quick example is the Spanish Audiencia Nacional’s expansion of the victim classes in the definition of genocide to include political groups, which purported to justify an early assertion of universal jurisdiction over former Chilean dictator Augusto Pinochet.⁹⁴

918, 919 (1999). In fact, “to remain consistent with the definitions used in international law, the Act textually refers to the wording of the relevant provisions of the international conventions.” *Id.* And its definitional provisions even explicitly invoke the relevant conventions by name; for example, the Act sets forth the definition of genocide after stating that the crime is defined “[i]n accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.” Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law art. 1, § 1, *translated and reprinted in* 38 I.L.M. 921 (1999). Although the Act formally adopts the definitions of the crimes from conventional law, like the Netherlands’ International Crimes Act, *supra* note 56, it went beyond conventional law regarding the availability of universal jurisdiction over “grave breaches” by including within this category acts that were not committed as part of an international conflict, Smis & Van der Borght, *supra*, at 920.

92. To take one of the earliest and most well-known examples of universal jurisdiction, the definitions of “war crimes” and “crimes against humanity” contained in the Nazi and Nazi Collaborators (Punishment) Law, under which the Israeli Supreme Court convicted Nazi war criminal Adolf Eichmann for acts which—leaving no doubt as to the universal basis of the jurisdiction—were committed before Israel was even a State, embodied the definitions of the respective crimes in the Nuremberg Charter. *See* The Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, 4 LSI 154 (1949–50) (Isr.), *translated and reprinted in Human Rights in Israel*, 1950 Y.B. HUM. RTS. 163, U.N. Sales No. 1952.XIV.1; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis arts. 6(b)–(c), Aug. 8, 1945, E.A.S. No. 472, 82 U.N.T.S. 280.

93. Colangelo, *The Legal Limits of Universal Jurisdiction*, *supra* note 24, at 155.

94. The court upheld jurisdiction for genocide based on crimes allegedly committed against a “national group” by stretching this victim class designation beyond its customary definition to include “a national human group, a differentiated human group, characterized by some trait, and integrated into the larger collectivity.” Audiencia Nacional, Nov. 5, 1998 (No. 173/98), *reprinted and translated in THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 103 (Reed Brody & Michael Ratner eds., 2000) [hereinafter PINOCHET PAPERS]. Finding that the acts alleged constituted genocide since they were designed “to destroy a differentiated national group” of political opponents irrespective of their nationalities, i.e., “those who did not fit in [Pinochet’s] project of national reorganization . . . [whether] Chileans or foreigners,” *id.* at 103–04, the court effectively (and none-too-subtly) amended the victim groups within the definition of genocide. Genocide has been defined consistently since the 1948 Genocide Convention in the statutes of international courts and

Had the case gone forward on these grounds, Chile—both the territorial and national State—would have had a strong legal objection to the exercise of Spain’s jurisdiction since the definition employed was exorbitant against the existing state of customary law.⁹⁵

But although treaties strongly evidence the core elements of universal crimes, there invariably will be aspects of the definitions that need to be ironed out further by state practice. Moreover, the decentralized and organic nature of the international legal system inevitably will result in variation among States on the precise definitions of universal crimes. At the same time, some definitional variation or flexibility in importing and enforcing international law is probably unavoidable⁹⁶ given how decen-

tries to have as victim groups only a “national, ethnical, racial or religious group, as such.” Genocide Convention, *supra* note 20, art. 2; ICTY Statute, *supra* note 59, art. 4; ICTR Statute, *supra* note 59, art. 2; ICC Statute, *supra* note 82, art. 6. Indeed, according to the International Criminal Tribunal for Rwanda, “a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship.” *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 512 (Sept. 2, 1998). The Audiencia’s sprawling construction *de facto* enlarges the class of victims to include potentially any group whatsoever—including, as in the case before it, political groups, which had been explicitly rejected as victims in the drafting of the Genocide Convention. See Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 YALE L.J. 2259, 2262–69 (1997). In short, the ruling clashes with one of the more recognizable legal demarcations of the crime of genocide under international law. For another example of an exorbitant definition of genocide, see Addis, *supra* note 68, at 153 n.99 (describing the Ethiopian Penal Code’s “erroneous definition of . . . genocide and crimes against humanity” and prosecutions based on that definition).

95. See Van Schaack, *supra* note 94, at 2262–69.

96. Certain variations on language will inevitably result, for instance, from differences between general prescriptions of international treaties as compared to more State-specific prescriptions of national laws implementing those treaties. For example, Article 1 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation provides for the treaty-equivalent of universal jurisdiction over anyone who “unlawfully and intentionally”:

. . . .

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight

Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178.

The U.S. implementing legislation similarly provides for such jurisdiction over whomever “willfully”:

. . . .

(3) places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft’s safety in flight

tralized enforcement of international law actually works: through States' national laws and procedures.⁹⁷

Consequently, objections to universal jurisdiction that are not based on a court's clear departure from the universal crime's core substantive definition might fall into the "hard-case" category. As indicated above, especially subject to hard-case classification would be crimes that depend on the application of standards. Examples here might include whether a specific act constitutes a war crime under standards of proportionality and necessity contained in the Geneva Conventions⁹⁸ and their Additional Protocols,⁹⁹ or whether a particular interrogation technique constitutes torture under the Torture Convention's definition of that crime.¹⁰⁰ The decisions of international criminal tribunals, and of national courts exercising universal jurisdiction (which are not precedent on their own, but nonetheless constitute state practice)¹⁰¹ would be particularly helpful guides here. In the end, the more States purport to apply international law through the exercise of universal jurisdiction, the more hard data the international legal system will have regarding the accepted scope and definitions of the crimes. Even where States clash on the definitions, the resolution of those clashes will only further add to customary law—which brings us to a final line of inquiry.

