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**Implications of the Age and Health of the Charged Persons & Accused
Before the Extraordinary Chambers in the Courts of Cambodia**

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TABLE OF CONTENTS

Background:	3
Executive Summary:	4
Discussion:	9
I. Mental Fitness	9
A. General Rule – Fitness to Stand Trial	9
Recommendation – Fitness to Stand Trial	12
B. Temporal – Charged Person has the Right to Request an Expert to Assess His or Her Fitness to Stand Trial During the Pre-Trial and Investigation Stages	13
C. “Adequate Reason” Required for the Appointment of an Expert to Assess Fitness to Stand Trial	14
i. Assessment by Doctor Should be within their Specialty	15
Recommendation – Expert Assessment	18
D. Burden of Proving the Accused’s Fitness to Stand Trial	19
Recommendation – Burden of Proof	20
II. Physical Fitness	21
A. Physically Fit for Detention	21
i. Provisional Release on Humanitarian Grounds Due to Medical Conditions Incompatible with Detention	23
1. “Practically Unconditional” Provisional Release	23
2. Conditional Provisional Release Equivalent to “House Arrest”	24
ii. Provisional Release Allowed When Adequate Medical Treatment Is Otherwise Unavailable at the Detention Unit	26
Recommendation for Detention/Provisional Release (Other than Fitness)	27
B. Right to be Present at Different Stages of the Proceedings	27
i. Pre-Trial/Investigation	27
ii. Trial	28
iii. Appeals	28
C. Physical Presence at Trial	29
i. General Rule – Right to be Physically Present	30
D. Waiver of the Right to be Present – Trials <i>in Absentia</i>	31
E. Exceptions to the Right to be Present – Trials <i>in Absentia</i>	32
i. Intentional Acts	32
1. Intentional Refusals	33
2. Intentional Disruptions	34
ii. Unintentional Acts	36
1. Derogation Not Allowed for Unintentional Acts if a Reasonable Alternative Exists	37
F. Determination of an Accused’s Ability to be Physically Present at Trial	43
III. Consequences of Lack of Fitness to Stand Trial or Inability to be Physically Present at Trial	46
A. Unfit to Stand Trial	46
B. Periodic Review and Possible Reexamination	46
C. Curing Unfitness – Alleviating the Impairment of Capacity	47
D. Finite Adjournment to Promote Recovery	47
i. Consequences of Adjournment	48
ii. Resuming the Proceedings after a Temporary Adjournment	49
E. Accommodating Measures to Promote Physical Presence or Participation	49
i. Adjusted Trial Regime (Facilitating Physical Presence)	49
ii. Audiovisual Accommodations (Facilitating Effective Participation)	50
Recommendation – Accommodating Measures	52
F. Joinder Issues and Severance of Mentally or Physically Unfit Co-Accused	54
Recommendation – If Severance is Required	55

BACKGROUND

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is unique among the international tribunals due to, *inter alia*, the advanced ages of the Charged Persons and the Accused and their corresponding declining health. Born 17 November 1942, and starting his trial at the age of 66, Kaing Guek Eav (alias “Duch”) is the youngest individual before the ECCC.¹ The other four Charged Persons are at least ten years older than Duch, and their dates of birth are as follows: Ieng Thirith – 10 March 1932,² Khieu Samphan – 27 July 1931,³ Nuon Chea – 7 July 1926,⁴ and Ieng Sary – 24 October 1925.⁵ An international tribunal dealing exclusively with Charged Persons/Accused in their late sixties, late seventies, or early eighties presents unique challenges to the ECCC’s objective of “bringing to trial senior leaders ... and those who were most responsible” for the violations of international or Cambodian law during the reign of Democratic Kampuchea.⁶ In particular, because there are only five Charged Persons/Accused, the death or incapacity of one, or all, of them before the completion of their respective trial would inflict a serious blow to the ECCC as an institution and deny the rule of law from running its natural course.

This memorandum will explore the implications of the age and health of the five Charged Persons/Accused on their mental fitness to stand trial, to be detained, and to be physically present or effectively participate at trial, as well as possible accommodations or proactive

¹ Kaing Guek Eav alias Duch, Criminal Case File No. 002/14-08-2006, Investigation No. 001/18-07-2007, Order of Provisional Detention (OCIJ, 31 July 2007).

² Ieng Thirith alias Phea, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007-ECCC/OCIJ, Order of Provisional Detention (OCIJ, 14 Nov. 2007).

³ Khieu Samphan alias Hem, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007-ECCC/OCIJ, Order of Provisional Detention (OCIJ, 19 Nov. 2007).

⁴ Nuon Chea, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, Order of Provisional Detention (OCIJ, 19 Sept. 2007).

⁵ Ieng Sary alias Van, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007-ECCC/OCIJ, Order of Provisional Detention (OCIJ, 14 Nov. 2007).

⁶ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 1.

measures that the ECCC could implement to protect and respect the rights of the Accused to a fair trial while allowing the Court to reach a verdict before the inevitable organic death or mental or physical incapacitation of the elderly Charged Persons/Accused.

EXECUTIVE SUMMARY

Internationalized courts have found that an Accused's right to be mentally present is protected by the fitness to stand trial requirement, *i.e.*, endowment with a mental capacity sufficient to exercise his or her implied or expressed procedural rights to make his or her defense. As well as this definition of fitness to stand trial, the 2004 ICTY *Strugar* decision also provided the now-widely-accepted standard for assessing an Accused's fitness to stand trial: "[A]n accused is considered fit to stand trial ... when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights." The main focus of the fitness to stand trial requirement is the capacity and functioning of an Accused's mind. The mere presence of a physical or mental ailment and the corresponding possibility that it could affect the Accused's mind or mental capacity is not determinative. A mental or physical ailment will only be relevant if it actually affects the individual's mental capacity to exercise his or her procedural rights.

At the ECCC, the advanced ages of the Charged Persons/Accused should not affect or alter the application of the clearly established *Strugar* standard. The source that limits the mental capacity – be it purely physical, purely mental, a combination of both, or simply old age – is irrelevant. The determinative issue is the mental capacity, *i.e.*, the mental presence of the Accused during preparation for trial and at the trial itself. If a one-hundred-year-old individual

can still participate effectively and exercise their procedural rights before the ECCC, then that person is mentally present before the court and fit to stand trial.

Questions have been raised at the ECCC about when, *i.e.*, at what phase of the proceedings, a party can request an assessment of a Charged Person's fitness to stand trial. A Charged Person/Accused can request that the Pre-Trial or Trial Chamber appoint an expert to assess his or her fitness to stand trial during the ECCC's investigation or trial phases. However, the Chambers require an adequate reason to question a Charged Person's capacity to participate before appointing an expert to assess fitness to stand trial. While the ECCC has previously denied both of the requests for the appointment of an expert to assess the fitness of the Charged Persons, the ECCC has yet to consider recent jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) that requires doctors and experts to comment only with respect to issues that fall within their area of expertise. The ECCC previously allowed cardiologists to comment on the mental health of the Accused, something not allowed under the ICTY's latest jurisprudence. Furthermore, if the ECCC adopts the ICTY's reasoning, the Trial Chamber should also consider whether the medical reports relied on in its decisions are the product of a primary care physician or a medical specialist, because the two should not be accorded the same weight.

If the question of an Accused's fitness to stand trial arises before the ECCC, one party will be assigned the burden of proof. But this raises the question: Is the burden on the Prosecution to prove that an Accused is fit to stand trial or is the burden on the Defense to prove that an Accused is not fit to stand trial? The ICTY held that the burden is on the Defense to prove that an Accused is not fit to stand trial, and the ECCC appears to have adopted that position. However, the more recent and nuanced approach stated by the Special Panels for Serious Crimes

(SPSC) of East Timor in the *Nahak* decision found that the assessment required by the ICTY's fitness test effectively places the burden on the Prosecution to prove that the Accused possesses the capacity to exercise his or her procedural rights. Furthermore, placing the burden on the Prosecution is especially appropriate if the Pre-Trial Chamber, Trial Chamber, or the Prosecution previously raised the issue of fitness to stand trial.

While waiting to stand trial, all of the Charged Persons before the ECCC are currently provisionally detained. Consensus exists among the internationalized tribunals on releasing pre-trial detainees on humanitarian grounds when they are diagnosed with a terminal or life-threatening disease. Additionally, an Accused can be provisionally released for health reasons if effective medical treatment is not available at the detention unit or inside the host country. Currently, no evidence exists that either the Accused or Charged Persons before the ECCC suffer from a life-threatening or terminal disease, and according to the general practice of the ECCC, they will continue to be detained during the pre-trial phase. However, a shift is occurring at international tribunals toward a presumption that detainees should be provisionally released unless clear circumstances warrant their detention. The ECCC's presumption to detain Charged Persons could be challenged on the grounds that the detention of aging and infirm Charged Persons' would be more appropriate – and more in line with the shift occurring at internationalized courts – in the form of “house arrest” at a hospital or private residence.

During the trial phase, international law provides an Accused with the general right to be tried in his or her physical presence. The right to be present protects the right of the Accused to be physically present in the courtroom and therefore able to personally confront witnesses and mount a defense utilizing his or her procedural rights. Furthermore, the physical presence of the Accused at trial is of vital importance, not only because it is one of the minimum guarantees of

the International Covenant on Civil and Political Rights (ICCPR), but for the practical considerations of establishing the facts of the case and, if the Accused is convicted, to enable an appropriate and enforceable sentence to be passed.

The mental presence of an Accused, protected by the fitness to stand trial requirement, and the right to be physically present at trial are both mechanisms that guard against trials where an Accused is absent – be it in mind or body. The general prohibition of international law against trials *in absentia* would be void of any substance if it only required the physical – without the mental – presence of an Accused at trial. But does the same logic apply when an Accused is mentally fit to stand trial, but physically unable to attend the trial because of illness or disease? In those circumstances, courts must decide whether to proceed in an Accused’s absence (*i.e.*, a trial *in absentia*), implement accommodating measures that may derogate from the Accused’s right to be present (*e.g.*, require an Accused to participate using a videoconference link from the hospital or detention unit bed), or adjourn the proceedings. Internationalized courts have grappled with this question and no fully satisfactory answer has materialized.

Internationalized courts and the ECCC have specific rules allowing them to proceed in the absence of an Accused if he or she is intentionally disrupting the trial or refuses to attend. However, the analysis becomes much more complex when a delay, disruption, or absence of an Accused is due to an unintentional act – *e.g.*, a health condition. If absent for health reasons, the ECCC is in a particularly difficult situation because the ECCC Internal Rules require the consent of the Accused before the Trial Chamber can implement accommodating measures that prevent the physical presence of the Accused or continue the trial *in absentia*. While the Chamber can proactively implement an adjusted trial regime to accommodate an Accused’s physical inability to participate in long trial sessions taking place several days a week, the trial schedule can only

be adjusted to a certain point before the trial comes to an effective halt (*e.g.*, trial for half a day, one day a week). Likewise, an Accused can always waive his or her right to be present, but it is highly unlikely to occur when an Accused alleges that he or she is ill and believes that the proper course of action is the adjournment of the proceedings. If this situation arises, the ECCC will have to weigh the medical reports and decide whether or not an Accused's illness or ailment in fact prevents him or her from being physically present at trial or participating via a video-link. At least one court has held that an Accused who claims to be too unwell to attend court on a particular day bears the burden of showing that that is indeed the case.

If the Trial Chamber finds that an Accused is capable of being physically present or effectively participating via a video-link, but the Accused refuses to attend, the ECCC will most likely be forced to derogate from the Accused's right to be physically present at trial. In order to derogate from a fundamental right, the ECCC must be satisfied that no reasonable alternative exists – *e.g.*, adjourning the proceedings to facilitate recovery – and the derogation serves a sufficiently important objective – *e.g.*, avoiding substantial trial delays. If derogation is required, then the restriction or derogation must impair the right no more than is necessary to accomplish the objective. The Trial Chamber will have to walk a fine line between “over” restricting the right of an Accused to be present and achieving the objective of a reasonably expeditious resolution of the trial. If the ailment is not of the nature that recovery is possible or probable the ECCC will most likely be forced to require an Accused to participate effectively via an audiovisual link. Furthermore, if the Accused refuses to participate through the audiovisual link, then the ECCC will have to continue *in absentia*. The ECCC will be able to justify the trial *in absentia* because one of the ECCC Internal Rules (IR) provide an exception to the right to be present when an Accused refuses to attend trial. On whatever grounds the Trial Chamber

justifies a potential trial *in absentia*, it will likely tarnish the appearance of a fair trial. While by no means the ideal solution, continuing the trial *in absentia* may be the only option that allows for the trial to continue and preventing it from grinding to an effective halt.

Finally, while a trial proceeding with the joinder of multiple Accuseds may ostensibly appear to save time, it should be noted that the right to be present requires the contemporaneous physical presence of all of the Co-Accused at trial. If the Chamber is required to sever the cases of one or more of the Co-Accuseds due to trial delays as a result of health issues, an adjusted trial regime could be implemented, consisting of some Co-Accuseds being tried in the morning session, and the remaining Co-Accuseds tried in the afternoon session.

