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## Is the test for fitness to plead the same during the appeal process as the trial process at the ECCC?

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CASE WESTERN RESERVE  
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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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ISSUE: IS THE TEST FOR FITNESS TO PLEAD THE SAME DURING THE APPEAL PROCESS AS THE TRIAL  
PROCESS AT THE ECCC?

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**Fall Semester, 2015**

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## **I. INTRODUCTION**

### **A. Scope**

This memorandum discusses whether the test of fitness to plead is the same during the appeal process as in the trial process at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).<sup>\*</sup> This memorandum provides a brief analysis on the fitness standard used at the trial level, and policy considerations for why a different, more flexible test should be used at the appellate level. In addition, this memorandum provides a brief insight into other, similar civil law jurisdictions and how these courts have handled related issues.

### **B. Summary of Conclusions**

#### **i. The trial level court used a specific standard of fitness.**

The ECCC trial level used different, more strict standard to determine if the accused was fit to stand trial at the trial level, than that which should be used on the appellate level. This standard, applied directly, would not be appropriate to apply to the current, ongoing appeals in the ECCC.

#### **ii. There seems to be an international trend towards using a more flexible standard of fitness on appeal.**

While there is not a well-established international rule for a differentiating standard for fitness, there arguably seems to be an international trend towards using a less strict standard during the appeal process than during the trial process.

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<sup>\*</sup> Is the test of fitness to plead the same during the appeal process as the trial process at the ECCC?



**iii. Using a more flexible standard of fitness would be appropriate for cases currently awaiting judgment on appeal.**

Even though there are other potential remedies against an accused who has been found unfit to plead and stand trial, using a less strict standard of fitness at the appellate level would be the most appropriate avenue.

**II. BACKGROUND**

Under Articles 4, 5, and 6 of the ECCC Statute, the Extraordinary Chambers were created to prosecute all Suspects who either committed or ordered crimes of genocide, crimes against humanity, and grave breaches of the Geneva Conventions of 1949, associated with the Democratic Kampuchea.<sup>1</sup> These crimes must have occurred between April 17, 1975, and January 6, 1979.<sup>2</sup> The ECCC also has jurisdiction to prosecute all Suspects “most responsible for the destruction of cultural property” and “most responsible for crimes against internationally protected persons” that occurred in connection with the armed conflict, during the same specified time frame.<sup>3</sup>

On January 15, 2014, two of the accused filed written for the Chamber to review their fitness to stand trial.<sup>4</sup> While these two accused have since been deemed fit to stand trial and have

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<sup>1</sup> *Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004* (NS/RKM/1004/006) [reproduced on accompanying flash drive at number 9].

<sup>2</sup> *Id.* at Article 1.

<sup>3</sup> *Id.* at Article 7-8.

<sup>4</sup> *Decision on Fitness of the Accused Khieu Samphan to Stand Trial*, 002/19-09-2007/ECCC/TC, 1 (24 April 2014); and *Decision on Fitness of Accused Nuon Chea to Stand Trial*, 002/19-09-2007/ECCC/TC, 1 (24 April 2014) [reproduced on accompanying flash drive at numbers 4 and 5, respectively].

been sentenced to life imprisonment at the trial level,<sup>5</sup> both men are of a certain age where there may be a question as to whether either of them will still be considered fit to stand trial through the appellate trial, until a final judgment is announced. Therefore, it is necessary to determine if the standard for fitness to plead and stand trial is the same during the appeals process as the trial process at the ECCC, or if a less strict, more flexible standard of fitness can be appropriate.

#### **A. Khmer Rouge**

Prior to the Khmer Rouge takeover, Cambodia had been ravaged by brutal civil war bombing and turmoil and was caught in the chaos of the U.S.-Vietnam conflict.<sup>6</sup> The Khmer Rouge took power in April 1975 and was overthrown in January 1979.<sup>7</sup> This regime ultimately led to the Cambodian genocide, mass executions, extreme national famine, and forced labor.<sup>8</sup> The following leaders of the Khmer Rouge were identified by the ECCC and were indicted under ECCC jurisdiction: Khieu Samphan, Ieng Sary, Nuon Chea, and Ieng Thirith.<sup>9</sup> Of these accused, both Nuon Chea and Khieu Samphan have recently been convicted at the trial level and sentenced to life imprisonment.<sup>10</sup> Ieng Thirith was found unfit to stand trial.<sup>11</sup>

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<sup>5</sup> *Case 002/01 Judgment*, 002/19-09-2007/ECCC/TC (7 August 2014) [reproduced on accompanying flash drive at number 2].