Everything said so far threatens to do something deeply antithetical to the very concept of custom: freeze it. If States are constrained in their exercise of universal jurisdiction to use the customary definitions of the crimes as they presently exist, then how can state practice evolve those definitions? One easy solution would be for States to get together and simply change the definition of the crime through an amendment to the

18 U.S.C. § 32(b)(3).

97. The field of conflict of laws can also provide guidance on how to deal with procedural versus substantive issues regarding the application of international law by national courts. According to longstanding conflict principles, the forum State uses its own procedural rules when applying foreign substantive law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934). While international law is, of course, not "foreign" to any State, States enforce its substantive rules through their own domestic processes. In this general vein, Leila Sadat has suggested that international law needs an *Erie*-type choice-of-law doctrine to aid in the treatment of international law in domestic courts. Sadat, *Exile, Amnesty and International Law*, *supra* note 25, at 1028.

98. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

99. *See* 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), *adopted* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979).

100. Convention Against Torture, *supra* note 83, art. 1.

101. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmts. a, b (1987).

relevant treaty, or to create a new instrument relating to that crime.¹⁰² But what about the State that tries to spark a change in international law by modifying on its own the definition of the crime? It has long been thought that States can alter international law by breaching it where that breach then gains acceptance and comes to represent a new customary norm.¹⁰³ And indeed, to state that proposition is to go far toward answering our question. Namely, the first State to exercise universal jurisdiction on the basis of an expanded definition may breach international law; but customary law's recursive constitution may immediately reduce the illegality of that breach if other States acquiesce in or approve of the universal jurisdiction assertion.

The logical last question is, which States' reactions count most? In comparison to other areas of international law where it may be hard to identify and measure the various interests of various States implicated by a given claim,¹⁰⁴ the universal jurisdiction scenario presents a relatively clear picture of the interested States and the degree of their interests. The most interested States are those whose sovereignty is most implicated—that is, States that would have national jurisdiction, based on national entitlements, over the crime in question. Consequently, the potential for evolving (or not) the definitions of universal crimes by the process of customary-law-violation-turned-new-custom rests not so much with the State claiming universal jurisdiction, but rather with the States whose nationals are in the dock. Where interested States object to the universal jurisdiction claim by rejecting a definitional expansion of the crime that

102. This has taken place to some extent with respect to crimes spelled out in the statute for the newly established International Criminal Court and to a lesser degree (since they are not treaties, strictly speaking) in the statutes of various international tribunals created under the auspices of the United Nations. For example, the Charter of the International Military Tribunal under which the Nazis were prosecuted defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. Although acts such as torture, imprisonment, and rape could potentially fall into the "other inhumane acts" receptacle, they are not set forth explicitly in the Charter and courts using its definitional provisions therefore would be on more precarious ground prosecuting these crimes as universal crimes against humanity than in prosecuting a listed offense such as "extermination" or "enslavement." Yet, by the end of the last century, international law evolved such that the statutes of the ICTY, ICTR, and ICC do affirmatively list torture, imprisonment, and rape as crimes against humanity, thus clarifying or perhaps adding to the customary definitions of crimes against humanity and, in any event, providing courts with firmer prosecutorial footing as to certain of these crimes. See ICTY Statute, *supra* note 59, art. 5; ICTR Statute, *supra* note 59, art. 3; ICC Statute, *supra* note 82, art. 7.

103. See ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 97–98 (1971).

104. See Michael Akehurst, *Custom as a Source of International Law*, in *THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1974–1975*, at 1, 40 (R.Y. Jennings & Ian Brownlie eds., 1977).

purports to justify the exercise of jurisdiction, the claim signifies an enduring breach of international law. However, if interested States approve of or acquiesce in the definitional expansion, such approval or acquiescence may signal a possible customary shift regarding the definition of the crime in line with the definition purporting to justify the exercise of universal jurisdiction.¹⁰⁵ As we shall see next, there still may be individual rights problems with *post hoc* acceptance of prosecutions that utilize definitions that stretch beyond the established proscriptions of customary law. But as far as state sovereignty goes, this section hopefully has exposed a basic limiting principle and sketched a constructive line of legal and policy inquiry for thinking about the questions it raises.

2. Individual Rights

Expanding definitions of universal crimes in order to claim jurisdiction over non-nationals for activity abroad can also lead to individual rights problems, mostly associated with the principle of legality, which is often expressed by the Latin maxim *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law). “The [legality] principle is not a legal rule, but rather a legal concept embodied in a series of legal doctrines.”¹⁰⁶ In the United States, it incorporates doctrines like the constitutional bar on *ex post facto* laws, due process protection against retroactive application of the criminal law, and modern prohibitions on the common law creation of criminal offenses.¹⁰⁷ As Beth Van Schaack has recently and comprehensively examined, the principle also exists in international law, and is “enshrined in a number of human rights declarations and treaties”¹⁰⁸ as well as international criminal tribunal statutes.¹⁰⁹ Van Schaack also explains, however, that its protections tend to be more relaxed in the international context than in

105. It should be noted that one territorial or national State’s approval of or acquiescence in a definitional expansion would not be enough to change the customary definition of the crime, especially against the backdrop of a widely ratified and longstanding treaty to the contrary. A basic definition of the hard-to-pin-down threshold for determining the existence of customary law appears in the Restatement, which states that “customary international law results from a general and consistent practice of [S]tates followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). Whatever view one takes of how much practice achieves the threshold level of generality and consistency necessary to form customary law, one improper assertion of universal jurisdiction accepted as legitimate by an interested State and in the face of a treaty to the contrary would not meet that test.

106. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005).

107. *Id.* at 337.

108. Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 173 (2008).

109. *Id.* at 176 (discussing the ICC’s legality provisions).

the domestic context, due in large part to the special character of a fairly young and evolving field of international criminal law.¹¹⁰ As a result, international criminal tribunals starting with the post-World War II tribunals at Nuremburg and Tokyo have devised various ways to avoid invalidating criminal charges on legality grounds.¹¹¹

The legality question of fair notice looms particularly large in cases of extraterritorial jurisdiction because the State asserting jurisdiction is by definition not one in which the defendant committed her allegedly criminal acts. Thus, assumptions about the territorial nature of criminal law and attendant presumptions that the defendant is on notice of that law in the territory in which she acts¹¹² can quickly fall away. Universal jurisdiction further cuts away at notice based on other connecting links, such as nationality. In this respect, the legality question in universal jurisdiction cases hovers at the intersection of criminal law and conflict of laws. Both fields protect the defendant against the unfair application of a law of which she had insufficient notice, whether because that law went into effect after the commission of the allegedly criminal activity or because it is applied by a sovereign to whose laws the defendant could not reasonably have known she was subject.

In the domestic conflict of laws arena, the U.S. Supreme Court has placed constitutional limits on a state's choice of law as a matter of Fourteenth Amendment due process. For a state constitutionally to apply its laws to a dispute, "that [s]tate must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹¹³ According to the Court, "[w]hen considering fairness in this context, an important element is the expectation of the parties."¹¹⁴ More recently, U.S. Courts of Appeal have been evaluating extraterritorial claims of U.S. federal jurisdiction over foreigners abroad under limits imposed by the Fifth Amendment's Due Process Clause.¹¹⁵ These limits, in turn, raise questions about the

110. See generally Van Schaack, *supra* note 108.

111. *Id.* at 133–71.

112. See, e.g., ROLAND J. STANGER, INTERNATIONAL LAW STUDIES 1957–1958: CRIMINAL JURISDICTION OVER VISITING ARMED FORCES 5 (1965) (noting that "charges of unfairness toward an alien on grounds of lack of notice are in part met by the consideration that, since he was aware that he was subject to the local law, he should have informed himself of its prohibitions").

113. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1985)).

114. Shutts, 472 U.S. at 822.

115. See United States v. Yousef, 327 F.3d 56, 111–12 (2d Cir. 2003); United States v. Moreno-Morillo, 334 F.3d 819, 827–30 (9th Cir. 2003); United States v. Quintero-Rendon, 354 F.3d 1320, 1324–26 (11th Cir. 2003); United States v. Perez-Oviedo, 281 F.3d 400, 402–03 (3d Cir. 2002); United States v. Suerte, 291 F.3d 366, 369–75 (4th Cir. 2002); United States v. Cardales, 168 F.3d 548, 552–54 (1st Cir. 1999).

constitutionality of applying U.S. criminal laws to individuals who have no or only slight connections to the United States at the time they commit their acts abroad, but later find themselves in U.S. custody.¹¹⁶ In the first ever prosecution under the U.S. Torture Convention Implementation Act,¹¹⁷ Chuckie Taylor, former Liberian dictator Charles Taylor's son, leveled precisely this Fifth Amendment due process challenge at the application of U.S. law to him for alleged acts of torture in Liberia against non-U.S. nationals.¹¹⁸

This discussion of legality and choice-of-law fairness principles circles back to a false-conflict view of universal jurisdiction because if the false-conflict view is followed, it protects both victims' and defendants' rights under both sets of fairness principles. It protects victims' rights because defendants cannot avoid conviction by claiming lack of notice that their conduct was illegal, or even of the law being applied to them—i.e., international law. Again, because the State exercising universal jurisdiction is not extending its own laws extraterritorially, but is instead acting as the application and enforcement vehicle of an otherwise applicable and preexisting international law that covers the globe, there is no legality problem.

This type of analysis can hold important lessons for those U.S. Courts of Appeal that model their Fifth Amendment due process tests for federal extraterritorial jurisdiction after the Supreme Court's Fourteenth Amendment due process test for state extraterritorial jurisdiction. A test that borrows unthinkingly from the domestic context, and that therefore requires some connection to the forum State—or “nexus,” as Courts of Appeal are fond of saying¹¹⁹—fails to take account of universal prohibitions contained in international law that are capable of application and enforcement in U.S. courts. Such a cramped view of U.S. jurisdiction at the international level not only unduly constrains the United States' ability to prosecute serious human rights violators like torturers and war criminals, but also ties prosecutors' hands in the struggle against transnational terrorism by erecting constitutional barriers to convicting those in U.S. custody for universal terrorist crimes outlawed in the U.S. code but that may have had no overt domestic connection; crimes including the

116. Particularly since the Supreme Court has also stated that “a postoccurrence change of residence to the forum [s]tate—standing alone—[is] insufficient to justify application of forum law.” *Allstate*, 449 U.S. at 302.

117. 18 U.S.C. §§ 2340–2340A (2000).

118. *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at *15 (S.D. Fla. July 5, 2007) (order on defendant's motion to dismiss the indictment). The District Court rejected the challenge finding that Taylor was a presumptive U.S. citizen and therefore a sufficient nexus existed so that the application of U.S. law was neither arbitrary nor fundamentally unfair. *Id.* at *16.

