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**Framing the Right to be Present in the Extraordinary Chambers in the Courts of
Cambodia**

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Internal Rule 81(1) of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) provides for the right of the accused to “be tried in his or her presence.”¹ The right to be tried in one’s presence—also expressed as the right to be present—is a component of the broader right to a fair trial. By requiring the attendance of the accused, the right to be present compels a confrontation between the accused and his accusers, lending a dimension of credibility to the proceedings.² Although the right to be present is a well-established tenet of international law, its translation from theory to practice has proven controversial with no one consensus emerging on the meaning of presence or the importance of presence relative to other considerations.³

In all likelihood, Case 002 will compel the ECCC Trial Chamber to prescribe its own vision on the scope and substance of the right to be present; even in the initial hearings for the case, held in June of this year, disputes arose regarding the interpretation of the right.⁴ The co-accused Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan are in their late seventies to mid-eighties and each suffers from a range of physical illnesses and maladies.⁵ Given their age and frailty, it is almost certain that the Trial Chamber will confront the questions of: (1) whether

¹ Extraordinary Chambers in the Courts of Cambodia Internal Rules (rev. Feb. 23, 2011), R. 81(1) [hereinafter ECCC Internal Rules].

² See M. Cherif Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions,” 3 DUKE J. COMP. & INT’L L. 235, 279 (1993).

³ See e.g., Jelena Pejic & Vanessa Lesnie, Lawyers Committee for Human Rights, “What is a Fair Trial? A Basic Guide to Legal Standards and Practice,” at 17 (2000), available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf.

⁴ See Christine Evans, “A Time of Transparency, ‘Not Sealed Envelopes,’” Cambodian Tribunal Monitor, June 27, 2011, <http://blog.cambodiatribunal.org/2011/06/time-of-transparency-not-sealed.html>.

⁵ See Gregory Katz, *Aging, Ill War Crimes Suspects Still Face Trials*, ASSOCIATED PRESS, May 31, 2011, available at 2011 WLNR 10827783.

a defendant who is too ill to attend the proceedings in person may be ordered to participate remotely and; (2) if he is ordered, whether audiovisual participation—the form of remote participation prescribed by the ECCC Internal Rules⁶—preserves his right to be present. How the Trial Chamber frames the right to be present will inform both these questions.

This Memorandum explores the options available to the Trial Chamber for framing the right to be present and the legal contentions supporting each frame. It also examines the impact of each frame on the Trial Chamber’s ability to hold proceedings in an accused’s physical absence and to impose audiovisual participation on an accused. Lastly, this Memorandum suggests that, in light of case law from international criminal tribunals and in the absence of specific guidance from Cambodian law, the ECCC should adopt a moderated and qualified approach to questions of presence.

I. FRAMING THE PROBLEM: FAIRNESS V. EXPEDITIOUSNESS

The right to be tried in one’s presence is protected by Article 14(3)(d) of the International Covenant on Civil and Political Rights (“ICCPR”).⁷ It is one of the “minimum guarantees” afforded to an accused as part of the broader right to a fair trial, provided for by Article 14(1) of the ICCPR.⁸ The right is intended in part to protect against trials *in absentia*. A trial in *absentia* is considered inherently unfair because it prevents the accused from presenting a defense, effectively guaranteeing that he will be convicted.⁹ It is generally recognized, however, that an accused may waive his right to be present.¹⁰

⁶ See *infra* Part I(B).

⁷ Article 14 of the ICCPR reads in relevant part:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equity . . . (d) To be tried in his presence”
International Covenant on Civil and Political Rights, art. 14(3)(d), *opened for signature*
Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter ICCPR].

⁸ *Id.* at art. 14(1).

⁹ See Bassiouni, *supra* note 2, at 279.

¹⁰ Both the ICTY and the ICTR permitted an accused to forfeit his right to be present. See *Prosecutor v. Simic*, Case No. IT-95-9/2-S, Sentencing Judgment, n.18, Oct. 17, 2002 (noting that the defendant had signed a total of twenty-five waivers of his right to be present); *Zigiranyirazo v. Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal,

The ECCC Internal Rules—the procedural and evidentiary rules governing ECCC proceedings¹¹—codify the right to be present, its breadth and its limitations, within Rule 81, a provision entitled “Presence of the Accused and defence lawyers.”¹² Rule 81(1) confers the right to be present upon any person accused of crimes before the ECCC.¹³ Rule 81(4) and Rule 81(5) each provide for scenarios in which proceedings may continue in the absence of the accused, notwithstanding an accused’s right to be present.¹⁴

a. *Rule 81(4): The Waiver Rule*

Rule 81(4), which may be termed the “waiver rule,”¹⁵ allows proceedings to continue in the absence of the accused, if the accused waives his or her right to be present.¹⁶ It is not necessary that the accused provide a particular reason for waiving his or her right to be present. As long as the accused “continues to refuse or fails to attend the proceedings . . . the proceedings may continue in his or her absence.”¹⁷ By not requiring the accused to justify his or her waiver of rights, Rule 81(4) in effect confers on the accused the right to be present (or not be present).

If an accused in Case 002 waives his or her right to be present, whether to preserve his or her health or for other reasons, then questions regarding the permissibility of continuing with the

¶ 14, Oct. 30, 2006 (holding that an accused may waive his right to be present) [hereinafter Zigiranyirazo Decision].

¹¹ For a background on the function and purpose of the ECCC Internal Rules, see Anne Heindel, “Overview of the Extraordinary Chambers,” *On Trial: The Khmer Rouge Accountability Process*, Documentation Center of Cambodia, eds. John D. Ciorciari and Anne Heindel, pp. 112-13 (2009).

¹² ECCC Internal Rules, R. 81.

¹³ “The Accused shall be tried in his or her presence, except as provided in this Rule.” *Id.* at R. 81(1).

¹⁴ *Id.* at R. 81(4)-(5).

¹⁵ The terms “waiver rule,” “consent rule” and “audiovisual rule” are my personal shorthand for referring to the numerous procedures contained with ECCC Internal Rules 81(4) and 81(5).

¹⁶ Rule 81(4) reads in its entirety:

If the Accused, following an initial appearance and having been duly summoned to the subsequent hearing, continues to refuse or fails to attend the proceedings, or is expelled from them in accordance with these IRs, the proceedings may continue in his or her absence. In such cases, the Accused may be defended during the proceedings by his or her lawyer. Where the Accused refuses to choose a lawyer, the Chamber shall order that the accused be represented by a lawyer and request the Defence Support Section to assign him or her a lawyer, from the lists mentioned as Rule 11. ECCC Internal Rule, R. 81(4).

