що його породжують. Існуюча сьогодні конструкція правового визначення тероризму досить громіздка, складна і утруднює кваліфікацію кримінально-правових діянь, що мають схожі кваліфікаційні ознаки, проте тероризмом не є. По-друге, потрібна подальша розробка на міжнародно-правовому рівні базових принципів боротьби з тероризмом. По-третє, необхідна розробка модельного міжнародного закону про боротьбу з тероризмом. По-четверте, ефективність боротьби з міжнародним тероризмом немислима без створення міжнародної системи моніторингу тероризму на основі обов'язкової передачі відповідної інформації від національних урядів, регіональних і міжнародних організацій, що беруть участь у різних формах боротьби з тероризмом, її накопичення і аналізу в спеціально створеному інформаційному банку. По-п'яте, при організації масштабної боротьби з тероризмом і транснаціональною злочинністю, необхідна розробка міжнародно-правових основ проведення міжнародних антитерористичних операцій із закріпленням обов'язковості санкції Ради Безпеки ООН на здійснення і контроль за їх проведенням. По-шосте, слід також вжити заходів щодо найшвидшої ратифікації членами міжнародного співтовариства конвенцій по боротьбі з тероризмом і подальшого внесення ними потрібних змін у національні законодавства. Необхідне скликання спеціальної сесії Генеральної Асамблеї ООН по боротьбі з тероризмом і ухвалення нею відповідних рішень

Gayday K. M.
Ph.D student, National University «Odessa academy of Law»

UNIVERSAL JURISDICTION IN ABSENTIA: MEANINGLESS OR REASONABLE DISTINCTION?

When talking about universal jurisdiction one has always to bear in mind that until this very moment there is 'no generally accepted definition of universal jurisdiction in conventional or customary international law' in words of the Judge Van Den Wyngaert expressed in her Dissenting Opinion in the International Court's of Justice Case Concerning the Arrest Warrant of the 11th of April 2000 (Democratic Republic of Congo v. Belgium). The lack of precise definition and scope of the notion may explain the lasting discussion on the matter. The part of it concerns the presence of a suspect on the territory of the Forum

State as a prerequisite for exercise of such jurisdiction. While some claim that the traditional explanation of universal jurisdiction is that some crimes are regarded as so heinous that every State has a legitimate interest in their repression, others insist that in general principle in order to exercise universal jurisdiction a State has to meet the requirement of the presence of a suspect within its territory. While the latter is sometimes called 'ordinary' or 'conditional' universal jurisdiction, the former is known as 'pure universal concern jurisdiction', or 'pure', or 'true', or 'absolute' universal jurisdiction but most commonly it is referred to as universal jurisdiction in absentia. The core meaning of such jurisdiction is absence of any nexus between the Forum State and the case in question, even the absence of a suspect within its territory. In such cases the only link which can be claimed is the international nature of the crimes committed, which justifies the right of any State to investigate. The reason why universal jurisdiction in absentia can be regarded as a purified form of universal jurisdiction by some scholars is that it also can be regarded as a kind of actio popularis. Since it allows all States constituting the international community and interested in ending impunity for gross violations of human rights to prosecute and punish alleged perpetrators notwithstanding the total lack of any nexus between them and the crime, it thus allows to act in the interest of the whole international community, what makes universal jurisdiction in absentia an action for the good of the international society. Judges Higgins, Kooijmans and Buergenthal, for instance, in the aforementioned Arrest Warrant Case in their Joint Separate Opinion seemed to regard universal jurisdiction in absentia as the original form of universal jurisdiction by reference to the Lotus principle (which is however disputable) and denying the presence of the suspect as its prerequisite.

Therefore universal jurisdiction in absentia is quite widely understood as a form of jurisdiction whose lawfulness is to be considered in its own right and thus as distinct from universal jurisdiction per se. However, the question may arise as on what grounds it is possible to distinguish so called ordinary universal jurisdiction and universal jurisdiction in absentia. Some may claim that the difference between them is simply temporal, precisely at which stage the presence of a suspect must be obtained. Others may find the underlying difference in the fact that ordinary universal jurisdiction is recognized only for a State in which a suspect is present, and universal jurisdiction in absentia is attributable to virtually any State in the world since it requires no

nexus between the crime and the State claiming jurisdiction. Moreover, some scholars may even argue that the distinction between the two is meaningless, since a State which initially only has universal jurisdiction in absentia, may eventually obtain ordinary universal jurisdiction by obtaining the custody of a suspect who is located abroad as the result of its arrest warrant or extradition request. Finally, for some the major difference is that the two have different rationales and status under conventional and customary international law, i. e. different legal status and the realm of their acceptance among States. The last point is worth more comprehensive studying.

As to the incorporation in conventional international law ordinary universal jurisdiction has much more firm position. While many contemporary treaties and conventions prescribe universal jurisdiction in the form of not even a right but more – an obligation upon States where a suspect is present and also provide such States with discretion in deciding whether to extradite or exercise jurisdiction itself, in contrast, universal jurisdiction in absentia is not explicitly prescribed by any convention (the major exceptions to the rule are found only in the Geneva Conventions). Moreover, Judge Guillaume in the same Arrest Warrant Case in his Separate Opinion proclaimed that '[u] niversal jusrisdiction in absentia is unknown to international conventional law.'