119. *See supra* note 115 and accompanying cases.

bombing of public places,¹²⁰ infrastructure,¹²¹ transportation systems,¹²² airports¹²³ and aircraft,¹²⁴ as well as hijacking,¹²⁵ hostage taking,¹²⁶ and even financing foreign terrorist organizations.¹²⁷

Why these crimes would qualify as universal has been elaborated in more detail in another place,¹²⁸ but a brief explanation can highlight legality issues for the present discussion. Each of the crimes listed is the subject of a widely-ratified international instrument not only criminalizing the act in question and requiring its criminalization at the national level, but also providing extraterritorial and extra-national jurisdiction for all States Parties with respect to the prosecution of the crime's perpetrators, even where the crime is committed in the territory of a non-party State.¹²⁹ Specifically, the treaties contain "prosecute or extradite" provisions mandating each State Party on whose territory offenders are "present" or "found" both (i) to "establish its jurisdiction over the offence" and (ii) either to prosecute or to extradite (to another State Party),¹³⁰ thus creating a comprehensive jurisdiction among States Parties. Moreover, because States Parties may establish jurisdiction and prosecute perpetrators of the crime absent any territorial or national connection—and even where the crime occurs in the territory of a non-party State—the prescriptive prohibition on the crime contained in the treaty effectively extends into all States, even non-parties. It would be strange to say the prohibition does so as a matter of the positive law of the treaty, since States are not bound by treaties to which they are not party.¹³¹ Ra-

120. 18 U.S.C. § 2332f (Supp. 2003).

121. *Id.*

122. *Id.*

123. *Id.* § 37.

124. *Id.* § 32.

125. 49 U.S.C. § 46502 (2000).

126. 18 U.S.C. § 1203 (2000).

127. 18 U.S.C. § 2339C (2000).

128. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*, *supra* note 18, at 176–88.

129. *See id.* at 189–201.

130. A famous example here is the Convention Against Torture. Article 5(2) of the Convention provides: "Each State Party shall . . . take such measures as may be necessary to establish jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him." Convention Against Torture, *supra* note 83, art. 5(2). And Article 7(1) provides:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in [the relevant provision] is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Id. art. 7(1).

131. Article 34 of the Vienna Convention on the Law of Treaties provides that "a Treaty does not create either obligations or rights for a third State without its consent." Vienna Con-

ther, the better view is that it does so as a result of the intent and practice of those States Parties to the treaty to create a generalizable customary norm of universal prescriptive jurisdiction over the crime in question. Said another way, since the prohibition may be applied to the perpetrators of the crimes even where those crimes are committed in the territories of non-party States, States Parties have created through their entrance into the treaty a customary international legal prohibition that extends into the territories of all States, irrespective of their status under the positive law of the treaty.

This can be crucial to a legality analysis. For example, if the treaty did not establish universal jurisdiction as a matter of customary law, then the defendant from a non-party State who commits an act in his home State that is (a) prohibited under the treaty, but (b) permissible in his home State, and (c) who is later prosecuted by a State Party to the treaty, would seem to have a quite valid legality defense. To be sure, one reason the defendant's home State may have declined to enter into the treaty was because it had laws contrary to those contained in the treaty; in which case, there would be a "true conflict" of laws between the States Parties on the one hand, and the non-party State on the other. Why should the defendant be "on notice" of a prohibition in a treaty to which his home State is not a party, where he is acting within his home State, and—let us stipulate since it makes no difference under the treaty regime—acts against other nationals of his home State under the color of his home State's laws? Unless the prohibition in the treaty is constitutive of a customary norm of universal jurisdiction against the crime, the treaty provisions allowing States Parties to prosecute the defendant would seem unavoidably to raise legality issues.

Seen in this light, a distinction drawn by the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the fairly recent Arrest Warrant case in the International Court of Justice¹³² can be worrisome for legality purposes. The Opinion distinguishes between "a classical assertion of universal jurisdiction" exercised where the accused is not present on the State's territory,¹³³ and the types of treaty provisions

vention, *supra* note 66, art. 34. Article 35 provides that treaties are only binding on non-parties where the non-party "State expressly accepts that obligation in writing." *Id.* art 35. Moreover, "[a] treaty provision establishing standards for extraterritorial criminal liability must be read, in light of 'any relevant rules of international law applicable in the relations between the parties,' against the background doctrine[] of *nullum crimen sine lege*." Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT'L CRIM. JUST. 215, 237 (2008).

132. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 63 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). For further discussion of the court's decision, see *infra* Part III.B.

133. *Id.* at 69.

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 relation to acts committed elsewhere.”¹³⁴

That distinction may well hold for universal adjudicative, or *in personam*, jurisdiction: the presence of the accused on 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 retroactivity 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 could betray bedrock principles of legality to say, for instance, “we had no power to apply our law prohibiting Y to you *at the time you committed Y*; but now that you’re in our territory we are empowered retroactively to apply our prohibition to you.” Only if Y were *already prohibited* under a universal legal prohibition—that the State subsequently enforces once it obtains personal jurisdiction over the defendant—would the prescriptive jurisdiction stand. Again, this becomes especially troubling in the case of the international true conflict where, absent the customary norm extending into his home State, the defendant national of a non-party State would have no notice of the prohibition contained in the treaty.

As is probably evident by now, the flip-side of the conceptual coin to protecting victims’ rights by extinguishing legality defenses is that the false-conflict view requires that when States exercise universal jurisdiction the crimes are in fact universal under international law and the law used to prosecute faithfully reflects the crime’s international legal definition.¹³⁵ Otherwise, the defendant with no connection to the State claiming

134. *Id.* at 75.

135. For example, had the district court in the Chuckie Taylor case not determined that Taylor was a presumptive U.S. citizen, *see supra* note 118, the court would have had to address whether the U.S. Torture Act adequately reflected the international legal prohibition on torture so as to put Taylor on notice of the substantive law being applied to him for acts that, in and of themselves, had no connection to the United States at the time they were committed. For a discussion of this requirement regarding U.S. jurisdiction over terrorist crimes abroad, see Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*, *supra* note 18, at 176–88.

jurisdiction might not be sufficiently on notice of the proscription the State is claiming to apply to him for purposes of prosecution and punishment.