¹⁷ *Id.*

trial in the accused's absence immediately dissipate. Put simply, the continuation of the trial cannot infringe upon the right to be present if waiver of that right serves as a condition precedent to continuing the trial. A right waived cannot be a right infringed.

b. *Rule 81(5): The Consent Rule and the Audiovisual Rule*

If an accused becomes seriously ill or unable to attend the proceedings, it is unlikely that he or she will waive the right to be present. A request to adjourn the trial or adjust the trial schedule allows an accused a degree of control over the proceedings that is sacrificed by waiving his or her right to be present; hence, it is in the interests of the accused in Case 002 not to waive their right to be present. Ieng Sary, in fact, has already requested that the trial be conducted in half-day sessions, stating that he has the right to be present and that he "intends to exercise this right."¹⁸

Rule 81(5) is concerned with the possibility of further requests in the vein of Ieng Sary's, requests where the accused's right to be present may unduly delay the proceedings against him or her. Rule 81(5) is divided into two portions: the "consent rule"¹⁹ and the "audiovisual rule."²⁰ The consent rule states that if the accused is too ill to attend his or her trial, the trial may continue in his or her absence if the Trial Chamber first secures the accused's consent. The

¹⁸Prosecutor v. Ieng Sary, et al., Case No. 002/19-09-2007-ECCC/TC, Ieng Sary's Motion to Conduct the Trial Through Half-Day Sessions, ¶ 6, Jan. 19, 2011. *See also* Ieng Sary's Request to Make Public Professor A. John Campbell's Geriatric Report, Case No. 002/19-09-2007-ECCC/TC, July 7, 2001, ¶ 5 (stating "Mr. IENG Sary intends to be present in order to attend the trial proceedings to the extent permitted by his physical health").

¹⁹ The portion of Rule 81(5), which I refer to as the "consent rule," reads as follows:

Where, due to health reasons or other serious reasons, the Accused cannot attend in person before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused's absence with his or her consent *Id.* at R. 81(5)

²⁰ The portion of Rule 81(5), which I refer to as the "audiovisual rule," reads as follows:

[W]here the Accused's absence reaches a level the causes substantial delay and, where the interests of justice so require, order that the Accused's participation before the Chamber shall be by appropriate audio-visual means. In such cases, the Accused may be defended during the proceedings by his or her lawyer. Where the Accused refuses to choose a lawyer, the Chamber shall order that the accused be represented by a lawyer and request the Defence Support Section to assign him or her a lawyer, from the lists mentioned at Rule 11. *Id.*

consent is essentially the consent to have his or her right to be present waived. If the right to be present is waived—upon the consent of the accused—there is no infringement of the right by proceeding with the trial under the consent rule.

Invocation of the consent rule is unlikely, however, for the same reasons that invocation of the waiver rule is unlikely. The accused consenting to the waiver of his rights when ill is as strategically undesirable as the accused waiving his rights upon his own initiative. In seeming recognition of this situation, Rule 81(5) includes the audiovisual rule for cases in which the accused is too ill to attend the trial but unwilling to waive his or her right to be present. The audiovisual rule states that if permitting the accused to exercise the right—i.e., delaying the trial when the accused is too ill to attend—results in “substantial delay” to the trial and “if the interests of justice so require,” the Trial Chamber may limit the accused’s participation in the proceedings to participation “by appropriate audio-visual means.”²¹

The audiovisual rule permits the trial to continue in the absence of the accused without the accused first waiving his or her right to be present. Because the accused is continuing to assert the right to be present at the same time that the trial is continuing without the presence of the accused, there is a possibility that invocation of the audiovisual rule infringes on the right to be present. Because it is the audiovisual rule—and neither the consent rule nor the waiver rule—that implicates a potential violation of fair trial rights, this Memorandum is concerned only with the permissibility of the audiovisual rule in particular and the permissibility of imposing audiovisual participation generally.

The significance of resolving the controversy behind the audiovisual rule is manifest. The scenario contemplated by the audiovisual rule—an accused too ill to be present in court but claiming his right to be present—pits the right to be present against the right to an expeditious trial. Continuing the proceedings without a waiver jeopardizes the right to be present; delaying the proceedings jeopardizes the right of victims to an expeditious trial.²² To resolve this contest of rights, the Trial Chamber must delimit the scope and substance of the competing rights and

²¹ *Id.*

²² The necessity of an expeditious trial lies not only in preventing unnecessary delays in the provision of finality to victims and the accused alike but also in preserving the integrity of the trial process. See Goran Sluiter, *Fairness and the Interests of Justice*, 3J. INT’L CRIM. JUST. 9, 10 (2005) (“An expeditious trial is not only an individual right . . . but is also necessary to maintain the integrity of the trial process.”) (internal quotations removed).

order them. Calls for the ECCC to “ensure that trials are fair and expeditious . . .”²³ must yield to a practical analysis of the right to be present, its limits and its possibilities.

II. FRAMING THE SOURCE: THE AUTHORITATIVE VALUE OF CAMBODIAN CIVIL LAW TRADITION VERSUS INTERNATIONAL LEGAL STANDARDS

The experimental nature of the ECCC lies not only in its status as a “hybrid tribunal”²⁴ but also in its status as a tribunal rooted in French civil law, surrounded by the jurisprudence of tribunals based in Anglo-Saxon common law.²⁵ The ECCC Framework Agreement attempts to clarify the parameters of this experiment, establishing a hierarchy between Cambodian law and international legal standards. Article 12 of the Agreement establishes Cambodian law as authoritative by stating that, “procedure shall be in accordance with Cambodian law.”²⁶ International standards, however, retain a significant degree of precedential value. If Cambodian law is silent, uncertain or simply inconsistent with international legal standards, then “guidance may . . . be sought in procedural rules established at the international level.”²⁷

The import of this provision is that the Trial Chamber’s analysis of the right to be present must be predicated on a weighing of the authoritative value of Cambodian law against the authoritative value of international standards. This weighing should conform to the hierarchy established by the Framework Agreement. This section discusses how the relevant domestic statute—the Cambodian Criminal Procedure Code—is at best unclear on the scope and structure of the right to be present and at worst inconsistent with the minimum international standards represented by the ICCPR. For this reason, the case law of international tribunals and

²³ Extraordinary Chambers in the Courts of Cambodia Establishment Law, art. 22 [hereinafter ECCC Establishment Law].

