UNITED
NATIONS

International Residual Mechanism for Criminal Tribunals

Case No. MICT-13-38-T

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BEFORE THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Mustapha El Baaj
Judge Margaret deGuzman
Judge Ivo Nelson de Caires Batista Rosa, Reserve Judge

Registrar: Abubacarr Tambadou

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC with PUBLIC ANNEXES A, B AND C

PROSECUTION SUBMISSION CONCERNING THE CONSEQUENCES OF A POTENTIAL DECISION THAT KABUGA IS UNFIT

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I. OVERVIEW

1. The Mechanism should continue to accommodate Kabuga's needs in order to ensure that his trial can continue.[1] If the Chamber concludes that Kabuga is not able to meaningfully participate in the proceedings even with the most extensive possible modifications and adaptations, then the Chamber should continue to hear the remainder of the Prosecution's evidence and any Defence case by way of an "Examination of Facts" procedure. By continuing with this adapted procedure, the Chamber would give effect to the core principles of the United Nations Convention on the Rights of Persons with Disabilities ("CRPD").

2. Holding an Examination of Facts would respect Kabuga's fair trial rights while also reflecting the wider interests of justice in adjudicating the evidence presented by the parties in this case. The Examination of Facts procedure by its nature could not result in a guilty verdict ascribing criminal responsibility but would result in a judicial determination of either acquittal or non-acquittal. Kabuga would thus have the opportunity to be acquitted in case the Prosecution fails to meet its burden of proof. If there were no acquittal, the procedure would provide a reasoned basis for the Mechanism's ongoing jurisdiction and custody over Kabuga. Were the Chamber to find Kabuga unfit and stay proceedings but *not* undertake an Examination of Facts, there would be no procedural means for Kabuga to achieve an acquittal and unconditional release.

3. Numerous domestic jurisdictions—espousing different legal traditions—employ such procedures in order to assess the charges against an unfit accused, enabling domestic courts to reach an outcome that balances the accused's rights with other countervailing public interests. Annex A sets out key aspects of a range of domestic procedures, which bear varying degrees of similarity with the proposed Examination of Facts procedure. Annex B is a Table of Authorities relied on in this submission and Annex A (with links to sources that can be found online). Annex C is a Book of Authorities attaching those sources that are not freely available online.

4. If the Trial Chamber finds Kabuga currently unfit but does not proceed with an Examination of Facts, the Chamber should stay the proceedings. Kabuga should remain in custody and subject to regular medical reporting to allow the Chamber to assess whether in future he regains the capability to meaningfully participate in his trial. With or without an

[1] The Prosecution files this submission pursuant to the Order for Submissions, 25 April 2023 ("Order"), to address the consequences of the Trial Chamber's potential decision that Kabuga is unfit for trial.

Examination of Facts, should Kabuga regain fitness, either by virtue of a change in his cognitive capabilities or as a result of newly available supports or treatments that enable him to meaningfully participate, his trial should resume.

5. The Prosecution respectfully requests to exceed the word limit for this submission, as fully addressing the Trial Chamber on this complex and important matter represents exceptional circumstances.[2]

II. KABUGA REMAINS UNDER MECHANISM JURISDICTION REGARDLESS OF HIS FITNESS

6. International criminal jurisprudence is clear: an unfit accused remains under the relevant court's jurisdiction until the proceedings are terminated,[3] which occurs only after the accused's death.[4] Notwithstanding any stay of proceedings, Kabuga would remain in the custody of the United Nations Detention Unit ("UNDU")[5] under a medical reporting regime.[6] Such custodial care is not punitive and the independent medical experts have confirmed that Kabuga is receiving and has access to the highest quality of medical care and treatment.[7]

7. The continued exercise of Mechanism jurisdiction is also consistent with various domestic jurisdictions in which courts exercise ongoing jurisdiction over accused who are deemed unfit to participate in criminal proceedings. In some jurisdictions, such as France, when an accused is considered unfit, the criminal proceedings are suspended but not

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[2] *See* Practice Direction on Length of Briefs and Motions, MICT/11/Rev.1, 20 February 2019, Article 17.

[3] *Prosecutor v. Hadžić*, Case No. IT-04-75-T, Public Redacted Version of 24 March 2016 Decision on Remand on the Continuation of Proceedings, 5 April 2016, para.30. *See* ECCC, *Prosecutor v. Ieng Thirith*, Case No.002/19-09-2007 ECCC-TC/SC (16), Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, 14 December 2012 ("*Ieng Thirith* Decision on Immediate Appeal Against Unconditional Release"), paras.38-39,52. *See also Prosecutor v. Đukić*, Case No.IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996 ("*Đukić* Order for Provisional Release"), p.3; ICC Rules of Procedure and Evidence, Rule 135(4) (providing for a periodic review of the case without mentioning termination).