DISCUSSION

I. Mental Fitness

The fitness to stand trial standard protects the right of an Accused to be mentally present by requiring that he or she has a sufficient mental capacity to exercise his or her implied or expressed procedural rights. Without this requirement, a mentally incompetent defendant could be physically present throughout the pre-trial phase and the trial, but in reality, be mentally absent and incapable of mounting a meaningful defense.⁷

A. General Rule – Fitness to Stand Trial

While the narrow issue of determining whether or not a Charged Person or an Accused is fit to stand trial has yet to come before the ECCC, the ECCC Pre-Trial Chamber (PTC) defined fitness to stand trial in its decisions on whether to appoint an expert to assess Nuon Chea and

⁷ See Deputy General Prosecutor for Serious Crimes v. Josep Nahak, Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, ¶¶ 46, 48 (Special Panels for Serious Crimes in East Timor, 1 Mar. 2005) [hereinafter *Nahak* Decision].

Ieng Sary's fitness to stand trial.⁸ The ECCC core documents, the ECCC Internal Rules, and Cambodian law do not define "fitness to stand trial."⁹ Therefore, per IR 33, the ECCC PTC sought "guidance ... in procedural rules established at the international level." In two separate, but practically identical, decisions on Nuon Chea and Ieng Sary's request for the appointment of a psychiatric expert, the ECCC PTC adopted the definition and assessment of an Accused's fitness to stand trial put forward in the 2004 ICTY *Strugar* decision and the 2005 SPSC of East Timor *Nahak* decision.¹⁰

In the 2004 *Strugar* decision, Trial Chamber II of the ICTY enumerated the reasoning behind the fitness to stand trial requirement, the definition of fitness to stand trial, and the assessment of an Accused's fitness to stand trial.¹¹ In *Strugar*, counsel for the defendant claimed that the Accused, a retired General of the Yugoslav People's Army and almost seventy-one years old, had been rendered unfit for trial based on a variety of disorders, including vascular dementia, post-traumatic stress disorder, depression, arthritis, and kidney failure. Based on the medical evidence and the Trial Chamber's own observations of the defendant in the courtroom, the Chamber found the defendant fit to continue his trial, there being "no grounds for either discontinuing the proceedings ... or adjourning them."¹²

In reaching this decision, the *Strugar* Trial Chamber explained the reasoning behind the fitness to stand trial requirement by noting the significance of "a number of relevant procedural

⁸ See generally Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC10), Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, (21 Oct. 2008) [hereinafter *Ieng Sary* Decision on Psychiatric Expert]; see also generally Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC07), Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, (22 Oct. 2008) [hereinafter *Nuon Chea* Decision on Appointment of an Expert].

⁹ See *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 28.

¹⁰ See generally *id.*; see also generally *Nuon Chea* Decision on Appointment of an Expert, *supra* note 8.

¹¹ See generally Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, (Trial Chamber, 26 May 2004) [hereinafter *Strugar* Decision].

¹² *Id.* at ¶ 52.

rights” of the Accused contained in the ICTY statute.¹³ Providing an Accused various procedural rights presupposes “that an accused has a sufficient level of mental and physical capacity” to exercise them.¹⁴ The Chamber inferred from these procedural rights that an Accused must possess the capacity “to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify.”¹⁵ If the Accused does not possess such a minimum standard of overall capacity, the rights afforded to an Accused are rendered meaningless.¹⁶ More specifically, the Trial Chamber stated, “[t]he nature of these rights indicates that their effective exercise may be hindered, or even precluded if an accused's mental and bodily capacities, especially the ability to understand, i.e. to comprehend, is affected by mental or somatic disorder.”¹⁷ While it is possible that a deficiency in one or all of the above capacities could be sufficiently compensated for with the assistance of legal counsel, this presupposes that an Accused possesses a level of capacity that enables him or her to instruct counsel efficiently for this purpose.¹⁸

Strugar also provided for the assessment of an Accused’s capacity to exercise his or her rights:

[A]n accused is considered fit to stand trial ... when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings

¹³ For example, “At the commencement of trial proceedings the Trial Chamber is required to confirm that an accused understands the indictment (Art 20 par 3). The accused is, inter alia, entitled to defend himself in person (Art 21 par 4(d)), to examine the witnesses against him (par 4(e)), and to have the free assistance of an interpreter if he cannot understand or speak the language used in the Tribunal (par 4(f)).” *Id.* at ¶ 21.

¹⁴ *Id.*

¹⁵ See *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 30 (citing *Strugar* Decision, *supra* note 11, ¶ 36).

¹⁶ *Nahak* Decision, *supra* note 7, ¶ 38.

¹⁷ *Strugar* Decision, *supra* note 11, ¶ 23.

¹⁸ See *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 31 (citing *Strugar* Decision, *supra* note 11, ¶ 22).

(in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence.¹⁹

The mere diagnosis of a mental or somatic disorder or the identification of conditions that could possibly affect the functioning of an Accused's mind is not determinative.²⁰ By way of example, the fact that an Accused suffers from a mental disorder, *e.g.*, depression, or is afflicted with a physical impairment, *e.g.*, a renal disorder that has a chemical effect on the functioning of the brain, is not determinative.²¹ Instead, fitness to stand trial is determined solely by the relevant capacities of an Accused, requiring the Chambers to ensure that an Accused possesses the requisite competence/capacity to conduct his or her defense by exercising his or her procedural rights.²²

Furthermore, the capacities of an Accused need not be present “at their notionally highest level, or at the highest level that a particular Accused has ever enjoyed in respect of each capacity.”²³ Similarly, courts note that it is a fact of nature that individuals vary as to their intelligence and understanding.²⁴ These normal variations among individuals do not raise concerns about fitness for trial.²⁵ Thus, a finding of incompetence to stand trial must be based on something more significant than merely low intelligence on the part of a defendant or a decrease in his or her capacity compared to the past.²⁶

Recommendation – Fitness to Stand Trial

If the issue of fitness to stand trial arises again, the ECCC will presumably use the *Strugar*

¹⁹ *Strugar* Decision, *supra* note 11, ¶ 37; Prosecutor v. Vladimir Kovačević, Case No. IT-01-42/2-I, Decision on Accused's Fitness to Enter a Plea and Stand Trial, ¶ 27 (Trial Chamber, 12 Apr. 2006) [hereinafter *Kovačević* Decision on Fitness]. The Special Panels for Serious Crimes in East Timor applied this principle in the *Nahak* Decision, *supra* note 7, ¶ 121.

²⁰ See *Strugar* Decision, *supra* note 11, ¶ 46.

²¹ See *id.*

²² See *id.*

²³ *Id.* at ¶ 37; *Kovačević* Decision on Fitness, *supra* note 19, ¶ 27; *Nahak* Decision, *supra* note 7, ¶ 121.

²⁴ *Nahak* Decision, *supra* note 7, ¶ 122.

²⁵ *Id.*

²⁶ *Id.*

standard to assess the Accused/Charged Persons. At the ECCC, the advanced ages of the Charged Persons/Accused should not affect or alter the application of the clearly established *Strugar* standard. The *Strugar* standard essentially determines whether an Accused has the mental capacity to effectively utilize his or her express and implied procedural rights to make his or her case. The source that limits the mental capacity – be it purely physical, purely mental, a combination of both, or simply old age – is irrelevant. The determinative issue is the mental capacity, *i.e.*, the mental presence of the Accused during preparation for trial and at the trial itself. If a one-hundred-year-old individual can still participate effectively and exercise their procedural rights before the ECCC, then that person is mentally present before the court and fit to stand trial. Therefore, the *Strugar* standard, as currently stated, would be the most appropriate gauge of the Accuseds’ mental capacity to exercise their procedural rights.

B. Temporal – Charged Person has the Right to Request an Expert to Assess His or Her Fitness to Stand Trial During the Pre-Trial and Investigation Stages

ECCC IR 32 provides that the Office of the Co-Investigating Judges (OCIJ) or the Chambers may order a Charged Person or Accused to undergo a medical, psychiatric, or psychological examination by an expert to determine whether he or she is physically and mentally fit to stand trial. While previously contested, the ECCC PTC held in October 2008 that the issue of fitness to stand trial “is triggered from the very moment an individual is charged with a crime before the ECCC.”²⁷ Following a line of reasoning similar to that contained in *Strugar*, the PTC determined that because Charged Persons are vested with certain procedural rights – such as the right to be informed of the charges against them, to prepare their defense, and to defend themselves – the need to have a “level of mental and physical capacity” to exercise those rights is required during the judicial investigative or pre-trial phase of the proceedings as well as the

²⁷ *Nuon Chea* Decision on Appointment of an Expert, *supra* note 8, ¶ 34.

trial phase.²⁸ Furthermore, this “level of mental and physical capacity” is of particular relevance during the investigative stage of the proceedings to allow cooperation between the Charged Person and his or her counsel.²⁹ Therefore, the ECCC PTC held that “charged persons are in principle entitled to [an evaluation of] their capacity to exercise their procedural rights effectively during the investigation and pre-trial phase.”

C. “Adequate Reason” Required for the Appointment of an Expert to Assess Fitness to Stand Trial

Based on ECCC IR 32 and the holding of the PTC, a Charged Person or an Accused may undergo an examination to assess his or her fitness to stand trial during the investigation and pre-trial phase. However, the ECCC core documents, the ECCC IR, and Cambodian law do not specify the “prerequisites for a successful application for an order of examination by an expert.”³⁰ Therefore, the ECCC PTC looked to the procedures of the other international tribunals regarding the appointment of an expert to determine fitness to stand trial.³¹ The ECCC PTC held that an Accused or a Charged Person was entitled to have his or her fitness to stand trial “evaluated by an expert if [the] request [was] properly justified.”³² The ECCC PTC clarified the meaning of “properly justified” by relying on the *Stanišić* decision of the ICTY Trial Chamber and the *Nahak* decision of the SPSC.³³ *Stanišić* held that “there must be ‘an adequate reason’ to hold an inquiry into the Accused’s competence to stand trial.”³⁴ The *Nahak* Decision required a “sufficient basis” for the independent evaluation of a defendant’s competence to stand trial, coupled with “some degree of doubt” and a significant “level of concern” as to the “defendant’s

²⁸ See *id.*

²⁹ See *id.* at ¶ 26.

³⁰ See *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 37.

³¹ See *id.*

³² See *Nuon Chea* Decision on Appointment of an Expert, *supra* note 8, ¶ 35; see also *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 38.

³³ *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 38.

³⁴ *Id.* at ¶ 38.

competence to stand trial.”³⁵ Combining the *Stanišić* standard of “adequate reason” to hold an inquiry into competence, with the *Nahak* requirement of “doubt” as to the defendant’s competence, and the *Strugar* standard of fitness to stand trial, the ECCC PTC held that an “adequate reason to question the Charged Person’s capacity to participate, with the assistance of his Co-Lawyers, in the proceedings and sufficiently exercise his rights during the investigation” is required for the appointment of an expert to assess a Charged Person’s fitness to stand trial.³⁶

A request for the appointment of an expert by both the Prosecution and the Defense, or acquiescence by the Prosecution, is not dispositive as to whether the Chamber will appoint an expert to assess the fitness of an Accused to stand trial.³⁷ Before the ECCC PTC decided the issue of whether to appoint an expert to evaluate Nuon Chea and Ieng Sary’s fitness to stand trial, the Prosecution did not object to the appointment of a specialist. The Co-Prosecutors took the stance that even though the Charged Persons’ conditions did not satisfy the *Strugar* and *Nahak* tests, the Co-Prosecutors consented to the appointment of an expert out of an “abundance of caution,” owing to “the special nature of [the ECCC] and the advanced ages of its detainees.”³⁸ Notwithstanding the Co-Prosecutors’ support (or acquiescence), the ECCC found that an “adequate reason to question [Nuon Chea and Ieng Sary’s] capacity to participate,” did not exist. Accordingly, the PTC denied the request for the appointment of an expert.³⁹

i. Assessment by Doctor Should be within their Specialty

To determine if there is “an adequate reason to question the Charged Person’s capacity to

³⁵ *Nahak* Decision, *supra* note 7, ¶ 7.

³⁶ *See Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶¶ 39-41.

³⁷ *Nahak* Decision, *supra* note 7, ¶¶ 51, 72 (“In the present case, both the Prosecutor and counsel for Josep Nahak agreed that an independent evaluation of the accused should be conducted. They brought to the attention of this Court the contents of the psychiatric report prepared by Dr. Duncan Wallace.”); but *see Nuon Chea* Decision on Appointment of an Expert, *supra* note 8, ¶ 28.

³⁸ *Nuon Chea* Decision on Appointment of an Expert, *supra* note 8, ¶ 30.