Therefore universal jurisdiction in absentia is of the exclusive character, since its exercise is not a direct consequence of the expansion of national jurisdiction under conventional international law. Though, such jurisdiction was recognized, for instance, by the U. S. courts in the Demjanjuk Case and by the German Federal Supreme Court in the Sokolovic Case, universal jurisdiction in absentia is not widely recognized by the States and, thus firmly supported in neither conventional nor customary international law. The only factor which promotes its exercise is the recognition of the interest of the international community. So in most of their domestic laws and practices States are reluctant to expand their jurisdiction beyond that which they are obliged to do under specific treaties or conventions and consequently to enact the relevant legislation.

On the other hand, however contemporary conventional international law contains wordings that conventions do 'not exclude any criminal jurisdiction exercised in accordance with internal law' (Art. 4(3) of the Torture Convention), what means that the lack of evidence of universal jurisdiction in absentia in conventional international law

does not lead to the conclusion about the prohibition of such jurisdiction under international law either.

Concerning its position in customary international law both can be found support and opposition of universal jurisdiction in absentia. In favor of the former A. Cassese, for instance, provides with two rationales for universal jurisdiction in absentia: the first is the extreme extent of gravity and magnitude of the crime; and the second is compliance with the principle of sovereign equality of States and non-interference in the internal affairs of the State where the crime has been prepared. However what remains questionable is State acceptance and opinio juris on these rationales. While in some states there is domestic law on universal jurisdiction in absentia like e. g. in Spain, Belgium, Germany, Italy, in others domestic courts have accepted universal jurisdiction in absentia, e. g. the USA in the Demjanjuk Case.

Nevertheless except for the support there are also strong arguments as to the opposition of universal jurisdiction in absentia. The law and practice of States prove the tendency to limit universal jurisdiction to cases in which a suspect is present on their territory, e. g. Canada, France, Switzerland and Denmark. Moreover, for the States allowing universal jurisdiction in absentia, it may provoke some opposition from the States involved in the case (this is exactly what happened to Belgium after the aforementioned Arrest Warrant Case, when Belgium amended its domestic law towards abolishing universal jurisdiction in absentia). In the stream of this argumentation A. Cassese also criticizes the approach of understanding universal jurisdiction as tantamount to universal jurisdiction in absentia, claiming that 'it would be contrary to the logic of current state relations to authorize any state of the world to institute criminal proceedings (commence investigations, collect evidence, and lay out charges) against any foreigner or foreign state official allegedly culpable of serious international crimes.' Furthermore, the possible arbitrariness in determination of the Forum State may also cause concerns of rights' protection of a suspect. In contrast to the ordinary universal jurisdiction, in the case of exercising universal jurisdiction in absentia suspects cannot foresee which State will claim jurisdiction, i. e. they will neither be able to know which State will issue an arrest warrant in the future, and thereby to which State they may be extradited, nor under which national law they will be prosecuted, what kind of punishment may be imposed, and in which State they will have to serve sentence.

In conclusion despite the lack of extensive conventional incorporation and support among states even the most innovative and disputed jurisdiction, such as universal jurisdiction in absentia, is not prohibited under international law unless it clashes with its other rules or principles. As the logic flows if universal jurisdiction is permissible then its exercise in absentia is permissible too, though which question remains without an answer is whether the latter is desirable. This issue will remain unresolved and unsure until either a corresponding case comes to an international tribunal, or an international treaty, or a recognized series of guidelines is accepted. At the moment the only statement which does no raise doubts is that universal jurisdiction, including universal jurisdiction in absentia, is envisaged to serve the interests of the international community as a whole by replacing impunity with accountability, thus being extremely important as a tool of fostering progressive development of international law towards human rights and justice.

Гнатенко Є. С.
викладач, Національний університет «Одеська юридична академія»

СПІВВІДНОШЕННЯ КРИМІНАЛЬНОГО ПРАВА УКРАЇНИ І МІЖНАРОДНОГО КРИМІНАЛЬНОГО ПРАВА. ПРОЦЕС ГАРМОНІЗАЦІЇ ТА АДАПТАЦІЇ

Правова система, яка існує сьогодні в Україні, складалася протягом тривалого часу під впливом різноманітних факторів історичного, політичного, соціального, економічного та іншого характеру. Зазначене цілком стосується і кримінального права України як частини його цілісної правової системи. Як і в кримінальному законодавстві будь-якої держави, у кримінальному законодавстві України змішані елементи національно-самобутнього з елементами запозиченого чужого – це законодавство завжди розвивалося під певним впливом кримінального законодавства інших держав, а також під впливом міжнародного права, який з часом ставав усе більш потужним.

Ні для кого не є таємницею, що забезпечення законності, рівності, судової незалежності, адекватності реакції на вчинений злочин та її швидкості є основними в системі владовідносин, що формують кримінально-правові норми. Узгодження національних