[4] *Prosecutor v. Đukić*, Case No.IT-96-20-A, Order Terminating the Appeal Proceedings, 29 May 1996, p.1; *Prosecutor v. Popović et al.*, Case No.IT-05-88-A, Decision Terminating Appellate Proceeding in Relation to Milan Gvero, 7 March 2013, paras.5, 7; *Prosecutor v. Hadžić*, Case No. IT-04-75-T, Order Terminating the Proceedings, 26 July 2016, p.1. *See also Prosecutor v. Talić*, Case No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003.

[5] *See* Prosecution Response to Defence Motion Seeking a Stay of Proceedings, in the Alternative Provisional Release, 18 May 2021 (confidential, with public redacted version filed on the same day), paras.8-10. Any potential interim release would be conditional, and the accused would remain subject to reporting requirements. *See Đukić* Order for Provisional Release, p.4; *Ieng Thirith* Decision on Immediate Appeal Against Unconditional Release, paras.40, 52, 54-60, 69, 73, 75.

[6] *See* Order Following Initial Appearance, 25 November 2020, p.3; Decision on Félicien Kabuga's Fitness to Stand Trial and to be Transferred to and Detained in Arusha, 13 June 2022, para.3.

[7] T.30, 17 March 2023; T.39, 23 March 2023.

terminated, and the court retains jurisdiction indefinitely.[8] In other jurisdictions such as Portugal, Mozambique, Angola, and São Tomé and Príncipe, criminal proceedings continue, and the accused's unfitness is considered at the guilt and/or sentencing stage.[9] In still other jurisdictions such as England and Wales, Northern Ireland, Scotland, Ireland, Australia, New Zealand, Guatemala and South Africa, the criminal proceedings are suspended and the court undertakes a fact-finding process akin to the proposed Examination of Facts. This alternative process justifies the court's continued exercise of jurisdiction over the accused in the absence of a determination of criminal responsibility.[10] It serves to ensure that justice is done, "as best as it can be in the circumstances, to the accused person and the prosecution".[11] Moreover, it allows the defendant the opportunity to be released from the jeopardy of the criminal charges.

III. THE CHAMBER SHOULD MAKE ALL NECESSARY ACCOMMODATIONS AS REQUIRED BY THE CRPD

A. The Chamber's approach should reflect the CRPD

8. As the successor of the ICTR and ICTY,[12] the Mechanism, "as a special kind of subsidiary organ of the U.N. Security Council, is bound to respect and ensure respect for generally accepted human rights norms."[13] In the report on the establishment of the ICTY, the UN Secretary General stated that "[i]t is axiomatic that the International Tribunal must fully

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[8] *E.g.* France: Cour de cassation, Chambre criminelle, 5 September 2018, 17-84.402, Publié au bulletin, *available at* https://justice.pappers.fr/decision/5ef758c36cd3967df343c97378d52b61 (« *la juridiction pénale, qui ne peut interrompre le cours de la justice, est tenue de renvoyer l'affaire à une audience ultérieure et ne peut la juger qu'après avoir constaté que l'accusé ou le prévenu a recouvré la capacité à se défendre* » […] « *la cour d'appel, qui devait surseoir à statuer et ne pouvait pas relaxer le prévenu pour un motif non prévu par la loi, a méconnu le sens des textes légaux et conventionnels susvisés* »). *See also* Brazil : Articles 149(2) and 152 of Código de Processo Penal, Decreto-Lei n. 3689, de 3 de Outubro de 1941, *available at* https://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm.

[9] Portugal: Articles 105-106 of Código Penal, Decreto-Lei n. 48/95, Diário da República n.º 63/1995, Série I-A de 1995-03-15, *available at* https://dre.pt/dre/legislacao-consolidada/decreto-lei/1995-34437675; Mozambique: Article 100 of Lei n.24/2019, de 24 de Dezembro, *available at* https://reformar.co.mz/documentos-diversos/lei-24-2019-lei-de-revisao-do-codigo-penal.pdf; Angola: Articles 116-118 of Código Penal, Lei n. 38/20 de 11 de Novembro 2020, *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/110651/137676/F-933265966/Lei%2038_2020.pdf; São Tomé and Príncipe: Articles 100-102 of Lei n.6/2012, de 6 de Agosto, *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/113412/142196/F1509673893/L%2015%2021.pdf.