³⁹ *See id.* at ¶ 42.

participate in the proceedings,” courts rely on medical assessments by doctors and the Court’s own observations.⁴⁰ As discussed above, Defense counsel for Nuon Chea requested that the ECCC appoint a specialist – a “qualified psychiatrist, clinical psychologist, or geratologist” for a “further evaluation ... of a markedly different nature than that of which has already been ordered by the OCIJ.”⁴¹ The Defense requested the appointment of a specialized doctor because the CIJs had previously ordered four cardiologists to determine, *inter alia*, any medical conditions and “their possible effects on the memory of the detainee and his capacity for comprehension.”⁴² In the decision denying the appointment of an expert, the PTC noted that although none of the doctors who examined Nuon Chea were specialists in either psychiatry or psychology, their reports concluded that the Charged Person’s capacities were not “significantly affected by his cardio-vascular ailments and that his cognitive functions [were] normal for a person of his age.”⁴³ Finally, the PTC noted that their own observations of the Charged Person’s behavior were compatible with the opinions expressed by the four cardiologists.⁴⁴

Similarly, in the Ieng Sary request for an expert to assess his fitness to stand trial, the CIJs ordered an evaluation by cardiologists and urologists to determine the “nature and gravity of the Charged Person’s ailments.”⁴⁵ However, the Ieng Sary Defense team argued for an expert assessment of the Charged Person’s psychiatric health, fearing that the Charged Person’s “mental state may deprive him of [the] essential ability to consult with” his defense team and “assist in his own defense.”⁴⁶ Based on the medical reports, expert reports, and the case file, the PTC concluded that there was no indication that the Charged Person’s physical ailments might have

⁴⁰ See *Strugar* Decision, *supra* note 11, ¶ 52.

⁴¹ *Nuon Chea* Decision on Appointment of an Expert, *supra* note 8, ¶¶ 28-29.

⁴² *Id.* at ¶ 36.

⁴³ *Id.* at ¶ 39.

⁴⁴ See *Nuon Chea* Decision on Appointment of an Expert, *supra* note 8, ¶ 42.

⁴⁵ *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 42.

⁴⁶ *Id.* at ¶¶ 4, 36.

an effect on his mental capacity.⁴⁷ Additionally, the PTC noted that Defense counsel's mere assertions of mental health issues were insufficient in light of the information contained in the medical reports "to warrant the appointment of a psychiatric expert."⁴⁸

However, following the two ECCC decisions, in April 2009, the ICTY *Stanišić* Trial Chamber emphasized that when assessing the health of an Accused, a doctor of one specialty should limit his or her diagnoses or recommendations to those aspects that fall "within the boundaries of [his or her] expertise."⁴⁹ The Chamber emphasized that a court-appointed psychiatric expert should not comment on "an Accused's *physical* ability to withstand proceedings" because such comments fall outside the scope of their specific expertise for which they were appointed.⁵⁰ Additionally, the Chamber provided a concrete example of how this reasoning applies vice versa, that an expert appointed to comment on physical ailments should not comment on psychological issues, the Chamber stated, "[L]imited weight will be given to ... a gastroenterologist's comments about the mental health of the Accused."⁵¹ Furthermore, the ICTY noted that it should be taken into consideration whether the medical reports are the product of a "primary care physician as opposed to medical specialists."⁵²

While the reporting doctors should utilize all available information relevant to the diagnoses of an Accused, the ICTY requires a doctor to report medical facts within that doctor's respective

⁴⁷ *Id.* at ¶¶ 43-44.

⁴⁸ *Id.* at ¶ 45.

⁴⁹ Prosecutor v. Jovica Stanišić and Franko Simatović, Case No IT-03-69-PT, Decision on Prosecution Motion for Revocation of Jovica Stanišić's Provisional Release and Re-Assessment of his Health and Revocation of Franko Simatović's Provisional Release, ¶ 40 (Trial Chamber, 24 Apr. 2009) [hereinafter *Stanišić* Decision on Re-Assessment of Health].

⁵⁰ Prosecutor v. Jovica Stanišić and Franko Simatović, Case No IT-03-69-T, Decision on Urgent Defence Request for Further Submissions of Psychiatric Medical Expert and Decision on Defence Motion to Redact Medical Reports, ¶ 13 (Trial Chamber, 6 Aug. 2009) [*Stanišić* Decision on Urgent Defence Request for Further Submissions of Psychiatric Medical Expert].

⁵¹ *Stanišić* Decision on Re-Assessment of Health, *supra* note 49, ¶ 16.

⁵² Prosecutor v. Jovica Stanišić and Franko Simatović, Case No IT-03-69-PT, Decision on Start of Trial and Modalities for Trial, ¶ 20 (Trial Chamber, 29 May 2009) [hereinafter *Stanišić* Decision Start of Trial and Modalities for Trial].

area(s) of expertise in order for the Court to make a legal determination as to the Accused.⁵³ The methodology employed by an expert, including the administration of specific medical tests, is the prerogative of the court-appointed expert.⁵⁴

Recommendation – Expert Assessment

Generally, individuals of advanced age and deteriorating health are more prone to mental and physical health issues. In particular, the four Charged Persons expected to be tried together in Case 002 have required frequent hospitalization or medical treatment.⁵⁵ Moreover, the Prosecution did not object to the Defense request for the appointment of an expert and implicitly condoned the request by the *Nuon Chea* and *Ieng Sary* Defense teams. Nuon Chea and Ieng Sary may very well have ample capacity to exercise their procedural rights to make their case. However, considering the one-of-a-kind, possibly once-in-a-lifetime, nature of the ECCC and the elderly Charged Persons before it, proactive health assessments by the ECCC from the outset would be prudent. The ICTY has supported such a position, reiterating “the importance of complete and transparent medical reporting.”⁵⁶ It is recommended that the ECCC, as a matter of procedure, appoint specialists to conduct, within their respective area(s) of expertise, a comprehensive physical and mental health evaluation of each detainee upon arrival at the ECCC Detention Unit to establish a health benchmark. The benchmark would be available to all the parties and Chambers, reduce the need for future general assessments by a medical expert, and

⁵³ *Stanišić* Decision on Urgent Defence Request for Further Submissions of Psychiatric Medical Expert, *supra* note 50, ¶ 15.

⁵⁴ *Id.*

⁵⁵ See *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 42; see also “Access of attorneys to the accused ‘Lawyers Denied Access to Hospitalized Ieng Sary,’” The Cambodian Daily, 31 Dec. 2008; “Jailed KR leader twice hospitalized this week,” The Phnom Penh Post, 5 Jan. 2009; “‘Ieng Sary’s Health Unclear’ Hague Doctor,” The Cambodian Daily, 24 Feb. 2009; “Khmer Rouge Foreign Minister too ill to attend genocide tribunal,” DPA 26 Feb. 2009; “Ailing former KR foreign minister next in the dock,” The Phnom Penh Post, Feb 26, 2009.

⁵⁶ *Stanišić* Decision on Urgent Defence Request for Further Submissions of Psychiatric Medical Expert, *supra* note 50, ¶ 18.

would potentially provide a valuable medical history to a future specialist(s) appointed by a Chamber to evaluate a detainee's mental fitness to stand trial or physical capacity to attend or participate in the proceedings.⁵⁷

On the other hand, if the ECCC continues to follow the internationally accepted assessment procedures of only appointing an expert when an “adequate reason” arises, then, in accordance with the most recent jurisprudence of the ICTY, any future specialist appointed by the ECCC should be confined to commenting only on his or her area(s) of expertise. Furthermore, the fact that a primary care physician, as opposed to a medical specialist, prepares a medical report should be considered in how much weight the Chamber affords the report.

D. Burden of Proving the Accused's Fitness to Stand Trial

In the decisions on Nuon Chea and Ieng Sary's request for the appointment of a psychiatric expert, the ECCC PTC adopted the burden of proof as described in *Strugar*.⁵⁸ In the ICTY *Strugar* decision, the Chamber held that the burden is placed on the Defense to prove by a “balance of probabilities” that the Accused is not fit to stand trial.⁵⁹ The “balance of the probabilities” standard is a lower evidentiary threshold than the “proof beyond a reasonable doubt standard,” requiring proof that “it is more probable than not” that the defendant's competence has been demonstrated.⁶⁰

However, the 2005 SPSC *Nahak* decision found that the *Strugar* assessment of the evidence “operates as the functional equivalent of placing the burden on the Prosecutor to prove the

⁵⁷ See Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-T, Reasons for Decision Denying the Stanišić Defence Request to Postpone the Court Proceedings and Decision Proceeding with the Court Session of 29 June 2009 in the Absence of the Accused, ¶¶ 4, 15 (Trial Chamber, 22 July 2009) [hereinafter *Stanišić* Reasons 29 June 2009] (Noting that there must be a change in the mental or physical health to warrant an adjournment).

⁵⁸ See generally *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8; see also generally *Nuon Chea* Decision on Appointment of an Expert, *supra* note 8.

⁵⁹ See *Strugar* Decision, *supra* note 11, ¶ 38.

⁶⁰ See *id.* at ¶ 38; see also *Nahak* Decision, *supra* note 7, ¶ 59.

defendant's fitness for trial.”⁶¹ Because the *Strugar* assessment requires that an Accused possess a minimum level of capacity, the burden of proving that the Accused does in fact possess such a capacity will inevitably fall on the Prosecution.⁶² While a “presumption of competence to stand trial” that resembles the “presumption of sanity” might exist, it has yet to be enumerated or expressed in any of the core documents, rules, or jurisprudence of the existing international courts.

Moreover, when both the Prosecution and the Defense address the issue of a Defendant's fitness for trial, the SPSC noted that there is no reason to place the burden of proof on the Defendant merely because his or her lawyer formally filed a motion on the point.⁶³ Placing the burden on the Prosecution to prove an Accused's fitness to stand trial is especially appropriate when the court has already appointed an expert to evaluate an Accused's condition. The *Nahak* decision noted that the appointment of an expert requires a determination by the Court that sufficient doubt existed as to the Accused's fitness to stand trial. Therefore, imposing or shifting the burden onto the Prosecution at this juncture is appropriate to alleviate that previously established doubt and thus prove that the Accused is in fact mentally fit to stand trial.⁶⁴

Recommendation – Burden of Proof

There are essentially two options when assigning the burden of proof. As the ECCC has already indicated in its PTC decisions, it will presumptively adopt the *Strugar* reasoning and allocate the burden of proof to the Defense. However, according to the more recent and nuanced *Nahak* reasoning, when determining which party has the burden of proving fitness to stand trial,

⁶¹ *Nahak* Decision, *supra* note 7, at FN 57, ¶¶ 152-154; *see also Strugar* Decision, *supra* note 11, ¶ 37.

⁶² *Strugar* Decision, *supra* note 11, ¶ 37 (“[A]n accused is considered fit to stand trial ... when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence.”); *see also Nahak* Decision, *supra* note 7, ¶ 121.

⁶³ *Nahak* Decision, *supra* note 7, FN 57 and ¶¶ 152-154.

⁶⁴ *Id.*

the Court should consider whether the PTC or TC appointed an expert and whether the Prosecution supported or objected to such an appointment. If the PTC or TC appointed an expert to evaluate the detainee's condition, thus acknowledging doubt as to the Accused's fitness, then the burden should be shifted to the Prosecution. Similarly, if the Prosecution initially raised or supported a request by the Defense to assess the Accused's fitness to stand trial, then the burden should be shifted to the Prosecution. It would be consistent with *Nahak*'s interpretation of *Strugar* for the ECCC to place the burden on the Prosecution to prove the Accused's fitness to stand trial in all circumstances, even when the Chambers did not appoint an expert and the Prosecution did not raise or support the appointment of an expert. In this instance, the Chamber could rely on the language and structure of the *Strugar* assessment itself to justify its decision to place the burden on the Prosecution. Additionally, the Chamber could note that, since the arrest and detention of the Charged Persons, an inherent doubt has always existed about the Charged Persons' fitness to stand trial due to their extraordinarily advanced ages and deteriorating health. Moreover, any unstated "presumption of fitness to stand" that might exist, would hold little weight considering the age and health of the Charged Persons.

II. Physical Fitness

A. Physically Fit for Detention

The ECCC has never provisionally released a Charged Person.⁶⁵ The ECCC Internal Rules (IR) do not contain an explicit provision for release from detention due to the health of a

⁶⁵ Anne Heindel Amicus Brief, In the Matter of the appeal by Ieng Sary against the order of provisional detention by the Office of the Co-Investigating Judges dated 14 November 2007, Case No. 002/19-09-2007-ECCC-OCIJ (PTC03) ¶ 4; available at http://www.eccc.gov.kh/english/cabinet/courtDoc/36/Amicus_Brief_Anne_Heindel_on_Ieng_sary_appeal_C22_I_13_EN.pdf

Charged Person.⁶⁶ The Cambodian Code of Criminal Procedure (CCCP) refers to health concerns only in the context of initial arrest.⁶⁷ The CCCP states that the Prosecutor may examine an arrested person to verify if his or her health condition is “suitable for arrest,” but it does not provide a standard for determining “suitability.”⁶⁸

Similarly, the ICTR and SCSL have never granted provisional release to a Charged Person. Moreover, the ICTY and ICTR have held that pre-trial detention is the rule, rather than the exception.⁶⁹ In direct opposition to the ICTY, ICTR, and the ECCC’s detention practices, in April 2009, the Special Tribunal for Lebanon (STL) held that provisional release should be the norm and detention the exception.⁷⁰

Likewise, the IRs of the ICTY, ICTR, SCSL, STL, and the International Criminal Court (ICC) do not contain an explicit provision for release from detention due to the health of a detainee.⁷¹ The ICTY has ordered provisional releases not only on fitness grounds, but also on humanitarian grounds when a detainee suffers from a terminal disease and due to health concerns

⁶⁶ Extraordinary Chambers in the Courts of Cambodia Internal Rules (revised Mar. 6, 2009) R. 104(1)(a) (ECCC Internal Rule 64(1) provide that the conditions for provisional detention are met when the Co-Investigating Judges have a well founded reason to believe that a Charged Person committed the crimes charged by the Prosecutor and consider his or her detention necessary to prevent pressure on witnesses, preserve evidence, ensure the presence of the Charged Person at proceedings, protect the Charged Person’s security, or preserve public order.)