²⁴ See *supra* note 9.

²⁵ Both the ICTY and the ICTY at least at their onset were oriented towards the party-driven models of the common law tradition, at least with respect to the presentation of evidence, even if this initial orientation has shifted within the lifetimes of these tribunals. See Daryl A. Mundis, *From ‘Common Law’ Toward ‘Civil Law’: The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT’L L. 367 (2001). The ECCC, on the other hand, is based on a judge-driven model in alignment with the civil law tradition. See David McKeever, *Evidence Obtained Through Torture Before the Khmer Rouge Tribunal*, 8 J. INT’L CRIM. JUST. 615, 618 (2010).

²⁶ ECCC Framework Agreement, art. 12.

²⁷ *Id.*

courts should guide the Trial Chamber in its own interpretation of the right to be present, including the permissibility of audiovisual limitations on that right.

A. *The CCPC: Trials in Absentia*

The permissibility of trials *in absentia* under the Cambodian Criminal Procedure Code (“CCPC” or “Code”) suggests that the right to be present is not absolute as a matter of Cambodian law. Although the Cambodian Constitution recognizes a right to be tried in one’s presence,²⁸ the Code fails to similarly recognize this right. Article 300 of the Code discusses the presence of the accused as a matter of procedure but not as a “right” of the accused. It states plainly that “[t]he accused shall appear in person during the proceedings at the court.”²⁹ By contrast, the assignment of a lawyer to the accused is swathed in the language of rights with the Code requiring that “[t]he Royal Prosecutor . . . inform the accused of his *right* to defense by a lawyer of his own choice, or of one pursuant to the Law on the Bar.”³⁰ The language of provisions regarding examination of the case files and time for the preparation of a defense also suggest the creation of “entitlements” belonging to the accused.³¹ The contrast in language between the Code’s discussion of the presence of the accused and its discussion of other elements of trial procedure suggests that the presence of the accused is neither “right” nor “entitlement.”

This reading of the Code and its treatment of presence is further supported by the procedural mechanisms it contains for continuing a trial in the absence of the accused. Article 333 effectively allows the court to conduct all the proceedings of a trial in the absence of the accused. It states that “[e]ven if the accused is absent, the court shall seek the truth, listen to the answers of the other parties and witnesses, and examine the exhibits.”³² Article 361 then permits

²⁸ Cambodian Constitution, art. 38 (“Every citizen shall enjoy the right to defense through judicial recourse.”).

²⁹ Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English Translation, 1st ed., adopted June 7, 2007, trans. Jurgen Assmann & Bunleng Chhun [hereinafter CCPC], art. 300.

³⁰ *Id.* at art. 304 (emphasis added).

³¹ Article 304 of the Code states that “[t]he selected or assigned lawyer shall immediately be informed. He shall be *entitled* to examine the case file and communicate with the accused.” It also states that “the court shall inform the accused that he is *entitled* to have a period of time for pre[paring his defense.” *Id.* at art. 304.

³² *Id.* at art. 333.

the judgment issued from a proceeding conducted in the accused's absence to "be deemed . . . a non-default judgment as far as he is concerned."³³

The categorization of the judgment as a non-default judgment, instead of a default judgment, has substantial negative consequences on the ability of the person convicted *in absentia* to challenge the conviction *in absentia*. A default judgment may be vacated from an opposition filed in the lower court that originally issued the default judgment.³⁴

A non-default judgment, however, cannot be vacated and cannot be opposed in the original first-instance court. The only mechanism for opposing a non-default judgment is to appeal to a higher-instance court. The appeal, if successful, results only in reversal of the judgment, not in its vacation, so that a judgment on the merits stands.³⁵ Because the person convicted *in absentia* is unable to vacate the judgment against him, he cannot request a retrial. By classifying a conviction *in absentia* as a default judgment, the person convicted *in absentia* is deprived of a forum for redress (the first-instance court), is bound by a judgment rendered *in absentia* but treated as being "on the merits" and, most importantly, is without an automatic right to a retrial.

B. *The Inconsistency of the CCPC with the ICCPR's Prohibition Against Trials in Absentia*

The Code's treatment of the right to be present violates the international minimum standards established by the ICCPR, an international legal convention to which Cambodia is a party.³⁶ The United Nations Human Rights Committee ("HRC"), the body responsible for

³³*Id.* at art. 361. Article 361 states in its entirety:

If the accused does not appear for trial, but had knowledge of his citation or summons, the judgment shall be deemed to be a non-default judgment as far as he is concerned. The accused shall be notified by writ of notification of the so deemed non-default judgment, which is subject to appeal. In case the accused was absent but provided the court with reasons for his absence which the court accepts as proper, the trial may be adjourned to another date to be specified by the court.

³⁴*Id.* at art. 365 & 370. Article 365 states that, "A convicted person may file an opposition against a default judgment, as far as he is concerned." Article 370 states that "[w]hen an opposition motion is made against an entire judgment, the judgment shall be considered void."

³⁵*Id.* at art. 405 ("If the Court of Appeal considers the accused is not guilty or that act is not an offense, the Court of Appeal shall reverse the judgment and acquit the accused.")

³⁶*See* "Status of International Convention on Civil and Political Rights," UNITED NATIONS TREATY COLLECTION, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-

monitoring implementation of the ICCPR, has stated that if a ratifying party to the ICCPR allows for trials *in absentia* under its domestic law, the party may only avoid a violation of the ICCPR by guaranteeing an automatic right to retrial for a judgment rendered *in absentia*.³⁷ For instance, the French Criminal Procedure Code permits trials *in absentia* but also confers on a person convicted *in absentia* the right to a fresh determination on the charges.³⁸ By contrast, a person convicted *in absentia* under the Cambodian Criminal Procedure Code, by virtue of the inability to vacate the conviction against him, has no corresponding right to a fresh determination of the charges.

The CCPC's violation of the ICCPR suggests that, in respect of the ECCC Framework Agreement, "procedural rules established at the international level," rather than Cambodian law, should guide the Trial Chamber's treatment of the right to be present. Adherence to these international standards requires at a minimum that the ECCC provide for the right to be present. The adoption of Article 13 of the Framework Agreement, which incorporates the right to be present established by the ICCPR into the ECCC's own framework of rights, satisfies this threshold matter.³⁹

III. FRAMING THE RIGHT TO BE PRESENT: PRECEDENT AMONG INTERNATIONAL TRIBUNALS

The ICCPR is an international convention representing the agreement of 167 party-states.⁴⁰ As an instrument of consensus, it cannot do more than provide the most basic of mutually-agreed upon standards. The criminally accused must be afforded a right to be present, and this right to be present must protect the criminally accused from the consequences of a conviction rendered *in absentia*.⁴¹

[4&chapter=4&lang=en](#) (listing the date of Cambodia's ratification of the ICCPR as May 26, 1992).

