INTERNATIONAL CRIMINAL LAW

DOI: https://doi.org/10.24833/0869-0049-2023-1-76-85

Research article
UDC: 341.4
Received 17 January 2023
Approved 23 March 2023

Alexander B. MEZYAEV
University of Management "TISBI"
13, ul. Mushtari, Kazan, Russian Federation, 420012
alexmezyaev@gmail.com
ORCID: 0000-0002-5318-3029

TRIAL IN ABSENTIA AND THE MODERN INTERNATIONAL CRIMINAL PROCEDURE

INTRODUCTION. *The article discusses the theoretical and practical problems of conducting trials in the absence of the accused (in absentia) in international criminal courts and tribunals.*
MATERIALS AND METHODS. *The article is based on international human rights treaties that regulate the rights of the accused in criminal proceedings, the statutory and procedural documents of these courts, and the practice of interpreting and applying the right of the accused to be present at the trial.*
RESEARCH RESULTS. *International human rights treaties establish the minimum rights of the accused in criminal proceedings. Among these rights is the right of the accused to be present at the trial. However, the practice of interpreting this right by the relevant conventional international bodies and international criminal courts and tribunals imposes significant limitations. A number of such restrictions appear to be both reasonable and justified. However, in many cases the restrictions are arbitrary and their justification is legally flawed.*
DISCUSSION AND CONCLUSIONS. *Universal and a number of regional international human rights treaties, in particular, the International Covenant on Civil and Political Rights of 1966 contain norms that are binding not only for states in their application of national law, but also establish general human rights standards in international law. Due to this circumstance, the provisions of such treaties bind any institutions operating directly in the system of international law, in particular, international criminal courts and tribunals. Thus, international criminal courts and tribunals are bound by the provisions of these treaties, not only in terms of their implementation, but also in terms of their interpretation. The practice of these courts demonstrates a very inconsistent application and not always convincing interpretation of the rights of the accused in general and the right to be tried in his presence. Currently, this practice is trying to change the previously formed trend towards increasingly severe restrictions on exceptions to the right of the accused to be tried in his presence.*

KEYWORDS: *international criminal procedure, trial in absentia, the rights of the accused, International Criminal Court, Special Court for Lebanon, International Tribunal for the Former Yugoslavia*

FOR CITATION: Mezyaev A.B. Trial in absentia and the modern international criminal procedure. – *Moscow Journal of International Law.* 2023. No. 1. P. 76-85. DOI: https://doi.org/10.24833/0869-0049-2023-1-76-85

The author declares the absence of conflict of interest.

МЕЖДУНАРОДНАЯ БОРЬБА С ПРЕСТУПНОСТЬЮ

DOI: https://doi.org/10.24833/0869-0049-2023-1-76-85

Исследовательская статья
УДК:341.4
Поступила в редакцию: 17.01.2023
Принята к публикации: 20.03.2023

Александр Борисович МЕЗЯЕВ
Университет управления «ТИСБИ»
Муштари ул., д. 13, Казань, 420012, Российская Федерация
alexmezyaev@gmail.com
ORCID: 0000-0002-5318-3029