Once again, the situation most susceptible to a legality defense is the true conflict where the defendant's acts are not prohibited in the State of their commission, but another State has unilaterally deemed them "universal" and thus subject to prosecution in its courts even though the State has no connection to either the defendant or his allegedly criminal activity. Similar to the sovereignty analysis in the previous section, proverbial "easy cases" for identifying such legality problems would occur where a State exercising universal jurisdiction manufactures a brand new universal offense on which it bases jurisdiction. In the not-totally-unlikely combination of these two situations—a true conflict with the defendant's domestic law and the manufacturing of a new universal crime on which jurisdiction is based in a foreign court—the defendant easily could be prosecuted under a law of which he had no notice.

By contrast, "hard cases" would be those in which the State exercising universal jurisdiction massages or expands the definition of a crime, perhaps one that regulates activity *malum in se* so that the defendant cannot claim lack of notice of the wrongfulness of his conduct, even though the definition of the crime used to prosecute is different than that generally recognized under the international law of which the defendant is deemed on notice.¹³⁶ It is not my objective here to tackle the full extent of the legality principle in international criminal law, which may well be inherently flexible to allow for necessary jurisprudential innovation.¹³⁷ That task has been skillfully and effectively handled by others.¹³⁸ Neither is it to explore whether international tribunal statements on legality can or should be transposed to national courts exercising universal jurisdiction.¹³⁹ Rather, my goal is simply to demonstrate that exercises of

136. See Van Schaack, *supra* note 108, at 155–58.

137. See *id.* at 124. Van Schaack asserts that "higher-order principles underlying the [*nullum crimen sine lege, nulla poena sine lege*] prohibition" are not infringed where new standards are applied to past conduct because:

[D]efendants [are] on sufficient notice of the foreseeability of [international criminal law] jurisprudential innovations in light of extant domestic penal law, universal moral values expressed in international human rights law, developments in international humanitarian law and the circumstances in which this law has been invoked, and other dramatic changes to the international order and to international law brought about in the postwar period.

Id.; see also *id.* at 183.

138. See generally Van Schaack, *supra* note 108.

139. This issue raises a host of interesting questions on its own. For example, even if we were to accept a more flexible international law version of legality, it nonetheless "may exert greater resistance in domestic prosecutions than it does in international ones where domestic

universal jurisdiction that comport with the false-conflict view protect both victims' and defendants' rights: by erasing defendants' legality and due process defenses, and by protecting the same from the arbitrary and unfair application of laws of which they had no notice.

B. Immunity and Amnesty

Through doctrines of immunity, international law grants States another type of "sovereignty claim" against the application of its proscriptions by other States claiming universal jurisdiction. International law is relatively clear, for instance, that "sitting heads of [S]tate, accredited diplomats, and other officials cannot be prosecuted while in office for acts committed in their official capacities."¹⁴⁰ The immunity that attaches to the holder of a protected state office or status is referred to as immunity *ratione personae*.¹⁴¹ The most famous example here is probably the International Court of Justice's 2002 ruling, mentioned earlier, that a Belgian arrest warrant grounded in universal jurisdiction over the Democratic Republic of the Congo's acting Minister of Foreign Affairs, Abdoulaye Yerodia Ndombasi, contravened the international law of immunity and was therefore void.¹⁴²

However, the Court went out of its way to emphasize that "the *immunity* from jurisdiction enjoyed by incumbent [officials] does not mean that they enjoy *impunity* in respect of crimes they might have committed."¹⁴³ Immunity thus does not absolve the defendant of international criminal liability, but merely shields him from prosecution in certain circumstances. And that shield is neither absolute nor an individual right, but rests in the hands of the defendant's home State.¹⁴⁴ As the Court observed, the defendant's State could itself prosecute¹⁴⁵ or waive the immunity.¹⁴⁶ The Court further explained that the immunity would not stand in the way of a prosecution by an international tribunal with jurisdiction over the crime.¹⁴⁷ On this last point, it appears that in striking the

courts are bound by constitutional articulations of the principle and where courts may not be able to rely upon the varied sources of international law for applicable rules of decision." *Id.* at 190.

140. PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 23, at 31.

141. Dapko Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 409–10 (2004).

142. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 (Feb. 14).

143. *Id.* at 25.

144. See Ruth Wedgewood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829, 838 (2000); Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2140 (1999).

145. Arrest Warrant of 11 April 2000, 2002 I.C.J. 3, 25–26.

146. *Id.*

147. *Id.*

balance between sovereignty and justice in the international system, international law preferences internationally constituted tribunals to administer justice over state sovereignty, but preferences state sovereignty over justice where such justice is to be administered by another, coequal sovereign State exercising universal jurisdiction.¹⁴⁸

The Court also indicated that the immunity shield is weaker once the accused leaves office,¹⁴⁹ consequently watering down an objection to the exercise of universal jurisdiction. Former officials enjoy only immunity *ratione materiae* under international law, which “precludes domestic prosecutions of current and former foreign-state agents for acts that those agents committed . . . within the scope of their official functions.”¹⁵⁰ Notably, “such immunity from foreign domestic criminal jurisdiction does not exist when the person is charged with an international crime.”¹⁵¹ This was in fact one of the knottier issues in the famous

148. For why this may be, see Sadat, *Exile, Amnesty and International Law*, *supra* note 25, at 975–76 (explaining that “[t]he vertical relationship between international and national law, at least as regards *jus cogens* crimes, . . . is quite different from the horizontal perspective apparent in cases of universal inter-state jurisdiction.”). Dapo Akande draws a distinction between tribunals established by the U.N. Security Council and tribunals established by treaty and asserts that the former can override immunity *ratione personae*, but the latter cannot with regard to officials of non-party States. See Akande, *supra* note 141, at 417 (footnotes omitted). Akande observes that:

[T]he possibility of relying on international law immunities (particularly immunity *ratione personae*) to avoid prosecutions by international tribunals depends on the nature of the tribunal: how it was established and whether the [S]tate of the official sought to be tried is bound by the instrument establishing the tribunal. In this regard, there is a distinction between those tribunals established by United Nations Security Council resolution (i.e., the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR)) and those established by treaty. Because of the universal membership of the United Nations and because decisions of the Council are binding on all UN members, the provisions of the ICTY and ICTR Statutes are capable of removing immunity with respect to practically all [S]tates. But this is only because those [S]tates are bound by and have indirectly consented (via the UN Charter) to the decision to remove immunity. On the other hand, since only parties to a treaty are bound by its provisions, a treaty establishing an international tribunal cannot remove immunities that international law grants to officials of [S]tates that are not party to the treaty. Those immunities are rights belonging to the nonparty [S]tates and those [S]tates may not be deprived of their rights by a treaty to which they are not party.

Id.

149. Arrest Warrant of 11 April 2000, 2002 I.C.J. 3, 25–26 (“[A]fter a person ceases to hold the office . . . he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former [official] of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.”).

150. Roth, *supra* note 131, at 218; see also, Akande, *supra* note 141, at 412–14.

151. Akande, *supra* note 141, at 413. Moreover, as Brad Roth points out:

rulings by the British House of Lords in response to the Spanish extradition request based in universal jurisdiction over Pinochet for torture.¹⁵² A majority of the British Law Lords held that Pinochet was not entitled to immunity with respect to the torture charges because of his status as former head of State.¹⁵³

A related matter involves domestic amnesties. There is a substantial literature addressing amnesties and their proper role in resolving tensions between peace and justice.¹⁵⁴ That debate is, naturally, well beyond the scope of this Essay. But it does demonstrate broad agreement that international law currently does not require one State to respect another State's domestic amnesty for universal crimes. Eugene Kontorovich for example critiques universal jurisdiction precisely because it poses obstacles to peacemaking since a single "holdout" State unconnected to a conflict can stand in the way of a complete amnesty favored by involved States, potentially defeating an optimally brokered peace by those with

[I]t is possible for the *nullem crimen* defence to arise directly from immunity *ratione materiae*: where, in the name of redressing an international law violation that has not been established as an international crime, a domestic prosecution proceeds from extraterritorial penal legislation that somehow falls within the [S]tate's internationally-recognized jurisdiction to prescribe, immunity *ratione materiae* blocks the prosecuting [S]tate's jurisdiction to prescribe within the scope of the foreign-state agent's official capacity, thereby leaving no penal law that condemns the agent's conduct.

Roth, *supra* note 131, at 223.

152. For a discussion of the complexities here, see Bradley & Goldsmith, *supra* note 144, at 2140–46.

153. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] UKHL 17, (1999) 2 W.L.R. 827, reprinted in Bartle *ex parte Pinochet* (1999) 38 I.L.M. 581 (Eng.). Some have argued that this absence of immunity *ratione materie* for international crimes stems in part from the fact that,

international law has subsequently [to the development of immunity *ratione materie*] developed rules permitting domestic courts to exercise universal jurisdiction over certain international crimes and . . . [that] that those rules contemplate prosecution of crimes committed in an official capacity. . . . In those circumstances, immunity *ratione materiae* cannot logically coexist with such a grant of jurisdiction. Indeed, to apply in such cases, the prior rule according immunity would serve to deprive the subsequent jurisdictional rule of practically all meaning.

Akande, *supra* note 141, at 415.

154. For recent commentary, see Kontorovich, *supra* note 6; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of A Prior Regime*, 100 YALE L.J. 2537 (1991); Sadat, *Exile, Amnesty and International Law*, *supra* note 25; Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339 (2006); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173 (2002); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283 (2007).

the highest stake in resolving the conflict.¹⁵⁵ In fact, amnesties themselves are often viewed with suspicion under international law. In this connection Michael Scharf notes many scholars' operating "assumption that the widespread state practice favoring amnesties constitutes a violation of, rather than a reflection of, international law in this area."¹⁵⁶ And Leila Sadat recommends that a State exercising universal jurisdiction "should keep in mind that amnesties are disfavored, perhaps even illegal in international law,"¹⁵⁷ and "to permit national amnesties to extinguish obligations imposed by international law would seem contrary to the foundational principles of international criminal law, and stand in opposition to the clear weight of authority and much of the state and international practice emerging in this field."¹⁵⁸ Thus while States may have certain immunity claims against the exercise of universal jurisdiction by another State, a claim based only on a domestic amnesty is substantially weaker if not nonexistent given the present state of international law.

C. Double Jeopardy or Non bis in Idem

A final limiting principle inherent in the concept of universal jurisdiction is that a State may not prosecute on the basis of universal jurisdiction after a prior prosecution of the same individual for the same crime by another State. This is an exception to how double jeopardy or *non bis in idem* rules conventionally are thought to operate in systems of multiple sovereigns. The general rule in the international system, much like the dual sovereignty doctrine in the U.S. federal system,¹⁵⁹ is that each sovereign may prosecute for an offense against its own laws.¹⁶⁰

This general rule largely explains modern international law and practice regarding double jeopardy protections. For example, human rights and humanitarian law instruments limit double jeopardy coverage to successive prosecutions by one State;¹⁶¹ extradition treaties narrowly and

155. See Kontorovich, *supra* note 6, at 401.

156. Scharf, *supra* note 154, at 341.

157. Sadat, *Exile, Amnesty and International Law*, *supra* note 25, at 1027.

158. *Id.* at 1028.