⁶⁷ See generally Cambodian Code of Criminal Procedure (*as adopted* 10 Aug. 2007).

⁶⁸ *Id.* at art. 99.

⁶⁹ See Kovačević Decision on Fitness, *supra* note 19, ¶ 6; see also Salvatore Zappalà, *Provisional Release*, in *The Oxford Companion to International Criminal Justice*, p. 519-520 (Antonio Cassese ed., 2009).

⁷⁰ See Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CH/PTJ/2009/03, ¶ 7 (Pre-Trial Judge, 15 Apr. 2009). Similarly, the ICC recently authorized the provisional release of an Accused in principle.

⁷¹ See International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, R. 65(B) (*as amended* 4 Nov. 2008) [hereinafter ICTY Rules]; see also International Criminal Tribunal for Rwanda (ICTR), Rules of Procedure and Evidence, R. 65(B) (*as amended* 14 Mar. 2008) [hereinafter ICTR Rules]; see also Special Court for Sierra Leone (SCSL) Rules of Procedure and Evidence, R. 65(B) (*as amended* 27 May 2008) [hereinafter SCSL Rules]; see also Rome Statute of the International Criminal Court, arts. 60(2), 58(1), *adopted* on July 17, 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* July 1, 2002 [hereinafter ICC Rome Statute]; see also Special Tribunal for Lebanon Rules of Procedure and Evidence, R. 102 (*as amended* 5 June 2009) [hereinafter STL Rules].

when adequate medical treatment is not available at the detention unit.⁷²

i. Provisional Release on Humanitarian Grounds Due to Medical Conditions Incompatible with Detention

When the medical condition of an Accused becomes incompatible with a state of continued detention, a court or tribunal should intervene and provide the necessary humanitarian remedies.⁷³

1. “Practically Unconditional” Provisional Release

If the condition of the Accused is terminal or immediately life threatening then provisional release with minimal conditions is appropriate.⁷⁴ The ICTY *Đukić* court cited the “exceptional circumstances” of Rule 65 when it ordered that the terminal cancer condition of the detainee was such as to be unequivocally incompatible with any kind of detention.⁷⁵ The extreme gravity of *Đukić*’s medical condition only allowed for palliative care and therefore justified a different environment. Relying solely on humanitarian reasons, the Trial Chamber ordered the provisional release of *Đukić* and allowed him to leave the territory of The Netherlands (the seat of the ICTY) so that he could join his family without delay.⁷⁶ The Chamber’s “practically unconditional” provisional release required very little of *Đukić* – notification of a change in address, periodic medical reporting, and guarantees to respond to any ICTY summons to ensure, if necessary, the

⁷² Prosecutor v. Simo Drljaca & Milan Kovačević, Case No. IT-97-24-T, Decision on Defence Motion for Provisional Release, ¶ 12 (20 Jan. 1998) [hereinafter *Kovačević* Decision on Provisional Release] (“Provisional release may be ordered when the accused’s state of health is not compatible with any form of detention.”); see also Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda (Trial Chamber, 7 Feb. 1997) (“[S]erious illness does not in itself justify the provisional release of an accused as long as adequate medical treatment can be administered to him by the Tribunal.”).

⁷³ Prosecutor v. Radolav Brđjanin & Momir Talić, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić, ¶¶ 32-33 (Trial Chamber, 20 Sept. 2002) [hereinafter *Talić* Decision].

⁷⁴ See *Kovačević* Decision on Provisional Release, *supra* note 72, ¶ 12; see also *id.*

⁷⁵ See generally *Talić* Decision, *supra* note 73; see also Prosecutor v. Djordje Djukić, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 4 (Trial Chamber, 24 Apr. 1996) [hereinafter *Đukić* Decision].

⁷⁶ *Đukić* Decision, *supra* note 75, at 4.

appearance of Đukić because the ICTY had yet to terminate the proceedings.⁷⁷ The Chamber released Đukić on 24 April 1996 on grounds of ill health and he died less than one month later on 18 May 1996.⁷⁸ On 29 May 1996, the Appeals Chamber issued a decision terminating the trial proceedings against the Accused.⁷⁹

2. Conditional Provisional Release Equivalent to “House Arrest”

When an Accused has an incurable disease, not in its final stage where death is imminent, conditional provisional release equivalent to “house arrest” is appropriate. In the ICTY *Talić* case, three doctors examined the Accused and concluded that the Accused had an incurable disease.⁸⁰ As in *Đukić*, the only possible treatment was palliative chemotherapy.⁸¹ The Trial Chamber concluded that Talić suffered from an incurable and inoperable locally advanced carcinoma with a rather unfavourable prognosis of survival even in the short term – the average survival of a patient in Talić’s condition is around one year and the chance that Talić would be alive in two years was around forty percent.⁸² Talić’s situation differed from the condition of Đukić because of the projected chances of survival and the stages of the disease; Đukić lived less than a month after being released while Talić died almost eight months after his release.⁸³

If provisionally released from the United Nations Detention Unit (UNDU), the Prosecution wanted Talić confined to a medical facility in Belgrade, citing a concern about the views of the witnesses and victims if the ICTY released Talić.⁸⁴ The Trial Chamber balanced two main

⁷⁷ *Id.*

⁷⁸ http://www.icty.org/x/cases/djukic/cis/en/cis_djukic_en.pdf

⁷⁹ http://www.icty.org/x/cases/djukic/cis/en/cis_djukic_en.pdf

⁸⁰ *Talić* Decision, *supra* note 73.

⁸¹ *Id.*

⁸² *Id.*

⁸³ The ICTY provisionally released Talić because of health reasons on 20 September 2002. Talić died almost eight months later on 28 May 2003 in Belgrade while on provisional release and on 12 June 2003, the Trial Chamber terminated proceedings against him. *See* http://www.icty.org/x/cases/Talić/cis/en/cis_Talić_en.pdf

⁸⁴ *Talić* Decision, *supra* note 73.

factors: the public interest cited by the Prosecution and the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence.⁸⁵ The Chamber found that any damage done to the witnesses and victims by releasing Talić would pale in comparison to damage done “to the institutional authority of the Prosecutor and even more so, that of [the ICTY], if the Trial Chamber disregarded the stark reality of Talić’s medical condition and ignored the fact that the Tribunal must assert, defend, and apply humanitarian law.”⁸⁶ The Chamber reasoned the chances were very minimal that Talić would still be alive at the conclusion of the trial, and even less likely that, if found guilty, he would be in a position to serve any sentence.⁸⁷

The Chamber noted that it would be inappropriate and inhumane to wait until Talić is “on the verge of death” or “half-dead” before ordering his provisional release.⁸⁸ Moreover, the rationale behind detention on remand does not function as a punishment but only as a means to ensure the presence of the Accused for the trial.⁸⁹ The Trial Chamber failed to understand why the Prosecution requested the continued detention of Talić knowing that in the near future, and in all probability before the end of the trial, his condition would be no different than Đukić, and thus necessitate “a practically unconditional provisional release.”⁹⁰ Furthermore, the palliative care and treatment that Talić’s condition required, and would require in the future, justified a different form of detention.⁹¹

The Chamber attached a number of conditions to Talić’s release to ensure that his on-going

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

trial would not be prejudiced.⁹² Unlike *Đukić*, the Chamber's conditions restricted Talić's ability to move freely through the imposition of a controlled residence requirement.⁹³ The Trial Chamber noted that such restrictions were tantamount to house arrest, and could still be considered a form of detention.⁹⁴ The Chamber strove to minimize any such risk of witness retaliation by restricting Talić's residence to an area distant from the one where he initially sought to be returned and which was part of the territory covered by the Indictment.⁹⁵

In the absence of a terminal or immediately life-threatening condition, detention is generally allowed.⁹⁶ In the 1998 ICTY *Kovačević* case, the Defense submitted that the medical condition of the Accused, consisting of both physical and mental disorders, was incompatible with incarceration at the UNDU.⁹⁷ The Trial Chamber found that the medical condition of the Accused did amount to an "exceptional circumstance," as required for release under ICTY Rule 65, and accordingly denied Kovačević's request for provisional release. The denial of provisional release expressly noted that while "the accused has a serious illness, there is no indication that the condition of the accused is terminal or immediately life-threatening."⁹⁸

ii. Provisional Release Allowed When Adequate Medical Treatment Is Otherwise Unavailable at the Detention Unit

A Charged Person/Accused can also be provisionally released for health reasons if effective

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Waiving the right to be present at trial, as discussed below in section II(D), can impact a Charged Person's request for provisional release. In *Talić*, the ICTY Trial Chamber took "into consideration [the Charged Person's] offer to waive his right to be present, should the proceeding against him continue" when reaching its decision to provisionally release him. However, the Trial Chamber clearly stated that it was "not imposing any such condition upon him as a pre-requisite for his provisional release mainly because of legal considerations, but certainly acknowledges his willingness not to obstruct the continuation of the trial against him." *Id.*

⁹⁶ *Kovačević* Decision on Provisional Release, *supra* note 72, ¶ 12.

⁹⁷ *Id.*

⁹⁸ *Id.*

medical treatment is not available at the detention unit or inside the host country.⁹⁹ Regarding the availability of treatment at the detention unit, the ICTY Chamber emphasized that the relevant issue is “whether the Accused [could] be adequately treated while detained...”.¹⁰⁰ Furthermore, if the Accused can be treated effectively in the detention center or within the host country, then it is irrelevant that “an accused who is ill would be in better spirits and more receptive to medical treatment in his home country with the support of his family.”¹⁰¹

Recommendation for Detention/Provisional Release (Other than Fitness)

While the general practice of the ECCC, ICTY, ICTR, and the SCSL is to detain Charged Persons during the pre-trial phase, a shift is occurring in at least one international tribunal to provisionally release detainees unless circumstances warrant detention.¹⁰² Currently, no evidence exists demonstrating that the four Charged Persons or the Accused before the ECCC suffer from a life-threatening or terminal disease. However, detention may not always be as clear when dealing with elderly detainees. While provisional detention is appropriate under international law, provisional release in the form of house detention with safeguards could be an appropriate option if the health of the detainees further deteriorates.

B. Right to be Present at Different Stages of the Proceedings

i. Pre-Trial/Investigation

There is no mention of the right to be present in the section of the ECCC Internal Rules addressing Pre-Trial Chamber Proceedings. Structurally, ECCC IR 81.1, which provides for the right to be present, is located in the IR under section E, “Proceedings Before the Trial Chamber.”

⁹⁹ *Id.*

¹⁰⁰ *See, e.g.,* Prosecutor v. Jovica Stanišić and Franko Simatović, Case No IT-03-69-PT, Decision on Provisional Release, ¶ 40 (Trial Chamber, 28 July 2004).

¹⁰¹ *Kovačević* Decision on Provisional Release, *supra* note 72, ¶ 14.

¹⁰² *See* Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, *supra* note 70, ¶ 7.

The ECCC PTC hears appeals from decisions made by the Co-Investigating Judges during the course of the investigation. This process is more analogous to an interlocutory appeal than a common law pre-trial hearing. A May 2007 ICTY separate opinion of Judge Shahabudeen noted, "...[T]here is generally no right to be present during the hearing of an interlocutory appeal."¹⁰³ Thus, the Accused may have no right to be present at Pre-Trial Chamber hearings.

ii. Trial

As noted above, ECCC IR 81.1 provides, "The Accused shall be tried in his or her presence." Internationalized courts have consistently held that the presence of the Accused at trial is "of vital importance," not only because it is one of the minimum guarantees of the International Covenant on Civil and Political Rights (ICCPR), but for the practical considerations of establishing the facts of the case and, if the Accused is convicted, to enable an appropriate and enforceable sentence to be passed.¹⁰⁴

iii. Appeals

The ECCC IR and CPC do not explicitly state that an Accused has a right to be present at an appeals hearing or judgment. On one hand, ECCC IR 109 requires the President of the Supreme Court Chamber at appeals hearings to inform the Accused of his or her fundamental rights as provided by the IR. Additionally, the IR provides that "[i]n all cases the Accused speaks last."¹⁰⁵ This appears to imply that the Accused must be present or at least participating in some way, perhaps via video conferencing. On the other hand, when the Chamber announces an appeal

¹⁰³ Separate Opinion of Judge Shahabudeen in Prosecutor v. Momcilo Krajisnik, Case No. IT-00-39-A, FN 27, (Appeals Chamber, 11 May 2007) (citing *Milat v. R.*, 205 ALR 338 (2004) (High Court of Australia)).

