Article

1 Introduction

On 7 June 2023, the Trial Chamber of the International Residual Mechanism for Criminal Tribunals ('IRMCT') made a decision that, if it had been applied, would have had long lasting effects on the right to be present at trial. The IRMCT's Trial Chamber was seized in the *Kabuga* case with the issue of whether the accused, Félicien Kabuga was mentally fit to stand trial. After considering the written and testimonial evidence of three independent medical experts, the Trial Chamber concluded that Kabuga did not possess the requisite mental capabilities to understand and participate in his trial, effectively rendering him absent from the proceedings.[1] The Trial Chamber then needed to determine how it would proceed in light of Kabuga's inability to effectively participate in the proceedings. It considered three options: putting an end to the proceedings; staying the matter; or continuing with a procedure through which evidence against Kabuga would still be heard but that would not result in a verdict.[2] The Trial Chamber decided to continue the proceedings against Kabuga and hold what it called an 'alternative finding procedure'.[3] While the decision did not fully detail how the alternative finding procedure would work, it did state that it will resemble a trial 'as closely as possible' albeit without the possibility of reaching a verdict against the accused.[4]

This article critically engages with the IRMCT's Trial Chamber's decision to hold an alternative finding procedure against Kabuga. It does this in full knowledge that the Appeals Chamber's decision to quash the Trial Chamber's order means that the procedure will not be

[1] *Prosecutor v. Kabuga* (Further Decision on Félicien Kabuga's Fitness to Stand Trial) No MICT-13-38-T (7 June 2023), para. 36 (hereinafter *Kabuga* Further Decision).
[2] *Ibid*., para. 51.
[3] *Ibid*., para. 57.
[4] *Ibid*.

held.[5] However, the issues raised by the proposed alternative finding procedure makes the decision an excellent framework for better understanding the relationship between the accused's mental fitness to stand trial and their right to be present at trial. This article will explore those issues in two parts. First, it sets out what the right to be present is, how it works and the purpose it is meant to serve. Second, the article discusses the right to be present in the context of the *Kabuga* case, particularly focusing on how the proposed alternative finding procedure does not comport with Kabuga's human rights. It particularly focuses on that aspect of the IRMCT's decision in which the Trial Chamber elects to continue the case using an alternative finding procedure. The article concludes that the Trial Chamber's decision fails to properly account for the accused's right to be present during trial as the procedure being proposed in nothing more than a *de facto* trial. It also finds that should a similar approach be followed by other international criminal courts and tribunals it will deprive the accused's right to be present of any real meaning.

2 The Right to be Present at Trial

The right to be present at trial is a fundamental human right held by every defendant brought before an international criminal court or tribunal and one of the central components of the accused's right to a fair trial.[6] The right to be present is considered 'an essential element of procedural equality' which ensures that defendants have sufficient opportunity to present evidence and challenge the case against them.[7] The presence of the defendant allows them to

[5] *Prosecutor v. Kabuga* (Decision on Appeals of Further Decision on Félicien Kabuga's Fitness to Stand Trial) MICT-13-38-AR80.3, A Ch (7 August 2023) ('Appeals Chamber *Kabuga* Fitness Decision').

[6] Geert-Jan Alexander Knoops, *An Introduction to the Law of the International Criminal Tribunals: A Comparative Study* (2003), 175; M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' 3 *Duke Journal of Comparative & International Law* (1993) 235, 267.

[7] Richard May and Marieke Wierda, *International Criminal Evidence* (2002), 280; Neil Cohen, 'Trial in Absentia Re-Examined' 40(2) *Tennessee Law Review* (1973) 155, 156.

exercise other fair trial rights including: consulting with their counsel about the meaning of the evidence being offered; confronting the witnesses testifying against them; challenging any written evidence introduced during trial; testifying on their own behalf; and generally assisting in the effective defence of the charges brought against them.[8]

The accused's right to be present was first recognised in international law in Article 14(3)(d) of the International Covenant on Civil and Political Rights, which states that any person facing a criminal trial is entitled to be tried in their presence.[9] It has since been incorporated into the Statute of every international criminal court and tribunal, including those that explicitly allow for trials *in absentia*.[10] That includes the IRMCT, whose Statute specifically states that the accused is to be tried in their presence when the Tribunal is deciding any charge brought against them.[11]

The physical presence of the accused is not, by itself, sufficient to satisfy the accused's right to be present at trial.[12] An accused is only truly considered present when they are able to

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[8] Daryl A. Mundis, 'Current Developments: Improving the Operation and Functioning of the International Criminal Tribunals' 94 *American Journal of International Law* (2000) 759, 761.
[9] Article 14(3)(d), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[10] Article 21(4)(d), UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993); Article 20(4)(d), UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994); Article 67(1)(d), Rome Statute of the International Criminal Court (17 July 1998) [hereinafter Rome Statute]; Article 17(4)(d), UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002); Article 16(4)(d), UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007); Article 35(d); Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea (27 October 2004) Article 19(3)(d); UN Security Council, Statute of the United Nations Mechanism for International Criminal Tribunals (22 December 2010) [hereinafter IRMCT Statute]; Article 21(4)(e); Law on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015).
[11] IRMCT Statute, *supra* note 10, art. 19(3)(d).
[12] Caleb H Wheeler, *The Right to be Present at Trial in International Criminal Law* (2018), 200.

understand and participate in the proceedings against them.[13] Because it is a right held by the accused, trial cannot take place in their absence should they wish to appear.[14] This owes to the fact that the right is meant to guarantee that the accused has the opportunity to make informed decisions about their defence, including whether they wish to testify, what evidence to present and to provide instruction to their counsel about how the witnesses against them might be cross-examined.[15] To do that, the accused must have the ability to understand the proceedings and to be able to effectively participate in them.[16] Until recently, that could only be accomplished if the accused was physically present in the courtroom, however the introduction of new technology like video link and virtual courtrooms means that an accused can now be present for trial without ever setting foot inside a courthouse.

While a physically absent accused can be present for their trial, it is equally true that a physically present accused can be absent. This most often occurs when the accused lacks the mental fitness to understand the progress of proceedings or does not understand the language of the court. The former situation, when an accused is not mentally fit to stand trial, exists when the accused cannot perform certain functions during the trial.[17] A accused's fitness to stand

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[13] *Ibid*., 225; *see also* William A. Schabas and Veronique Caruana, "Article 63: Trial in the Presence of the Accused", in Otto Triffterer and Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court* (3rd edn. 2016), 1576.

[14] *Prosecutor v Ruto et al*. (Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial") ICC-01/09-01/11, A Ch (25 October 2013), para. 49; *see also Prosecutor v. Gbagbo et al*. (Public Redacted Decision on Counsel for Mr. Gbagbo's Request for Reconsideration of the 'Judgment on the Prosecutor's Appeal Against the Oral Decision of Trial Chamber I pursuant to Article 81(c)(i) of the Statute' and on the Review of Condition on the Release of Mr. Gbagbo and Mr. Blé Goudé) ICC-02/11-01/15 (28 May 2020), para. 69.

[15] *Kunnath v. The State* [1993] 1 W.L.R. 1315.

[16] Sarah J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights* (2007), 113; Catherine S. Namakula, "Language Rights in the Minimum Guarantees of Fair Criminal Trial" 19(1) *J. Speech Lang. & L.* (2012) 73, 84; William A. Schabas, *An Introduction to the International Criminal Court* (4th edn., 2011), 306; Fawzia Cassim, "The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process" 38 *Comp. & Intl. L. J. S. Afr.* (2005) 285, 287.