<sup>6</sup> Jaya Ramji and Beth Van Shaack, *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts*, 13 (2005) [reproduced in part on accompanying flash drive at number 20].

<sup>7</sup> *Id.*

<sup>8</sup> “Introduction,” *Extraordinary Chambers in the Courts of Cambodia*, <http://www.eccc.gov.kh/en/about-eccc/introduction> [<http://perma.cc/LN9X-FSR4>].

<sup>9</sup> *Closing Order*, 002/19-09-2007-ECCC-OCIJ, 402 (15 September 2014) [reproduced on accompanying flash drive at number 3].

<sup>10</sup> *Case 002/001 Judgment*, 622 (2014).

## **B. Formation of the ECCC**

On December 18, 2002, nearly thirty years after the devastation of the Democratic Kampuchea, the United Nations (“UN”) General Assembly adopted resolution 57/228 that recalled the serious violations of the Khmer Rouge regime.<sup>12</sup> This resolution urges the Secretary General of the UN and the Royal Government of Cambodia to solidify and draft an Agreement that would outline the role of the Extraordinary Chambers, which would operate within Cambodian law, to prosecute crimes committed during the Democratic Kampuchea.<sup>13</sup> The UN General Assembly soon thereafter accepted the proposed Agreement, and thus the Extraordinary Chambers in the Courts of Cambodia were established.<sup>14</sup> As the official Agreement between the UN and the Royal Courts of Cambodia states, the ECCC was created for the purpose of prosecuting “senior leaders of the Democratic Kampuchea and those who are most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”<sup>15</sup> Since the passage of the Agreement, the

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<sup>11</sup> *Decision on Ieng Thirith’s Fitness to Stand Trial*, 002/19-09-2007/ECCC/TC (17 November 2011) [reproduced on accompanying flash drive at number 6].

<sup>12</sup> G.A. Res. 109(b), UN GAOR, 57th Sess., U.N. Doc. A/RES/57/228 (February 2003). [reproduced on accompanying flash drive at number 12].

<sup>13</sup> *Id.*

<sup>14</sup> G.A. Res. 109(b), UN GAOR, 57th Sess., U.N. Doc. A/RES/57/228/B (May 2003). [reproduced on accompanying flash drive at number 13].

<sup>15</sup> *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 57/228 (18 December 2002) [reproduced on accompanying flash drive at number 11].

ECCC has become fully functioning and has indicted and convicted several senior leaders of the Democratic Kampuchea.

### **C. Situation now at the ECCC**

#### **Nuon Chea and Khieu Samphan have both been convicted at the trial level.**

During the trial process, both of the accused filed written submissions with the Chamber for a report on fitness to stand trial.<sup>16</sup> The Chamber assigned three different medical experts to examine each accused individually; and then collectively, the experts were to issue a report on each of the accused.<sup>17</sup> From these reports, the Chamber concluded that both Nuon Chea and Khieu Samphan were fit to stand trial.<sup>18</sup> Even though both of these accused were convicted at the trial level and an appeal verdict will soon be delivered, there is a question of whether either of the accused's medical conditions may deteriorate over this time. This presents an interesting procedural question of whether the standard that the Chamber used on the trial level for determining fitness to plead will be the same on the appellate level, or if the standard will be one of a lesser degree.