¹⁰⁴ International Law Commission (ILC), Draft Statute for an International Criminal Court, Report of the ILC on the Work of its Forty-Sixth Session, 2 May - 22 July 1994, U.N. GAOR, 49th Sess., Supp. No. 10, commentary to article 37 at 109 ¶ 4, U.N. Doc. A/49/10 (1994).

¹⁰⁵ See ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 66, R. 21(1)(d) ("Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.").

judgment, IR 111 provides that if “the Accused is absent, [the Chamber] may issue an Arrest and Detention Order.” The right of an Accused to be present at an ECCC appeals hearing or judgment is unclear at this point.

The ECHR has noted, “[T]he personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing.”¹⁰⁶ Accordingly, the ECHR has also noted that the right to be present may require the presence of the defendant for certain procedures on appeal that require the court to have the personal impression of the defendant.¹⁰⁷ The presence of an Accused at an appeals hearing is only required when there are “special circumstances warranting the applicant’s personal presence.”¹⁰⁸ For instance, the presence of an Accused may be required when an appeals chamber needs to examine an Accused about his or her motives or to assess his or her personality and character. Therefore, in certain instances, it is considered essential to the fairness of the proceedings that an Accused be present at the hearing of the appeal and afforded the opportunity to participate, together with his defense counsel.¹⁰⁹

C. Physical Presence at Trial

Likely because of its fundamental importance to the rights of an Accused, the majority of international jurisprudence on the right to be present focuses on the right of an Accused to be present during the trial stage. As mentioned above, the right of an Accused to be present at trial is universally recognized. Nonetheless, an Accused can waive his or her right to be present at trial. In the absence of a waiver given freely by an Accused, trials *in absentia* are allowed when

¹⁰⁶ Case of Michael Edward Cooke v. Austria, Application no. 25878/94, European Court of Human Rights, Judgment, ¶¶ 35, 42-43 (Court, 8 Feb. 2000).

¹⁰⁷ See Case of Pobornikoff v. Austria, Application no. 28501/95, European Court of Human Rights, Judgment, ¶ 31 (Court, 3 Oct. 2000).

¹⁰⁸ See Stanford v. United Kingdom, (Application no. 16757/90), European Court of Human Rights, Judgment, 11, ¶¶ 27-28 (Court, 23 Feb. 1994).

¹⁰⁹ See *Pobornikoff*, *supra* note 107, ¶ 31.

an Accused is absent because of an intentional act – a refusal to attend or disruptions – by the Accused. Courts treat such intentional acts as an implied waiver of the right to be present, thus allowing the trial to continue in the absence of the Accused with representation by counsel.

On the other hand, the absence of an Accused due to unintentional circumstances can generally only proceed *in absentia* with the procurement of the consent of the Accused demonstrated through an express waiver. Even with a waiver, accommodating measures should be implemented to allow the Accused to participate in the trial. If the Chamber cannot secure an express waiver then the Chamber will likely adjourn the trial until the unintentional delay is resolved, for instance, until the Accused recovers from an illness or surgery. When a Trial Chamber determines that the absence is due to no fault of the Accused, *i.e.*, unintentional, then only in exceptional circumstances could a court justify derogating from the Accused’s right to be present and continue the proceedings *in absentia* or with the Accused’s participation via an audio/video link.

i. General Rule – Right to be Physically Present

ECCC Internal Rule 81.1 clearly states that “[t]he Accused shall be tried in his or her presence...”. However, the ECCC core documents, the ECCC Internal Rules (IR), and Cambodian law do not define “presence.”¹¹⁰ Therefore, if this issue arises, the ECCC will seek “guidance ... in procedural rules established at the international level.”¹¹¹

The ECCC’s right of the Accused to be tried in his or her presence is consistent with international criminal law’s general prohibition against trials *in absentia* and the corresponding

¹¹⁰ See *Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 28.

¹¹¹ See ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 66, R. 33.

right to be present.¹¹² Appeals Chambers for both the ICTY and ICTR interpreted the right of the Accused to be present in their respective Statutes as “the right to be *physically* present.”¹¹³

The ICTR Appeals Chamber considers the physical presence of an Accused before the court, as a general rule, one of the most basic and common precepts of a fair criminal trial.¹¹⁴

D. Waiver of the Right to be Present – Trials *in Absentia*

An Accused can expressly waive his or her right to be present at the trial, allowing for it to be conducted *in absentia* with counsel present.¹¹⁵ However, even after waiving the right to be present an Accused can still request to effectively participate in the proceedings with the

¹¹² See International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S. No. 14668, vol 999 (1976), art. 14(3)(d); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, (*as amended* 29 Sept. 2008), art. 21(4)(d) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, (*as amended* 13 Oct. 2006), art. 20(4)(d) [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, (*as adopted* 14 Aug. 2000), art. 17(4)(d) [hereinafter SCSL Statute]; ICC Rome Statute, *supra* note 71, art. 63.1; *see also* *Strugar* Decision, *supra* note 11, ¶ 32 (holding that “in principle, trials in *absentia* are not permitted before the Tribunal”); *see also* Prosecutor v. Issa Hassan Sesay et al., Case No. SCSL-04-15-T, Ruling on the Issue of the Refusal of the Accused Sesay and Kallon to Appear for their Trial, ¶ 9 (Trial Chamber, Jan. 19, 2005) [hereinafter *Sesay* Decision] (finding that “[i]n effect, Article 17(4)(d) makes it a mandatory requirement for every person accused of crime within the jurisdiction of the Special Court for Sierra Leone to be tried in his or her presence); *see also* Report of the Secretary General Pursuant to paragraph 2 of the Security Council Resolution 808, 48th Sess., ¶ 101, U.N. Doc. S/25704 (1993) 27, ¶ 107. While the STL Statute provides for trials *in absentia*, this is unique to the STL. Statute of the Special Tribunal for Lebanon, *supra* note 71, art. 22. However, the trial *in absentia* provision could be a result of the civil law tradition of Lebanon, but more likely, its objective is to try suspects under Syrian jurisdiction not turned over to the STL. Christoph Safferling, *Trial in Absentia*, in Cassese, *supra* note 69, 542-543; *see also* Paola Gaeta, *To Be (Present) or Not To Be (Present)—Trials In Absentia before the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1165 (2007).

¹¹³ Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, ¶ 6 (Appeals Chamber, 16 May 2008) (emphasis in original) [hereinafter *Stanišić* Decision on Defence Appeal of the Decision on Future Course of Proceedings] (citing The Prosecutor v. Edouard Karemera et al., Case No. ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning his Right to be Present at Trial, (Appeals Chamber, 5 Oct. 2007) [hereinafter *Nzirorera* Decision]; Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, ¶¶ 11-13 (Appeals Chamber, 30 Oct. 2006) [hereinafter *Zigiranyirazo* Decision].

¹¹⁴ *See Zigiranyirazo* Decision, *supra* note 113, ¶ 11.

¹¹⁵ *See id.* at ¶ 14; *see also* *Stanišić* Decision on Defence Appeal of the Decision on Future Course of Proceedings, *supra* note 113, ¶ 6 (citing Ferdinand Nahimana et. al. v. The Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 96 (Appeals Chamber, 28 Nov. 2007); Slobodan Milošević v. The Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 13 (Appeals Chamber, 1 Nov. 2004) [hereinafter *Milošević* Decision]; *see* Brozicek v. Italy, Application no. 10964/84, European Court of Human Rights, Judgment, ¶ 45 (Court, 19 Dec. 1989) (holding that a trial without the presence of the accused might be permissible, if the accused voluntarily waived this right to be present); *see also* *Sesay* Decision, *supra* note 112, ¶ 16.

assistance of accommodating measures.¹¹⁶ Any waiver by the Accused must be a voluntarily and unequivocal act.¹¹⁷ To ensure that a waiver is given freely, courts will confirm the waiver with defense counsel and require an Accused to sign a statement acknowledging his or her absence from trial.¹¹⁸ For example, in the ICTY *Stanišić* case, the Accused signed one-day waivers of his right to be present for hearings on March 3-6, 2008, indicating his inability to attend court due to illness.¹¹⁹ Once signed, the waivers of the right to be present are then recorded in a daily record by the head of the detention facility.

E. Exceptions to the Right to be Present – Trials *in Absentia*

The right to be present is not absolute. Even when an Accused refuses to waive his or her right to be present, in certain circumstances exceptions will allow for the trial to proceed in the absence of the Accused. ECCC IRs 81.2 – 81.5 provide four enumerated exceptions to the right to be present. Three of the exceptions provide for trials *in absentia* when an intentional act(s) by an Accused prevents his or her presence. The fourth and final exception pertains to unintentional circumstances that prevent the Accused's presence, and therefore requires the consent of the Accused before the proceedings can continue in his or her absence. Similarly, the ICTY, ICTR, ICC, SCSL, and ECHR have all held that the right to be physically present is not absolute because an Accused can forfeit his or her right to be physically present at trial.¹²⁰

i. Intentional Acts

The ECCC IR provide exceptions to the right to be present for both intentional refusals to

¹¹⁶ See *Sesay* Decision, *supra* note 112, ¶ 16.

¹¹⁷ *Colozza v. Italy*, Application no. 9024/80, European Court of Human Rights, Judgment, ¶ 28 (Court, 12 Feb. 1985) (holding that “any waiver must be free and unequivocal.”).

¹¹⁸ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Future Course of Proceedings, ¶ 7 (Trial Chamber, 9 Apr. 2008) [hereinafter *Stanišić* Decision on Future Course].

¹¹⁹ *Id.*

¹²⁰ See *Stanišić* Decision on Defence Appeal of the Decision on Future Course of Proceedings, *supra* note 113, ¶ 6; *Sesay* Decision, *supra* note 112, ¶ 16.

attend trial and intentional disruptions at trial.¹²¹ While some exceptions for intentional acts are contained in the Rules of the internationalized tribunals, judicial decision of the tribunals have expanded these basic enumerated exceptions to include both refusals to attend trial and intentional disruptions.¹²²

1. Intentional Refusals

ECCC IR 81.3 and 81.4 both provide an exception to the right to be present when the Accused intentionally refuses to attend a proceeding. IR 81.3 provides an exception when “the Accused refuses to attend the proceedings” and IR 81.4 provides for a trial *in absentia* when “the Accused, following an initial appearance and having been duly summoned to the subsequent hearing, continues to refuse or fails to attend the proceedings[.]”

Likewise, Rule 60 of the SCSL provides for an exception when the Accused has made an appearance but refuses to attend trial.¹²³ In the SCSL *Sesay* case, the Chamber cited this exception when two of the Accused refused to appear at their trial.¹²⁴ Defense counsel stated that the two Accused did not wish to attend the proceedings anymore, but wanted their lawyers to represent them. The Chamber informed the two Accused of their obligation to attend the trial proceedings and they responded that they did not want to attend.¹²⁵ Accordingly, the Chamber tried both of the Accused *in absentia* based on their refusal to attend trial after being afforded the

¹²¹ See ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 66, R. 81.2 (Providing for an exception to the right to be present when the Accused is not in detention and “does not attend a hearing set by the Chamber.”) Since all the Charged Persons/Accused are in detention this exception will not be examined. Regardless, the analysis would be identical to the analysis under IR 81.3 and 81.4.).

¹²² ICTY Statute article 21(4)(d), ICTR Statute article 20(4)(d), and SCSL Article 17(4)(d) incorporate verbatim the language used in ICCPR Article 14(3)(d), which provides the accused with some minimum guarantees, one of which is the right of the accused to be tried in his presence, but does not enumerate any exceptions to that right. However, the Rules of Procedure adopted by each international tribunal enumerate certain general exceptions.

¹²³ “[T]he accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do.” SCSL Rules, *supra* note 71, R. 60. Rule 60 also provides an exception when “the accused, having made his initial appearance, is at large and refuses to appear in court.”

¹²⁴ See *Sesay* Decision, *supra* note 112, ¶ 16.

¹²⁵ *Id.*

opportunity.

While the ICTR and ICTY Rules do not provide an enumerated exception for an Accused's refusal to attend trial, the courts have found that such an exception exists. For example, in the ICTR *Barayagwiza* case, the Court held that when an Accused is "fully aware of his trial" and informed by the Court of his right to join at any time, but still refuses to attend, then the Accused actively chose not to be present at trial.¹²⁶ The ICTR further noted that when an Accused has been "duly informed of his ongoing trial, neither the [ICTR] Statute nor human rights law prevent the case against [the Accused] from proceeding in [the Accused's] absence."¹²⁷

Tribunals generally treat intentional acts of the Accused that cause his or her absence as a waiver of the right to be present. At the SCSL, an Accused that refuses to attend trial can be tried *in absentia* if the "Judge or Trial is satisfied that the accused has, expressly or impliedly, waived his right to be present."¹²⁸ For example, in *Sesay*, two Accused refused to attend trial and the Chamber subsequently held that both of the Accused waived their right to be present at their trial.¹²⁹

While other courts utilize the implied waivers to the right of the Accused to be present when an Accused refuses to attend, the ECCC IRs contain an enumerated exception. Therefore, if an ECCC Accused refuses to attend trial without any recognized justification (discussed below), *e.g.*, illness, the ECCC will have little difficulty proceeding in his or her absence.