[17] *Prosecutor v. Strugar* (Judgement) IT-01-42-A (17 July 2008), para. 47.

trial is dependent on whether they can carry out the functions necessary to allow them to understand the proceedings and effectively exercise their fair trial rights, which in turn would allow them to meaningfully participate in the proceedings.[18]

This issue was first taken up by the post-Second World War Tribunals in Nuremberg and Tokyo. Prior to the commencement of the Trial of the Major War Criminals at Nuremberg, defendants Gustav Krupp and Rudolf Hess indicated that they were not mentally fit to stand trial.[19] Hess later rescinded his claim of mental unfitness, but Krupp was never tried for the crimes alleged against him because the Tribunal found that he suffered from degenerative physical and mental conditions preventing him from understanding the proceedings.[20] At the Tokyo Tribunal, trial was stayed against defendant Ōkawa Shūmei after it was determined that he lacked the mental capacity to enter a plea, instruct counsel or otherwise assist in his own defence.[21]

The International Criminal Tribunal for the former Yugoslavia ('ICTY') established the modern framework for assessing an accused's fitness to stand trial in the *Strugar* case.[22] There, the Tribunal was confronted with an accused afflicted with impairments to his psychological, intellectual and cognitive functioning resulting from dementia and Parkinson's

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[18] *Prosecutor v. Ongwen* (Public redacted version of Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen) ICC-0204-01/15, T Ch IX (16 December 2016), para. 7; *citing Prosecutor v. Gbagbo et al.* (Decision on the Fitness of Laurent Gbagbo to Stand Trial) ICC-02/11-01/15, Chamber I (27 November 2015), para. 36.

[19] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol. 2 (1948), at 1; *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol. 3 (1948), at 1.

[20] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol. 1 (1947), at 127.

[21] Order with Reference to Ōkawa, Shumei, International Military Tribunal for the Far East (28 April 1947) <http://imtfe.law.virginia.edu/collections/tavenner/4/4/order-reference-okawa-shumei> accessed 10 November 2022.

[22] *Prosecutor v. Strugar* (Decision Re: The Defence Motion to Terminate Proceedings) IT-01-42-T, T Ch I (26 May 2004), at para. 36.

disease.[23] While the ICTY's Trial Chamber ultimately found Strugar capable of standing trial, it did introduce a non-exhaustive list of seven functions an accused must be able to perform to be considered sufficiently competent to stand trial.[24] Those functions are: 1) plead to the charges; 2) understand the nature of the charges; 3) understand the course of proceedings; 4) understand the details of the evidence; 5) instruct counsel; 6) understand the consequences of the proceedings; and 7) testify.[25] It is not necessary for the accused to be able to fulfil these functions to their highest level of competency to be found fit to stand trial.[26] What is important is that they have a general understanding of the proceedings and are able to grasp the 'broad thrust' of the evidence being presented.[27] The *Strugar* functions have become that standard by which mental competency is determined in international criminal law and are the same functions identified by the IRMCT when deciding that Kabuga was not fit to stand trial.[28]

The International Criminal Court has taken a somewhat different approach to deciding whether an accused is mentally fit to stand trial. In *Gbagbo*, Trial Chamber I applied all of the *Strugar* functions, although they described those functions in a slightly different way from the ICTY.[29] The International Criminal Court really began to diverge from earlier jurisprudence on mental fitness in its decisions finding Dominic Ongwen and Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ('Al Hassan') fit to stand trial. When considering Ongwen's mental fitness to stand trial, the Trial Chamber did not rely on either *Strugar* or *Gbagbo*, but instead identified different capacities based on the rights identified in Article 67 of the Rome Statute.[30]

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[23] *Prosecutor v. Strugar* (Transcript) IT-01-42, PT Ch (15 December 2003), 193, lines 11-25; 194, lines 1-6.
[24] *Strugar* Decision Re: The Defence Motion, *supra* note 22, para. 36.
[25] *Ibid*.
[26] *Strugar* Judgement, *supra* note 17, para. 47.
[27] *Ibid*.
[28] *Kabuga* Decision on Appeals, *supra* note 5, para. 23; *see also Strugar* Decision Re: The Defence Motion, *supra* note 22, para. 36; *see also Gbagbo et al.*, *supra* note 18, para. 35; *Ongwen* Decision on the Defence Request, *supra* note 18, para. 8.
[29] *Gbagbo et al.*, *supra* note 18, para. 39.
[30] *Ongwen* Decision on the Defence Request, *supra* note 18, para. 8.

The capacities the *Ongwen* Trial Chamber felt a defendant needs to display include: understanding the charges; understanding the conduct, purpose and possible consequences of the proceedings; instructing counsel in the preparation and conduct of his or her defence; and making a statement during proceedings should they choose to do so.[31] The *Strugar* functions missing from this list include demonstrating the ability to plead and understanding the details of the evidence.[32] The issue of mental competence was raised at the ICC again in the *Al Hassan* case, and there the Trial Chamber took the same approach as that taken in *Ongwen*.[33] Further, the *Al Hassan* court did not consider all of the *Ongwen* competencies when deciding that Al Hassan was fit to stand trial.[34]

The reason the ICC did not consider the same functions as the ICTY may lie in the wording of the Rome Statute. The *Strugar* functions missing from the list of competencies detailed in *Ongwen* and applied in *Al Hassan* relate to rights that are not found in Article 67 of the Rome Statute. Specifically, the right to plead and the right to understand the details of the evidence are not amongst a defendant's enumerated rights at the ICC.[35] Despite this absence, it seems axiomatic that an accused is able to understand the evidence presented during trial to be able to exercise some of the other competencies identified by the *Ongwen* Trial Chamber, particularly instructing their counsel and assisting in the preparation and conduct of their defence.[36] It may be that the Trial Chamber found understanding the evidence to be an implicit part of the other Article 67 rights and therefore left it out of the list of the mental fitness' competencies as redundant. Whatever the explanation, the ICC is clearly charting its own, somewhat more narrow, course with regard to deciding whether an accused is mentally fit to

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[31] *Ibid*.
[32] *Ibid*; *see also Strugar* Decision Re: The Defence Motion *supra* note 22, para. 36.
[33] *Prosecutor v. Al Hassan* (Public redacted version of Decision on the Defence Notice on Mr Al Hassan's Unfitness to Stand Trial) ICC-01/12-01/18, T Ch X (13 July 2020), para. 34.
[34] *Ibid*.
[35] Article 67, Rome Statute of the International Criminal Court (17 July 1998).
[36] *Ongwen* Decision on the Defence Request, *supra* note 18, para. 8.

stand trial. That being said, the ICC remains something of an outlier in this respect, and when considering Kabuga's fitness to stand trial, the IRMCT more closely hewed to the approach of the ICTY.