ПРОВЕДЕНИЕ ЗАОЧНОГО СУДЕБНОГО РАЗБИРАТЕЛЬСТВА В СОВРЕМЕННОМ МЕЖДУНАРОДНОМ УГОЛОВНОМ ПРОЦЕССЕ

ВВЕДЕНИЕ. *В статье рассматриваются теоретические и практические проблемы проведения заочных судебных процессов (in absentia) в международных уголовных судах и трибуналах.*
МАТЕРИАЛЫ И МЕТОДЫ. *Основой для статьи являются международные договоры в области прав человека, регулирующие права обвиняемых в уголовном процессе, уставные и процессуальные документы данных судов и практику толкования и применения права обвиняемого присутствовать на процессе.*
РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Международные договоры по правам человека устанавливают минимальные права обвиняемого в уголовном процессе. Среди данных прав названо право обвиняемого присутствовать на процессе. Однако практика толкования данного права соответствующими конвенционными международными органами и международными уголовными судами и трибуналами устанавливает существенные ограничения. Ряд таких ограничений представляются как разумными, так и обоснованными. Однако во многих случаях ограничения носят произвольный характер, а их обоснование является юридически дефектным.*
ОБСУЖДЕНИЕ И ВЫВОДЫ. *Универсальные и ряд региональных международных договоров по правам человека, в частности, Международный пакт о гражданских и политических правах 1966 г. содержат нормы, которые являются обязательными не только для государств в их применении национального права, но и устанавливают общие стандарты прав человека в международном праве. В силу данного обстоятельства, положения таких договоров связывают любые институты, действующие непосредственно в системе международного права, в частности, международные уголовные суды и трибуналы. Таким образом, международные уголовные суды и трибуналы связаны положениями данных договоров, не только в вопросах их исполнения, но и в вопросах их толкования. Практика деятельности указанных судов демонстрирует весьма непоследовательное применение и не всегда убедительное толкование прав обвиняемых вообще и права быть судимым в его присутствии. В настоящее время данная практика пытается изменить ранее сформировавшуюся тенденции к всё более жесткому ограничению исключений из права обвиняемого быть судимым в его присутствии.*

КЛЮЧЕВЫЕ СЛОВА: *международный уголовный процесс, заочное судебное разбирательство, судебный процесс in absentia, права обвиняемого, Международный уголовный суд, Специальный суд по Ливану, Международный трибунал по бывшей Югославии*

ДЛЯ ЦИТИРОВАНИЯ: Мезяев А.Б. 2023. Проведение заочного судебного разбирательства в современном международном уголовном процессе. – *Московский журнал международного права.* № 1. С. 76-85. DOI: https://doi.org/10.24833/0869-0049-2023-1-76-85

Автор заявляет об отсутствии конфликта интересов.

1. Introduction

The legal status of the accused in modern international criminal proceedings is a very topical theoretical and practical problem of modern international law[1]. The increase in the number of international criminal courts and tribunals (hereinafter - ICCT), as well as the number of international trials, poses new problems of this kind [Zappala 2003:10-25]. One such problem is ensuring the rights of the ICCT's accused[2], in particular, the right to be tried in his or her presence [Wladimiroff 2000: 415-450]. Often this right is considered as the prohibition of trial *in absentia*, though this approach is narrower.

2. Trial in absentia in domestic legal systems

The right of the accused to be tried in his or her presence in international treaty law has been derived from the practice of domestic legal systems. Analyzing the issue of the trial *in absentia* in national legal systems, one should note the fundamental theoretical difference in the approach to this issue in the common law countries (ComLC), on the one hand, and civil law countries (CivLC), on the other. In the ComLC, the jurisdiction of the court is understood as a real opportunity to judge a particular person and apply a specific rule of law to him. Therefore, jurisdiction in the ComLC arises, as a general rule, at the moment when a person is in the hands of justice. The main emphasis in the understanding the jurisdiction in CivLC, is on the power of the court to pronounce its opinion on questions of law, which can be done without the presence of the accused.

In CivLC the prohibition of *in absentia* trials is enshrined in the criminal procedure legislation and sometimes even in constitutions. For example, in para 2 of article 123 of the Constitution of the Russian Federation, as a general rule, trial *in absentia* is not allowed. Article 47 of the Code of Criminal Procedure of the Russian Federation (CCPRF) establishes the right of the accused to participate in the trial of a criminal case in the courts of the first, appeal, cassation and supervisory instances. Thus, the term "accused" should be interpreted in a broad sense within the meaning of para 16, part 4, article 47 of the CCPRF, the right to be present at the trial extends to all levels of the proceedings, including the stage after the entry of the sentence into force. According to para 1 of article 247 of the CCPRF, the criminal trial, as a general rule, is carried out with the obligatory participation of the defendant. If the circumstances that served as the basis for proceedings *in absentia* are eliminated, the court decision made *in absentia* is canceled at the request of the convicted person or his defense counsel, and the subsequent trial is carried out in the usual manner (para 7 of article 247 of the CCPRF). This norm was completely unreasonably criticized by some experts [Kazakov 2009:220] who do not take into account that the conditional nature of the trial *in absentia* is regulated not only by the norms of Russian domestic law, but also by international law. Exceptions to this rule are possible, but can be established only in the case expressly provided for by the Russian federal law. In 2006, in connection with the ratification of the Council of Europe Convention on the Prevention of Terrorism, amendments were made to the CCPRF, according to which the trial in the absence of the defendant may be possible only in exceptional cases and only in relation to the crimes of grave and especially grave nature.