³⁷ See *Maleki v. Italy*, Communication No. 699/1996, U.N. Doc. CCPR/C/66/D/699/1996, July 27, 1999 ("[T]he violation of the author's right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy.").

³⁸ See Rachel K. David, "Ira Einhorn's Trial in Absentia: French Law Judging United States Law," 22 N.Y. L. SCH. J. INT'L & COMP. L. 616 & n. 64-66 (2003).

³⁹ Framework Agreement, art. 13 ("The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process.").

⁴⁰ See *supra* note 35.

⁴¹ See generally Bassiouni, *supra* note 2.

What confronts the ECCC Trial Chamber is not a normative consideration of the right to be present but a practical inquiry into the scope and structure of the right. Resolution of this inquiry cannot depend on the ICCPR alone. The ECCC Trial Chamber should pattern its interpretation of the right to be present on the international standards reflected in the ICCPR as well as the case law of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”). Along these lines, this Part of the Memorandum analyzes how the ICTY and ICTR have tackled three specific questions of interpretation: (1) the meaning of presence; (2) the permissibility of derogating from the right to be present; and (3) the degree of derogation permissible. This analysis is then applied to the ECCC’s audiovisual rule and an assessment is issued regarding the compatibility of the audiovisual rule with the right to be present.

A. *Framing “Presence” – Physical Presence or Constructive Presence*

Neither the ICCPR nor the ECCC Internal Rules define the term “presence.”⁴² This lacuna raises the question of whether the right to be present is the right to be physically present or whether the right should be interpreted broadly to include forms of “constructive presence.” The ICTR in *Prosecutor v. Zigiranyirazo* favored the narrower interpretation of the right.⁴³ This preference has been echoed not only in subsequent decisions from the ICTR⁴⁴ but also in decisions from the ICTY⁴⁵, suggesting that the established standard among international tribunals and courts is to interpret the right to be present as the right to be physically present.

In *Zigiranyirazo*, the ICTR Trial Chamber ordered the accused to listen remotely to the testimony of a key witness. The ICTR Trial Chamber ordered that the witness testify in the Netherlands as the Defendant watched through an audiovisual feed in Tanzania.⁴⁶ The Defendant filed an interlocutory appeal on the grounds that he had the right to be physically present for the

⁴² The ECCC Internal Rules includes a glossary of words; however, the term “presence” is not included within this glossary. The ICCPR includes no glossary of words.

⁴³ See *Zigiranyirazo* Decision at ¶ 14.

⁴⁴ *Prosecutor v. Nzirorera*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning His Right to be Present at Trial, Oct. 5, 2007, ¶ 15 [hereinafter *Nzirorera* Decision].

⁴⁵ *Prosecutor v. Stanišić, et al.*, Decision on Defence Appeal of the Decision on Future Course of Proceedings, Case No. IT-03-69-AR73.2, ¶ 6, May 16, 2008 [hereinafter *Stanišić* Appeals Chamber Decision].

⁴⁶ *Zigiranyirazo* Decision at ¶ 6.

proceedings and so the imposition of audiovisual participation violated this right.⁴⁷ The Prosecutor advocated a broader interpretation of the right, suggesting that the right to be present protected only against a trial *in absentia* occurring without the accused's knowledge.⁴⁸

The ICTR Appeals Chamber agreed with the Defendant's narrower interpretation of the right, noting that "the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial."⁴⁹ It reasoned that a plain understanding of the word "presence" entails physical proximity and that the language of the ICTY Rules of Procedure, the Statute of the International Criminal Court ("ICC") and the Rules of Procedure for the Special Court of Sierra Leone ("SCSL") all imply that the right to be present may be satisfied by the physical presence of the accused only.⁵⁰ The ICTR Appeals Chamber then reversed the order imposing audiovisual participation on the Defendant.⁵¹

A survey of the ECCC Internal Rules suggests that the ECCC conforms already to the *Zigiranyirazo* standard on the meaning of "presence." Internal Rule 81(1) phrases the right as the "right to be tried in one's presence, *except as provided in this Rule.*"⁵² The waiver rule, the consent rule and the audiovisual rule then immediately follow this language of exceptions.⁵³ Because the waiver rule, the consent rule and the audiovisual rule all concern the physical absence of the accused, it may be inferred that physical absence is the exception to the rule and physical presence is the rule—i.e., the presence guaranteed by the right to be present.

B. *Framing Derogability: Peremptory or Presumptive Norm*

Because audiovisual participation cannot be physical presence satisfying the right to be present, any deployment of the ECCC's audiovisual rule constitutes *per se* infringement of the right to be present. The relevant inquiry then becomes whether the right to be present is a peremptory or presumptive norm of international criminal law. If the right is a peremptory norm—a right from which no derogation is ever permitted⁵⁴—then the audiovisual rule

⁴⁷*Id.* at ¶ 10.

⁴⁸*Id.* at ¶ 10.

⁴⁹*Id.* at ¶ 11.

⁵⁰*Id.* at ¶¶ 11-12.

⁵¹*Id.* at ¶ 25.

⁵² ECCC Internal Rule, R. 81(1) (emphasis added).

⁵³ See *supra* Part I(a)-(b).

⁵⁴ See Vienna Convention on the Law of Treaties, art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("For the purposes of the present Convention, a peremptory

becomes a *per se* impermissible violation of international criminal law; alternatively, if the right is a presumptive norm—a right from which derogation is permitted in limited circumstances—then it becomes at least possible for the audiovisual rule to comply with international criminal law.