2. Intentional Disruptions

ECCC IR 81.4 contains an exception to the right to be present for intentional disruptions that result in an Accused being "expelled from [the proceedings]."

¹²⁶ Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, ¶ 6 (Trial Chamber, Nov. 2, 2000).

¹²⁷ *Id.*

¹²⁸ SCSL Rules, *supra* note 71, R. 60.

¹²⁹ See *Sesay* Decision, *supra* note 112, ¶ 16.

The rules of the ICTY, ICTR, and ICC likewise provide for trials *in absentia* due to the disruptive behavior of an Accused. ICTY Rule 80(B) of the Rule of Procedure and Evidence of the International Tribunal (ICTY Rules), provides that “[t]he Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom.” Rule 80(B) of the ICTR Rules of Procedure and Evidence (ICTR Rules) and Article 63 of the Rome Statute of the ICC provide a similar exception for continued disruptions of trial.¹³⁰

The SCSL Rules do not contain an exception for the disruption of trial.¹³¹ Nevertheless, the SCSL Trial Chamber in the *Gbao* case held, “[I]t is not the policy of the criminal law to allow ... [an Accused’s] disruptive conduct to impede the administration of justice or frustrate the ends of justice.”¹³²

As with refusals to attend trial, courts generally hold that intentional trial disruptions are a waiver of an Accused’s right to be present at trial and, after the removal of the Accused from the courtroom, *in absentia* proceedings can continue with defense counsel present.¹³³ However, the ECCC IR contain an enumerated exception pertaining to intentional disruptions that allows for trials *in absentia*. While it is unlikely that an Accused before the ECCC will be found disruptive, if the situation occurs, then the ECCC IR have a clear provision that will allow the trial to

¹³⁰ “The Trial Chamber may order the removal of an accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed.” ICTR Rules, *supra* note 71, R. 80(B); “If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required.” ICC Rome Statute, *supra* note 114, art. 63.2.

¹³¹ See SCSL Rules, *supra* note 71, R. 60.

¹³² Prosecutor v. Issa Hassan Sesay et al., Case No. SCSL-04-15-T, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, ¶ 8 (Trial Chamber, 13 July 2004).

¹³³ See ICTY Rules, *supra* note 71, R. 80(B); ICTR Rules, *supra* note 71, R. 80(B).

proceed in the Accused's absence.

ii. Unintentional Acts

A Trial Chamber's determination of whether an Accused's condition or act is intentional – in the form of a delay, refusal to attend, or disruption of trial – or unintentional, is of great significance. While intentional acts may be held to be implied waivers of the right to be present, unintentional acts or conditions that are no fault of an Accused, but delay the trial, generally lead to a trial or appeals chamber emphasizing that derogation of the right to be present should be avoided if at all possible.

The ECCC's fourth enumerated exception to the right to be present pertains to unintentional acts. ECCC IR 81.5 states:

“[D]ue to health reasons or other serious concerns, the Accused cannot be present before the Chamber, it may, with the consent of the Accused, continue the proceedings in his or her absence.... The Accused may also request to follow the proceedings by appropriate audiovisual means. If questioning of the Accused is necessary, the Chamber may order that the Accused be questioned from his or her current place of abode, if necessary, by appropriate audiovisual means.”

ECCC IR 81.5 includes a requirement that the Trial Chamber obtain the consent of the Accused before a trial can proceed *in absentia* when the absence is due to health concerns. Once the Accused consents, then the Accused can “request to follow the proceedings by appropriate audiovisual means” or “be questioned from his or her current place of abode, if necessary, by appropriate audiovisual means.” Because the ECCC IR provide an explicit health provision that requires consent, it would appear to go against the spirit of the rules to find that legitimately unintentional absences or delays caused by the health of an Accused fit into one of the other exceptions provided by the ECCC IR that do not require consent: “failed to appear at hearing” (81.2), “refuses to attend” (81.3), or “refuse or fails to attend the proceedings, or is expelled from them,” (81.4) unless health is not found to be relevant.

None of the other internationalized courts contain enumerated exceptions in their Rules relating to unintentional absences, disruptions, or delays caused by the health of an Accused. The general view of international tribunals is that the delay or disruption of a trial due to an unintentional act of the Accused justifies his or her absence from the courtroom and the trial cannot continue until the Accused is once again present.¹³⁴ For example, in *Sesay*, the Chamber emphasized that the two Accused who refused to appear in court both “appeared to Detention authorities to be fit and healthy and ... have no medical condition that would prevent their attendance in court.”¹³⁵ Therefore, derogating from a fundamental right of an Accused, such as the right to be present, is generally not allowed when the absence or delay is due to no fault of the Accused.

1. Derogation Not Allowed for Unintentional Acts if a Reasonable Alternative Exists

Some international tribunal’s Trial Chambers have imposed accommodations that derogate from the Accused’s right to be physically present at trial, but that still allow him or her to “participate effectively” in the trial. However, before derogating from an Accused’s right to be present at trial, the proportionality principle must be satisfied.¹³⁶ The proportionality principle requires that “any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish this objective.”¹³⁷

¹³⁴ See *Sesay* Decision, *supra* note 112, ¶ 16; see generally *Stanišić* Decision on Future Course, *supra* note 118.

¹³⁵ See *Sesay* Decision, *supra* note 112, ¶ 16.

¹³⁶ Of course, derogation can occur after an Accused expressly waives his or her right to be present.

¹³⁷ *Milošević* Decision, *supra* note 115, ¶ 17; see also *Zigiranyirazo* Decision, *supra* note 113, ¶ 14; *Nziorera* Decision, *supra* note 113, ¶ 11. Furthermore, the United Nations Human Rights Committee has observed that any such restrictions “must be the least intrusive instrument amongst those which might achieve the desired result.” Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/rev.6, 12 May 2003, 176.

However, while derogation from the right to be present “may be warranted in light of substantial trial delays...derogation is not appropriate when reasonable alternatives exist.”¹³⁸

Derogation from a fundamental right is difficult to justify. For example, any derogation imposed on an Accused in relation to their right to be present has been subsequently overruled on appeal because the derogation did not satisfy the proportionality principle.¹³⁹ In those decisions, the Appeals Chambers consistently reasoned that it is inappropriate to derogate when the disruption or delay in the trial was due to no fault of the Accused and a reasonable alternative existed.¹⁴⁰

In the *Stanišić* case, three weeks before the trial commenced, the Trial Chamber found it necessary to derogate from the Accused’s right to be present at trial because his health conditions regularly interfered with the proceedings.¹⁴¹ Accordingly, the Trial Chamber ordered the establishment of a “video-conference link to enable the Accused to participate in his trial proceedings from the United Nations Detention Unit when he is too unwell to be physically present in court.”¹⁴² The Trial Chamber chose expediency over the physical presence of the Accused, reasoning that if “the Trial Chamber has to postpone the proceedings each time the Accused is too ill to be physically present in court, it is very likely that the trial would last unreasonably long.”¹⁴³ The Chamber continued, “The legal basis for carrying on the trial in

¹³⁸ *Stanišić* Decision on Defence Appeal of the Decision on Future Course of Proceedings, *supra* note 113, ¶ 19; *see also* ICC Rome Statute, *supra* note 71, art. 63.2 (providing that that “such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”).

¹³⁹ *Stanišić* Decision on Defence Appeal of the Decision on Future Course of Proceedings, *supra* note 113, ¶ 19; *Nzitorera* Decision, *supra* note 113, ¶ 15; *see also* *Zigiranyirazo* Decision, *supra* note 113, ¶ 20.

¹⁴⁰ *Id.*

¹⁴¹ *See* Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-PT, Order Establishing a Procedure for the Monitoring of and Reporting on the Accused Stanišić’s Ability to Attend Court in Person and/or to Participate in the Court Proceedings Via the Video-Conference Link, ¶ 2 (Trial Chamber, 8 May 2008) [hereinafter *Stanišić* Order Establishing a Procedure].

¹⁴² *Stanišić* Decision on Future Course, *supra* note 118, ¶¶ 14-15.

¹⁴³ *Id.* at ¶ 12.

those circumstances where [the Accused's] ill health prevents him from coming to court is that his health condition is a factor that persistently interferes with the right to a fair and expeditious trial, warranting derogation from the right to be present in court.”¹⁴⁴ The Chamber concluded, “In the prevailing circumstances, the establishment of a video-conference link meets the test of proportionality.”¹⁴⁵ When the trial initially commenced on 28 April 2008,¹⁴⁶ the Accused did not attend the proceedings and did not participate in them through the videoconferencing link provided to him at the detention unit.¹⁴⁷

On appeal, since Stanišić never expressly waived his right to be present, the Appeals Chamber had to determine if the derogation to Stanišić's right to be present satisfied the proportionality principle.¹⁴⁸ Citing the unintentional nature of Stanišić's disruptions and the possibility of recovery, the Appeals Chamber of the ICTY weighed the options of adjourning the trial until the Accused recovered with that of derogating from Stanišić's right to be present by requiring him to use a videoconference link when physically too unwell to attend court.¹⁴⁹ The Appeals Chamber found that the Trial Chamber erred in choosing to restrict the Accused's right to be present instead of the available and reasonable alternative of adjourning the trial for three to six months. The Chamber reasoned that such a period “could potentially secure the Accused's ability to fully exercise his right to be present at trial within a relatively short period of time.”¹⁵⁰

Similarly, in the ICTR *Nzirorera* case, the issue was “whether the presence of an accused is

¹⁴⁴ *Id.* at ¶ 15.

¹⁴⁵ *Id.*

¹⁴⁶ The trial initially commenced on 28 April 2008, but was delayed almost a year due to the health of *Stanišić*. The trial recommenced in June 2009 as discussed below.

¹⁴⁷ *Stanišić* Order Establishing a Procedure, *supra* note 141, ¶ 2.

¹⁴⁸ *Stanišić* Decision on Defence Appeal of the Decision on Future Course of Proceedings, *supra* note 113, ¶ 19.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

required during the cross-examination of a witness by a co-accused or his counsel.”¹⁵¹

At trial in June of 2007, counsel for the Accused requested an adjournment for three days because the Accused was ill and physically unfit to attend trial.¹⁵² The Trial Chamber ruled that the presence of an accused is required during the cross-examination of a witness by a co-accused or his counsel.¹⁵³

The Appeals Chamber found that “the right to an expeditious trial ... was a relevant consideration for the Trial Chamber in balancing whether or not to proceed in the absence of the [Accused].”¹⁵⁴ However, noting the complexity and length of the case, the Appeals Chamber was “not satisfied that the three day delay to the trial” was a sufficient reason to continue the trial *in absentia* and derogate from “the statutory right of the [Accused] to be present at his own trial when the absence of the [Accused] was due to no fault of his own.”¹⁵⁵ The Chamber held that the Trial Chamber’s “restrictions on the [Accused]’s fair trial rights were unwarranted and excessive” and failed the proportionality test.¹⁵⁶

Additionally, in *Zigiranyirazo*, the primary question for the ICTY Appeals Chamber was whether the Trial Chamber properly exercised its discretion when it restricted the Accused’s right to be present at his trial by requiring him to participate via video-link during the testimony of a key witness.¹⁵⁷ While the Appeals Chamber noted the general importance of the objectives cited by the Trial chamber for restricting Zigiranyirazo’s right to be present – witness protection, the proper assessment of an important prosecution witness, and the need to ensure a reasonably expeditious trial – the Trial Chamber’s “restrictions on the [Accused’s] fair trial rights were

¹⁵¹ *Nzirorera* Decision, *supra* note 113, ¶ 15.

¹⁵² *Id.* at ¶ 2.

¹⁵³ *Id.* at ¶ 3.

¹⁵⁴ *Id.* at ¶ 15.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *Zigiranyirazo* Decision, *supra* note 113, ¶ 15.

unwarranted and excessive in the circumstances” and failed the test of proportionality.¹⁵⁸ Once again, the Chamber noted that none of the external variables “preventing the [Accused’s] personal attendance at his own trial, resulted from any action on his part.”¹⁵⁹

Derogation from a fundamental right was warranted in the ICTY *Milošević* case because no reasonable alternative existed and the delay was due to no fault of the Accused. However, the Appeals Chamber stressed that any derogation from a fundamental right must impair the right no more than is necessary to accomplish the objective. In *Milošević*, the Trial Chamber derogated from Milošević’s right to self-representation by restricting his role in his own defense at trial. The Trial Chamber reasoned that because Milošević’s self-representation factored into his declining health and his poor health led to substantial trial disruptions and delays, his right to self-representation should be restricted to allow for the trial to continue.¹⁶⁰

On appeal, the Chamber noted the need to derogate from Milošević’s right to represent himself, even though the trial delays were unintentional. The Appeals Chamber held that “it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety.”¹⁶¹ The Chamber acknowledged that while normally an unintentional act or circumstances of the Accused that delays the trial should not lead to derogation, circumstances such as those present in Milošević justified derogating from a fundamental right:

Defense counsel objects that ‘the appointment of counsel to an accused who is engaging in deliberate misconduct ... is quite distinct from the situation where an accused would be allowed to continue [representing himself] but for a finding of medical unfitness.’ But it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety. How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to

¹⁵⁸ See *id.*, at ¶¶ 17, 22.