It should be emphasized that some kind of proceedings *in absentia* are allowed in the countries of both legal systems and all criminal procedure models (inquisitorial, adversarial and mixed). The differ-

[1] *Mezhdunarodnaya i vnutrigosudarstvennaya zashchita prav cheloveka: uchebnik*. Pod red. L.Kh. Mingazova [International and domestic protection of human rights: a textbook. Ed. by L.H. Mingazov]. Moscow: Prospekt. 2021. P. 317. (In Russ.).

[2] *Mezhdunarodnaya i vnutrigosudarstvennaya zashchita prav cheloveka: uchebnik*. Pod red. L.Kh. Mingazova [International and domestic protection of human rights: a textbook. Ed. by L.H. Mingazov]. Moscow: Prospekt. 2023. P. 209. (In Russ.).

ence lays is only in the grounds and redistribution of exceptions. Thus, the inquisitorial model is characterized by wider opportunities for holding a trial *in absentia*, with the possibility to conduct a new trial with the participation of the accused, when he or she is arrested. For example this approach was confirmed by the Federal Court of Switzerland when in 2001 it indicated that a person previously convicted *in absentia* should be provided with the *right to a re-trial.*

3. Trial in absentia in international human rights law

For the first time, a direct ban on holding a trial *in absentia* on international level was enshrined in para 3d of article 14 of the International Covenant on Civil and Political Rights (CCPR), which states that everyone has the right to be tried in his presence [Lazutin et al. 2020: 208-210]. The same provision was also enshrined in para 4e of article 75 of Additional Protocol I and article 6.2.e of Additional Protocol II to the 1977 Geneva Conventions for the Protection of Victims of War.

In *Dieter Wolf v. Panama* Human Rights Committee (HRC) noted that the concept of a fair trial should be interpreted "taking into account the fulfillment of the conditions of equality of arms and adversarial process." HRC also emphasized that these conditions are not considered fulfilled when the accused deprive the possibility of personal presence in the proceedings.

This right is not directly or expressly enshrined in any other international treaty. For example article 6 (fair trial) of the European Convention of Human Rights and Fundamental Freedoms does not expressly mentioned trials *in absentia*. In the same time, European Court of Human Rights (ECHR), in its practice of interpreting article 6, includes in the concept of a fair trial the right of the accused to be tried in his or her presence (however, stipulating the possibility of certain restrictions). In *Colozza v. Italy*, the ECHR, applying a teleological interpretation [Lazutin et al. 2020 2020:212], held that, despite the absence of an expressed right to be tried in his presence, article 6.1 of the ECHR must be understood as suggesting such a right [McDonald 2000: 547].

In general, the position of international human rights bodies is that, although the process *in absentia* in exceptional circumstances can be recognized as legal, but only if a number of conditions are strictly observed. In the *Sejdovic v. Italy*, the European Court of Human Rights ruled that trial *in absentia*, in the absence of evidence of his *subpoena*, is a violation of the right to a fair trial under article 6 of the ECHR [Motrokhin 2015:202-203]. In *Stanford v. UK* the same court noted that the European Convention granted the accused not a simple right to be present at the trial, but the right to participate, moreover, to participate effectively. European Court emphasized that this right is an integral part of the principle of a fair trial under para 1 of the article 6 of ECHR. This approach been confirmed in a number of other cases.

