NOTES

Regina v. Doot

In 1935, the American Society of International Law in cooperation with the Harvard Law School published an impressive series of drafts in an attempt to codify international law.[1] With respect to crime, careful research disclosed five general principles used to determine penal jurisdiction among the States of the world. These five general principles are: (1) the *territorial* principle, determining jurisdiction by reference to the place where the offense is committed; (2) the *nationality* principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense; (3) the *protective* principle, determining jurisdiction by reference to the national interest injured by the offense; (4) the *universality* principle, determining jurisdiction by reference to the custody of the person committing the offense; and (5) the *passive personality* principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense.[2]

United States and Anglo-Canadian case law, reflects a long standing recognition of the territorial principle[3]; however, in de-

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[1] *Harvard Research in International Law: Codification of International Law Jurisdiction With Respect to Crime,* (1935), 29 Am. Jour. Int'l, Law, (Supp.), 1.

[2] *Ibid.,* at p. 445. The territorial principle is everywhere considered fundamental to the penal law. The nationality principle is also considered though the researchers found differences fundamental in its application. The protective principle, while employed by many states, is ancillary to some other jurisdictional axiom. The universality principle is primarily recognized in piracy cases, and the passive personality principle is found to be ancillary and neglected if other means of obtaining jurisdiction proved satisfactory.

[3] *U.S. Bowman* v. 260 U.S. 94, 43 S. Ct. 39, 67 L. Ed. 149, (1922); *MacLeod* v. *A.-G. for New South Wales,* [1891] A.C. 455, 60 L.J.P.C. 55, 65 L.T. 321, 17 Cox C.C. 341, 14 Digest (Repl.) 145, 1075.

See also, *Rose* v. *Himely,* 8 U.S. (4 Cranch) 241, 279 (1808) *(dictum), Blackmer* v. *U.S.,* 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375, (1932), *Rocha* v. *U.S.,* 288 F. 2d 545 (C.A. 9 Cir. 1961), *U.S.* v. *Pizzarusso,* 388 F. 2d 8 (C.A. 2d Cir. 1968), *U.S.* v. *Rodriguez,* 182 F. Supp. 479 (S.D. Cal. 1960).

United States Courts have interpreted the territorial principle under the the so-called "objective" test extending jurisdiction over all acts which take

termining the applicability of their respective criminal laws in any given situation, many other factors weigh in the decision. This note shall survey the differences in defining the situs of a conspiracy for jurisdictional purposes in United States and Anglo-Canadian case law, in light of the recent decision in *Regina* v. *Doot*.[4]

Regina v. Doot.

At issue in *Regina* v. *Doot*[5], is the competence of a British court to try a person for a conspiracy, committed outside the jurisdiction, to do an illegal act within the jurisdiction. The uncontested facts showed that Doot and others had agreed in Belgium or Morocco to buy cannabis in Morocco and, having travelled through England and Canada to import the drug into the United States[6]. The defendants were apprehended when customs officials discovered the contraband at Southampton port.

On appeal, the defendants argued that when an agreement was made in a country other than England to commit an offense coguizable by English law, nevertheless, no conspiracy triable by English courts had been committed, even if some act pursuant to the illegal agreement was consummated on English soil[7]. English courts, contended the defendants, are restricted to cognizance of offenses completed within their borders[8]; therefore, since a cons-

effect within the sovereign even though the author is elsewhere. *Ford* v. *U.S.*, 273 U.S. 593, 47 S. Ct. 531, 71 L. Ed. 793 (1927). The "subjective" test would restrict jurisdiction to those persons who are within the state and there violating its laws. Berge, *Criminal Jurisdiction and the Territorial Principle*, (1931), 30 Mich. L. Rev. 238.

Editorial note:

The Canadian position appears to be that of strict adherence to the territorial principle of determining jurisdiction, both as regards problems of Canadian/foreign conflicts as to the *situs* of nominate offences (*R.* v. *Selkirk*, [1965] 2 C.C.C. 353, 357, 359; [1965] 2 O.R. 168 (C.A.)), and as regards jurisdiction of courts in various provinces to try defendants for conspiracies formed *ex juris*, with reference to s. 434(1) of the Criminal Code, R.S.C. 1970, c. C-34: see *R.* v. *Connolly and McGreevy* (1894), 25 O.R. 151, 1 C.C.C. 468 (C.A.); *R.* v. *Horbas*, [1969] 3 C.C.C. 95, 67 W.W.R. 95 (Man. C.A.). In view of the relative paucity of analyses of the bases for this position in the very limited Canadian jurisprudence in point, the present author's analysis of the English and American position bears attention. J.D.F.