159. See *Heath v. Alabama*, 474 U.S. 82, 88 (1985). The Supreme Court in *Heath* resolved the dual sovereignty issue in the context of U.S. federalism. The Court held that because "by one act [the defendant] has committed two offenses, for each of which he is justly punishable," no violation of the prohibition on double jeopardy results from successive prosecutions by different sovereigns. *Id.*

160. Colangelo, *Double Jeopardy and Multiple Sovereigns*, *supra* note 5.

161. See Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 22, 1984, Europ. T.S. No. 117 (entered into force Nov. 1, 1988); International Covenant on Civil and Political Rights art. 14(7), Dec. 16, 1966, 999 U.N.T.S. 17.

self-consciously construe exceptions to a default rule permitting double jeopardy among States;¹⁶² and no general principle of law has developed to prevent double jeopardy among States.¹⁶³ Double jeopardy protection therefore attaches only to successive prosecutions by the same sovereign—or, put another way, to successive prosecutions under the same law (deriving from the same sovereign’s lawmaking power).

However, since universal jurisdiction does not provide States with an independent power to prescribe law, but only the power to apply via domestic process international law, a State has no separate law to apply and enforce in a successive prosecution where the crime already has been prosecuted by another State. Briefly put, because all States are members of the international law-making, -applying, and -enforcing collective, where one State applies the international norm through a good faith prosecution, that State effectively uses up the international law over that crime and consequently extinguishes jurisdiction for all other States wishing to exercise universal jurisdiction. In effect, universal jurisdiction functions as a kind of complementary or subsidiary jurisdiction: States with jurisdiction based on territorial or national entitlements may apply international law (since they too are members of the international legal system), and once they do, universal jurisdiction States have no law left upon which to prosecute again, thereby creating a double jeopardy bar.

To illustrate, suppose *X*, a national of State *B*, commits a crime in State *A* territory. Both State *A* and State *B* successively may prosecute after an initial prosecution by the other State because each has a distinct national entitlement, based on nationality or territoriality, giving each national jurisdiction or independent lawgiving power over the crime, thus making each a separate “sovereign” for purposes of double jeopardy. Now imagine the crime is a universal crime under international law. Both State *A* and State *B* still successively may prosecute after a prior prosecution by another State since each still has a distinct national entitlement, creating national jurisdiction and hence independent prescriptive power over the crime.

But what about State *C*, which only may prosecute on the basis of universal jurisdiction?¹⁶⁴ State *C* is in the same position as Spain in the hypothetical above where the U.S. national is alleged to have committed torture in Egypt.¹⁶⁵ If instead of committing a universal crime under in-

162. See U.N. Model Treaty on Extradition, G.A. Res. 116, art. 3(d), U.N. GAOR, 45th Sess., Annex, U.N. Doc. A/RES/45/116 (1990); European Convention on Extradition art. 9, Dec. 13, 1957, 359 U.N.T.S. 274.

163. See Colangelo, *Double Jeopardy and Multiple Sovereigns*, *supra* note 5, at 815–20.

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

165. See *supra* Part II.B.2.

ternational law, *X* committed a garden-variety robbery in State *A*, State *C* would have no ordinary ability to apply State *C* national law to *X*. Rather, for State *C* to prosecute it would need to rely uniquely upon its international jurisdiction over the universal crime in question. The State *C* national law used to prosecute therefore has no self-supporting national jurisdictional basis, but is merely the vehicle through which State *C* applies and enforces international law. Because State *C* has no independent national jurisdiction to apply its national law, but must rely uniquely on a shared international jurisdiction to apply international law, State *C* would be blocked from prosecuting by a prior prosecution for the universal crime in question.

The reasoning would be roughly as follows. Let's suppose State *B*, the national State, prosecutes *X* first for the universal crime. State *B*, like every State, is part of the international lawmaking collective. It is also part of the international law-applying and -enforcing collective. Thus when State *B* prosecutes *X* for a universal crime, State *B* applies and enforces international, as well as its 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 State *A* (the territorial State with a national entitlement to exercise national jurisdiction—and apply its own national law—to activity within its borders). 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 State *B* is one.

Where State *B* applies the international prohibition in its courts, State *C* cannot then come along and claim itself to be the international law-enforcer if State *B* 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 violate the prohibition on double jeopardy, and the doctrine of dual sovereignty cannot pretend to save it.

To sum up then, State *B*'s initial application and enforcement of international law blocks a successive State *C* prosecution since State *C* is jurisdictionally constrained to apply and enforce *that same law*, i.e., international law. State *C* has no alternative basis of jurisdiction or lawgiving power (unlike State *A*, which retains a national entitlement to apply its national law to acts within its borders). As a universal jurisdiction State, all State *C* can enforce is a shared international law, which State *B* already enforced. We are left, in turn, with the

paradigmatic double jeopardy protection: you cannot be prosecuted for the same offense, under the same law (here international law), twice.

This conceptual model explains why the one situation States overwhelmingly if not uniformly refrain from pursuing successive prosecutions is one in which their only basis of jurisdiction is the universal nature of the crime under international law.¹⁶⁶ In fact, as noted earlier, many States' universal jurisdiction laws incorporate directly principles of complementarity or subsidiarity, often because such laws implement obligations under the Rome Statute,¹⁶⁷ thus precluding the exercise of universal jurisdiction where a State with national jurisdiction has already prosecuted in good faith.

Moreover, this sort of national enforcement of international law appears to be exactly what the double jeopardy provisions of certain international tribunal statutes have in mind. The provisions in the *ad hoc* tribunals for both the former Yugoslavia and Rwanda 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.¹⁶⁸ 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, and 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*,"¹⁶⁹—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.