4. The early legal regulation of the trial in absentia in international tribunals

The first case in which the question of the legitimacy of holding an international trial *in absentia* arose was the trial against William II of Hohenzollern. Article 227 of the Versailles Treaty of 1919 provided the constitution of the special tribunal for trying the former German Emperor. However, this trial did not take place due to the fact that the Netherlands refused to extradite the accused. It is difficult to say to what extent this very refusal of extradition became a decisive obstacle to the conduct of the trial. Nevertheless, there are material fact (whatever interpretation of it could be) to state that the beginning of the formation of international criminal procedure was associated with a negative attitude towards the trial *in absentia.*

The practice of the International Military Tribunal (IMT) shows the different approach to trial without the accused present. One of the IMT accused, namely Martin Bormann, was tried in Nuremberg *in absentia*. However, this decision was not an easy one. During the 1945 Potsdam Conference, in response to Clement Attlee's remark that he considers Hitler alive and proposes to include him in the list of the accused, Iosif Vissarionovich Stalin replied: "But he is not in our hands"[3]. This reply shows that that time I.V.Stalin did not consider it correct to conduct a trial *in absentia* even over a living Hitler.

However, later the compromise on the issue of the trial against not present accused was reached. Article 12 of the Charter of the IMT states: if a de-

[3] *Berlinskaya (Potsdamskaya) konferentsiya rukovoditelei trekh soyuznykh derzhav - SSSR, SShA i Velikobritanii 17 iyulya-2 avgusta 1945* [Berlin (Potsdam) Conference of the Leaders of the Allied Powers - USSR, USA and Great Britain July 17 - August 2, 1945]. Moscow: Izdatel'stvo politicheskoi literatury Publ.1984. P. 248-249. (In Russ.).

fendant "has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence". M. Bormann was tried *in absentia* and sentenced to death. It is interesting to note that the conduct of trial in absentia against M. Bormann laid the foundation for the guarantees of such trial. First, the notice[4] in newspapers was posted in Bormann's hometown for a month[5], and also read over the radio. Thus, the Allied Powers laid down the principle of prior notice to the accused of the conduct of the trial. Although this form of notice is difficult to qualify as "ensuring" the notification of the accused. Secondly, the defendant M.Bormann was assigned a lawyer (F.Bergold).

During the trial, F.Bergold tried to challenge the jurisdiction of the IMT over his client in connection with the death of the accused. At the time of the trial, Bormann's death was not confirmed, and therefore the court denied the lawyer's claim. However until the last day, Bergold maintained his position on cancelling of the proceeding against dead accused or, alternatively, suspending the proceedings until the accused could be questioned in court *viva voce.*

It should be noted that conducting a trial *in absentia* in a joint trial (in the presence of other defendants) is clearly poses the absent accused in a more disadvantaged position compared to other defendants. This was clearly seen at the Nuremberg trial as well as at some of some recent trials (for example in the notorious trial in the Netherlands court on the MH-17 flight in 2022).

5. Legal regulation of the *trial in absentia* in the modern international tribunals

In the modern international criminal courts and tribunals, the right of the accused to be present during the trial [Vasyakina 2018-2019:60] was enshrined in 1993, when the Statute of the International Tribunal for the Former Yugoslavia (ICTY) established this rule in article 21.4.d of the ICTY's Statute. Again, it was not an easy decision. As Judge G.McDonald (USA) stressed that the question of trial *in absentia* was one of the main stumbling blocks between the judges during their deliberation on the adoption of the Tribunal's Rules of Procedure [Robinson 2000:554-555]. For example, the proposal of Judge A. Cassese (Italy) was considered that a trial *in absentia* is admissible, but if the accused is brought to the tribunal, he or she should have the right to a new trial. However, it was MacDonald's proposal that was accepted - the possibility of holding some kind of veiled form of trial in absentia, during which the evidence of the prosecution would be presented and made public, and at the same time the defendant's lawyer would be "present". Despite the fact that, at first glance, Cassese's proposal looks more stringent, in fact it violates the rights of the accused to a lesser extent. The fact is that in the first case, a trial was envisaged, and the second proposal (which was adopted) only provides for the reading and publication (i.e. creating a public outcry) of the allegations of the prosecution in the presence of a lawyer (one-sided hearings instead of an adversarial process!). It is no coincidence that it was somehow recognized even by one of the judges of the ICTY (albeit in an attempt to justify the legality of this procedure)[6].