Scholarship on the status of the right is equally divided. The camp of scholars who view the right as peremptory base their arguments in the language of the ICCPR.⁵⁵ First, the ICCPR frames the right to be tried in one's presence as one of the "minimum guarantees" afforded to the accused.⁵⁶ These scholars contend that because the right to be present is a minimum guarantee, any infringement of the right provides the accused with less than he is minimally guaranteed and, hence, any infringement must be an impermissible violation of the right.⁵⁷ This textual analysis of the ICCPR is predicated on the assumption that had the right to be present been a presumptive norm, the phrase "minimum guarantees" would have been avoided. Second, the ICCPR has a single provision regarding derogation.⁵⁸ This provision only permits derogation in a "time of public emergency which threatens the life of the nation"⁵⁹ Because it is a logical impossibility for an international court or tribunal to be confronted with a national emergency,

norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

⁵⁵ See Sara Stapleton, "Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation," 31 N.Y.U. J. INT'L L. & POL. 535, 548 (1999); see also Patrick Robinson, "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY," Berkeley Journal of International Law Publicist, Volume 3, Fall 2009, available at http://bjil.typepad.com/Robinson_macro.pdf.

⁵⁶ ICCPR, art. 14.

⁵⁷ See Stapleton, *supra* note 54 at 548-549.

⁵⁸ ICCPR, art. 4(1). The derogation provision reads in its entirety:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

⁵⁹ *Id.*

the provision is inapplicable at the international level, rendering the right non-derogable before international tribunals and courts.⁶⁰

The camp of scholars who view the right as a presumptive norm respond that the ICCPR is tailored to domestic governments, not international tribunals; for this reason, the language of the ICCPR cannot be the only basis for inferring the presumptive or peremptory status of the right.⁶¹ First, this camp of scholars contends that each “minimum guarantee” provided by the ICCPR is not an end within itself, but a means of collectively securing the independence and impartiality of a court; hence, so long as the independence and impartiality of a court is maintained, it is possible to derogate from the “paper rights” without sacrificing the overarching right to a fair trial.⁶² Second, to the degree that language is probative, the language of the ICCPR supports the view that the right to be present is only a peremptory norm. The ICCPR includes a list of non-derogable rights; the absence of fair trial rights from this list suggests that the right to be present is not intended to be a peremptory norm.⁶³

Although the scholarship on derogability is divided, tribunal jurisprudence reveals that, in practice, the right to be present is treated as a presumptive norm.⁶⁴ This treatment of the right was first articulated in *Prosecutor v. Milošević*. In *Milošević*, the ICTY Appeals Chamber recognized that the right to be present may be “restricted on the basis of substantial trial disruption.”⁶⁵ The *Milošević* Tribunal has been cited in several cases—both in the ICTY and ICTR—to support the

⁶⁰See Stapleton, *supra* note 17, at 600; see also Robinson, *supra* note 17.

⁶¹See Goran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, 939-40 (2003).

⁶²See Jacob Katz Cogan, *International Criminal Courts and Fair Trials*, 27 YALE J. INT’L L. 111, 117 (2002) (“A second approach to the problem of fair trial asks, instead, whether these international courts have the independence and coercive powers necessary to ensure fair trials, regardless of the sufficiency of paper rights accorded the accused in tribunals’ statutes.”).

⁶³See ICCPR, art. 4. Scholars, however, do disagree about whether a strict reading of Article 4 is appropriate. For a discussion of this scholarly disagreement, see Ana D. Bostan, *The Right to a Fair Trial: Balancing Safety and Civil Liberties*, 12 CARDOZO J. INT’L L. 34 (2004) (discussing the contentions in support of reading Article 4 as “strictly limitive” or reading it more broadly in order to include the fair trial rights provided under Article 14).

⁶⁴See Wayne Jordash and Tim Parker, *Trials in Absentia at the Special Tribunal for Lebanon*, 8 J. CRIM. JUST. 487, 496 (2010) (“Notwithstanding the apparently mandatory language contained in Article 14(3)(d), there appears to be a consensus among states party to the ICCPR that the right is not absolute and may be subject to certain restrictions.”).

⁶⁵*Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, Nov. 1, 2004, ¶ 13 [hereinafter *Milošević Appeals Chamber Decision*].

proposition that, at the level of international courts and tribunals, the right to be present is not absolute and may be forfeited by the accused.⁶⁶

Interestingly, the *Milošević* Tribunal did not provide normative or policy-based reasoning for treating the right to be present as a presumptive norm. Instead, it relied on the Tribunal's procedural rules without analyzing the permissibility of the rules themselves. It noted that "[n]otwithstanding the express enunciation of this right in the [ICTY] Statute, Rule 80(b) of the [ICTY] Rules of Procedure and Evidence allows a Trial Chamber 'to 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.'"⁶⁷ Later cases have cited *Milošević* for the contention that the right to be present is not absolute, also without providing normative or policy-based reasoning.⁶⁸

Potentially, *Milošević* viewed the right to be present in terms similar to those scholars who de-emphasize the ICCPR's language of "minimum guarantees." Like the ICCPR, both the ICTY and ICTR Statutes list the right to be present as a "minimum guarantee" belonging to the accused.⁶⁹ The disparity between the right on paper and the right in practice, however, suggests that the ICTY and ICTR do not interpret "minimum guarantee" as synonymous with "peremptory norm." Since *Milošević*, the predominant practice in international criminal law has been to treat the right to be present as not absolute. This approach is likely to

⁶⁶ *Stanišić* Appeals Chamber Decision, ¶ 6 & nn.2-3 (citing to *Milošević* to support the contention that the right to be present is not absolute); *Zigiranyirazo* Decision ¶ 14 & n.50 (citing to *Milošević* to support the contention that the right to be present is not absolute); *Nzirorera* Decision ¶ 11 & n.29 (citing to *Milošević* to support the contention that the right to be present is not absolute).

⁶⁷ *Milošević* Appeals Chamber Decision at ¶ 13.

⁶⁸ *Stanišić* Appeals Chamber Decision, ¶ 6 & nn.2-3 (citing to *Milošević* to support the contention that the right to be present is not absolute); *Zigiranyirazo* Decision ¶ 14 & n.50 (citing to *Milošević* to support the contention that the right to be present is not absolute); *Nzirorera* Decision ¶ 11 & n.29 (citing to *Milošević* to support the contention that the right to be present is not absolute).

⁶⁹ Statute of the International Criminal Tribunal for the former Yugoslavia, art. 21(4)(d), as amended May 25, 1993 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, art. 20(4)(d) [hereinafter ICTR Statute].

been entrenched further as both the Special Court for Sierra Leone⁷⁰ and the Special Tribunal for Lebanon⁷¹ contain procedural rules limiting the right to be present.