### **III. Legal Discussion**

#### **A. Jurisdiction**

##### ***The Agreement between UN and the Royal Government of Cambodia outlines the scope of the ECCC's jurisdiction.***

According to Article 9 of the Agreement,

The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention

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<sup>16</sup> *Decision on Fitness of the Accused Khieu Samphan to Stand Trial*, at ¶ 1 (2014).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at ¶ 2; and *Decision on Fitness of Nuon Chea to Stand Trial*, at ¶ 2 (2014).

and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chamber promulgated on 10 August 2001.<sup>19</sup>

According to Article 12, the criminal procedure used at the ECCC to try the above-mentioned crimes must be in accordance with Cambodian law.<sup>20</sup> Where there seems to be inconsistency in the rule or the application of the rule, the Court can look at the procedural rules from outside jurisdictions and to rules established at the international level.<sup>21</sup> In light of Article 12, the following discussion will provide both a view of the standard for fitness to plead within the Cambodian jurisdiction and within other civil law jurisdictions. This paper will also present a discussion of how customary international law seems to be forming on this subject.

## **B. Standard of Fitness at Trial Level**

### **i. The ECCC has previously outlined the standard for fitness to plead at the trial level.**

In order for an accused to be found fit to stand trial, he must be “capable of meaningful participation which allows him to exercise his fair trial rights.”<sup>22</sup> The accused must be able to exercise these rights to an extent that he is “able to participate effectively in his trial and has an understanding of the essentials of the proceedings.”<sup>23</sup> To determine if the accused meets this threshold test, the Chamber can seek medical expert opinion, make its own observations of the

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<sup>19</sup> *Agreement between the United Nations and the Royal Government of Cambodia*, at Art. 9.

<sup>20</sup> *Id.* at Art. 12.

<sup>21</sup> *Id.*

<sup>22</sup> *Decision on Fitness of the Accused Khieu Samphan*, at ¶ 6 (2014).

<sup>23</sup> *Id.*

accused's presence, and acknowledge certain pre-existing medical conditions.<sup>24</sup> The Chamber can also look to the accused's capacity to understand the nature or essence of the charges, the general consequence of the proceedings, the details of the evidence, and even whether or not the accused still has the overall ability to instruct his lawyers and even to testify on his own behalf.<sup>25</sup>

**ii. Ieng Thirith**

Along with several other leaders of the Democratic Kampuchea, Ieng Thirith was also indicted for crimes against humanity, grave breaches of the Geneva Conventions of 1949, and genocide.<sup>26</sup> Between her indictment and the start of her trial, she was found unfit to stand trial, and the Trial Chamber ordered her to be released.<sup>27</sup> The medical reports confirmed that the accused was suffering from the medical condition *dementia*.<sup>28</sup> The Supreme Court Chamber overturned the order for release, and ordered that a new assessment of her fitness to stand trial to be conducted.<sup>29</sup> The Chamber found that she was still unfit to stand trial.<sup>30</sup> The Supreme Court Chamber then issued a "regime of judicial supervision."<sup>31</sup> With this supervision, the Chamber

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<sup>24</sup> *Decision on Fitness of the Accused Khieu Samphan*, at ¶ 6 (2014).

<sup>25</sup> *Id.*

<sup>26</sup> *Extraordinary Chambers in the Courts of Cambodia*, "Ieng Thirith," <http://www.eccc.gov.kh/en/indicted-person/ieng-thirith> [<http://perma.cc/8A8X-NBDE>].

<sup>27</sup> *Immediate Appeal Against Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following the Supreme Court Chamber Decision of 13 December 2011*, 002/19-09-2007-ECCC/SC(16), ¶ 2 (2011). [reproduced on accompanying flash drive at number 8].

<sup>28</sup> *Termination of the Proceedings Against the Accused Ieng Thirith*, 002/19-09-2007/ECCC/TC, ¶ 3 (2015). [reproduced on accompanying flash drive at number 10].