Thus, Rule 61 "Procedure in the event of the impossibility of executing a warrant of arrest", was included in the Rules of Procedure and Evidence. According to this Rule, the prosecutor must present evidence of the guilt of the person concerned, while he may, but is not obliged (!) to present witnesses. At first sight, as can be seen from paragraph D, the purpose of this procedure is - in the event that judges have recognized that there is substantial evidence of the guilt of individuals - issuance of an international arrest warrant. However, this purpose is in fact a clear repetition of Rules 47 and 55, which already provide for the issuance of an arrest warrant. Although the text of these Rules does not contain the word "international", it is clear that the warrant issued by the in-

[4] Nuremberg Trial Proceedings Vol. 1: Order of the Tribunal Regarding Notice to Defendant Bormann. URL: https://avalon.law.yale.edu/imt/v1-04.asp (accessed 12.01.2023).

[5] The notice in particular says: *"If Martin Bormann appears, he is entitled to be heard in person or by counsel. If he fails to appear, he may be tried in his absence, commencing November 20, 1945 at the Palace of Justice, Nuremberg, Germany, and if found guilty the sentence pronounced upon him will, without further hearing, and subject to the orders of the Control Council for Germany, be executed whenever he is found".*

[6] See the dissenting opinion of Judge Sidhwa in *Prosecutor v Rajic.* The judge argued that the procedure under rule 61 was forced to inform the public about the charges against specific individuals. Thus, one of the main tasks of the ICTY was once again confirmed as a weapon of ideological and psychological warfare against the Serbs. ICTY: *Prosecutor v. Rajic.* Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence. September 13, 1996. Separate Opinion of Judge Sidhwa. Para 7. URL: https://ucr.irmct.org/scasedocs/case/IT-95-12#... (accessed 12.01.2023).

ternational tribunal is international in nature. Thus, the purpose of the development and adoption of Rule 61 is different, not related to the issuance of an arrest warrant. In the practice of the ICTY, Rule 61 has been applied in a number of cases, in particular, in the case of D. Nikolić (IT-94-2-R61), the case of M. Martić (IT-95-11-R61), the Vukovar case (IT-95-13-R61), Rajic case (IT-95-12-R61), R. Karadzic and R. Mladic case (IT-95-5-R61; IT-95-18-R61).

Members of the tribunal, representing the civil law family, tried to recognize trial *in absentia* in ICTY. Contrary to this position, the judges from common law family prevailed. In ICTY trial *in absentia* was formally prohibited, but its "veiled" form was allowed. Article 61 of the rules of procedure allowed a *de facto* trial in absentia, which in practice proved to be a greater violation of the rights of the accused than the direct admission of a trial *in absentia* with the guarantee of a re-trial. Thus, at the level of the ICTY Statute, the trial *in absentia* was prohibited, and at the level of the rules of procedure, it was actually allowed.

Later all international (or internationalized) courts and tribunals followed the ICTY approach of recognition of the right of the accused [Kostenko 2001:64] to be tried in his or her presence their statutes (article 20 of the Statute of the International Tribunal for Rwanda, article 63.1 of the Statute of the International Criminal Court, article 17.4.d of the Statute of the Special Court for Sierra Leone, Regulation 2001/1 of the United Nations Mission in Kosovo and others). In the same time, many of these courts conducted trials in absentia. To understand this contradiction it should be highlighted that the modern ICCT distinct between the right of the accused to be tried in his/her presence on one hand, and the prohibition of the trial *in absentia* on another hand.