C. *Framing the Permissibility of Derogation: The Proportionality Analysis*

It is well-established that, in international public law, a departure from a fundamental right (not only fair trial rights nor the right to be present) is governed by the principle of proportionality.⁷² The ICTY has stated that, pursuant to the principle of proportionality, “any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.”⁷³ Wordings of the principle vary at the margins; however, the principle generally consists of the following elements: (1) the purpose behind departing from the right must be the pursuit of a “compelling” or “sufficiently important” objective (the legal-basis requirement); (2) the restriction on the right must be necessary (the least-restrictive-means requirement); and (3) the restriction must be proportional to the objective pursued (the proportionality requirement).⁷⁴

⁷⁰The right to be tried in one’s presence is provided by Article 17(4)(d) of the SCSL Statute but under Rule 60 of the SCSL Rules of Procedure and Evidence, the right may be derogated from under particular circumstances. *See* Statute of the Special Court for Sierra Leone, art. 17(4)(d), adopted Aug. 14, 2000; Special Court of Sierra Leone Rules of Procedure and Evidence, R. 60, amended May 28, 2010.

⁷¹The Special Tribunal for Lebanon provides for a limited right of the accused to be tried in his presence. *See* Statute of the Special Tribunal for Lebanon, art 16(4)(d), adopted Mar. 29, 2006 [hereinafter STL Statute]. Interestingly, the STL Statute also includes a provision expressly providing for a trial *in absentia*. This provision represents a substantial departure from other international courts and tribunals, which generally provide for the prohibition of or substantial restrictions on trials *in absentia*. *See generally* Jordash, *supra* note 22; STL Statute, art. 22.

⁷²The proportionality principle within international public law developed in regional human rights courts, such as the European Court of Human Rights, the Inter-American Court of Human Rights and the European Court of Justice. It has in more recent years been applied and refined by international courts and tribunals. For a history of the development of the proportionality principle in its regionalized context, see Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 467-471 (2011); see also Milošević Appeals Chamber Decision at ¶ 17 & n. 50 for the Milošević Tribunal’s discussion of the role of the principle of proportionality.

⁷³*Stanišić Appeals Chamber Decision*, ¶ 6.

⁷⁴*See generally* Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EURO. L. J. 158 (2010); see also Zigiranyirazo Decision at ¶ 14 (holding that the proportionality principle is the principle “pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.”).

Although it concerned the right to self-representation, *Prosecutor v. Milošević* provides a comprehensive discussion of the principle, reflecting the standards to be applied in conducting a proportionality analysis. In *Milošević*, the ICTY Trial Chamber assigned counsel to represent Defendant Milošević, despite Milošević's insistence on representing himself, a right guaranteed by Article 14(3)(d) of the ICCPR and Article 21(4)(d) of the ICTY Statute.⁷⁵ In its order assigning counsel, the Trial Chamber noted that the combination of Milošević's self-representation and frail health had resulted in substantial delays to the trial schedule.⁷⁶ Because of these delays, the Trial Chamber noted, stripping Milošević of his right to self-representation had become necessary to maintaining a fair and expeditious trial.⁷⁷

The ICTY Appeals Chamber then analyzed whether the order assigning counsel to Milošević had conformed to the principle of proportionality. First, in its ruling remanding the order for modification, the Appeals Chamber noted that a legal basis for derogating from the right to self-representation existed. In its view, Milošević's self-representation "[was] substantially and persistently obstructing the proper and expeditious conduct of his trial," even if the obstruction had been unintentional.⁷⁸ Second, no less restrictive means for limiting the right existed. The alternative means—delaying the trial schedule—had been attempted previously and discarded as ineffective.⁷⁹ Third and lastly, the Appeals Chamber held that the particular terms of the order infringed disproportionately on the right to self-representation, resulting in an impermissible

⁷⁵ ICCPR, art. 14(3)(d); ICTY Statute, art. 21(4)(d).

⁷⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶ 65 [hereinafter *Milošević* Trial Chamber Decision] ("The health of the accused has been a major problem in the progress of the trial. In the Prosecution's case the trial was interrupted over a dozen times on account of the ill health of the accused, thereby losing some 66 trial days.").

⁷⁷ *Id.*

⁷⁸ *Prosecutor v. Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Case No. IT-02-54-AR73.7, ¶ 14, Nov. 1, 2004 [hereinafter *Milošević* Appeals Chamber Decision] ("But it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety.").

⁷⁹ The Appeals Chamber, in its analysis of the least-restrictive-means element, adopted a standard of deference towards the Trial Chamber. It upheld the Trial Chamber's assignment of counsel to Milošević on the grounds that because, "[T]he Appeals Chamber cannot conclude . . . that the Trial Chamber abused its discretion" on "the bare decision to assign counsel," "it was within the Trial Chamber's direction to assign counsel to Milošević notwithstanding his opposition." *Id.* at ¶ 15.

deprivation of Milošević's self-representation rights.⁸⁰ The Appeals Chamber suggested that, instead of assigning counsel to represent Milošević, counsel should have been assigned to assist Milošević in representing himself.⁸¹ This modification would be a proportional infringement on Milošević's self-representation rights because it would allow Milošević to represent himself whenever he happened to be well enough to attend the proceedings against him.⁸²

Milošević illustrates the standards adopted by international courts and tribunals generally in applying each component of the proportionality analysis. The legal-basis requirement is the most broadly interpreted and, for this reason, the lowest hurdle to pass; the existence and continued likelihood of substantial delays to the trial schedule has been recognized as a permissible basis for derogating from the fair trial rights of an accused.⁸³

By contrast, satisfying the least-restrictive-means requirement is likely to require a showing either that other means have proven ineffective or that no other means for restricting the right exists.⁸⁴ The proportionality requirement, however, is the most troublesome component of the proportionality analysis to satisfy. Rough proportionality is not sufficient to establish the necessary relationship between the objective pursued and the restriction adopted. Instead, there must be strict proportionality between the objective and the restriction. As the ICTY has noted, only "a carefully calibrated set of restrictions" is sufficient to satisfy the proportionality requirement.⁸⁵

⁸⁰*Id.* at ¶¶ 17-18.

⁸¹*Id.* at ¶ 19.

⁸²*Id.* at ¶ 19.

⁸³The pursuit of a fair and expeditious trial has been successfully used as the basis for derogating from the rights of the accused in, among other cases, the case of *Stanišić* before the ICTY and *Zigiranyirazo* before the ICTR. *Stanišić* Decision at ¶ 18 ("The Appeals Chamber considers that in determining the future course of the proceedings in this case, the Trial Chamber's decision to balance the right of the Accused to be present with the right . . . to an expeditious trial was reasonable."). *Zigiranyirazo* Decision at ¶ 17 (agreeing with the necessity of providing for an expeditious trial). *But see Nzirorera* Decision (holding that a three-day delay in the trial was not a sufficient basis for derogating from the right of the accused to be present).