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, and a national court prosecutes Jane for the international crime of genocide,¹⁷⁰ the *ad hoc* tribunals may not then prosecute Jane a second time for genocide. But if the national court prosecutes Jane not for the international crime of genocide, but instead for the "ordinary crime" of homicide, the international tribunal may still prosecute Jane for that same act under the international law proscribing genocide. 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

166. See Colangelo, *Double Jeopardy and Multiple Sovereigns*, *supra* note 5, at 827.

167. ICC Statute, *supra* note 82, art. 17.

168. ICTY Statute, *supra* note 59, art. 10; ICTR Statute, *supra* note 59, art. 9.

169. ICTY Statute, *supra* note 59, art. 10; ICTR Statute, *supra* note 59, art. 9.

170. 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 59, art. 4(2)(a)(2); ICTR Statute, *supra* note 59, art. 2(2)(a).

act as the decentralized “international sovereign.” 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), resulting from acts for which an individual already was prosecuted in national court.¹⁷¹

Finally, and perhaps most fascinatingly, these same rules of international double jeopardy seem to have been articulated 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.¹⁷² *United States v. Furlong* explained in dicta that if someone were prosecuted in U.S. courts for piracy, an offense against the “law of nations” and subject to a shared “universal jurisdiction” by all States,¹⁷³ that person would have a double jeopardy defense against a successive prosecution in the courts of any other “civilized State.”¹⁷⁴ But the same would not hold regarding successive prosecutions for the parochial crime of murder. For murder was a crime within each State’s *national* jurisdiction and was determined under each State’s own national law, allowing each State independently to apply and enforce its own law where it had jurisdiction over the crime.¹⁷⁵ Hence, double jeopardy protection attaches to bar a successive prosecution based only on universal jurisdiction not just because the law used to

171. More broadly for successive international tribunal and universal jurisdiction prosecution purposes, the line between “ordinary” and international crimes may not always be clean. For instance, customary international law prohibitions arise out of state practice accompanied by *opinio juris*. Although most modern international crimes are the result of treaties, the state practice component of a customary prohibition could also take the form of national prohibitions on crimes whose suppression becomes a matter of international legal obligation either in its own right, or through incorporation into a preexisting category of international crime like crimes against humanity. In that situation, a prosecution under national law for the crime could effectively apply the emergent international prohibition on the crime, making successive prosecution under a distinct international law unavailable. The best inquiry for determining the availability of such a successive international law prosecution is probably whether the substantive definition of the crime in the national law used to prosecute faithfully reflects the emergent international prohibition on the crime, and whether the national law penalty sufficiently reflects the gravity of that international crime. Michele N. Morosin further points out that the argument for a successive international tribunal prosecution after a national prosecution for the same conduct “is strengthened if the country [in which the national court proceedings occur] has a statute addressing [the international crime] and did not charge the defendant with this crime.” Michele N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 NORDIC J. INT’L L. 261, 265 (1995).

172. See *Houston v. Moore*, 18 U.S. 1, 32–35 (1820); *United States v. Furlong*, 18 U.S. 184, 197 (1820).

173. *Furlong*, 18 U.S. at 184.

174. *Id.* at 197.

175. *Id.*

prosecute looks the same as that already used by a national jurisdiction State, but because it actually *is* the same.

CONCLUSION

Standing controversially but firmly in the crossroads of state sovereignty and human rights, universal jurisdiction raises vital questions for international lawyers and policy makers that go to the very heart of the modern international legal system. The most basic is how to let it do its work combating serious international crimes and vindicating fundamental human rights, while at the same time checking its potential to disrupt stability through interstate meddling in a system premised on the coequal sovereignties of its members. This question is far from simple; indeed, it is intriguingly multi-layered. To conclude, I want to suggest that a false-conflict view of universal jurisdiction does a pretty good job of starting to answer it, and that such a view can offer a solid conceptual framework with which to approach the issue going forward.

Under the false-conflict view, no conflict of laws exists among States because the State exercising universal jurisdiction does not extend extraterritorially its own national laws, but instead applies through domestic process a universally applicable international law that covers the globe. Consistent with this model, a State exercising universal jurisdiction must apply the international legal proscriptions on the universal crimes it seeks to prosecute. The incorporation and application of substantive international law through domestic procedures holds a number of significant implications and counter-implications.

First, it erases claims of sovereign interference by States unwilling or unable to prosecute universal crimes committed in their territories or by their nationals. But correspondingly, it provides States whose nationals are the subject of foreign universal jurisdiction proceedings that depart from established international law a basis on which to identify and object to jurisdictional overreaching by other States. Second, perpetrators of serious international crimes cannot avoid conviction by claiming that they were not on notice of the law being applied to them. But correspondingly, the false-conflict view protects defendants' rights not to be unfairly subject to laws of which they had no notice. Third, it provides States with recognized immunity claims under international law to object to potentially destabilizing universal jurisdiction assertions over public officials. And finally, because an exercise of universal jurisdiction fundamentally applies international law, once a good faith prosecution for a universal crime already has taken place in one State, universal jurisdiction is unavailable in other States since the first prosecution already

would have applied the international law against that crime, leaving the universal jurisdiction State no law upon which to prosecute again.

Each of these implications and counter-implications seeks to accommodate sovereignty and individual rights concerns in the international legal system. Yet there are many questions left unresolved—including questions about the precise definitions of universal crimes and the availability of certain forms of liability for those crimes under international law, due process and fair procedures across jurisdictions, minimum thresholds for recognition of foreign judgments, and sentencing practices and policies—some of which can only be answered through the accumulation of hard data in the form of universal jurisdiction assertions by States and the reactions of other interested States. My purpose has been simply to offer a helpful way of thinking about them.