The practice of the International Tribunal for the Former Yugoslavia appears to be very contradictory and inconsistent [Mirovich 2012:218]. In *Prosecutor v. Blaskic* ICTY's Appeals Chamber noted that the process *in absentia* is unacceptable, since in this case establishing the guilt or innocence of the accused is extremely difficult and even impossible[7]. In the same time ICTY took different approach in the case *Prosecutor v. S. Milosevic*, when in April 2005 it attempted to continue the trial without the presence of the accused. Qualifying the situation as an "attempt", it should be noted that not any court hearings in the absence of the accused can be qualified as a violation of his right to be tried in his presence. So, for example, a meeting at which a sudden situation with the illness of the accused is discussed and at which a decision was made to adjourn the trial would be quite legal, since it would not violate the rights of the accused. At the same time, holding the court session without S. Milosevic remained only an "attempt" due to the exceptional courage of the witness. On April 19, 2005, it was announced that "the prison doctor recommended that the accused be left in the cell". This caused a lengthy discussion about whether it was possible to hold a hearing without the presence of the accused. The prosecutor's office argued that holding the hearing was not only possible, but also necessary, since the accused's poor health allegedly disrupted the normal course of the process. The court decided to hold court hearings without the participation of the accused. Formally, the court decided to "ensure the rights of the accused", which meant that S. Milosevic would have the opportunity to view the video recording of the cross-examination. However, the violation of the accused's right to have his trial in his presence was prevented by the witness Kosta Bulatovich, who refused to answer the prosecutor's questions without S. Milosevic.

A number of objective factors show that the judicial chamber deliberately made an unlawful decision, that is, it was not an error in the interpretation and application of law. First, the court was offered a correct and legally justified decision (by an appointed lawyer). Secondly, even the witness himself presented additional arguments to the court, which, although they are optional, nevertheless, after their presentation, exclude - in the good faith of the court - the commission of an error by him. Thirdly, the court hearings were held in the absence of not only the accused, but also a medical report. Thus, the court conducted the hearing without knowing the nature of the accused's illness and thus was unable to correctly assess the duration of the possible break. Finally, fourthly, there is every reason to believe that this incident is one of the numerous provocations specially prepared by the ICTY against S.Milosevic. As it turned out later, S.Milosevic was against remaining in the cell and demanded that he be taken to court. However, during the hearings, the prosecutor's office

[7] Mezyaev A.B. Prava obvinyaemogo v sovremennom mezhdunarodnom ugolovnom protsesse (voprosy teorii i praktiki). Avtoref. diss. ...d-ra yurid. nauk [The rights of the accused in modern international criminal procedure (questions of theory and practice). Doctor of Juridical Sciences Degree Thesis]. Moscow. 2013. P. 23 (In Russ.).

and the court proceeded from the thesis they themselves invented about Milosevic's unwillingness to come to court in connection with his illness. Raises questions and the medical report of the prison doctor Falke, which was submitted only a few hours after the end of the hearing on April 19. However, there is no reason why this report (or at least the information itself) should not be submitted immediately. Thus, objectively, the court could not have made a mistake: the "flaws" are too great to assume this. The totality of these shortcomings speaks precisely about the intentionality of the decision. Even if we take into account the fact that the court considered S.Kay as the legal lawyer of S.Milosevic (since he himself appointed him to this position), then on that day the lawyer did not have the authority to represent his interests from S.Milosevic [Mezyaev 2005:94-99].

So, for example, at the trial of the *Prosecutor v. Bizimungu et al.* in the ICTR, each absence of one of the accused is preceded by a notification by the lawyer that the accused is absent voluntarily and he (the lawyer) has received a mandate to represent the interests of his client on that day[8]. As for the decision of the appellate chamber - and the decision of the judicial chamber was based precisely on this decision - it cannot serve as the basis for the decision to hold the court session in absentia, since the decision of the appellate chamber itself concerned the question of the "participation" of the accused in the process, and not the holding process in absentia.

Special Court for Sierra Leone conducted the trial *in absentia* in the case *Prosecutor v. Sesay, Kallon and Gbao* (RUF case) in relation to the accused Augustine Gbao. This accused refused to recognize this court and the SCSL found nothing better than to interpret it as his waiver of his right to appear before it. This is a huge misinterpretation of the position of the accused, who justifiably raised very serious questions of law, that the Court failed to answer properly. This misinterpretation of the legal arguments of Gbao was actually the result of this failure to answer more fundamental issue related to the legality and legitimacy of SCSL.