<sup>29</sup> *See Immediate Appeal Against Decision on Reassessment*, at ¶ 2 (2012).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶ 3.

ordered that Ieng Thirith would be subject to a new medical examination every six-months to determine if she was still considered unfit to stand trial.<sup>32</sup> The accused has since died on August 22, 2015.<sup>33</sup> Following her death, the Chamber terminated all charges against Ieng Thirith pursuant to the Internal Rules.<sup>34</sup>

**What are the implications of the termination of proceedings against Ieng Thirith on the potentiality of pending cases?**

If any of the accused file to have their fitness re-examined, the question remains if the Supreme Court Chamber will then issue a reassessment of the accused's fitness, just as it did in Ieng Thirith's situation. In her situation, the same fitness standard was used on reassessment as in the initial assessment.<sup>35</sup> Also, when Ieng Thirith was found unfit to stand trial, she was placed into judicial supervision.<sup>36</sup>

The accused currently awaiting appeal at the ECCC should not be held to the same standard. Unlike Ieng Thirith's case, the ECCC actually received a conviction for both Khieu Samphan and Nuon Chea at the trial level. Ieng Thirith's case never reached a conviction, because she was found unfit to plead prior to an official and final ruling.<sup>37</sup> Also, even though Ieng Thirith was found unfit to plead, she was still placed under judicial supervision and

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<sup>32</sup> *Immediate Appeal Against Decision on Reassessment*, at ¶ 17(6) (2012).

<sup>33</sup> ECCC Press Release: *Accused Person Ieng Thirith Dies* (22 August 2015) [reproduced on accompanying flash drive at number 1].

<sup>34</sup> ECCC Internal Rules, Rule 23 *bis*. (6) (2015) [reproduced on accompanying flash drive at number 7].

<sup>35</sup> *Immediate Appeal Against Decision on Reassessment* (2012).

<sup>36</sup> *Id.* at ¶ 3.

<sup>37</sup> *Id.* at ¶ 19.

subjected to medical examinations every six months, to determine if at any point she would become fit to stand trial.<sup>38</sup> Because the Chamber has already convicted the two accused men that are currently awaiting appeal, the Chamber should consider using a different standard of fitness at the appellate level.

### **C. Standard of Fitness on Appeal**

#### **Cambodian Law does not provide a standard for fitness to stand trial on the appellate level.**

Because of the jurisdictional constraints placed on the ECCC, the Chamber must first look to local Cambodian law to determine if there is a specified standard for fitness. The *Code of Criminal Procedure for the Kingdom of Cambodia* does not provide a standard that the ECCC could follow when determining if the accused is fit to stand trial.<sup>39</sup> Because Cambodian law does not designate a specific standard, the Chamber is permitted to look towards procedural rules that have been established at over regional jurisdiction and customs at the international level.<sup>40</sup>

### **D. International Standards**

#### **i. International Criminal Tribunal for the Former Yugoslavia**

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has provided a primer for other international criminal courts when looking at the standard for fitness to stand trial. The ICTY held that the test for fitness to stand trial is not the same as defining if the

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<sup>38</sup> *Immediate Appeal Against Decision on Reassessment* (2012), at ¶ 3.

<sup>39</sup> *The Code of Criminal Procedure for the Kingdom of Cambodia*, Khmer-English Translation (September 2008) [reproduced on accompanying flash drive at number 18].

<sup>40</sup> *Agreement between the United Nations and the Royal Government of Cambodia*, at Art. 12.



accused has a mental or physical disorder.<sup>41</sup> The ICTY first determined that the threshold test for fitness is whether the accused has the capacity to effectively exercise his rights at “such a level that it is possible for the accused to participate in the proceedings and to ... make his defense.”<sup>42</sup> In the case of *Prosecutor v. Strugar*, the ICTY furthered this standard by providing a more in-depth approach to determining fitness to stand trial.

In *Strugar*, the ICTY held that the accused must have the “overall capacity allowing for a meaningful participation in the trial,” and also the accused must have “the capacity to *reasonably* pursue his rights” (emphasis added).<sup>43</sup> In this case, the accused’s medical examination revealed that he was suffering from multiple physical and mental disorders, including “recurrent depression, vascular dementia, residual posttraumatic stress disorder, vertebrobasilar insufficiency, [and] chronic renal failure.”<sup>44</sup> The accused contended that as a result of all of these conditions overlapping, his “cognitive abilities had deteriorated his judgment [sic] thinking, general processing of information, as well as in impaired memory, learning, attention and concentration.”<sup>45</sup> While the court held that an accused’s fitness must be considered in light of the combination of his or her illnesses, the threshold test is whether or not the accused has an “overall capacity allowing for meaningful participation in the trial.”<sup>46</sup> In the end, the ICTY found

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<sup>41</sup> *Prosecutor v. Strugar*, IT-01-42-A, 28 (2008) [reproduced on accompanying flash drive at number 16].