There is also a growing recognition that the accused has a duty to be present at trial that exists alongside the right to be present.[37] The duty exists, at least in part, as a way to prevent an absent defendant from frustrating the interests of justice by refusing to appear knowing that their non-appearance will halt the proceedings against them.[38] The right and the duty to be present must not, however, be viewed as being co-extensive. If they were, the mandatory aspect of the duty would subsume the voluntary nature of the right.[39] To ensure that the right to be present still has meaning, the accused must be given the opportunity to exercise his or her right to be present before a decision is made to punish the accused by proceeding with a trial *in absentia*.[40]

The right to be present is not absolute, making it possible for the accused to waive their right to be present.[41] The ability to waive the right is not unfettered, there are some clear limitations on when accused may do so.[42] A waiver of the right to be present is only effective when it is both knowing and voluntary.[43] A waiver is knowingly made when the accused has notice of the charges against them and the date and location in which those charges will be

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[37] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., 2016), 1035; *c.f.* William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 807; *see also* Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (2016), 164.
[38] *Ruto et al.*, *supra* note 14, para. 42.
[39] Wheeler *The Right to be Present*, *supra* note 12, 259.
[40] *Ibid*.
[41] Christoph J.M. Safferling, International Criminal Procedure (2012), 400.
[42] *Prosecutor v. Gbagbo et al*. (Public Redacted Decision on Counsel for Mr. Gbagbo's Request for Reconsideration of the 'Judgment on the Prosecutor's Appeal Against the Oral Decision of Trial Chamber I pursuant to Article 81(c)(i) of the Statute' and on the Review of Condition on the Release of Mr. Gbagbo and Mr. Blé Goudé) ICC-02/11-01/15 (28 May 2020) para. 70.
[43] *Sejdovic v. Italy*, 42 EHRR 17 (2006), para. 86; *Pishchalnickov v. Russia*, App. No. 7025/04 (ECtHR, 24 September 2009), para. 77; *see also* Wheeler *The Right to be Present*, *supra* note 12, 128.

determined.[44] A waiver is voluntary when it is freely made and is not the product of compulsion.[45] A knowing and voluntary waiver can be either explicit or implicit. An explicit waiver is expressed through an oral or written indication from the defendant, or through their counsel, that they do not intend to appear for trial.[46] Waiver can be implied by demonstrating that the accused had knowledge of the charges and the date and location of the proceedings and subsequently failed to appear for trial.[47] At its root, the right to be present at trial is best understood as a right not to be unilaterally excluded from trial, rather than as a directive that trial can only take place if the accused is present.[48]

The IRMCT has adopted rules that closely resemble these international standards in its provision detailing when trial may be held in the absence of the accused. Pursuant to Rule 98 of the IRMCT's Rules of Procedure and Evidence, five criteria must be met before the Trial Chamber can proceed with trial in the accused's absence. They are: 1) the accused must have made an initial appearance under Rule 64; 2) the IRMCT's Registrar has duly notified the accused that it is required that they be present for trial; 3) the accused is physically and mentally fit to be present for trial; 4) the accused has voluntarily and unequivocally waived, or has forfeited, their right to be tried in their presence; and 5) the interests of the accused are represented by counsel.[49] This list is inclusive, meaning all five of these conditions must be met for trial to comply with the IRMCT's rules and the accused's right to be present at trial.

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[44] *Mbenge v. Zaire*, Comm. No. 16/1977 (Human Rights Committee 25 March 1983), para. 14.2.
[45] *Sejdovic*, *supra* note 43, para. 86; *Pishchalnickov supra* note 43, para. 77.
[46] *Shkalla v. Albania,* App. No. 26866/05 (ECtHR, 10 August 2011), para. 70; *see also* Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, doc. no. OJ L65/5 [2016], para. 33.
[47] *Ibid*.
[48] Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (2010), 165; Thilo Marauhn, 'The Right of the Accused to be Tried in his or her Presence', in David Weissbrodt and Rüdiger Wolfrum (eds.), *The Right to a Fair Trial* (1997), 764.
[49] Rule 98, IRMCT Rules of Procedure and Evidence (2020).

Further, the chapeau of Rule 98 indicates that it applies only when an accused 'refuses to appear' for trial, not when they are absent for some other reason.[50]

3 The IRMCT's Decision to Continue Proceedings Against Félicien Kabuga After Finding Him Mental Unfit to Stand Trial

Issues surrounding the relationship between an accused's mental fitness to stand trial and their right to be present at trial gained renewed relevance in May 2020, following Félicien Kabuga's arrest in Paris by the French police. Kabuga, a Rwandan national, was a wealthy and influential business person during the 1994 Rwandan genocide. During that time, he served in several prominent positions, including as president of the *Comité d'initiative of Radio Télévision Libre des Mille Collines* ('RTLM') and the *Comité Provisoire of the Fonds de Défense Nationale* ('National Defence Fund').[51] RTLM was a radio station in Rwanda whose stated purpose was to ensure that individuals and entities who opposed the government had a platform for sharing their views.[52] It was later determined by the International Criminal Tribunal for Rwanda ('ICTR') that RTLM broadcasts engaged in ethnic stereotyping that created contempt and hatred of the Tutsi population.[53] Some RTLM broadcasts advocated direct violence against Tutsis and called for their extermination.[54] It is alleged that Kabuga, in his capacity as president of RTLM, conspired to direct and incite others to commit genocide against the Tutsi ethnic population through the dissemination of anti-Tutsi propaganda and rhetoric on the radio.[55]

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[50] *Ibid*.
[51] *Prosecutor v. Kabuga* (Amended Indictment) ICTR-98-44B-1 (1 October 2004), para. 1.
[52] *Prosecutor v. Nahimana et al.* (Judgment and Sentence) ICTR-99-52-T (3 December 2003), para. 490.
[53] *Ibid*., para. 486.
[54] *Ibid*.
[55] *Prosecutor v. Kabuga* (Prosecution's Second Amended Indictment) MICT-13-38-PT (1 March 2021), para. 21 (hereinafter '*Kabuga* Second Amended Indictment').

Kabuga is also alleged to have provided material, logistical, financial and moral support to several militia groups, collectively and colloquially referred to as the *Interahamwe*, as well as other armed individuals from the Hutu ethnic group.[56] It was the *Interahamwe* and those individual Hutus that actually carried out many of the killings of ethnic Tutsis. The *Interahamwe* started as the youth wing of the *Mouvement Révolutionaire National pour le Développement* ('MRND'), which was the ruling party in Rwanda from 1975 until the genocide in 1994.[57] In 1992, the Rwandan military began to arm and train the *Interahamwe*, converting them into a militia group.[58] Once the genocide began, the term *Interahamwe* came to be applied to any group or individual involved in committing acts of violence against members of the Tutsi ethnic group.[59] Responsibility is attributed to the *Interahamwe* for much of the mass killing of Tutsis that occurred during the genocide.[60] Kabuga is alleged to have supported the *Interahamwe* in two different ways. First, as president of the RTLM, he permitted and promoted the broadcast of information that actively encouraged the *Interahamwe* to kill Tutsis and also advocated for their total extermination.[61] Second, he is thought to have provided local *Interahamwe* groups with material and financial support, and it is further alleged that in some cases he also gave them access to properties he owned for meeting and training purposes.[62]

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[56] *Ibid*., para. 39.
[57] *Prosecutor v. Bagosora et al.* (Judgment and Sentence) No. ICTR-98-41-T (18 December 2008), para. 456.
[58] *Ibid*., paras. 458 - 459; *see also Prosecutor v. Bizimungu et al.* (Judgment and Sentence) ICTR-99-50-T (30 September 2011), para. 185.
[59] *Prosecutor v. Rutaganda* (Judgement and Sentence) ICTR-96-3-T (6 December 1999), para. 133.
[60] *Prosecutor v. Kambanda* (Judgement and Sentence) ICTR-97-23-S (4 September 1998), para. 39(v).
[61] *Nahimana* Judgment, *supra* note 52, para. 488; *see also Kabuga* Second Amended Indictment, *supra* note 55, paras. 11.
[62] *Kabuga* Second Amended Indictment, *supra* note 55, paras. 42, 44, 46, 48 - 49.