[10] *See* Annex A.

[11] *Subramaniam v. R*, [2004] HCA 51 ("*Subramaniam v. R*"), *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2004/51.html, para.40.

[12] *See Prosecutor v. Munyarugarama*, Case No.MICT-12-09-ARI4, Decision on Appeal against the Referral of Pheneas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, paras.4, 6.

[13] *Prosecutor v. Rwamakuba*, Case No.ICTR-99-44C-T, Decision on Appropriate Remedy ("*Rwamakuba* Remedy Decision"), 31 January 2007, para.48. *See also Rwamakuba* Remedy Decision, para.45.

respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings."[14]

9. The Mechanism has a responsibility to give effect to the rights encapsulated in the widely-ratified CRPD. The CRPD is one of the core international human rights instruments and the international standard for non-discrimination based on disability.[15] It protects "those who have long-term physical, mental, intellectual or sensory impairments".[16] "[E]quality before the law, equal protection before the law and non-discrimination"—fundamental principles underlying the CRPD[17]—have been accepted as *jus cogens* norms.[18]

10. The CPRD's emphasis on identifying creative and novel ways to enable an accused to meaningfully participate in a trial should guide the Chamber's approach to Kabuga's case. Reflecting the Mechanism's position within the broader international framework of laws and rights, the Chamber's deliberations on Kabuga's fitness[19] should be informed by the progressive evolution of global human rights standards and accommodations for persons with disabilities and look beyond delimiting precedent in the earlier jurisprudence.[20] Upon

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[14] Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. Doc S/25707, 3 May 1993, para.106, *available at* https://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf. *Compare with* Rome Statute of the International Criminal Court, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544 ("ICC Statute"), Article 21 (expressly providing that "the application and interpretation of the applicable law must be consistent with internationally recognised human rights."), *available at* https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

[15] United Nations Office of the High Commissioner for Human Rights, *The Core International Human Rights Instruments and their monitoring bodies*, *available at https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies*.

[16] CRPD, Article 1.

[17] CRPD, Articles 3, 5. *See also* CRPD, Articles 12-14.

[18] Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States* ("*Inter-American Court of Human Rights Advisory Opinion*"), 17 September 2003, para.101, *available at* https://www.unhcr.org/media/29525 ("Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. […] This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*."). *See also* International Law Commission Report on the work of the seventy-first session (2019), Chapter V: Peremptory norms of general international law (*jus cogens*), pp.161-162, fn.760, *available at* https://legal.un.org/ilc/reports/2019/english/chp5.pdf (citing the above *Inter-American Court of Human Rights Advisory Opinion*, the ILC report notes that general principles of law may form the basis of *jus cogens* norms of general international law, observing that "[g]eneral principles of law are part of international law since they have a general scope of application with equal force for all members of the international community").

[19] *See* Order, p.1.

[20] *See Prosecutor v. Strugar*, Case No.IT-01-42-A, Appeal Judgement, 17 July 2008 ("*Strugar* AJ"), paras.44-55; *Prosecutor v. Hadžić*, Case No.IT-04-75-T, Public Redacted Version of 24 March 2016 Decision on Remand on the Continuation of Proceedings, 5 April 2016, para.29. Other human rights bodies have diverged from the CRPD Committee's absolute proscription on unfitness declarations and consequent deprivation of liberty: *e.g.,*

signature by 20 states, the CRPD treaty became effective in May 2008, only two months before the ICTY Appeals Chamber issued its judgement in the *Strugar* case. Since that time, the principles espoused in the CRPD have become widespread and as of today, 186 states have now adopted the treaty.[21]

B. The CRPD requires all necessary accommodations to facilitate participation

11. The CRPD is clear that persons with mental and/or physical impairments should not receive differential treatment before the law or in legal proceedings.[22] As such, the focus in a criminal trial should be on identifying and implementing supports and accommodations to enable an accused with disabilities to participate.[23] In Kabuga's case, the Prosecution's position that Kabuga's criminal trial should continue with all appropriate supports and accommodations—up to and including an Examination of Facts if an unfitness declaration is unavoidable—is consistent with the CRPD.[24]

Human Rights Committee, *Fijalkowska v Poland* 1061/2002, Views, CCPR/C/84/D/1061/2002, para.8.3; Human Rights Committee, General Comment No 35: Liberty and Security of Person (art. 9), 16 December 2014, para.19; European Court of Human Rights, *Juncal v United Kingdom*, 1950, ETS 005.132 Application No 32357/09, Admissibility, 17 September 2013, paras.5, 25.