<sup>42</sup> *Prosecutor v. Kovačević*, IT/01-42/2, ¶ 27 (2006). [reproduced on accompanying flash drive at number 15].

<sup>43</sup> *Strugar*, at 23 and 28 (2008).

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Strugar*, at 13 (2008).

<sup>46</sup> *Id.* at 28.

that Strugar was fit to stand trial.<sup>47</sup> First, the court determined that it was undisputed by either party that Strugar understood the nature of the charges he was facing. Secondly, the court found that it was reasonable to conclude that Strugar did possess capacity to “understand the course of the proceedings and the details of the evidence.”<sup>48</sup> To determine this, the court made its own observations about the accused’s behavior, especially Strugar’s behavior in light of his explanations and concerns that he made in regards to his medical report.<sup>49</sup> Thirdly, the court found that the accused reasonably had the capacity to testify at trial.<sup>50</sup> Finally, the court concluded that Strugar was able to reasonably instruct his counsel, by looking at how Strugar had in fact already been instructing his counsel about information relating to the medical report.<sup>51</sup>

The analysis set forth in the *Strugar* opinion provides a foundational basis for assessing the fitness standard on the appellate level. Even though the ICTY Appeals Chamber was primarily focused on whether the trial court erred when issuing its judgment.<sup>52</sup> The ECCC can apply this standard similarly. By taking similar factors under consideration to those that the ICTY considered, the ECCC will seemingly be using a more flexible standard than it had already

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<sup>47</sup> *Strugar*, at 29 (2008).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 28. Here, the court once again made observations of Strugar’s participation in recollecting events and statements made to his medical examiners.

<sup>51</sup> *Id.* at 30.

<sup>52</sup> *Id.*

applied, when determining an accused's fitness to plead at the trial level. But even though this standard may seem lesser, it has been fully upheld by the ICTY Appeals Chamber.<sup>53</sup>

- ii. Many other national courts seem to be using a standard similar to that standard defined in *Strugar*, or a standard otherwise more flexible than that employed at the ECCC.**

### Germany

In recent years, German national courts have reprised the interest in bringing former alleged Nazis to justice. This reprisal has led to many German courts leaning towards a more flexible standard of fitness at both the trial and appellate levels.

In the past decade alone, several alleged Nazis have since been indicted and were later were found fit to stand trial as late as 2009.<sup>54</sup> Heinrich Boere, for example, was 88 years old at the time of his indictment.<sup>55</sup> Boere had confessed to willingly joining the *Nederlandsche-SS* in 1942, and confessed to taking part in espionage to serve the Nazi regime.<sup>56</sup> While Boere was found unfit to plead at the trial level due to a pre-existing heart condition, the German Higher Regional Court of Appeal in Cologne reversed this decision.<sup>57</sup> While the official appellate decision is unavailable in English, Swoboda's article provides that "old age and infirmity [are]

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<sup>53</sup> *Strugar*, at 30 (2008).

<sup>54</sup> Pizzo, *Not Guilty – “But Not Innocent: An Analysis of the Acquittal of John Demjanjuk and its Impact on the Nazi War Crimes Trials,”* *Boston College International and Comparative Law Review*, Vol. 18, Issue 1, Art. 4. [reproduced on accompanying flash drive at number 25].

<sup>55</sup> Swoboda, "Paying the Debts – Late Nazi Trials before German Courts," *Journal of International Criminal Justice*, Oxford Journals (2010) [reproduced on accompanying flash drive at number 26].

<sup>56</sup> *Id.* at 17.

<sup>57</sup> Swoboda, at 17.

only taken into account...so that the court may grant conditional early release.”<sup>58</sup> This statement leads the reader to infer that the appellate court did not necessarily take “old age and infirmity” into account when appealing the trial court’s decision on fitness.