Kabuga fled Rwanda soon after the end of the genocide and lived as a fugitive until his arrest in France.[63] Following his arrest, Kabuga was transferred to the custody of the IRMCT. He was originally meant to be transferred to the Mechanism's Arusha branch, but successfully argued that his medical condition made The Hague a more appropriate destination.[64] At the same time, Kabuga also alleged that he suffered from a variety of different medical ailments that rendered him unfit to stand trial.[65] As a result, the Trial Chamber began to monitor Kabuga's health to determine whether he could be transferred to Arusha for trial. Initially, those reports indicated that Kabuga was 'a moderately vulnerable, elderly individual with substantial chronic physical and mental conditions', but that his condition did not inhibit his transfer to Arusha.[66] However, Kabuga fell and broke his femur in February 2021, which caused him to experience a physical and psychological decline.[67] In particular, he began to suffer from short-term memory loss, a decrease in his ability to contextualise information and regular incidents of momentary confusion.[68]

Following this apparent decline in Kabuga's mental functioning, the Trial Chamber's monitoring of his health also included an ongoing assessment of his ability to understand and participate in his trial.[69] Over the course of ten months, Kabuga was examined by five different experts in an effort to determine whether he possessed the requisite mental fitness to stand trial. These experts were unable to agree about Kabuga's competence, with three concluding that he

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[63] Basillioh Mutahi, 'Rwanda genocide: How Félicien Kabuga evaded capture for 26 years' (BBC 24 May 2020) <https://www.bbc.co.uk/news/world-africa-52758693> accessed 1 November 2022.
[64] *Prosecutor v. Kabuga* (Decision on Félicien Kabuga's Fitness to Stand Trial and to be Transferred to and Detained in Arusha) MICT-13-38-PT (13 June 2022), para. 62 (hereinafter '*Kabuga* Decision on Fitness').
[65] *Prosecutor v. Kabuga* (Public Redacted Version of 'Urgent Defence Motion for Félicien Kabuga's Transfer to The Hague and Not to Arusha') MICT-13-38-PT (5 October 2020), paras. 18 - 22.
[66] *Kabuga* Decision on Fitness *supra* note 44, para. 3.
[67] *Ibid*., para. 4.
[68] *Ibid*.
[69] *Ibid*., para. 5.

was fit to stand trial while the other two insisted that he was not.[70] Based on these opinions, and the clear split between them, the IRMCT's Trial Chamber ruled that the defence had failed to prove that Kabuga was unfit to stand trial.[71] As a result, trial was allowed to proceed, although in light of Kabuga's ill-health, the court sat for a limited number of hours a day, and hearings were only held three days a week.[72]

The trial ran for several months before Kabuga's mental fitness once again became an issue. In early March 2023, a new report was issued in which the previously appointed independent experts all agreed that Kabuga was no longer fit to meaningfully participate in the trial.[73] As a result, the Trial Chamber stayed proceedings until it had the opportunity to determine whether Kabuga's mental fitness would allow the trial to continue.[74] The Trial Chamber took testimony from the experts about Kabuga's mental fitness and, after two months of deliberation, concluded that he was no longer mentally fit to stand trial.[75] What seems to have persuaded the Court is the experts' conclusion that Kabuga was incapable of performing some of the functions necessary to understand and participate in the proceedings, and that although he could still complete others, his ability to do so was no more than superficial.[76] In particular, the Trial Chamber identified Kabuga's lack of a functioning memory, which it viewed as a prerequisite for participating in a complex trial, as an important reason for its decision.[77]

This ruling left the Trial Chamber to decide how to proceed in light of Kabuga's inability to understand or participate in the trial. Having heard evidence for several months,

[70] *Ibid*., paras. 10, 16, 19, 22, 36.
[71] *Ibid*., para. 56.
[72] *Prosecutor v. Kabuga* (Transcript) MICT-13-38-PT (18 August 2022), 7, lines 1-5.
[73] *Prosecutor v. Kabuga* (Trial Transcript) MICT-13-38-T (8 March 2023), 4, lines 5-9.
[74] *Prosecutor v. Kabuga* (Scheduling Order) MICT-13-38-T (10 March 2023), 2.
[75] *Kabuga* Further Decision, *supra* note 1, para. 36.
[76] *Ibid*., paras. 33 - 34.
[77] *Ibid*., para. 36.

and with the prosecution only weeks away from concluding its case, the Court was hesitant to dismiss or indefinitely stay the matter. However, Kabuga's lack of mental fitness clearly meant that the trial could not continue as the IRMCT's Rules of Procedure and Evidence specifically forbid proceeding against an accused who is not mentally fit to stand trial.[78]

Foreseeing this problem even before reaching its decision, the Trial Chamber ordered the parties to file submissions about what sort of procedure, if any, should be held if it was found that Kabuga lacked the requisite competency to be tried.[79] The defence made clear that the matter must be stayed as no legal basis existed to continue.[80] Alternatively, the prosecution suggested that rather than halt the proceedings, the Court should conduct an 'examination of the facts'.[81] Under the procedure proposed by the prosecution, the Trial Chamber would continue to hear evidence against Kabuga, and he would be allowed to present evidence in his defence, but the court would be prevented from entering a verdict at the conclusion.[82] The prosecution argued that following such a course would help develop the factual record, respect the contributions of the witnesses and provide some sense of justice for the victims of Kabuga's alleged crimes.[83]

Following deliberation, the Trial Chamber sided with the prosecution and decided that it would to continue the proceedings against Kabuga by holding what it called an 'alternative finding procedure.'[84] It justified its decision on the twin bases that an alternative procedure was the best way to respect Kabuga's rights and to effectuate the goals of the IRMCT, which it identified as combatting impunity and contributing to the restoration and maintenance of peace

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[78] IRMCT Rules of Procedure and Evidence, *supra* note 49, Rule 98.
[79] *Prosecutor v. Kabuga* (Order for Submissions) MICT-13-38-T (25 April 2023), 2.
[80] *Prosecutor v. Kabuga* (Defence Submission in Response to the Chamber's Order of 25 April 2023) MICT-13-38-T (9 May 2023), para. 11.
[81] *Prosecutor v. Kabuga* (Prosecution Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit) MICT-13-38-T (9 May 2023), para. 16.
[82] *Ibid*.
[83] *Ibid*., para. 17.
[84] *Kabuga* Further Decision, *supra* note 1, para. 57.

in Rwanda.[85] In reaching that decision, the Trial Chamber gave relatively little attention to whether such a proceeding complies with Kabuga's rights as a person with s disability, his right to be present at trial, or the impact proceeding in his absence might have on the overall fairness of the trial.

The matter was ultimately considered on appeal resulting in the Appeals Chamber quashing the Trial Chamber's decision to hold an alternative finding procedure and ordering it to stay the matter.[86] The Appeals Chamber's decision is primarily based on the conclusion that that there is no provision in the Statute of the IRMCT, or the Statutes of its predecessors, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia, permitting it to hold an alternative finding procedure.[87] The Appeals Chamber also found that the proposed alternative finding procedure is incompatible with the accused's statutory right to be tried in their presence, and that continuing trial against a mentally unfit accused necessarily deprives them of that right.[88]

While the Appeals Chamber's decision prevented the Trial Chamber from conducting an alternative finding procedure, the initial decision to proceed in that manner raised a number of novel questions relating to Kabuga's human rights. These include whether the proposed procedure complied with Kabuga's rights as a disabled person and whether it sufficiently distinct from a trial to avoid implicating his right to be present at trial. Answering the latter question requires further inquiry into how the alternative finding procedure would have been constructed, whether staying the matter would have been a better alternative to the proposed procedure; and what approach would best fulfil the interests of justice. Each of these questions will be considered in turn in the subsequent sections.