The same approach of recognition of the right to be tried in his/her presence on one hand, and conducting the part of the trail in absentia was demonstrated in the practice of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Article 35(d) of the Law Establishing the ECCC and article 81 of this court's Rules of Procedure prohibit trial *in absentia,* but again this was the result of serious disputes between the Cambodian and international judges of this tribunal. It is impossible not to note the influence of international legal regulation of this right on the legal systems of states [Benderskaya 2009:36]. In the same time during the trial in a case *Prosecutor v. Ieng Sari* the part of the proceedings was conducted *in absentia.*

The only international court that *explicitly* recognizes the possibility of holding a trial *in absentia* is the Special Tribunal for Lebanon (STL). Article 22 of the STL Statute allows trials *in absentia* in three specific cases: the defendant's waiver of his or her right to be present at the trial, the state's refusal to transfer the accused to the tribunal, and failure to locate the accused in hiding. This provision of the Statute of the STL was applied in the case *Prosecutor v. D. Ayyash and others.*

The question cannot but arise as to what was the reason for such a sharply different attitude towards trials in absentia, when the Special Tribunal for Lebanon was set up. However, the fact that the trial in absentia has become the only trial in the STL suggests that such a scenario was planned in advance. At the same time, it cannot be ruled out that this tribunal was created not so much to find out the truth, but to declare certain political forces guilty, and the fulfillment of this task should not have been dependent on the presence of certain persons at the disposal of the court. This version is to a certain extent confirmed by other "oddities" of the Special Tribunal for Lebanon, in particular its selectivity. Against the background of several dozen assassinations of heads of state and government around the world, the decision to create a special international court in relation to the assassination of the head of the Lebanese government (moreover, the former one) looks like a clear dissonance.

The STL's approach towards trial in absentia made a bad influence in some other international courts. For example the Bangladesh International Crimes Tribunal (BICT) also recognized the possibility of conducting the trial without the accused present. However, this tribunal, despite its "international" name, is neither international nor internationalized. According to the classification of Prof. A.Volevodz, BICT is a "pseudo-international" or "quasi-international" institution [Volevodz 2011:325]. However,

[8] ICTR: *Prosecutor v. Bizimungu et al.* Minutes of proceedings of October 26, 2007.

the reason for inclusion of a provision on the possibility of holding a trial in absentia in the BICT Statute [Herath 2014:4] was reference to the "abolition by the UN of the ban on holding a trial in absentia by the adoption of the Statute of the Special Tribunal for Lebanon". The conclusion about the "cancellation" of the right of the accused to be present at his trial is clearly unfounded: the UN Security Council resolution on the adoption of the statute of a particular tribunal cannot "cancel" the norms of international treaties.

The "Lebanese precedent" was a clear dissonance to the trend, if not towards a complete ban on trials in absentia in international criminal proceedings, then towards further restriction of such processes. However, it was difficult to imagine that it would become the basis for an almost complete reversal in this matter.

In 2021-2022, a trial was held in the Netherlands against those accused of shooting down an aircraft that was flying MH-17. Although this process was carried out in national jurisdiction, it had a pronounced international character. In fact, this trial was conceived as a trial of the Russian Federation as a state. This is clearly evident from the nature of the indictment, in which the defendants were chosen for their connection to Russia's top military and political leadership. The fact that this court did not aim to clarify the truth is also evidenced by the course of the investigation, in which the most important evidence was discarded that refuted the anti-Russian version of the prosecution. For all the accused, this trial was held *in absentia*. Only one accused was represented by a lawyer of his choice. The remaining three were represented by counsel by appointment of the court.

On November 24, 2022, the Prosecutor of the International Criminal Court, K. Khan, made a request to the Pre-Trial Chamber to hold hearings on the confirmation of charges *in absentia* against Joseph Koni in the context of the situation in Uganda. This is the first time in the history of the ICC that Article 61(2)9(b) of the ICC Statute and Rules 123 and 125 of the ICC Rules of Procedure and Evidence have been invoked.