[21] The text of the CRPD was adopted by the United Nations General Assembly on 13 December 2006, and it came into force on 3 May 2008. *See* United Nations Treaty Collection, Chapter IV, Human Rights, 15. Convention on the Rights of Persons with Disabilities, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en.

[22] *E.g.* CRPD, Articles 12(2), 13(1), 14(1)-(2).

[23] In its concluding observations on the initial reports of various states parties, the Committee recommended that persons with disabilities who have committed crimes be tried under the ordinary criminal procedure (and declarations of unfitness be removed)—with specific procedural adjustments to ensure their equal participation in the criminal justice system. *See e.g.* Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Republic of Korea, 29 October 2014, CRPD/C/KOR/CO/1, at para.28; Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Ecuador, 27 October 2014, CRPD/C/ECU/CO/1, at para.29(b); Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Belgium, 28 October 2014, CRPD/C/BEL/CO/1, at para.28; Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Australia, 21 October 2013, CRPD/C/AUS/CO/1, at paras.30, 32; Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of New Zealand, 31 October 2014, CRPD/C/NZL/CO/1, at paras. 30, 33-34. *See* Committee on the Rights of Persons with Disabilities, General Comment No.1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014 ("General Comment No.1"), paras.7, 15, 17, 26, 28-29, 31, 40, 42. *Also e.g.* United Kingdom Law Commission, *Unfitness to Plead, Volume 1: Report* (2016) ("UK Law Commission 2016 Report"), *available at* https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/01/lc364_unfitness_vol-1.pdf, para.1.12; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Report*, June 2014 ("Victorian Law Reform Commission 2014 Report"), *available at* https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Review_of_the_Crimes_Mental_Impairment_and_Unfitness_to_be_Tried_Act_0.pdf, p.xI, paras.18-19.

[24] *See* T.39, 42, 46, 30 March 2023; Prosecution's Submission Pursuant to the 15 December 2022 "Order For Submissions in Relation to the Joint Monitoring Report", 22 December 2022 (confidential). *See also* Registrar's

12. Depriving a person of their legal capacity on the basis of their mental capacity—for example, by declaring them unfit for trial and precluding any opportunity to offer a defence—contravenes Article 12 of the CRPD.[25] Article 12 provides that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life"[26] and requires that appropriate measures be taken to provide persons with disabilities access to the support they may require in exercising their legal capacity.[27] These measures should respect the "rights, will and preferences of the person".[28] In its general comment on Article 12, the Committee on the Rights of Persons with Disabilities ("CRPD Committee") indicated that impairment "must never be grounds for denying legal capacity or any of the rights provided for in article 12".[29]

13. Consequently, Article 13 confirms that for persons with disabilities to have effective access to justice, they must be provided procedural and age-appropriate accommodations to facilitate their effective role as participants in legal proceedings.[30]

14. In its Guidelines on Article 14, the CRPD Committee directly criticised the practice of precluding accused deemed to be "unfit" from participating in their criminal trials instead of supporting and enabling their participation:

> […] declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant. […] The Committee has recommended that "all persons with disabilities who have been accused of crimes and… detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation"[31], as well as procedural accommodations to ensure fair trial and due process.[32]

Submission in Relation to the "Decision on Félicien Kabuga's Fitness to Stand Trial and to be Transferred to and Detained in Arusha" of 13 June 2022, 12 December 2022 (public with confidential Annex).

[25] General Comment No.1, paras.13-15.

[26] CRPD, article 12(1). *Also* General Comment No.1, paras.6-9, 11-15, 24-25, 30.

[27] CRPD, Article 12(2). *Also* General Comment No.1, paras.12, 15-29, 39, 50.

[28] CRPD, Article 12(4). *Also* General Comment No.1, paras.17, 20-21.

[29] General Comment No.1.

[30] CRPD, Article 13(1).

[31] Committee on the Rights of Persons with Disabilities, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, September 2015 ("Guidelines on Article 14"), para.16, *citing* CRPD/C/AUS/CO/1, para.30.

[32] Guidelines on Article 14, para.16 *citing* CRPD/C/MNG/CO/1, para.25, CRPD/C/DOM/CO/1, para.29(a), CRPD/C/CZE/CO/1, para.28, CRPD/C/HRV/CO/1, para.22, CRPD/C/DEU/CO/1, para.32, CRPD/C/DNK/CO/1, paras.34-35, CRPD/C/ECU/CO/1, para.29(b), CRPD/C/KOR/CO/1, para.28, CRPD/C/MEX/CO/1, para. 27, CRPD/C/NZL/CO/1, para. 34.