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[85] *Ibid*., paras. 51, 57.
[86] *Kabuga* Decision on Appeals, *supra* note 5, para. 79.
[87] *Ibid*., paras. 61 - 62.
[88] *Ibid*., paras. 64 - 65.

3.1 Kabuga's Rights as a Person with a Disability

The Trial Chamber attempted to justify its decision to hold an alternative finding procedure, at least in part, on the belief that doing so would be the best way to respect Kabuga's human rights. Unfortunately, neither the facts of the situation or the relevant law supports such a determination. Instead, the Trial Chamber's decision threatens both Kabuga's rights as a person with a disability and his right to a fair trial. In 2016, the UN Committee on the Rights of Persons with Disabilities ('CRPD Committee') issued its Guidelines on the Right to Liberty and Security of Persons with Disabilities.[89] In those guidelines, the CRPD Committee established that declaring an accused unfit to stand trial and to continue to detain them following such a declaration is a violation of Article 14 of the UN Convention on the Rights of Persons with Disabilities ('UNCRPD').[90]

The *Kabuga* Trial Chamber cited these guidelines with approval, although it did so in a way that substantively changed their meaning. The statement in the guidelines contains two operative clauses, both of which must be fulfilled for a court's action to constitute a violation of Article 14 of the UNCRPD. First, there must be a declaration that the accused is unfit to stand trial, and second, the court must continue to detain the accused on the basis of that declaration.[91] The Kabuga Trial Chamber, in their decision, failed to consider the second clause and asserted that a declaration of unfitness is, by itself, a violation of the accused's UNCRPD rights.[92] Such a reading would not, however serve the object and purpose of Article 14, which is specifically about ensuring that people with disabilities are not subject to unlawful or

[89] UN Committee on the Rights of Persons with Disabilities, 'Report of the Committee on the Rights of Persons with Disabilities' UN Doc. A/72/55 (2017) Annex (hereinafter 'Report of the CRPD Committee').
[90] *Ibid*., para. 16. *see also* Article 14, UN General Assembly, *Convention on the Rights of Persons with Disabilities,* A/RES/61/106 (24 January 2007) (hereinafter 'UNCRPD').
[91] *Ibid*.
[92] *Kabuga* Further Decision *supra* note 1, para. 27.

arbitrary detention.[93] The continued arbitrary detention of the accused is a fundamental part of what makes a declaration of incompetence a violation of Article 14 and cannot be read out of it in the manner proposed. Therefore, a declaration that an accused lacks the mental capacity to stand trial is not, on its own, a violation of the UNCRPD. It only becomes a violation when the trial court continues to detain the accused following such a declaration.

On that basis, the Trial Chamber's decision to continue to detain Kabuga is, in itself, a violation of Article 14 of the UNCRPD. They have made a declaration that Kabuga is mentally unfit to stand trial and are still detaining him on the basis that it would be inappropriate to terminate the proceedings and release him.[94] The Trial Chamber could remedy this violation of Kabuga's rights by releasing him and providing him with the accommodations and support necessary to allow him to participate in the proceedings.[95] However, as the Trial Chamber has already determined that his mental state makes it impossible for him to participate in trial, it is difficult to envision what accommodations and support exist that could achieve that result. Therefore, it would seem that the only outcome that might be compliant with the UNCRPD would be to discontinue or stay the proceedings and release Kabuga from custody.

The Trial Chamber instead decided to continue to violate Kabuga's rights as a person with a disability. It believed that addressing the crimes alleged against him was of such importance to the victims and the international community that it warranted holding the alternative finding procedure.[96] In so doing, it authorized Kabuga's continued detention while the alternative finding procedure was ongoing. In essence, the trial chamber decided to continue to imprison him on the basis of the severity of the charges against him, while admitting that there is no possibility of convicting him, a clear violation of his Article 14 rights as explained

[93] UNCRPD, *supra* note 90, art 14.
[94] *Kabuga* Further Decision, *supra* note 1, para. 47.
[95] Report of the CRPD Committee, *supra* note 89, para. 16.
[96] *Kabuga* Further Decision, *supra* note 1, para. 47.

in the Guidelines on the Right to Liberty and Security of Persons with Disabilities. Further, the Trial Chamber continued to imprison Kabuga even after instituting the stay in proceedings it was told to impose by the Appeals Chamber.[97] While there may be practical reasons for doing this, particularly the need to find a place to release him to, it still constitutes an infringement of his rights under the UNCRPD.

3.2 Kabuga's Right to be Present at Trial

Prioritizing the interests of the victims over those of the accused not only violates Kabuga's rights as a person with a disability, it also threatens his right to be present at trial and, by extension, his right to a fair trial. There is no support in the statute or rules of the IRMCT permitting proceedings to continue against a mentally unfit accused because it would be in the best interests of the victims. The statute obliges the Trial Chamber to conduct trial with 'full respect for the rights of the accused and due regard for the protection of victims and witnesses.'[98] There is a clear semantic difference between the 'full respect' for their rights that the accused is entitled to and the 'due regard' owed to the victims and witnesses. This discrepancy between what is owed to the accused and to the victims has generally been interpreted to mean that when the rights of the accused come into conflict with the interests of the victims, it is the latter that must give way.[99] The International Criminal Court, which has a substantively similar rule in its own Statute, has found that although the interests of the victims and the witnesses are relevant, the rights of the accused must always be paramount.[100]

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[97] *Prosecutor v Kabuga* (Decision Imposing an Indefinite Stay of Proceedings) MICT-13-38-T, T Ch (8 September 2023), 5.
[98] IRMCT Statute, *supra* note 10, art. 18.
[99] Caleb H. Wheeler, *Fairness and the Goals of International Criminal Trials* (2023), 11; Joanne Williams, "Slobodan Milosevic and the Guarantee of Self-Representation" 32 *Brooklyn J. Int'l. L* (2007) 553, 574; *citing* Joseph L. Falvey Jr., "United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia" 19 *Fordham Int'l L. J.* (1995) 475, 487.
[100] *Prosecutor v Katanga* (Minority Opinion of Judge Christine Van den Wyngaert) ICC-01/04-01/07, T Ch (7 March 2014) para. 311; *see also* Rome Statute, *supra* note 10, art. 64(2).

Therefore, the *Kabuga* Trial Chamber lacked a legal basis for prioritizing the interests of the alleged victims over Kabuga's fair trial rights in deciding to hold an alternative finding procedure. As a result, conducting an alternative finding procedure that bears most of the hallmarks of a trial, is a clear violation of Kabuga's right to be present.

Despite this, it does not appear that Kabuga's right to be present at trial was foremost in the Trial Chamber's mind when it made its decision to proceed with an alternative finding procedure. Proceeding against an accused that is unable to understand or participate constitutes a violation of their right to be present at trial.[101] Their mental condition renders them absent from trial and it is well-established that trial can only proceed in the accused's absence when they have voluntarily waived their right to be present during the trial.[102] However, a mentally unfit accused's inability to appear cannot be considered a waiver of their rights as their mental unfitness necessarily means that they lack the capacity for it to be made knowingly. Their non-appearance is the product of their mental condition and is not a choice being made by the accused to absent themselves. This lack of choice, or the ability to choose, means that nothing can be done to make the accused's absence voluntary other than waiting for their mental condition to improve to a point where they able to perform the necessary functions.