¹⁵⁹ See *id.* at ¶ 20.

¹⁶⁰ *Milošević’s* poor health required repeated adjournments throughout the presentation of the Prosecution’s case and delaying the start of the Defence’s case by nearly three months. *Milošević* Decision, *supra* note 115, ¶ 15.

¹⁶¹ *Id.* at ¶ 13.

withstand all the rigors of trial work – the late nights, the stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month? Must the Trial Chamber be forced to choose between setting that defendant free and allowing the case to grind to an effective halt? In the Appeals Chamber’s view, to ask that question is to answer it.¹⁶²

While derogation from Milošević’s right to self-representation was warranted, the Appeals Chamber found that the specific restrictions imposed on Milošević by the Trial Chamber failed the proportionality principle. The Chamber reiterated that any derogation from a fundamental right should impair the right no more than is necessary to accomplish the objective. Instead of the overly restrictive measures imposed by the Trial Chamber on Milošević’s right to self-representation, the Appeals Chamber offered a more appropriate and reasonable alternative:

[W]hen [Milošević] is physically capable of doing so, Milošević will take the lead in presenting his case ... [W]here Milošević is sufficiently well to present a vigorous, two-day opening statement, it was an abuse of discretion to curtail his participation in the trial so dramatically on the grounds of poor health. ... [T]he Trial Chamber [must] steer a careful course between allowing Milošević to exercise his fundamental right of self-representation and safeguarding the Tribunal’s basic interest in a reasonably expeditious resolution of the cases before it.¹⁶³

Although still a derogation from the right to self-representation, the Appeals Chamber’s least restrictive manner of derogating allowed Milošević to exercise his fundamental right when capable of doing so, but when health problems of Milošević reemerged with sufficient gravity, “the presence of Assigned Counsel [would] enable the trial to continue even if Milošević was temporarily unable to participate.”¹⁶⁴

Throughout all of the ICTY and ICTR decisions regarding derogation from a fundamental

¹⁶² *Id.*

¹⁶³ *Id.* at ¶ 19.

¹⁶⁴ *Id.* at ¶¶ 4, 20. (finding that “[o]ver the course of the trial, Milošević’s health problems have posed steadily growing difficulties for both him and the Trial Chamber. He has long suffered from two chronic cardiovascular conditions: severe essential hypertension and hypertrophic heart disease. Medical reports ordered by the Trial Chamber in July 2002 revealed that the stress of the trial had so badly exacerbated these two conditions that careful monitoring by a cardiologist would be necessary throughout the proceedings.”).

right, be it the right to be present or the right to self-representation, the Appeals Chambers of the international tribunals have consistently overruled Trial Chambers that chose expediency over protecting those fundamental rights. If the health of an Accused disrupts or delays a trial before the ECCC, the Trial Chamber will have to walk the fine line between overly restricting the right of an Accused to be present and achieving a “reasonably expeditious resolution of the case[.]”¹⁶⁵

F. Determination of an Accused’s Ability to be Physically Present at Trial

An Accused can be mentally fit to stand trial, but not physically capable of being present at trial.¹⁶⁶ However, at some point an Accused who claims to be incapable of attending trial due to an alleged illness or medical condition may be found to be refusing to attend trial.¹⁶⁷

Circumstances such as these unfolded in the *Stanišić* case, requiring the ICTY to develop a procedure to assess whether the Accused was physically capable of attending court.¹⁶⁸ First, if the Accused did not waive his right to be present and did not opt to participate via a videoconference link from his bed at the UNDU, but still claimed that he was too ill to attend court, the medical officer or an independent medical expert would conduct an examination. At court, the Chamber would confirm with Defense counsel that the Accused did not waive his right to be present. Then, if necessary, the Chamber would hear the medical officer or the independent medical expert and:

[D]etermine that either: (a) Mr Stanišić is well enough to participate in the proceedings, either in person or, if he elects, via video-conference link, in which case Mr Stanišić shall be deemed to have waived his right to be present and the trial will continue in his absence, unless the Chamber uses its discretion to adjourn the proceedings taking into account Mr Stanišić’s health problem; or (b) Mr Stanišić is too unwell to participate in the

¹⁶⁵ *Id.* at ¶ 19.

¹⁶⁶ *Stanišić* Decision on Re-Assessment of Health, *supra* note 49, ¶ 17.

¹⁶⁷ *Stanišić* Decision Start of Trial and Modalities for Trial, *supra* note 52, ¶ 7.

¹⁶⁸ *Id.*

proceedings in either way, in which case the Chamber shall adjourn the proceedings until the next scheduled court session.

The question of whether an Accused is able to attend court proceedings is a legal determination made ultimately by the Trial Chamber, not by medical experts.¹⁶⁹ While facts presented by a medical assessment are a large part of the consideration, they are still one of many considerations.¹⁷⁰ The medical officer reporting to the Trial Chamber must make a clear distinction in the medical reports between “what the Accused has stated to the medical officer and the medical facts supporting that statement.”¹⁷¹ In regards to the burden of proof, an Accused who claims to be too unwell to attend court on a particular day bears the burden of showing that that is indeed the case.¹⁷²

After an adjournment due to the health of the Accused that lasted more than a year, the ICTY implemented this procedure in anticipation of resuming the *Stanišić* trial. On 9 June 2009, the date of the Prosecution’s opening statement at trial, the Accused informed the Chamber “that he was too unwell to attend court, that he did not waive his right to be present during the court session on that day, and that he did not wish to use the video-conference link.”¹⁷³ Counsel for Stanišić requested the Trial Chamber adjourn the trial for 9 and 10 June 2009.¹⁷⁴ The ICTY rejected Stanišić’s claim that he was unfit to attend court based on the medical reports and the medical officer’s conclusions. The opening statement subsequently proceeded without Stanišić.¹⁷⁵

¹⁶⁹ *Id.* at ¶ 22.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Stanišić* Reasons 29 June 2009, *supra* note 57, ¶ 14.

¹⁷³ *Id.* at ¶ 3.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

The Accused repeated the same claims on the following day, 10 June 2009, the second day of the Prosecution’s opening statement. Once again, the Chamber referred to the medical reports that concluded that “there [were] no physical medical reasons preventing [Stanišić from] participating in proceedings in the adapted [videoconference link] room.”¹⁷⁶ Regarding the psychological condition of the Accused, the medical report concluded that “although his state of mind is depressed, there are no evident psychiatric reasons preventing [Stanišić from] participating in proceedings.”¹⁷⁷ Once again, the Chamber proceeded without the Accused present in court or participating via videoconferencing.¹⁷⁸

On the first day of the presentation of evidence at trial, 29 June 2009, Stanišić again claimed that he was physically unable to attend trial. The Chamber did not grant an adjournment because the medical reports from the UNDU medical officer and the appointed experts all concluded that the Accused’s medical situation had not significantly changed since 9 and 10 June 2009, when he was initially deemed physically fit to attend or participate at his trial.¹⁷⁹ Furthermore, because the burden was on the Defense, the Chamber considered that the *Stanišić* Defense had “not demonstrated that the information before the Chamber was insufficient for the purpose of deciding on postponement or adjournment of proceedings or whether to proceed in the absence of the Accused due to his health situation.”¹⁸⁰ The ICTY rejected Stanišić’s claim that he was physically unfit to attend court and subsequently heard the testimony of the first witness in his absence.¹⁸¹

¹⁷⁶ *Id.* at ¶ 4.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at ¶¶ 5, 11.

¹⁷⁹ *Id.* at ¶ 15.

¹⁸⁰ *Id.* at ¶ 17.

¹⁸¹ *Id.* at ¶ 3.

III. Consequences of Lack of Fitness to Stand Trial or Inability to be Physically Present at Trial

A. Unfit to Stand Trial

In *Strugar*, the ICTY Trial Chamber noted “the consequences of finding an Accused unfit to stand trial are likely to vary according to the circumstances.”¹⁸² It noted the various possibilities: “discontinuance of the trial, appropriate treatment should the court become satisfied that [the Accused] committed the charged acts, continuance of the trial with mandatory representation of the accused (European civil law).”¹⁸³ With respect to the proceedings before the ICTY, the Trial Chamber held there is “no statutory or other basis for a trial before this Tribunal to continue while an accused is unfit to stand trial...”¹⁸⁴ Similarly, the Rules of Procedure and Evidence (RPE) of the International Criminal Court (ICC) clearly state that when an Accused is deemed unfit to stand trial, it must adjourn the trial.¹⁸⁵

B. Periodic Review and Possible Reexamination

Internationalized tribunals have held that lack of fitness to stand trial is not an absolute defense, but a mere bar to prosecution.¹⁸⁶ The ICC RPE make clear that a defendant found unfit to stand trial is subject to periodic review and possible reexamination.¹⁸⁷ If, at some later point, the ICC is satisfied that an Accused is fit to stand trial, then the proceedings may resume.¹⁸⁸ The SPSC took a similar stance in the *Nahak* decision, noting that unfitness acts “as a bar to the commencement or continuation of his trial,” but “a defendant’s trial can commence even after a

¹⁸² See *Strugar* Decision, *supra* note 11, ¶ 39.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ International Criminal Court Rules of Procedure and Evidence, (as adopted 9 Sept. 2002), R. 135.4 [hereinafter ICC RPE]. The Rome Statute and the corresponding ICC RPE reflect general or customary principles of international law. See *Nahak* Decision, *supra* note 7, FN 16.

¹⁸⁶ See *Strugar* Decision, *supra* note 11, ¶ 39; ICC RPE, *supra* note 185, R. 135.4; *Nahak* Decision, *supra* note 7, ¶ 155.

¹⁸⁷ ICC RPE, *supra* note 185, R. 135.4.

¹⁸⁸ *Id.*

period of suspension, should the defendant's unfitness prove to be temporary.”¹⁸⁹

C. Curing Unfitness – Alleviating the Impairment of Capacity

A trial can continue if the Chamber can alleviate the impaired capacity of the Accused.¹⁹⁰ For instance, if a court provided special technical equipment to enable an Accused with a hearing impediment to follow the proceedings, the incapacity would be cured.¹⁹¹ Also, the ICTY has noted that in some circumstances legal assistance to an Accused might sufficiently compensate for any limitation of capacity, thus allowing an Accused to stand trial.¹⁹² Additionally, the capacity to understand the languages used by the Court can be overcome by interpreters or translators.

Before the ECCC, it is possible that an Accused's inability to digest facts, translation, or otherwise effectively participate could be cured by providing the Accused additional resources. However, an Accused must always satisfy the underlying *Strugar* standard that requires an Accused to possess a level of mental capacity to sufficiently exercise his or her implied or expressed procedural rights to make a defense.

D. Finite Adjournment to Promote Recovery

When an Accused is unfit to stand trial or physically unable to be present at trial, courts have held that a finite adjournment to promote recovery is appropriate.¹⁹³ In *Strugar*, the ICTY noted that when a temporary condition causes the unfitness to stand trial, an appropriate option is to

¹⁸⁹ *Nahak* Decision, *supra* note 7, ¶¶ 155, 157.

¹⁹⁰ *Kovačević* Decision on Fitness, *supra* note 19, ¶ 25 (“In the view of Trial Chamber II, it is apparent, from the provisions and the clear implications of Articles 20 and 21 of the Statute of the Tribunal, that an accused will have these capacities or, with assistance of counsel, interpretation or otherwise, will be able to exercise these capacities in a sufficient degree to enable his or her defence to be presented.”).

¹⁹¹ See *Strugar* Decision, *supra* note 11, ¶ 39.

¹⁹² *Id.*

¹⁹³ *Id.*

adjourn the trial and resume upon the Accused's recovery.¹⁹⁴ In both *Stanišić* (3-6 month adjournment) and *Nzirorera* (3 days), the ICTY and ICTR Appeals Chambers overturned their respective Trial Chamber's decisions and held that an adjournment would be a more appropriate course of action rather than derogating from the Accused's right to be present. These decisions note the unintentional nature of the disruptions and the possibility of recovery in their reasoning. Similarly, in the *Milošević* case, the ICTY Trial Chamber established that "[b]ased on the medical advice of the examining physicians ... when Milošević's blood pressure elevated to unacceptable levels, an adjournment would be necessary until his condition returned to normal."¹⁹⁵ Following this procedure, the proceedings were suspended thirteen times because of Milošević's ill health, for a total of sixty-six days during the two-year presentation of the Prosecution's case.¹⁹⁶

ECCC IR 81.5 provides for such a finite adjournment and the PTC utilized this provision to adjourn the hearing due to Ieng Sary's ill health in February 2009.¹⁹⁷

i. Consequences of Adjournment

If adjourned for a significant period, a Chamber will grant the Accused provisional release and establish a comprehensive reporting procedure to monitor the health of the Accused.¹⁹⁸ As discussed above in section II(A), provisional release on medical grounds generally requires the imposition of conditions restricting the Accused to a medical facility at which they will receive

¹⁹⁴ *Id.*

¹⁹⁵ *See Milošević* Decision, *supra* note 115, ¶ 4.