15. In line with the CRPD, national law reform commissions have recommended reformulating the unfitness test "to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all."[33] Similarly, such commissions have recommended the introduction of additional court-based support measures to "optimis[e] an accused's fitness where they might otherwise be unfit",[34] and several jurisdictions have adopted comprehensive manuals on courtroom accommodations.[35]

IV. IF THE CHAMBER FINDS KABUGA UNFIT, IT SHOULD PROCEED IMMEDIATELY TO AN EXAMINATION OF FACTS

A. An Examination of Facts is in the interests of justice

16. Should the Chamber determine that Kabuga is unfit to stand trial as a result of mental and/or physical impairment, an Examination of Facts would be the most effective means of executing its function "to arrive at the truth and to do justice for the international community, victims, and the accused".[36]

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[33] *E.g.* Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, August 2014 ("Australian Law Reform Commission 2014 Report"), *available at* https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf, para.7.4.

[34] *E.g.* Victorian Law Reform Commission 2014 Report, para.3.124.

[35] *E.g.* United Kingdom Judicial College, Equal Treatment Bench Book, 28 February 2018, *available at* https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf; Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2022), Chapter 5: People with disabilities, *available at* https://jirs.judcom.nsw.gov.au/public/assets/benchbooks/equality/; Judicial College of Victoria, *Disability Access Bench Book* (2016), Chapter 5: Considerations during hearings, *available at* https://www.judicialcollege.vic.edu.au/eManuals/DABB/indexpage.htm#59523.htm.

[36] *See Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para.9, *referring to* Prosecutor's Regulations No.2 (1999), Regulation 2(h). *See also* Remarks of President Theodor Meron, Opening of the Arusha Branch of the Mechanism for International Criminal Tribunals, 2 July 2012, *available at*: https://www.irmct.org/sites/default/files/statements-and-speeches/120702_president_meron_arusha_en.pdf (noting, for example, that "through its patient and methodical consideration of case after case—of courageous witness testimony, reams of evidence, and hours of argument—the ICTR has helped to construct a powerful and poignant record of the agonizing horror—of the genocide—that engulfed Rwanda in 1994", that "thanks to both the ICTR and ICTY that the world—and in particular those men, women, and children who lived through the almost indescribable tragedies in Rwanda and the former Yugoslavia—has a fuller understanding of what happened there", and that "[w]ith an understanding of this history, we are all better prepared for the fight to ensure that such atrocities never happen again". President Meron also stressed that "[w]e cannot afford to let those accused of the most horrific of crimes wait out criminal justice ŠandĆ to let the remaining fugitives—or anyone else—assume that the passage of time signals indifference or the weakening of the international community's resolve to ensure accountability for the worst of crimes").

17. In the circumstances of this case—including the breadth and severity of the charges, the stage of the proceedings, and the resources invested in Kabuga's arrest and prosecution—an Examination of Facts stands out as the fairest and most practical resolution of the charges. Having invested over two decades in bringing Kabuga to justice, the Prosecution is mere weeks away from closing its case.[37] A robust defence followed by a reasoned judicial decision—including findings on witness credibility—would give purpose to the evidence already on record. It would respect the contributions of the numerous witnesses who testified or provided prior testimony and statements tendered in this case, including many who are now deceased, as well as the others who are scheduled to testify.[38] It would raise the prospect of a final judicial determination in the form of an acquittal on some or all of the charges. It would shed new light both on Kabuga's role in the genocide, and on other matters of considerable importance, including the management and operation of RTLM and the nature and sources of *Interahamwe* support. It would blunt, in some small measure, Kabuga's attempt to evade accountability by fleeing from justice. Furthermore, as set out below, it would respect and protect the rights of the Accused.