3.2.1 Modifying the procedure does not cure the violation of Kabuga's right to be present

Trial is the culminating event of any criminal legal process. International criminal trials are held to determine whether an individual is responsible for the crimes alleged against them pursuant to the laws of the international court or tribunal in which the trial is being

[101] Wheeler *The Right to be Present*, *supra* note 12, 225; Schabas and Caruana, *supra* note 13, 1576.
[102] *Sejdovic*, *supra* note 43, para. 86; *Pishchalnickov supra* note 43, para. 77.

conducted.[103] Criminal responsibility is dependent on the existence of sufficient evidence demonstrating that the accused's actions fulfil all of the elements of the crime or crimes alleged against them.[104] Evidence is considered sufficient to support a conviction when each element of the crime is proven to the requisite standard of proof.[105] International criminal courts and tribunals, including the IRMCT, require that the evidence be proven to the beyond reasonable doubt standard.[106]

Adversarial criminal trials, the principles of which are incorporated into the trial procedures of every international criminal justice institutions, are cast as a contest between the prosecution and defence.[107] During an adversarial trial the prosecution introduces evidence meant to demonstrate that the accused is guilty to the requisite standard while the defendant challenges that evidence, and introduces evidence of their own, for the purpose of instilling the requisite doubt in the fact-finder.[108] As discussed in section 2 above, the right to be present at trial exists to ensure that the accused has the opportunity to fulfil their role in the process should they wish to. While it is one the accused can voluntarily waive, it is not one that can be taken from them without their consent.

Here, the IRMCT's Trial Chamber was confronted with a situation in which the normal trial procedure could not be followed. Kabuga's mental state leaves him unable to participate in the trial against him and it also renders him incapable of making an informed decision as to whether trial should proceed without his participation. The Trial Chamber, in recognition of

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[103] Alexander Heinze, 'Prosecutors and Trials', in Ronald F Wright, Kay L Devine and Russell M Gold (eds), *The Oxford Handbook of Prosecutors and Prosecution* (2021), 118.
[104] *Prosecutor v. Stakić* (Appeal Judgment) IT-97-24-A, A Ch (22 March 2006), para. 219.
[105] *Prosecutor v Gbagbo et al.* (Judgment in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions) ICC-02/11-01/15 A, A Ch (31 March 2021), para 106.
[106] *Prosecutor v Mladić* (Appeals Judgment) MICT-13-56-A, A Ch (8 June 2021), para. 272.
[107] Mirjan Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' 121 *University of Pennsylvania Law Review* (1973) 506, 563.
[108] Michelle Coleman, *The Presumption of Innocence in International Human Rights and Criminal Law* (2021), 81-2, 84.

the fact that the trial could not continue, created an alternative finding procedure that 'resembles trial as closely as possible'.[109] In particular, the alternative finding procedure requires the prosecution to prove all of the *actus reus* and *mens rea* elements of the crimes alleged against Kabuga to the criminal standard of beyond a reasonable doubt.[110] This exactly replicates the responsibility placed on the prosecution if the matter had continued as a trial. However, what it does not do is ensure that Kabuga has the opportunity to rebut the evidence against him because his lack of mental fitness deprives him of that opportunity. Therefore, what the IRMCT Trial Chamber proposed is, in effect, a procedure that replicates a trial but that did not give the accused with the opportunity to participate in their own defence.

In describing the structure of the alternative finding procedure it intended to conduct, the Trial Chamber did make one alteration to distinguish it from a trial. It indicated that, in light of the fact that Kabuga has been found unfit to stand trial, no guilty verdict could be entered at the end of the alternative finding procedure.[111] In the Trial Chamber's view, that concession was sufficient to adequately safeguard Kabuga's fair trial rights.[112] However, this small change in the procedure is unlikely to provide the desired protection. It is implicit in the obligation placed on the prosecution to prove its case to the beyond reasonable doubt standard that at the conclusion of the alternative finding procedure the Trial Chamber will evaluate whether the prosecution had met that burden. Therefore, were the Trial Chamber to find that sufficient evidence had been presented to meet the requisite standard, it could then be inferred (if not actually declared) that Kabuga is guilty of the crimes alleged. Such a finding constitutes a *de facto* verdict, even if his *de jure* guilt or innocence cannot be established. This evidentiary requirement and the finding that will result from it makes this a trial in fact, if not in law.

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[109] *Kabuga* Further Decision, *supra* note 1, para. 57.
[110] *Ibid*.
[111] *Ibid*.
[112] *Ibid*, para. 53.

This conclusion is further supported when one considers the reason the prosecution bears the evidentiary burden during criminal trials. The prosecution is required to prove the guilt of the accused because to do otherwise would violate the accused's presumption of innocence.[113] The IRMCT's Statute requires that the accused be presumed innocent until proven guilty.[114] It entitles anyone accused of a crime to be treated as an innocent person and to enjoy the privileges that come with innocence.[115] The presumption of innocence cannot be overcome unless it has been determined that the charges against the accused have been proven to the requisite standard, which in this case is beyond a reasonable doubt.[116] As a result, a finding by the Trial Chamber that the prosecution had met that threshold, and therefore overcome the presumption of innocence, is tantamount to a ruling that the accused is guilty of the crimes alleged. In this instance, it would permit people to treat Kabuga as guilty despite the fact that the evidence supporting that supposition was established during a procedure in which he was unable to participate.

A proceeding that is, in effect a trial, does not conform to the accused's rights simply by removing the possibility that it cannot result in a conviction. The violation of the right to be present lies in the possibility that the factual record relevant to the charges will be established without the participation of the accused, not in whether they could be convicted on the basis of that record. While this issue has not been decided under international criminal law, similar questions have been addressed by the European Court of Human Rights ('ECtHR'). The ECtHR held in *Kremzow* that an accused should be present for any proceedings where their character, state of mind or motive will be assessed, and that their absence from such a

[113] Coleman, *supra* note 108, p. 82.
[114] IRMCT Statute, *supra* note 10, art. 18.
[115] Elies van Sliedregt, 'A Contemporary Reflection on the Presumption of Innocence' 80 *Revue International de Droit Pénal* (2009) 247, 263.
[116] Coleman, *supra* note 108, p. 96.

proceeding violates the right to be present.[117] It was specifically found that these matters are of such 'crucial importance' to the accused, that it is 'essential' that they be present and able to participate in the relevant proceeding.[118] Additionally, the ECtHR has also found that hearing and examining evidence against an involuntarily absent accused constitutes a violation of their right to be present at trial.[119] Such a violation can be cured, but only if the accused subsequently has the opportunity to have the evidence heard during their absence re-evaluated.[120] These rulings suggest that the defect is in the process of taking the evidence in the accused's absence, and not the outcome that would result from that process.

The Trial Chamber's decision to authorise a *de facto* trial against Kabuga fails to adequately account for his inability to participate in his own defence. As the Trial Chamber itself found, Kabuga is not able to instruct counsel, testify in his own defence, understand the evidence, or understand the progress of proceedings.[121] Proceeding against an accused under these circumstances is a departure from how an adversarial proceeding is normally conducted. It means that the facts against the accused will be established without his input or the opportunity to raise the doubt necessary to avoid conviction. Pursuing an alternative procedure like the one proposed by the trial chamber effectively denies him of his right to participate in the determination of the charges against him, which is a violation of his right to be present at trial.