[4] [1972] 3 W.L.R. 33.

[5] *Id.* The issue has never before arisen in the English Courts. *Ibid.*, at p. 38.

[6] *Ibid.*, at p. 34.

[7] *Ibid.*, at p. 35.

[8] *Ibid.*, at p. 36. This clearly was an argument advocating the subjective territorial principle of jurisdiction. See: *op. cit.*, n. 2 and accompanying text,

piracy consists of making an unlawful agreement and is both committed and completed at the time of formation, the offense was committed in either Belgium or Morocco [9]. The Crown, on its behalf, submitted that a conspiracy continues in existence until discharge or lapse, or some subsequent agreement; therefore, at the least, there would be no discharge until after the vehicles containing the narcotics entered England, at the most when they finally left for North America [10]. Reversing the defendant's conviction, the Court held a conspiracy is not a continuing offense, the essential ingredient is the agreement, and the offense is complete when the agreement is made; therefore, the situs of the conspiracy is outside England and not cognizable within.

American Analysis.

The federal law of conspiracy in the United States [11] has been called many things, at best, "elastic, sprawling and pervasive".[12] It is impossible to view the law of conspiracy in *pari materia* with the rest of the federal criminal code which is intended to give "the world in language that the common world will understand ... what the law intends to do if a certain line is passed".[13]

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[9] *Id.*

[10] *Ibid.*, at p. 37.

[11] 18 U.S.C. §371 (1970) provides that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
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> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

To conspire "to commit an offense against the United States" means to conspire to commit a substantive crime elsewhere defined in the United States Code. *Eg.*, 18 U.S.C. §2312 (1970), *The National Motor Vehicle Theft Act*, prohibiting the transportation of stolen motor vehicles in intestate commerce. A charge of cinspiracy to transport a stolen motor vehicle in intestate commerce would be indictable under 18 U.S.C. §§371, 2312.

See also, *eg.* 18 U.S.C. §372 (impede or injure federal officer), §1201 (kidnapping), §241 (civil rights violation) which may be indicted specially without recourse to 18 U.S.C. §371.

[12] *Krulewitch* v. *U.S.*, 336 U.S. 440, 445, 69 S. Ct. 716, 719, 93 L. Ed. 790, 795 (1949) (Jackson, J. concurring).

[13] *McBoyle* v. *U.S.*, 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816, 818 (1931) (Holmes, J.).

In *United States* v. *Bowman*,[14] the Supreme Court vocalized the territorial principle of confirming criminal jurisdiction. The exigencies of dealing with the modern criminal have slowly eroded the territorial restriction in applying American conspiracy statutes; yet there appears to be a reluctance to discard the terminology of the territorial principle. American courts have repeatedly upheld convictions obtained in *Regina* v. *Doot* situations [15].

Nine years after the *Bowman* [16] court opined that absent Congressional intent to provide for punishment outside the strict territorial jurisdiction of the United States there can be none, a lower federal court held that a conspirator who had not set foot in the United States could be guilty of a conspiracy to import contraband liquor "by a fiction as repeating their agreement wherever any part of it [was] executed".[17]

By 1956, the Courts had come to hold in extraterritorial situations, that the conspiracy was not complete until one of the overt acts was committed,[18] thus forcing the crime to be committed within the territorial jurisdiction of the United States. A far more sophisticated argument allowed a federal appeals court to affirm the defendant's conviction, in *Brulay* v *United States*,[19] where the evidence showed a Mexican conspiracy to import amphetamines illegally into the United States. The defense argued that not only was the conspiracy formed outside the United States, but that no overt act was committed on United States soil and, therefore, regardless of what happened in Mexico, no crime was committed in the United States. The Court of Appeals paid tribute to the territorial principle by citing *Bowman*,[20] inferring that Congress intended the provisions of the smuggling statute should extend to foreign

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[14] 260 US. 94, 43 S. Ct. 39, 67 L. Ed. 149 (1922).

[15] *E.g.*, *U.S.* v. *Downing*, 51 F. 2d 1030 (C.A. 2d Cir. 1931); *Ramey* v. *U.S.*, 230 F 2d 171 (C.A. 5th Cir. 1956); *Brulay* v. *U.S.*, 383 F. 2d 345 (C.A. 9th Cir. 1967), *cert. den.*, 389 U.S. 986, 88 S. Ct. 469, 19 L. Ed. 2d 478 (1967) (Douglas, J. dissenting).