Furthering this idea, a German trial court also indicted another accused Nazi in 2009.<sup>59</sup> John Demjanjuk, 89 years old at the time of his indictment, was deported from the United States to Germany to stand trial.<sup>60</sup> In 2009, Demjanjuk was found fit to stand trial.<sup>61</sup> The court looks to many different factors in order to determine if the accused to fit to stand trial. First, the court takes into consideration the accused’s health.<sup>62</sup> During the course of his fitness hearings, Demjanjuk’s health seemed to be deteriorating rapidly.<sup>63</sup> Medical examiners requested that Demjanjuk only be required to spend two, 90-minute-sessions in court daily.<sup>64</sup> Also during Demjanjuk’s fitness hearing, his son (“Demjanjuk Jr.”) officially reported to the Associated Press that his father was dying of “incurable leukemic bone marrow disease.”<sup>65</sup> Also, at one

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<sup>58</sup> Swoboda. at 19.

<sup>59</sup> Beck, *Does Age Prevent Punishment? The Struggles of the German Juridical System with Alleged Nazi Criminals: Commentary on the Criminal Proceedings Against John Demjanjuk and Heinrich Boere*, 11 German L.J. 347 (2010). [reproduced on accompanying flash drive at number 22].

<sup>60</sup> *Id.*

<sup>61</sup> “Demjanjuk deemed ‘fit to stand trial,’” *The Jerusalem Post* (3 July 2009). Available at <http://www.jpost.com/International/Demjanjuk-deemed-fit-to-stand-trial> [<http://perma.cc/JW2S-GWFM>].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

point during the hearings, the proceedings were suspended for a brief session because Demjanjuk was “too ill to attend.”<sup>66</sup> While there is no official English opinion of the case that would help determine why exactly Demjanjuk was found fit to plead given the circumstances, Swoboda’s above argument is furthered by this decision, implying that “old age and infirmity” were not substantially taken into account when determining the accused’s fitness.

Both the *Boere* case and *Demjanjuk* are examples of accused who are approximately the same ages as the two accused that are awaiting appeal in the ECCC, and in similar health situations. In these cases, German courts seem to be applying a less strict standard of fitness, at least in cases of former war criminals. While no standard is explicitly stated, German national courts seem to be using a more flexible standard of fitness, both at the trial level and the appellate level, by not necessarily placing a substantial weight on the issues of old age and infirmity.

#### United Kingdom and Chile

The Chilean courts used a similar standard to that of the ICTY, when it found Augusto Pinochet mentally fit to stand trial, thus denouncing a determination to the contrary by the United Kingdom’s House of Lords.<sup>67 68</sup> Pinochet was first found unfit by the British House of Lords, who noted his extensive brain injuries and loss in memory.<sup>69</sup> Pinochet was eventually released, and later was indicted by Chile courts. The Chilean court applied the standard of “whether or not

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<sup>66</sup> Beck, at 353.

<sup>67</sup> See Byers, *The Law and Politics of the Pinochet Case*, 438 (2000), paraphrasing a Spanish-only press release article [reproduced on accompanying flash drive at number 24].

<sup>68</sup> The House of Lords is the highest court in the United Kingdom. Byers, 426.

<sup>69</sup> *Id.*

Pinochet would be capable of following the process of a trial so as to instruct his lawyers.”<sup>70</sup> The court, however, clarifies that simply proving a mental illness or memory loss is not the threshold factor.<sup>71</sup> Similar to the ICTY’s analysis in *Strugar*, the Chilean judge presiding over Pinochet’s case looked to several different factors when conducting her analysis of whether Pinochet should be found fit to stand trial.<sup>72</sup> Not only did the judge review Pinochet’s newly released medical records, but she also used her own observations of Pinochet’s behavior.<sup>73</sup> In 2003, Pinochet provided an interview for a Spanish television network based in the United States.<sup>74</sup> In that interview, the judge noted that Pinochet “appeared lucid and defiant” and was very clearly making declarations about his past behavior.<sup>75</sup> Ultimately, the judge in this case took all these factors into consideration when determining Pinochet fit to stand trial, effectively denouncing the previous House of Lords ruling.<sup>76</sup>

### Cayman Islands

In one specific case from the Cayman Islands, a less strict standard of fitness seems to have been used. At the trial level, the court looked to a psychiatric evaluation to determine that

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<sup>70</sup> Beck, at 353.