3.2.2 Staying Proceedings Against Kabuga is a Better Approach Than Holding a *De Facto* Trial

Rather than subject Kabuga to a *de facto* trial, the Trial Chamber could have chosen to stay the proceedings against him. The Trial Chamber rejected that approach, despite the

[117] *Kremzow v. Austria*, [1993] ECHR 40, para. 67.
[118] *Ibid*.
[119] *Idalov v. Russia* (2012) App. No. 5826/03, para. 178.
[120] *Ibid*.
[121] *Kabuga* Further Decision, *supra* note 1, paras. 31-33.

principle established by the International Criminal Court that it is necessary for proceedings to be stayed if it is clear that the essential preconditions of a fair trial cannot be met.[122] The IRMCT Trial Chamber felt instead that staying a proceeding against an unfit accused is only appropriate when they have 'a realistic prospect of regaining fitness.'[123] In reaching that decision, the IRMCT failed to consider several cases in which stays were imposed in cases where there was no prospect of the accused recovering their mental fitness to stand trial. In particular, the *Hadžić* and *Kovačević* cases both demonstrate that the International Criminal Tribunal for the former Yugoslavia supported the proposition that proceedings should be stayed when the accused is not competent to participate in trial. In *Hadžić*, the accused suffered from a brain tumour that had, at the time the stay was ordered, trebled in size in less than a year. [124] During that time, he had also developed swelling on his brain and a new lesion was also detected.[125] This led Hadžić's treating physician to conclude that his ability to participate in trial, which was already compromised, would only continue to deteriorate.[126] As a result of his condition and diagnosis, the Trial Chamber found that Hadžić was no longer able to effectively communicate with and instruct his counsel or exercise his fair trial rights.[127] It ordered that the proceedings be stayed indefinitely, as doing so was consistent with the past practice of the International Criminal Tribunal for the former Yugoslavia.[128] Proceedings were ultimately terminated following Hadžić's death.[129]

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[122] *Prosecutor v. Lubanga* (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) ICC-01/04-01/06 (13 June 2008), para. 91.
[123] *Kabuga* Further Decision, *supra* note 1, para. 49.
[124] *Prosecutor v. Hadžić* (Public Redacted Version of 24 March 2016 Decision on Remand on the Continuation of Proceedings) IT-04-75-T (5 April 2016), para. 28.
[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*., para. 29.
[128] *Ibid*., para. 30.
[129] *Prosecutor v. Hadžić* (Order Terminating the Proceedings) IT-04-75-T, T Ch (22 July 2016).

The International Criminal Tribunal for the former Yugoslavia's Trial Chamber also chose to stop proceedings against Vladimir Kovačević, another accused found to be mentally unfit to stand trial. After applying the criteria previously established by the tribunal in the *Strugar* case, it was determined that Kovačević lacked the ability to perform any of the necessary trial functions including : pleading to the charges; understanding the nature of the charges; understanding the course of the proceedings; understanding the significance of the evidence; instructing counsel; understanding the consequences of the proceedings; and testifying.[130] The matter was halted (although never officially stayed), and ultimately transferred to the War Crimes Chamber of the District Court in Belgrade, where Kovačević was indicted in July 2007.[131] Later that year, the charges brought against him by the prosecutor in Serbia were dropped following a diagnosis that he suffered from permanent and incurable mental illness.[132]

It has also been the practice of other international criminal justice institutions to stay proceedings following a finding that the accused is mentally unfit to stand trial. That was the approach taken by the Extraordinary Chambers in the Courts of Cambodia when confronted with the mental fitness of Ieng Thirith, one of the defendants in the *Chea* case. In this situation, the evidence showed that Ieng Thirith suffered from a progressive and degenerative condition with little possibility that she might recover.[133] As a result, she was found mentally unfit to

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[130] *Prosecutor v. Kovačević* (Public Version of the Decision on Accused's Fitness to Stand Trial or Enter a Plea) IT-01-42/2-I (12 April 2006), para. 45.
[131] *Prosecutor v Kovačević* (Indictment) District Courts in Belgrade, War Crimes Chamber (26 July 2007) <https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Serbia/KovacevicVladimir_Indictment_26-7-2007.pdf> accessed 21 February 2024.
[132] Balkan Insight, 'Serb Army Officer Charges Dropped' (Balkan Insight, 5 December 2007) <https://balkaninsight.com/2007/12/05/serb-army-officer-charges-dropped/> accessed 21 February 2024.
[133] *Prosecutor v. Chea et al.* (Decision on Ieng Thirith's Fitness to Stand Trial) 002/19-09-2007-ECCC-TC (17 November 2011), para. 53.

stand trial and the matter against her was stayed.[134] In all of these situations, the cases were stayed or otherwise halted even though the presiding courts knew that it was unlikely the accused would regain their fitness to participate in trial. These cases demonstrate that the IRMCT Trial Chamber was incorrect in its *Kabuga* decision when it asserted that stays were only used in situations where the possibility existed that the accused's condition might improve.

Further, at least one of the cases the *Kabuga* Trial Chamber relied on in its decision also seems to support the conclusion that staying proceedings against a mentally unfit accused is appropriate even if there is no possibility of the accused regaining their fitness. In *Nahak*, the Special Panel for Serious Crimes in the Dili District Court, applying international criminal law, determined that the accused was mentally unfit to stand trial and stayed the proceedings against him.[135] At no point did the trial court suggest that the matter was stayed because a reasonable prospect existed that Nahak would regain his fitness to stand trial. Instead, the trial court conceded that he may never be fit to stand trial and that the matter could remain unresolved as a result of its order.[136] The court recognized that this outcome would be disappointing to the victims and witnesses, but considered it unavoidable based on Nahak's lack of competence to stand trial. This finding is more in line with the approach taken in *Hadžić, Kovačević* and *Chea* than what was advocated by the *Kabuga* trial court.

Another issue with the decision not to stay the *Kabuga* case lies in the fact that three of the five cases the trial chamber relied on in reaching that decision do not involve an accused who lacks the mental fitness to stand trial.[137] Instead, they involve individuals who were unable

[134] *Ibid*., para. 61.
[135] *Prosecutor v. Nahak* (Findings and Order on Defendant Nahak's Competence to Stand Trial) Case No. 01A/2004 (1 March 2005), para. 156.
[136] *Ibid*., para. 164.
[137] *Kabuga* Further Decision, *supra* note 1, para. 48.

to participate on the basis of physical illness or injury.[138] While such cases can be instructive, there needs to be some recognition that an accused unable to participate due to a physical limitation is in a fundamentally different position than one who cannot attend based on their mental condition. Certain accommodations can be implemented to allow a physically unfit individual participate in trial, including holding shorter hearings or reducing the number of days the court sits each week, that are not available for a mentally unfit accused. Therefore, a decision to stay a matter when the accused is physically unfit is made on a different basis than when the accused is mentally unfit, and that difference needs to be taken into account when deciding whether staying the matter is an appropriate result.

3.2.3 Prioritizing Kabuga's Right to be Present Would Best Satisfy the Interests of Justice

It also appears that there is no real foundation for the Trial Chamber's finding that the interests of the international community justify holding an alternative finding procedure against Kabuga. Although the Trial Chamber did not elaborate as to what specific interests the international community has in continuing proceedings against Kabuga, the implication is that allowing the matter to proceed to some sort of conclusion would satisfy the international community's general interest in seeing justice done. Some legal foundation exists supporting the assertion that the interests of justice may demand that trial continue in the absence of the accused. In *Mbenge v. Zaire*, the UN Human Rights Committee determined that *in absentia* proceedings are permissible under some circumstances, particularly when doing so is in the interest of the proper administration of justice.[139] The Special Court for Sierra Leone built on the Human Rights Committee's position as to this issue and found on at least two occasions that the interests of justice allows trial to continue against an accused who disrupts or refuses

[138] *Ibid*.
[139] *Mbenge*, supra note 44, para. 14.1.

to attend trial.[140] The International Criminal Court's Appeals Chamber also reached a similar conclusion in *Gbagbo*, that trial can continue against a wilfully absent accused, but the court has not yet been called upon to put this issue to the test.[141]

Despite these rulings, it is difficult to see how the interests of justice would be served by proceeding in Kabuga's absence. The Human Rights Committee, the Special Court for Sierra Leone and the International Criminal Court all limited the application of the proper administration of justice principle to those accused who were wilfully absent from trial. The Special Court for Sierra Leone specifically stated that illness can act as a justification for the accused's absence, and that an ill defendant is not wilfully absent.[142] Here, Kabuga's absence is not the result of a wilful decision not to intend. Instead it is the product of his illness which makes him unable to understand or participate in the proceedings against him. As a result, proceeding against him under these circumstances does not meet the existing standard permitting a court to continue trial *in absentia* against a wilfully absent accused.