[16] 260 U.S. 94, 43 S. Ct. 39, 67 L. Ed. 149 (1922).

[17] *U.S.* v. *Downing*, 51 F. 2d 1030, 1031, (C.A. 2d Cir. 1931). See also, *Ford* v. *U.S.*, 273 U.S. 593, 47 S. Ct. 531, 71 L. Ed. 293 (1927).

[18] *Ramey* v. *U.S.*, 230 F. 2d 171 (C.A. 5 Cir. 1956).

[19] 383 F. 2d 345 (C.A. 9 Cir. 1967), *cert. den.*, 389 U.S. 986, 88 S. Ct. 469, 19 L. Ed. 2d 469 (1967) (Douglas, J. dissenting). See also, *U.S.* v. *Perlman*, 430 F. 2d 22 (C.A. 7th Cir. 1970), *cert-den.*, 400 U.S. 832, 91 S. Ct. 64, 27 L. Ed. 2d 63 (1970), holding "jurisdiction" proper where the defendant handled the foreign end of a hashish smuggling operation, with a companion based in Chicago to receive the drug.

[20] 260 U.S. 94, 43 S. Ct. 39, 67 L. Ed. 149 (1922).

countries and that the conspiracy section is extended along with it.[21]

While it is arguable that the *Bowman*[22] rule, "which depends upon the purpose of Congress as evinced by the description and nature of the crime"[23] inherently requires the extension of the smuggling prohibition, there is nothing more to say on behalf of extending the general conspiracy statute concommitently than conspiracy to smuggle is not specially indictable.[24] Tacking the general conspiracy statute onto another statute, which is arguendo extraterritorial clearly violates the restriction against extraterritorial punishment where Congress has failed to provide for it. The decision would have rested on firmer ground had the territorial principle been completely abandoned and the conviction affirmed on the basis of the nationality or protective principles.[25] Perhaps the court was alluding to just such a result when it said that an American citizen may be charged and punished for the crime although it was committed in Mexico;[26] however, clarification is still wanting.

Conclusion.

In determining whether the extraterritorial situs of a conspiracy will be "transported" to a situs within the jurisdiction to enable punishment for the harm caused, American courts have viewed the facts relevant to its establishment "against a background of the type of crime involved".[27] The line of cases preceding *Regina* v. *Doot*[28], similarly viewed the facts against a background of the type of crime involved; thus arises the anomoly between *Doot* and the corresponding American cases.

Unquestionably, *Regina* v. *Doot*[29], distills the essence of the subjective territorial principle discarded by the American courts fifty years ago [30] for the less restrictive nationality and protective prin-

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[21] 383 F. 2d, at p. 350.
[22] *Op. cit.*, n. 14 and accompanying text.
[23] *Ibid.*, at p. 79, 43 S. Ct., at p. 41, 67 L. Ed., at p. 151.
[24] *Op. cit.*, n. 15.
[25] *Op. cit.*, n. 2 and accompanying text.
[26] 383 F. 2d, at p. 350.
[27] *U.S.* v. *Rich*, 262 F. 2d 415, 417 (C.A. 2d Cir. 1959). "A workable definition of conspiracy applicable equally in all cases and to all types of crime is a virtual impossibility." *Ibid.*, at p. 418.
[28] [1972] 3 W.L.R. 33.
[29] *Id.*
[30] See, *op. cit.*, n. 3, *especially, Ford* v. *U.S.*, 273 U.S. 593, 47 S. Ct. 531, 71 L. Ed. 793 (1927).

ciples. While Anglo-Canadian courts are cognizant of the situs of the agreement to determine jurisdiction, American courts respond to a jurisdictional act (harm) other than the agreement itself to determine jurisdiction. While "acts in performance (of the conspiracy) go to prove the offense but are not constituent or essential parts of it",[31] though triable as a substantive crime in England, the act in furtherance of the conspiracy is the essential jurisdictional element triggering the American criminal process.

Those international criminal jurists who have been caught up by the American "law and order" campaign may well find the limits of the rule prescribed in *Regina* v. *Doot*[32] distasteful; others may find the wisdom of the Court more telling: "... this case illustrates once more the dangers and difficulties which lie in wait for those who persist in framing indictments containing the popular offense of conspiracy in addition to substantive offenses."[33] Perhaps the Courts should not fill the gaps in the substantive criminal law with conspiracy where the legislature has opted to leave gaps — purposefully.

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31 [1972] 3 W.L.R., at p. 37.

32 *Ibid.*, at p. 33.

33 *Ibid.*, at p. 42.

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