<sup>71</sup> Rohter, “Chilean Judge Says Pinochet is Fit for Trial,” *New York Times* (14 Dec. 2004). At <http://www.nytimes.com/2004/12/14/world/americas/chilean-judge-says-pinochet-is-fit-for-trial.html>. [perma link could not be created for this file].

<sup>72</sup> Rohter, 14 Dec. 2004.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; quoting television interview: “Everything I did, I would do again.”

<sup>76</sup> Byers, at 438 (2000).

the accused was not fit to stand trial.<sup>77</sup> Even though the case did not officially go through an appeals process, the accused continued to undergo psychiatric evaluations until he was sentenced, even after the court's decision.<sup>78</sup> From one of these evaluations, the examining psychiatrist found that the accused had "appeared to have developed more pronounced symptoms of paranoia."<sup>79</sup> Even though these subsequent evaluations point to the accused suffering from acute psychological disorders, the court still declared him fit to stand trial and proceeded with his sentencing, noting the idea that deteriorated personality orders or deteriorated mental status is not enough to exclusively decide the accused's fitness.<sup>80</sup>

### South Africa

According to the South African Criminal Procedure Act, courts must look at mental illness or mental defect when determining if the accused can be found fit to plead.<sup>81</sup> The mental status of the accused must be such that it renders the accused "incapable of appreciating the wrongfulness of his or her act or omission."<sup>82</sup> The accused must be incapable of acting with an appreciation of the wrongfulness of his or her actions.<sup>83</sup> This standard seems to be a much more broad standard than that the ECCC applied at the trial level. Instead of using a standard of

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<sup>77</sup> "Judicial Decisions," *Commonwealth Law Bulletin*: Vol. 29, No. 1, 104 (2003). [reproduced on accompanying flash drive at number 23].

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Criminal Procedure Act 51 of 1977*, Chapter 13, Section 78(1)(a-b) (1977). [reproduced on accompanying flash drive at number 19].

<sup>82</sup> *Criminal Procedure Act 51* (1977).

<sup>83</sup> *Id.*

“meaningful participation,” South African courts seem to focus more on the severity of the accused’s mental status when determining fitness, versus how much the accused will be able to participate in the proceedings. The standard set forth in the South African Criminal Procedure Act seems to require a much more serious mental debility than the standard used at the trial level at the ECCC.

### Australia

According to the Australian Criminal Law Consolidation on Mental Impairment, there are several factors that Australian courts must take into consideration when determining if the accused is fit to stand trial.<sup>84</sup> According to this Australian standard, the accused can be found unfit to stand trial if the accused’s “mental processes are so disordered or impaired” that the he or she is unable to

- (1) Understand, or rationally respond to, the accusations against him or her;
- (2) Exercise his or her procedural rights;<sup>85</sup> or
- (3) Understand the general nature of the proceedings, or “to follow evidence.”<sup>86</sup>

In comparison to the standard expressed at the trial level of the ECCC, this standard in the Australian Criminal Law Consolidation seems to be less strict. Also, in Australian courts, when an accused person is deemed unfit to stand trial, the accused will then be taken under judicial supervision indefinitely, much like the judicial supervision furnished by the ECCC.<sup>87</sup> By

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<sup>84</sup> *Australia—South Australia: Criminal Law Consolidation (Mental Impairment) Amendment Act of 1994*, “Division 3” (1995). [reproduced on accompanying flash drive at number 17].

<sup>85</sup> Such as, giving “rational instruction” to his or her counsel and “the right to challenge jurors” *Id.* at 269H(b).

<sup>86</sup> *Id.* at 269H(a-c).