Using the interests of justice to justify the continuation of proceedings against an absent accused ignores the international community's overriding interest in ensuring that an individual accused of a crime is afforded a fair evaluation of the charges against them.[143] There are two reasons why guaranteeing the accused's right to a fair trial is seen as important to the international community. First, trials of alleged war criminals and *genocidaires* have no value

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[140] *Prosecutor v. Norman et al.* (Ruling on the Issue of Non-Appearance of the First Accused, Samuel Hinga Norman, The Second Accused, Moinina Fofana and the Third Accused, Allieu Kondewa at the Trial Proceedings) SCSL-04-14-PT, (1 October 2004), para. 22; *see also Prosecutor v. Sesay et al.* (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) SCSL-04-15-T (12 July 2004), para. 8.

[141] *Prosecutor v. Gbagbo et al*. (Public Redacted Decision on Counsel for Mr. Gbagbo's Request for Reconsideration of the 'Judgment on the Prosecutor's Appeal Against the Oral Decision of Trial Chamber I pursuant to Article 81(c)(i) of the Statute' and on the Review of Condition on the Release of Mr. Gbagbo and Mr. Blé Goudé) ICC-02/11-01/15 (28 May 2020), para. 69.

[142] *Norman et al.*, *supra* note 140, para. 17.

[143] Yvonne McDermott, *Fairness in International Criminal Trials* (2016), 146.

if they fail to ensure that the procedural rights of the accused are being respected.[144] One purpose of international criminal trials is to hold accountable those individuals responsible for committing the crimes alleged.[145] Using an unfair procedure to apportion responsibility calls into question whether a correct determination was reached.[146] Further, encroaching on the accused's human rights is not an acceptable response to their alleged violations of the human rights of others. This simply creates a cycle of rights violations without any apparent end that would undermine the international community's authority as a promoter of human rights.

That, in turn, leads to the second reason that the international community has a dominant interest in protecting the accused's right to a fair trial. Another purpose of international criminal trials is to positively reinforce the rule of law by providing domestic courts with a trial model that promotes the protection of human rights.[147] Those efforts would be undermined if international criminal trials were conducted using procedures that failed to meet the human rights standards established by the international community.[148] It would also diminish the legitimacy of human rights rules made by the international community in the eyes of domestic governments leading to the possible widespread rejection of international human rights standards.

4 Conclusion

The motivation of the IRMCT's Trial Chamber to try and conclude the proceeding against Kabuga is understandable, particularly in light of the fact that the victims of the crimes alleged against him have been waiting to see him tried for almost thirty years.[149] Unfortunately,

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[144] Christopher V. Steinert, 'Trial Fairness Before Impact: Tracing the Link Between Post-Conflict Trials and Peace Stability (2019) 45(6) *International Interactions* 1003, 1025.
[145] Wheeler *Fairness*, *supra* note 99, p. 6.
[146] *Ibid*.
[147] *Ibid*., 35.
[148] Frédéric Mégret, "Beyond Fairness: Understanding the Determinants of International Criminal Procedure" 14 *UCLA J. Int'l. L. Foreign Aff.* (2009) 37, 71.
[149] *Kabuga* Further Decision, *supra* note 1, paras. 47, 50 – 51.

doing so is simply not possible without violating his right to a fair trial and his rights as a person with a disability. Fortunately, the Appeals Chamber recognised this, along with the fact that there was simply no statutory support for continuing proceedings against an accused that is not mentally fit to stand trial.[150]

The accused's right to be present at trial is an important part of their right to a fair trial.[151] The right to be present extends beyond the mere physical presence of the accused in the courtroom; it also requires that the accused be able to understand and participate in the proceedings.[152] An accused who cannot understand and participate in trial is considered not mentally fit to stand trial.[153] When a Trial Chamber decides that the accused is not mentally fit it is, in effect, finding that the accused is not, and cannot, be present for trial. As a result, continuing trial against an accused who lacks the requisite mental fitness is necessarily a violation of their right to be present.

Choosing to subject a mentally unfit accused to a procedure that resembles a trial, but that will not result in a verdict, is also a violation of their right to be present. That is because the danger of proceeding against an absent accused does not lie in the possible outcome that might result in their absence. Instead, it exists in the procedure whereby evidence is introduced and developed without the accused being able to contribute to, or challenge, that factual record. Therefore, the defect exists in the process of taking evidence against an absent accused and not the potential for reaching a guilty verdict without their participation. Such a result is nothing more than the unfortunate by-product of the flawed procedure.

While any alternative finding procedure is a *prima facie* violation of the accused's right to be present, the approach proposed by the IRMCT Trial Chamber constitutes a particularly

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[150] *Kabuga* Decision on Appeals, *supra* note 5, para. 79.
[151] Knoops, *supra* note 6, 175; Bassiouni, *supra* note 6, 267.
[152] Wheeler *The Right to be Present*, *supra* note 12, 258-9.
[153] *Ongwen* Decision on the Defence Request, *supra* note 18, para. 7; *citing Gbagbo et al.*, *supra* note 18, para. 36.

egregious infringement of Kabuga's rights. This is in large part due to the decision to conduct a procedure that resembles a trial as closely as possible. The requirement that the prosecution prove each element of the alleged crimes is of particular concern, as it will allow for the inference of a verdict even if one cannot actually be entered by the court. Therefore, the one concession the Trial Chamber made to Kabuga's inability to participate, ineffective as that concession may be, will vanish once it makes a decision as to whether the charges have been proven to the requisite standard. The procedure the Trial Chamber intended to conduct is then nothing more than a *de facto* trial, even if it is called an alternative finding procedure. As such, it violates Kabuga's right to be present at trial and calls into question the fairness of the proceedings as a whole.

Holding an alternative finding procedure not only violates Kabuga's rights, it also endangers the rights of future defendants. Currently, proceeding against an absent accused is only permitted when they have voluntarily waived their right to be present. Alternative finding procedures, at least in the form proposed by the IRMCT Trial Chamber, would be conducted in the absence of such of waiver, fundamentally upending how the right to be present has been understood in international criminal law. Based on this ruling, a court confronted with an absent accused who has not waived their right to be present could still proceed to hear evidence against them. After hearing that evidence, the chamber would be called upon to decide whether the prosecution met the criminal standard of proof and presented sufficient evidence to fulfil all of the elements of the crimes alleged. Such a procedure has all of the hallmarks of trial, with the only difference being that verdict is implicit in the court findings rather than explicitly declared in the decision. Should alternative finding procedures like this become a common practice, the right to be present at trial will be rendered effectively meaningless because international criminal justice institutions will have a route to determining the accused's guilt without their participation in the proceedings against them.