¹⁹⁶ *Id.*

¹⁹⁷ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 17), Written Version of Oral Decision of 26 February 2009 on the Requests Presented Before the Pre-Trial Chamber during the Hearing Held on the Same Day, ¶ 3 (Pre-Trial Chamber, 27 Feb. 2009) (granting "[t]he Request to adjourn the hearing on the Appeal is granted because of the health condition of the charged person. The Pre-Trial Chamber finds the medical report of the Doctor of the Detention Centre which was provided to the Pre-Trial Chamber just before this hearing, sufficient to lead to this conclusion.").

¹⁹⁸ *Stanišić* Decision on Future Course, *supra* note 118, Orders.

treatment and require them to return to the tribunal detention unit after treatment is completed.¹⁹⁹

When an Accused is diagnosed with a terminal illness and given a short period to live, confinement to a private residence is appropriate.²⁰⁰

ii. Resuming the Proceedings after a Temporary Adjournment

For an Accused to be deemed able to resume the proceedings, the April 2009 *Stanišić* decision held that an Accused must be “able to endure the rigours of a trial and still participate effectively in such trial.”²⁰¹ In one prong of the test, the Accused must be physically capable of enduring the physical rigours of participating in a trial. If able to endure those rigours, then the Accused must also be able to “effectively participate” in the proceedings. “Effectively participate” essentially requires that an Accused satisfy the *Strugar* standard and have the mental capacity to exercise his other rights either while physically present in the courtroom or participating via a videoconferencing link from the detention unit or a hospital bed.²⁰²

E. Accommodating Measures to Promote Physical Presence or Participation

Tribunals often implement accommodating measures that facilitate an “Accused to *be physically present* in court or *to participate* in the proceedings.”²⁰³

i. Adjusted Trial Regime (Facilitating Physical Presence)

When an Accused is unable “to endure the rigours of a trial and still participate effectively in such trial,” the Trial Chamber may introduce accommodating measures.²⁰⁴ In *Stanišić*, the Trial

¹⁹⁹ Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Decision on Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro, ¶ 5(d) (Appeals Chamber, 16 Dec. 2005); Prosecutor v. Vladimir Kovačević, Case No. IT-01-42/2/I, Decision on Provisional Release, at 2-3 (Trial Chamber, 2 June 2004).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² The *Stanišić* Defence argued that the Accused was not mentally fit to be present in court or participate via the videoconference link. See *Stanišić* Reasons 29 June 2009, *supra* note 57, ¶ 11.

²⁰³ See *Stanišić* Decision on Re-Assessment of Health, *supra* note 49, ¶¶ 15, 17 (emphasis added); see also *Milošević* Decision, *supra* note 115, ¶ 4.

²⁰⁴ *Stanišić* Decision on Re-Assessment of Health, *supra* note 49, ¶ 15.

Chamber noted that “mentally Mr. Stanišić is not *unable* to effectively participate in the trial ... [and] the seemingly increased rate of exhaustion could undoubtedly be accommodated in an adjusted trial regime.”²⁰⁵ By decreasing the number of days a week or hours a day that court is in session, an Accused will, in theory, be able to exercise his or her right to be present while allowing the proceedings to continue.²⁰⁶ As an example of one adjusted trial regime, the Chamber in *Stanišić* held hearings only two days per week. These hearings were divided into sessions of one hour and fifteen minutes, with breaks lasting thirty minutes.²⁰⁷ Stanišić could address the Court at any time if he required additional breaks. When possible, the hearings were conducted on consecutive days to avoid extended interruptions of the presentation of evidence. Furthermore, the hearings were conducted in the afternoon to facilitate any determination of the medical status of Stanišić prior to the hearing.²⁰⁸

Before the ECCC, the Defense counsel for one of the Charged Persons in Case 002, Ieng Sary, noted that he “cannot remain seated for more than an hour.”²⁰⁹ Due to health conditions such as these, it is likely that the Trial Chamber will have to implement an adjusted trial regime to accommodate the needs of the four Co-Accused in Case 002.

ii. Audiovisual Accommodations (Facilitating Effective Participation)

²⁰⁵ *Id.* at ¶ 17 (“The Chamber is mindful of Mr Stanišić’s illnesses and inconveniences associated therewith and wants to draw particular attention to the fact that trial proceedings can be adjusted to accommodate the concerns of the Accused Stanišić.”)

²⁰⁶ *Milošević* Decision, *supra* note 115, ¶ 4 (“Even during periods of good health, the Trial Chamber’s working schedule was substantially constrained by doctors’ recommendations of a reduced hearing schedule. In order to allow Milošević to recover from the exertions of trial, the Trial Chamber initially mandated four consecutive rest days between every two weeks of hearings. After signs of a further downturn in Milošević’s health, however, that period had to be increased to four days of rest for every week of trial, yielding a sitting schedule of three days per week.”).

²⁰⁷ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No IT-03-69-T, Reasons for Decision Denying the Stanišić Defence Request to Postpone the Court Proceedings and Decision Proceeding with the Court Session of 29 June 2009 in the Absence of the Accused, ¶ 6 (Trial Chamber, 22 July 2009).

²⁰⁸ *Stanišić* Decision Start of Trial and Modalities for Trial, *supra* note 52, Annex, ¶ 1.

²⁰⁹ *See Ieng Sary* Decision on Psychiatric Expert, *supra* note 8, ¶ 2.

The ECCC IRs provide for the usage of an audiovisual link from an Accused's bed to the courtroom, but also expressly require the consent of the Accused before implementing such measures.²¹⁰ Through judicial decisions, the ICTY and the ICTR have provided the same video-link alternative and generally require the consent of the Accused. The ICTR noted that requiring an Accused to use an audiovisual link, over an Accused's objection, is unprecedented and it "is not surprising, therefore, that there are no express provisions in the Statute and Rules of th[e] ICTR] or of the ICTY for the participation of an Accused by video-link in his or her own trial."²¹¹ For the ECCC to force an Accused to use an audiovisual link because he or she is legitimately unable to be physically present at trial due to no fault of his or her own, would stand in sharp contrast to ECCC IR 81.5 and the decisions of the other international tribunals.

However, assuming the Accused consents to accommodating measures or the ECCC found it appropriate to derogate from the right to be present because no reasonable alternative existed (e.g., the physical ailment or health conditions related to the age of an Accused showed no signs of possible recovery), then the proportionality principle would require the use of the least intrusive instrument, one of which could be an audiovisual link from the detention center or hospital bed to the courtroom.

In *Stanišić*, the Chamber offered the Accused the opportunity to "make use of the video-conference link from the UNDU, should he opt not to physically attend court":²¹²

A video-conference link will allow Mr Stanišić to follow the proceedings, to see the witnesses at all times, to make a statement [...] if he chooses to do so, and to otherwise address the court. The Chamber and the parties in the courtroom will also be able to see Mr Stanišić at the videoconference link.

²¹⁰ See ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 66, R. 81.5.

²¹¹ See *Zigiranyirazo* Decision, *supra* note 113, ¶ 12.

²¹² *Stanišić* Decision Start of Trial and Modalities for Trial, *supra* note 52, ¶ 6 (Finding that "[i]f Mr Stanišić indicates that he is too unwell to attend court in person, the Commanding Officer is to remind him of his right to be present in court, ask him if he waives his right to attend and offer him the opportunity to communicate with counsel.").

A telephone line will allow Mr Stanišić to communicate with his counsel in the courtroom and a member of the Defence team may be present with Mr Stanišić at the UNDU. Mr Stanišić will also have access to eCourt and Livenote transcript in the observation room.²¹³

Recommendation – Accommodating Measures

The ECCC could implement proactive accommodations or contingency plans to expedite the trial while protecting the right of the Accused to be present. Assuming the Charged Persons/Accused are fit to stand trial, the ECCC should, at the earliest juncture, be prepared to implement accommodating measures so that an Accused can be present at trial when physically capable or participate effectively when not physically capable.

If the ECCC cannot secure the consent of the Accused, and health issues cause substantial delays in the proceedings, then the nature of the ailment must be considered. If the ailment is likely to recover with time, adjournment is the preferred course of action because it is a reasonable alternative and the least restrictive to the rights of the Accused to be present at trial. Trial may resume when the ECCC is satisfied that the Accused is once again “able to endure the rigours of a trial and to effectively participate in such trial.” As mentioned above in section I(C), to proactively prevent such a potential adjournment, and considering the age and declining health of the Accused/Charged Person, assessment and monitoring by mental and physical specialists should be implemented from the outset.

If the Chamber deems that a delay in trial or absence of an Accused is the result of a legitimate, unintentional, and permanent health condition, international criminal jurisprudence allows for a trial to continue with accommodating measures in the absence of the Accused in two circumstances. First, with a waiver or consent from the Accused accepting the implementation

²¹³ *Stanišić* Decision Start of Trial and Modalities for Trial, *supra* note 52, Annex, ¶ 5.

of such accommodations in place of his or her right to be actually present. Second, if the Accused does not consent, then the Chamber must satisfy the proportionality principle before derogating from the right to be present. This scenario is plausible if the health of the Accused caused substantial trial delays/disruptions, but the Accused remained mentally capable under *Strugar* and physically capable of enduring the trial with the assistance of accommodating measures. If the Accused refuses to attend trial due to health concerns, the Trial Chamber will have to determine whether the Accused is physically capable of attending trial prior to the commencement of trial each day based on that morning's medical report or expert opinion. If the Trial Chamber answers in the negative, the Trial Chamber may institute accommodating measures (*e.g.*, adapted trial regime combined with regular medical reporting to allow the trial to forecast needed adjustments in both the long and short term) that offset the "rigours of a trial" with the objective of not derogating from the Accused's right to be present. Where an Accused is unable to physically attend trial and the accommodating measures are substantially delaying the trial, the Chamber would be forced to derogate from the Accused's right to be present in the least intrusive manner by allowing, *e.g.*, the Accused to effectively participate remotely from a hospital detention unit via an audiovisual link.

However, requiring an Accused, who claims that he or she is unable to physically attend trial, to participate effectively in the trial via an audiovisual link can result in a trial *in absentia*. If an Accused before the ECCC, like the Accused in the ongoing ICTY *Stanišić* case, refuses to participate with the assistance of an audiovisual link, then the ECCC will most likely have to justify the Accused's absence by citing IR 81.3 and 81.4, the intentional acts exceptions to the right to be present, and find that the Accused has intentionally refused to attend the proceeding.

F. Joinder Issues and Severance of Mentally or Physically Unfit Co-Accused

Internationalized tribunals require the physical presence of all of the Co-Accuseds at trial. In the ICTR *Nzirorera* case, the issue was “whether the presence of an accused [was] required during the cross-examination of a witness by a co-accused or his counsel.” The Chamber found that in a joint trial, if one of the Accused cannot be present at court “it is irrelevant for the purpose of that determination whether or not the witness’s testimony was likely to concern the alleged acts and conduct of a co-accused only.”²¹⁴ Therefore, if ECCC’s Case 002 is a joint trial with four Co-Accuseds, and one of them is unable to be present for witness testimony due to health reasons – and does not waive his or her right to be present – the witness will not be allowed to testify even if the testimony does not concern the alleged acts and conduct of the absent Co-Accused.

When considering severing the cases of the Co-Accused, the ICTY has noted that “[i]n dealing with the question of the future course of the trial, the Trial Chamber cannot ignore the fact that the Accused is not the only person on trial ... and [t]he Co-Accused ... is also on trial, and he, too, is entitled to a fair and expeditious trial.”²¹⁵ Similarly, in *Kovačević*, “[t]he [ICTY Trial] Chamber granted the Prosecution’s Motion for separate trials severing the cases of the Accused, Pavle Strugar and Miodrag Jokić because the medical condition of the Accused was causing a delay in the proceedings against the Co-Accused.”²¹⁶

If a Co-Accused is deemed unfit for trial or unable to be physically present at trial, the ECCC will have the option of severing any joint cases. Furthermore, if substantial trial delays occur,

²¹⁴ *Nzirorera* Decision, *supra* note 113, ¶ 15.

²¹⁵ *Stanišić* Decision on Future Course, *supra* note 118, ¶ 13.

²¹⁶ See Prosecutor v. Pavle Strugar, Case No. IT-01-42-PT, Decision on the Prosecutor’s Motion for Separate Trial and Order to schedule Pre-Trial Conference and start of the trial against Pavle Strugar, (Trial Chamber, 26 Nov. 2003); see also *Nahak* Decision, *supra* note 7, ¶ 9 (ordering that “the charges against the Defendant be severed from the original indictment and that separate proceedings conducted in the case against him.”).

severance may be required under Article 35 of the Law on the Establishment of the ECCC because it entitles an Accused “to be tried without delay.” Thus, severance of the cases can potentially protect the rights of the Co-Accused to be tried without delay.

Recommendation – If Severance is Required

Before trying multiple Accused jointly, it should be noted that internationalized tribunals require the contemporaneous physical presence of all of the Co-Accused at trial. If the Chambers find a Co-Accused unfit for trial or unable to be physically present at trial, the ECCC will have the option of severing any joint cases. Severance would pose a logistical problem before the ECCC, because the ECCC consists of a single trial chamber, whereas the other international tribunals have multiple trial chambers. Possible adjusted trial regimes could be implemented, consisting of some Co-Accused being tried in the morning session, with the remaining Co-Accused tried in the afternoon session.