Lecture One

JURISDICTION IN CRIMINAL LAW

1. Jurisdiction in criminal law
   a. In criminal law jurisdiction has to aspects
      i. Substantive aspect
      ii. Procedural aspect
   b. Substantive aspect of jurisdiction
      i. The substantive aspect of criminal jurisdiction is concerned with the power of a sovereign to define conduct as criminal, i.e. to enact criminal laws
      ii. That a sovereign has the power to enact criminal laws does not mean that the sovereign has the power to proceed against a particular defendant by placing him on trial for violating one of those laws
   c. Procedural aspect of jurisdiction
      i. The procedural aspect of criminal jurisdiction is concerned with the power of a sovereign to proceed against a particular individual by placing him on trial for and convicting him of violating a criminal law adopted by the sovereign
   d. Distinction between substantive and procedural aspects of jurisdiction
      i. The distinction between the substantive and procedural aspects of criminal jurisdiction can be capsulized as follows:
         (1) The substantive aspect of criminal jurisdiction is concerned with whether a sovereign has the power to enact a particular criminal law while the procedural aspect of criminal jurisdiction is concerned with whether the sovereign’s courts have the power to
place a particular defendant on trial for violating one of the sovereign’s criminal laws

2. Principles of Substantive Criminal Jurisdiction
   a. Customary international law recognizes five principles of jurisdiction under which every sovereign is considered to have the power to adopt criminal laws that define crimes
      i. Principles of jurisdiction under customary international law and domestic criminal law
         (1) As a matter of domestic law the principles of customary international law do not limit the power of a sovereign in adopting any type of criminal statute
            (a) Sovereign can ignore the jurisdictional principles of customary international law and still render a valid conviction under his own law
               (i) United States v. Yunis, 924 F2d 1086 (D.C. Cir. 1991)
            (b) Sovereign has inherent power to make law and does not depend upon customary international law to give him power to do so
   b. The principles of jurisdiction recognized by customary international law are classified as non-territorial principles and territorial principles
      i. Non-territorial principles of jurisdiction
         (1) All of the non-territorial principles of criminal jurisdiction recognize the power of a sovereign to adopt laws that define crimes without regard to where they might be committed
            (a) Under these principles a sovereign can adopt criminal laws that apply to conduct committed wholly outside of the sovereign’s borders
         (2) There are four non-territorial principles, any one of which a sovereign can rely on when adopting criminal laws that define crimes that may be committed outside of its borders
            (a) Protective principle
               (i) Recognizes that a sovereign can adopt a statute that criminalizes conduct that occurs outside of its borders when that conduct affects the sovereign itself
                  1) E.g. Espionage

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(b) Nationality principle

(i) Recognizes that a sovereign can adopt criminal laws which govern the conduct of the sovereign’s nationals while outside of its borders

(c) Passive personality principle

(i) Recognizes that a sovereign can adopt criminal laws that apply to conduct of foreign nationals who commit crimes against the sovereign’s nationals while the sovereign’s nationals are outside of the sovereign’s territory.

(d) Universal principle

(i) Recognizes that a sovereign can adopt criminal laws that apply to conduct anywhere in the world when that conduct is recognized by nations as being of universal concern

1) E.g. Piracy

ii. The territorial principle

(1) The territorial principle recognizes the power of a sovereign to adopt criminal laws that apply to any person or entity who engages in the statutorily condemned conduct within the sovereign’s borders

(a) Territorial jurisdiction and situs

(i) Under the territorial principle of criminal jurisdiction the situs of the crime is critical because under that principle the sovereign is recognized as having the power to adopt laws that apply to conduct that has its situs within the sovereign’s borders

1) The situs of a crime is determined by the place where the criminal act takes effect


(b) Two aspects of the territorial principle

(i) There are two aspects of the territorial principle
1) Subjective aspect

2) Objective aspect

(ii) Subjective aspect

1) Under this aspect of territorial jurisdiction
   the sovereign is recognized as having the
   power to adopt criminal laws that apply to
   criminal conduct that is physically
   committed within his borders

(iii) Objective aspect

1) Under this aspect of territorial jurisdiction
   the sovereign is recognized as having the
   power to adopt criminal laws that apply to
   conduct performed wholly outside of his
   borders when that conduct has or is intended
   to have a substantial detrimental effect
   within them

   a) *United States v. Ivanov*, 175 F.
      Supp.2d 367 (D. Conn. 2001)

2) In such cases the perpetrator is said to have
   been constructively present inside the
   sovereign’s borders

(c) Admiralty jurisdiction

(i) Ships of a sovereign are considered to be part of the
    sovereign’s territory while on the high seas. As
    such admiralty jurisdiction is a species of
    territorially based jurisdiction

   1) High seas includes seas and the waters that
      are tributary to them to the extent they are
      navigable

   2) *United States v. Flores*, 289 U.S. 137 (1933)

3. Principles of Procedural Jurisdiction

   a. Assuming a sovereign has the power to adopt a criminal law under one of the five
      principles discussed above or under its own domestic law, before it can apply that
      law to an individual through a criminal prosecution and conviction the tribunal
      that will determine whether a violation of the law has occurred and impose
      punishment therefor must have jurisdiction over the defendant

   i. Jurisdiction over the person is called *in personam* jurisdiction
ii. A tribunal cannot proceed against or a convict a defendant of a crime if it does not have *in personam* jurisdiction over him

iii. Generally *in personam* jurisdiction is determined by the domestic law of the jurisdiction that is prosecuting

b. In the United States a tribunal obtains *in personam* jurisdiction over a defendant in a criminal case when the defendant physically appears before it

i. Manner in which defendant physically appears

   (1) A defendant can physically appear before a court in one of two ways

   (a) Voluntarily

   (i) Where he has chosen to appear before the court instead of being arrested and brought before it

   (b) Involuntarily

   (i) When the defendant has been arrested by law enforcement agents and is brought before the court involuntarily

ii. Extra-legal arrests and rendition

   (1) One area of recurring controversy is whether a court obtains *in personam* jurisdiction over a defendant who is brought before it through extra-legal actions by law enforcement agents

   (a) In the United States these controversies have usually occurred when American law enforcement agents have ignored an existing extradition treaty, entered a foreign country, and without following treaty procedures arrested the defendant there and forcible brought him back to the United States for trial

   (b) The U.S. Supreme Court as well as state supreme courts have consistently held that absent a provision in a treaty that expressly prohibits extra-legal arrests and renditions, such an action does not preclude an American court from obtaining *in personam* jurisdiction over the defendant


c. Subsequent flight or absence

i. Once a court obtains *in personam* jurisdiction over a defendant his subsequent flight or absence from the jurisdiction does not defeat the court’s *in personam* jurisdiction over him
(1) As a result a once a court obtains *in personam* jurisdiction over a defendant, if that defendant subsequently flees the jurisdiction or fails to appear the court has the power to place him on trial and convict him *in absentia*

(a) In the United States a defendant can only be tried *in absentia* if he has been warned that could occur if he does not appear for trial

(b) As a result when any defendant is arraigned or brought before a court for a hearing in which the court will determine whether he should be released on bond prior to trial (That proceeding is called a bond hearing.) the court advises the defendant that if he does not appear for trial the court can place him on trial and convict him *in absentia*