⁸⁴*Stanišić* Decision at ¶ 19 ("The Appeals Chamber notes that in choosing to establish the video-conference link, the Trial Chamber excluded other potential options, including, as the Prosecution observes, allowing the case to remain in the pre-trial phase for three to six months.").

⁸⁵Appeals Chamber *Milošević* Decision, ¶ 18.

IV. FRAMING AN ORDER IMPOSING AUDIOVISUAL PARTICIPATION: CONSIDERATIONS IN APPLYING THE PROPORTIONALITY PRINCIPLE TO THE ECCC AUDIOVISUAL RULE

ECCC Internal Rule 81(5) imposing audiovisual participation on an accused when his or her health-related absence “causes substantial delay” corresponds to the practice and procedure of international courts and tribunals. The audiovisual rule, in permitting audiovisual participation to be instituted only in limited circumstances, conforms to the international standard that the right to be present is the right to be physically present. Likewise, the audiovisual rule, in permitting audiovisual participation even when the accused does not waive his right to be present, conforms to the international practice that treats the right to be physically present as a presumptive and not a peremptory norm.

Against these standards, the audiovisual rule is a permissible limitation on the right to be present, even if a particular application of the rule in a particular case is impermissible. It is important to note that the audiovisual rule leaves much of the minutiae of procedure unresolved, including the time at which a delay is deemed “substantial” and the camera angle of the proceedings to be relayed. How such minutiae is resolved in an order from the ECCC Trial Chamber impacts the permissibility of audiovisual participation; in continued accordance with international standards, the specifics of the order and their implementation must satisfy the principle of proportionality. This segment of the Memorandum analyzes the issues that the ECCC Trial Chamber may confront in crafting an order of audiovisual participation and how they implicate each element of the proportionality analysis.

a. *Legal-Basis Requirement*

The legal-basis requirement is concerned with whether the purpose in imposing audiovisual participation is the promotion of a “sufficiently important objective.”⁸⁶ Mitigating the dilatory effects of accommodating a fair trial right has been recognized as a proper basis for derogating from the fair trial rights of the accused.⁸⁷ Because the audiovisual rule permits

⁸⁶ See *Milošević* Appeals Chamber Decision at ¶ 17.

⁸⁷ See *Zigiranyirazo* Decision; see also *Prosecutor v. Karemera, et al., Decision on Nzirorera’s Interlocutory Appeal Concerning His Right to be Present at Trial*, Case No. ICTR-98-44-AR73.10, ¶ 15, Oct. 5, 2007 (“The Appeals Chamber agrees that the right to an expeditious trial as a right guaranteed to all accused by the Statute of the Tribunal was a relevant consideration for the Trial Chamber in balancing whether or not to proceed in the absence of the Appellant.”).

audiovisual participation to be imposed only in response to “substantial delay,”⁸⁸ the Trial Chamber should be readily be able to establish that audiovisual participation is being imposed in pursuit of an expeditious trial.

b. *Least-Restrictive-Means Requirement*

The audiovisual rule states that it may be invoked if “the Accused’s absence reaches a level that causes substantial delay.”⁸⁹ The phrase “that causes”—instead of “will cause” or “may cause”—suggests that audiovisual participation is not to be ordered as a preventative mechanism. It suggests the trial must have experienced a substantial delay, and it is the existence of delay, not the likelihood of delay, that operates as the basis for imposing audiovisual participation.⁹⁰ In effect, the audiovisual rule requires the Trial Chamber to accommodate the accused’s exercise of his right to be present and tolerate the attendant delays to the trial schedule until the delays reach the stage of becoming “substantial.” By the time the Trial Chamber is able to impose audiovisual participation, the alternatives to audiovisual participation—accommodation and tolerance—must already be exhausted. The exhaustion of these alternatives then serves as evidence that imposing audiovisual participation is the least restrictive means for securing an expeditious trial.

The hitch in satisfying the “least-restrictive-means” requirement, however, may be the absence of guidance regarding what is and what is not a “substantial delay.” In the absence of specific guidance, it is possible for the Trial Chamber to attempt to impose audiovisual participation at a stage where delays have occurred but where the delays are not yet substantial. In *Nzirorera*, for instance, the absence of the accused had delayed the proceedings by only three days when the ICTR Trial Chamber ordered his trial to continue *in absentia*.⁹¹ However, the ICTR Appeals Chamber held that three days did not constitute a substantial delay and reversed

⁸⁸ ECCC Internal Rule 81(5).

⁸⁹ *Id.*

⁹⁰ An implied prohibition against preventative derogation would accord with the precedent established by other tribunals. For instance, in the case of *Milošević*, the ICTY Appeals Chamber modified the Trial Chamber’s order assigning counsel to Milošević, in order to protect “the default presumption that, when he is physically capable of doing so, Milošević will take the lead in presenting his case” *Milošević Appeals Chamber Decision* at ¶ 19.

⁹¹ *Nzirorera Trial Chamber Decision*.

the Trial Chamber's order.⁹² Comparatively, the *Milošević* Tribunal held that a delay of approximately eight months is substantial.⁹³

The opposed results in *Nzirorera* and *Milošević* suggests that a substantial delay is an amount of time that materially impacts the completion of the trial. That is, a delay so extended in duration or at so critical a juncture that it cannot be corrected. A delay is then assessed in relation to the particulars of the case—e.g., the testimony or evidence that is delayed, the stage of the trial at which the delay occurs, the number of days by which the trial is delayed and the likelihood of continuing delays if the accused continues to exercise his rights.

c. Proportionality Requirement

Both the proportionality requirement and the least-restrictive-means requirement concern themselves with degrees of infringement but on varying scales of analysis. The least-restrictive-means requirement asks whether a broadly-defined category of infringement—e.g., imposing audiovisual participation— infringes on the right to be present to a lesser degree than another broadly-defined category of infringement—e.g., postponing trial. The proportionality requirement asks a similar question but on a narrower level. It asks whether a given form of infringement—that is, the least restrictive means of infringement—is being implemented in the least restrictive manner. It compares not categories of infringement but methods of implementing a particular category of infringement.