<sup>87</sup> “Australia and New South Wales” *Commonwealth Law Bulletin*, 15 (January 1995) [reproduced on accompanying flash drive at number 21].



using wordings such as *rationality* and to generally *understand*, these phrases indicate that the accused need only to be able to generally comprehend the trial itself. Whereas, the “meaningful participation” standard seems to imply a heightened sense of self-awareness that is expressly not required of Australian courts.

### **Conclusion on national standards**

Although there does not seem to be any one consistent and cohesive standard when determining the fitness to stand trial, many courts have been applying a more flexible standard both at the trial level and on appeal than the standard used at the ECCC trial level. It is arguable that all of these courts, when aggregated together, have created an international custom of using a more flexible standard. In many of the aforementioned cases, the accused in question were similarly situated to the accused that are currently awaiting an appeal verdict at the ECCC. Therefore, the Supreme Court Chamber should not be strictly bound to the exact same “meaningful participation” standard used at the trial level. Instead, the Chamber should employ a more flexible standard for fitness.

#### **IV. Policy Reasons for arguing for a less strict, more flexible standard of fitness to plead.**

In addition to the above analysis permitting the ECCC to use a more flexible standard of fitness, there are also many ethical arguments for why the Supreme Court Chamber should use a lower standard for fitness. First, as argued by Dinah PoKempner, the ECCC is a way to help transition Cambodia into what she calls a “culture of accountability.”<sup>88</sup> After the atrocities that occurred in Cambodia between 1975 and 1979, holding the leaders of the Democratic Kampuchea publically responsible for their actions is the first real step towards bettering the

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<sup>88</sup> Ramji and Schaack, at 333-345 (2005).

Cambodian state.<sup>89</sup> Along with cultural accountability, the ECCC was formed for the purpose of pursuing both justice and “national reconciliation, stability, peace and security.”<sup>90</sup> These were ideas not only of legitimate concern to the people and government of Cambodia, but also to the United Nations General Assembly.<sup>91</sup> Using a more flexible standard of fitness would not only be procedurally accepted and conforming to international law, but it was also be a practice that would help further the goals of the ECCC, and help lead to the reconstruction of Cambodian faith in the international legal community.

**V. There is Another Argument the ECCC could Make Based on the Rome Statute.**

While there are both procedural and policy reasons for using a more flexible standard of fitness to plead, there is perhaps a different avenue that the Chamber could follow. The Rome Statute of the International Criminal Court provides that the appellate chamber is permitted to deliver its judgment in the absence of the person, acquitted or convicted.<sup>92</sup> This presents another interesting question to the ECCC. If the ECCC were to apply this same standard, even if one of the accused were to be found unfit to stand trial, the Chamber could still issue its judgment against the accused, treating the accused as merely legally absent.<sup>93</sup> While there is a question as to whether an “in absentia” judgment is actually enforceable, there would at least be a final judgment for the record. If the ECCC decided to take this route, rather than argue for a similar or lower fitness standard, the Chamber would have to look more towards policy, rather than

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<sup>89</sup> Ramji and Schaack, at 333-345 (2005).

<sup>90</sup> “Preamble,” ECCC Internal Rules (2015).

<sup>91</sup> *Id.*

<sup>92</sup> *Rome Statute of the International Criminal Court*, art. 83(5), July 17, 1998 I.L.M. 999. [reproduced on accompanying flash drive at number 14].

<sup>93</sup> *Id.*

procedural reasoning, and determine whether issuing a non-enforceable judgment would still be a positive step toward justice and national reconciliation.

## **VI. Conclusion**

For all of the above-discussed reasons, the ECCC should be able to avoid having the convictions of Nuon Chea and Khieu Samphan vacated, even if their fitness declines during the appeals process. First, the ECCC should use a less strict, more flexible standard of fitness on appeal than that which was used at the trial level. The *Strugar* opinion from the ICTY provides a standard that is more appropriate than the “meaningful participation” standard used by the ECCC. If the ECCC were to use a more flexible standard, it would be well within the constraints of international jurisprudence. In addition to this ICTY opinion, the recent evolution of customary international law leans towards a more flexible standard of fitness. And finally, reasons of policy and ethics support recording long-awaited judgments against perpetrators of atrocities such as war crimes and crimes against humanity.