

Problems of Exercising Criminal Jurisdiction over Crimes Committed in the Maritime Space under Georgian Legislation

Abstract

This paper aims to study and analyze the norms of international treaty and domestic law of Georgia on the exercising criminal jurisdiction over crimes committed in the maritime space; To demonstrate the practice of states refraining from exercising criminal jurisdiction in ports and inland waters. Using the interpretation of norms, deductive and inductive methods of research, to identify shortcomings, contradictory and problematic aspects of Georgian legislation and to explain which norms should be used in exercising criminal jurisdiction over crimes committed in the maritime space.

Introduction

According to the theory of territoriality, criminal jurisdiction depends on the place of commission of a criminal offense. The principle of territoriality found applicability in Article 4 of the Criminal Code, according to which, a person who has committed a crime in the territory of Georgia shall be criminally liable under this Code. At the same time, according to the same article, CCG applies to crimes committed on the continental shelf and in the Special Economic Zone of Georgia. Although the primary form of national criminal jurisdiction is the application of the law to crimes committed in the territory of the state and it is recognized by all states as an essential aspect of state sovereignty, the territorial application of jurisdiction is relatively problematic for crimes committed in the maritime space because the state has no absolute ability to exercise criminal jurisdiction beyond inland waters.

The aim of the paper is to analyze the international and national legal approaches to the exercise of criminal jurisdiction over crimes committed in the maritime space; To study the regime established by the 1982 United Nations Convention on the Law of the Sea ("UN Convention"), to which Georgia is a party; To compare the legal provisions of the Georgian legislation with them, identify the problems and outline the ways of their elimination. For these purposes, this paper consists of three chapters. At first, the interaction between international treaties and national legislation will be reviewed. The second chapter discusses the established regime of exercising criminal jurisdiction under the UN Convention and the practice of states, while the third chapter reviews the problematic aspects of the issue as well as the ways to solve them.

1. Interaction between norms of international and domestic law

In general, as a result of the granting domestic legal force to an international treaty, based on them and other normative acts in force in the country, there is a need to ascertain norms that take precedence. First of all, we need to assess whether an international treaty is part of the Georgian

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legislative space and what place it occupies in the hierarchy of normative acts. Pursuant to Article 6(1) of the Law on International Treaties of Georgia, the International Treaty of Georgia is an integral part of the legislation of Georgia, that is also reinforced by Article 7(1) of the Organic Law of Georgia on Normative Acts according to which "constitutional agreement of Georgia and international agreements and treaties of Georgia are also normative acts of Georgia." Therefore, due to the fact that Georgian law gives domestic legal force to an international treaty, it is important to determine its exact place in the hierarchy of normative acts. According to Article 4(5) of the Constitution of Georgia, an international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia. In particular, this provision of the Constitution, on the one hand, reinforces the legal force of an international treaty in the domestic legal space and, on the other hand, defines its hierarchy, that is also reinforced by many other legal acts. Accordingly, an international treaty, including the UN Convention, is legally binding upon Georgia and it is an integral part of domestic law and has precedence over the law of Georgia.

2. The regime of criminal jurisdiction established by the UN Convention

Offenses committed in the maritime space are a "dynamic legal scenario" in which international law recognizes the competitive existence of several domestic jurisdictions. At any time, a ship shall be subject to the domestic law of the state in which it is registered (flag state), but it may also fall within the territorial jurisdiction of another state during the transit of its waters and ports, thereby being subject to the jurisdiction of another state (coastal state). Moreover, when a citizen of the state is involved in a criminal offense, whether s/he is the alleged offender or the victim, the state of citizenship also has the right to investigate and prosecute.

If criminal offense is committed on a ship within inland waters, during a visit to the port, or when the ship is to enter port, or when the ship departs from a port and is in the territorial sea of the state, the state may exercise absolute jurisdiction of the port state over alleged offenses. The issue of jurisdictional competition arises in such situations. Under national practice, matters of lesser importance, such as petty theft, often remain under the ship's jurisdiction, since the ship is not necessarily a place without law, as it is governed by the laws of the flag state. Consequently, if one member of the crew steals a cigarette from another, the port state will not interfere in case. However, the situation is different for more serious crimes such as assault, murder and those involving the interests of the port state. The port state has the right and even requires the exercise of its jurisdiction as an expression of sovereignty if a criminal act committed abroad affects the peace, order and "good government" of the port state.

There are two approaches to this issue: French and Anglo-American. For example, according to UK, refraining from exercising local jurisdiction is a matter of courtesy and discretion. In *Wildenhus's* case 120 U.S. 1 (1887) the United States Supreme Court ruled that the murder of one crewmember by another (both were citizens of Belgium) committed on a Belgian steamship in the port of Jersey City was a disturbance of public tranquility on the shore. The Anglo-American approach differs from the French practice expressed in the opinion of the French Supreme Administrative Court in the 1806 cases of *Sally* and *Newton*. The French Supreme Administrative Court applied the principle of local jurisdiction in cases where it was possible to harm state interests, such as police matters, or crimes committed by crewmembers against aliens, including ones committed on board of a ship. Local

jurisdiction did not apply to domestic discipline and to crimes committed by crewmembers that did not concern aliens unless the tranquility and order in the port was harmed, or if local authorities were not asked to assist. Compared to American doctrine, French practice is more liberal towards the flag state and more explicitly rejects its own territorial jurisdiction over certain categories of cases, but in reality, the difference is minimal and the practice of both parties is fairly uniform. The French approach stipulates the precedence of local jurisdiction, while according to French court rulings, the murder of one crewmember by another harms peace in the port.