The audiovisual rule provides no guidance on the mechanics of the audiovisual connection to be imposed. The text of the rule only requires that the audiovisual connection be “appropriate.”⁹⁴ In the absence of other guidance, the requirement of appropriateness may be understood as a proxy for the requirement of proportionality; hence, audiovisual participation is “appropriate” if imposed in a manner that restricts the right to be present as minimally as possible.

First, the duration of audiovisual participation should be minimal. In practical terms, the ECCC Trial Chamber should not limit the accused to audiovisual participation for a prescribed

⁹² *Nzirorera Appeals Chamber Decision*.

⁹³ The Prosecution's case-in-chief had been suspended for more than two months, *Milošević Appeals Chamber Decision* at ¶ 4, and the opening of the Defense's case-in-chief had been delayed by more than six months, *Id.* at ¶ 5, resulting in a cumulative delay to the trial of approximately eight months.

⁹⁴ ECCC Internal Rule 81(5).

interval of time. Instead, the Trial Chamber should order that the accused be limited to audiovisual participation on days when he is too ill to attend but wishes to participate in the proceedings. To illustrate, in *Stanišić*, the ICTY Trial Chamber issued an order permitting “the Accused to participate in the proceedings from the UNDU [United Nations Detention Unit] on days when he is too unwell to attend.”⁹⁵ The *Stanišić* Order limited the accused’s right to be present only on days in which the exercise of that right would have resulted in the trial’s adjournment—i.e., days in which the accused was too ill to attend but wanted to participate. Similarly, in *Milošević*, the ICTY Appeals Chamber rejected an order assigning counsel to Milošević in favor of an order assigning counsel to assist Milošević in representing himself. As the Appeals Chamber noted, the latter order retained “the default presumption that, when he is physically capable of doing so, Milošević will take the lead in presenting his case”⁹⁶

Applied to the right to be present, an order of audiovisual participation should retain a default presumption that, when it is possible for the accused to attend the proceedings against him, he will be permitted to exercise his right to be present. An order preemptively limiting the accused’s right to be present establishes a default presumption that the accused is unable to attend, resulting in a disproportional infringement of the right to be present. In effect, restricting the accused’s right to be present in advance results in overenforcement of the right to an expeditious trial, regulating not only the days in which the accused is too ill to attend but also potentially the days in which the accused is able to attend.

Second, the audiovisual connection should be constructed in a manner that allows the accused to participate as fully and effectively in the trial as possible. The right to be present is intended in part to allow the accused to participate fully and effectively in the proceedings against him or her. Although the accused is not physically in the courtroom, he may still be able to so fully and effectively participate in his trial that the infringement of the right to be present is minimal. In *Stanišić*, the audiovisual connection included several features that attempted to mimic the nature of being present in the courtroom, including a camera angle of the witness at all times, a real-time display of exhibits and trial transcripts, a telephone connection to the accused’s

⁹⁵ Prosecutor v. *Stanišić*, Decision on Future Course of Proceedings, Case No. IT-03-69-PT, Apr. 9, 2008 at ¶ 14 [hereinafter *Stanišić* Trial Chamber Decision].

⁹⁶ *Milošević* Appeals Chamber Decision at ¶ 19.

lawyers in the courtroom and a microphone connection to the judges.⁹⁷ These features, as the *Stanišić* Prosecutor contended, “restrict[ed] the Accused’s right to be physically present as minimally as possible” by creating a “virtual presence that allows the Accused to participate fully and effectively in his case.”⁹⁸

The *Stanišić* Tribunal, however, did not analyze the sufficiency of the audiovisual connection, leaving unresolved the question of whether the audiovisual connection established in *Stanišić* permitted the accused to participate as fully and effectively as possible. In any event, even if the Tribunal had discussed the sufficiency of the audiovisual connection in that case, because of the discrepancy in complexity between *Stanišić* and Case 002⁹⁹, a *Stanišić* precedent may not have been readily transferrable to the ECCC Trial Chamber in constructing a proper audiovisual connection.

The ECCC Trial Chamber then in adjudicating on the elements of a minimally-infringing audiovisual connection will have to consider, based on the cursory discussion in *Stanišić*, the camera images to be relayed to the accused, the timing of the images and the sounds to be relayed to the accused and the ability of the accused to communicate with lawyers and judges in the courtroom. Many features of the audiovisual connection to be used in Case 002 have, however, already been fixed. In anticipation of deploying the audiovisual rule, the ECCC has already established an audiovisual connection between the holding cells of the accused and the courtroom in which the proceedings will occur.¹⁰⁰ These existing features must be analyzed for their sufficiency as well.

⁹⁷ *Stanišić* Appeals Chamber Decision at ¶ 13.

⁹⁸ *Id.*

⁹⁹ The inclusion of civil party victims in the proceedings is a feature of the ECCC not provided for at the ICTY. See generally Andrew F. Diamond, *Victims Once Again? Civil Party Participation Before the Extraordinary Chambers in the Courts of Cambodia*, 38 RUTGERS L. REC. 1 (2011). The greater number of co-defendants—four defendants in Case 002 rather than two defendants as in *Stanišić*—raises a number of questions regarding the camera images to be relayed and the telephone connections to be set-up.

¹⁰⁰ Extraordinary Chambers in the Courts of Cambodia, “Behind the Scenes: Holding Cells,” available at <http://www.eccc.gov.kh/en/articles/behind-scenes-holding-cells> (last visited July 20, 2011).

CONCLUSION

This application of the proportionality analysis to the ECCC's audiovisual rule confirms that the ECCC Trial Chamber may issue an order imposing audiovisual participation and which protects the expeditiousness of the proceedings in Case 002 without impermissibly infringing on the right of the accused to be present. Cambodian law's treatment of the right to be present is inconsistent with the international standards embodied in the ICCPR and the rulings of the ICTY and ICTR, suggesting that the ECCC Trial Chamber should defer to international standards rather than Cambodian law. At the level of international courts and tribunals, there is no categorical prohibition against infringing on the right to be present; the right has been derogated from in the proceedings of the ICTY and the ICTR.

Ultimately, the question of audiovisual participation is a question of how to balance concerns for an expeditious trial with concerns for a fair trial. For this reason, contentions at either of the extremes cannot succeed. Framing of the right to be present too broadly as a peremptory norm seems to be supported only by legal academics; likewise, framing the right to be present too narrowly as the right to be effectively present seems to defy the current of international precedent. Permitting derogations from the right to be present, so long as those derogations conform to the principle of proportionality, allows the ECCC Trial Chamber to avoid the extremes and carve a balance between the right to an expeditious trial and the right to a fair trial.