A number of authors emphasize a qualitatively new stage that the world community has entered in the last years [Ivanov, Korzhenyak, Lapikhina 2021:9]. The activity of the modern international criminal courts and tribunals demonstrates a clear shift in the previous tendency to the strengthening of the fair trial guarantees to the derogation of them. It looks as an integral part of the western approach to create so-called "rules based order" [Vylegzhanin et al. 2021:35] instead of international law. One of the sharp example is the attempt of the ICCT to interpret the **right** of the accused to be present at the trial **as a duty**. During the trial in the case *Prosecutor v. Mucić et al.* Judge A. Karibi-White (Nigeria) ordered to bring the accused to the courtroom (who refused to come to court due to his poor health), «by whichever method one can bring him». Only a week later the judges were able to find some arguments to explain the behavior of the presiding judge. The reason for making such a decision was the practice of states (which allegedly proceeds from the fact that in such circumstances the accused is brought to court by force). However, firstly, the practice of only a very limited number of states of a very unclear selection[9] (Britain, USA, Australia, Italy and Bosnia) was considered, and secondly, the practice of states in itself is not a source of law in itself and at best could only be used as an aid to the interpretation of existing rules of law. However, the Trial Chamber did not establish such rules of law. It is absolutely clear that this decision of the judges is not only unreasonable, but also incorrect. The aggressive and unreasonable approach of the presiding judge in *Mucic* could be compared with the practice or other tribunals of even in other cases of the very ICTY.

In *Prosecutor v. C.Taylor* the Special Court for Sierra Leone, the presiding judge, before starting the trial, declared that the accused had expressly waived the right to be present at that session, that he was represented by counsel, and in accordance with rule 60 of the Rules of Procedure, a hearing may be held in the absence of the accused[10].

In *Prosecutor v. Kenyatta* and *Prosecutor v. Ruto* cases the Trial Chamber of the International Criminal Court (ICC) held that being present at trial is not only a right of the accused under article 67(l) (d), but also a duty under article 63(1). This conclusion looks very doubtful, since the assertion that a right is an obligation is devoid of legal logic and deprives one conclusion of its meaning. The right can be exercised by the accused at his choice, and cannot be magically transferred into a duty. At the same time, in the same

[9] *De facto,* the selection of legislation for this "analysis" was based on the the nationality of judges and defendants.

[10] See the transcript of the hearing in the case of *Prosecutor v. Ch. Taylor* of 6 July 2009. P. 24270. URL: http://www.rscsl.org/Documents/Transcripts/Taylor/6July2009.pdf (accessed 12.01.2023).

decisions, the judicial chambers recognized their right to give permission to the accused to be absent during the process. Later, the ICC Rules of Procedure and Evidence were amended to deal with the ability of the accused to be absent from the trial. In the Appeals Chamber decision in *Prosecutor v. Ruto,* although the defendant was allowed not to attend the trial, exceptions were made for certain stages of the trial [Suhfree 2019:47]. Thus, a number of trial stages were recognized as requiring the obligatory presence of the accused. However, the presence at the trial is precisely the right of the accused, and not an obligation. Such a manipulation is hardly could be called as a mistake of interpretation. It is a deliberate attempt to change the existing law[11].

6. Conclusion

The activity of the modern international criminal courts and tribunals demonstrates a trend of ever greater restriction of the rights of the accused. In some cases, one can even speak of the degradation of those high standards of human rights protection that were created by universal and regional international law [Kohler 2003: 112]. This also applies to the right of the accused to be tried in his/her presence.

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About the Author

Alexander B. Mezyaev,
Doctor of Juridical Sciences, Professor, Head of the Department of Constitutional and International Law University of Management "TISBI"

13, ul. Mushtari, Kazan, Russian Federation, 420012

alexmezyaev@gmail.com
ORCID: 0000-0002-5318-3029

Информация об авторе

Александр Борисович Мезяев,
доктор юридических наук, профессор, заведующий кафедрой конституционного и международного права, Университет управления «ТИСБИ»

420012, Российская Федерация, Казань, ул. Муштари, д. 13

alexmezyaev@gmail.com
ORCID: 0000-0002-5318-3029