As for the jurisdiction in the territorial sea of the coastal state, unlike inland waters, where in fact, it has full criminal jurisdiction over any ship other than military and other state-owned vessels used for non-commercial purposes in the territorial sea, the case is much more complicated. If a ship does not visit a port of the state but makes a peaceful passage through its territorial sea, the jurisdiction of the coastal state is limited by Article 27 of the UN Convention, which provides that the coastal state may exercise criminal jurisdiction:

- if the consequences of the crime extend to the coastal state;
- if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state;
- if the case involves illicit traffic in narcotic drugs or psychotropic substances.

However, it should be noted that ships in peaceful transit mode are not normally subject to the criminal jurisdiction of the coastal state as long as they do not violate the requirements of Article 19 of the Convention.

If the offense is committed on board of the ship before it enters the territorial sea of a coastal state, then there shall be no territorial grounds for exercising jurisdiction of the coastal state unless the vessel heads to the port of that state. Although the UN Convention provides for the coastal state to have jurisdiction over its exclusive economic zone and continental shelf regarding economic exploitation and environmental protection, this does not apply to criminal matters, so the coastal state should rely on other grounds for recognition of jurisdiction in the maritime space beyond the territorial sea to exercise criminal jurisdiction over offenses committed on board of the ship. Hence, if the offense is committed before entering the territorial sea, the jurisdiction of the coastal state shall not apply, except the cases provided for in Chapters XII and V of the Convention; However, with regard to the protection of the environment and the special economic zone, in order to be able to exercise jurisdiction, the laws and regulations adopted in accordance with these Chapters has to be violated. In such case, the coastal state may take measures to arrest a person or conduct investigation on a foreign vessel passing its territorial sea. It is noteworthy that even in this event, the pollution of the territorial sea has to be "intentional and serious", or violate the regime of a special economic zone, for example, by unlicensed fishing. If the state has enacted criminal laws on particular offenses, it may, as an exception, exercise criminal jurisdiction.

3. Regime established by the legislation of Georgia and problematic aspects

The analysis of the legislation of Georgia, first of all, should be started with Article 4 of the CCG. We conclude from the language that Georgia has full criminal jurisdiction over the entire territory of Georgia, including the territorial sea, as well as the special economic zone and the continental shelf. Besides, it is worth mentioning Article 27 of the Law of Georgia on Maritime Space of 1998, which repeats Article 27 of the UN Convention, but, at the same time, expands the scope of criminal jurisdiction by offenses such as crime committed by citizens of Georgia, unlawful imprisonment and offences against peace and humanity.

The norm clarifies that, on the one hand, Article 27 of the Law on Maritime Space is contrary to Article 4 of the Criminal Code, in that it narrows and limits the scope of this article to specific crimes, on the other hand, the whole domestic regulation is contrary to the standard established by the international treaty, since, as it turned out, Article 4 is in itself broad and its implementation in practice is inconceivable without violating the international treaty norms and, therefore, the constitutional provision about the hierarchy. At the same time, it is important to consider whether the regime established by the law on maritime space is in line with the UN Convention.

The four grounds of criminal jurisdiction under the Law on Maritime Space are identical to the grounds established by the Convention, so there are no problems in this regard, nor it is a problem to exercise criminal jurisdiction over a crime committed by a citizen of Georgia, because, in this case, the competing jurisdiction of the citizenship will unequivocally apply. A reference to a crime against peace and humanity among the given grounds, by its very nature, may also be considered to be justified, given that this crime is subject to universal jurisdiction. As regards unlawful imprisonment, it is contrary to the norms of international treaty law, since Article 27 of the UN Convention is a norm containing an exhaustive catalog and, with regard to unlawful imprisonment, no other provision of the Convention provides for any exception. Therefore, as mentioned in the first chapter, according to the Constitution, the norms of the international treaty have precedence over domestic norms, it is important to eliminate the discussed legislative shortcomings. Otherwise, there is an obligation to apply international legal norms and not the extended regime established by the legislation of Georgia. It is also important to note that, in particular, the Law on Maritime Space does not specify the possibility of exercising criminal jurisdiction over a special economic zone and continental shelf.

Conclusion

Shortcomings in the legislation are a particular problem for the application of the norm. Unfortunately, in practice, there are cases when the bodies applying the norm does not know the regime established by international maritime law and they use a special norm of national law that regulates the issue and which is supposedly adopted by the legislature in accordance with the norms of international law.

The analysis of the Law on Maritime Space reveals that the legislature is well-acquainted with the UN Convention. Consequently, it is unclear why there is an extended model of criminal jurisdiction in Georgian law, which leads to violations of the norms of the international treaty. Nevertheless, the analysis of the norms regulating the issue reveals that the legislation of Georgia is problematic regarding the exercise of criminal jurisdiction over crimes committed in the maritime space and requires the correction of shortcomings.

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