B. If a criminal trial is not possible, an Examination of Facts is a suitable accommodation that is consistent with the CRPD

18. In the event the Chamber determines that Kabuga falls within the small class of defendants who are unable to participate effectively in trial "whatever the level of support provided",[39] an Examination of Facts that closely resembles a criminal trial is the best alternative to accommodate his rights to legal capacity and equality before the law under the CRPD.[40] The CRPD emphasises identifying and providing accommodations to facilitate an

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[37] *See below*, para.21(b) (an Examination of Facts can take place in accordance with a regular sitting schedule).
[38] *E.g.* Victorian Law Reform Commission 2014 Report, para.7.34, 7.37, 8.13.
[39] UK Law Commission 2014 Issues Paper, para.2.80, *available at* https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/unfitness_issues.pdf; UK Law Commission 2016 Report, paras.1.12, 2.5, 3.171. *See also* Australian Law Reform Commission 2014 Report, pp.200-201 (The Australian Law Reform Commission recommended that the Crimes Act 1914 (Cth) test be amended 'to provide that a person cannot stand trial if the person *cannot be supported*: (emphasis added) to (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings; (b) retain that information to the extent necessary to make decisions in the course of the proceedings; (c) use or weigh that information as part of the process of making decisions; or (d) communicate the decisions in some way.).
[40] UK Law Commission 2016 Report, paras.1.11-1.12; UK Law Commission, *Unfitness to Plead: Current Project Status, available at* https://www.lawcom.gov.uk/project/unfitness-to-plead/ ("An alternative finding hearing should replace the current trial of the facts. The new hearing would more closely mirror a full trial, giving defendants better opportunity to challenge the prosecution. And allowing victims to give a full account of their experience"). *See* Piers Gooding et al., "Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change", 40 Melbourne

accused's participation in legal proceedings.[41] An Examination of Facts would allow for Kabuga to participate to the extent he is able (giving effect to his will and preference),[42] while recognising and accounting for his inability to "meaningfully participate".[43] Moreover, such a process would afford Kabuga an opportunity to defend against the charges and be acquitted, instead of remaining indefinitely subject to these charges under the Mechanism's jurisdiction.[44] This would address the CRPD Committee's Article 14 concern that an unfitness declaration results in deprivation of liberty without the opportunity to present a defence.[45]

C. The Chamber's Examination of Facts should follow a procedure that closely resembles a criminal trial and concludes as soon as possible

19. Consistent with the CRPD principles discussed above, the proposed Examination of Facts should differ from a criminal trial only to the extent strictly necessary in light of Kabuga's capacity, following the same procedures and ensuring the same procedural rights and safeguards as a criminal trial to the extent possible. Apart from Kabuga's limited ability to participate, the proposed Examination of Facts should differ from a criminal trial only insofar as the final disposition would be limited to acquittal or non-acquittal, with no possibility to render a guilty verdict.

University Law Review 816 (2017), pp.860-863. *E.g.* Crimes Act 1900 (ACT) ("Australian Capital Territory Act"), *available at* https://www.legislation.act.gov.au/a/1900-40, s.316(1); Criminal Justice (Mental Impairment) Act 1999 (Tas) ("Tasmanian Act"), *available at* https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-021, s.16(1); Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic) ("Victorian Act") *available at*: https://content.legislation.vic.gov.au/sites/default/files/2023-03/97-65aa080-authorised.pdf, s.16(1); Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No.12 (NSW) ("New South Wales Act"), *available at* https://legislation.nsw.gov.au/view/html/inforce/current/act-2020-012#pt.4-div.3, s.56(1); *R v. Zvonaric* [2001] NSWCCA 505, *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCCA/2001/505.html, para. 19.

[41] CRPD, Articles 5(3), 13(1), 14(2).

[42] *See* UK Law Commission 2016 Report, para. 3.173.

[43] *See* T.11, 15 March 2023 (Kennedy); T.41-42, 16 March 2023 (Kennedy). *Cf.* Strugar AJ, paras.55, 60. *See, e.g.*, UK Law Commission 2016 Report, para.3.172.

[44] *E.g. Subramaniam v. R* [2004] HCA 51, *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2004/51.html, para.40; New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences, Report 138* (2013) ("New South Wales Law Reform Commission 2013 Report"), *available at* https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-138.pdf, paras.6.41-6.43; New South Wales Act, s.54.

[45] CRPD, Article 14(1); Guidelines on Article 14, para.16.

20. There is general consensus among national law reform commissions grappling with this issue that a process resembling a full criminal trial as closely as possible gives greatest effect to the CRPD.[46] The UK Law Commission, for example, stated:

> We consider that full trial is best not just for the defendant, but also for those affected by an offence and society more generally. This is because the full criminal process engages fair trial guarantees for all those involved … and allows robust and transparent analysis of all the elements of the offence and any defence advanced. It also offers the broadest range of outcomes in terms of sentence and other ancillary orders.[47]

21. The procedure for an Examination of Facts should therefore be as follows:

a. **Kabuga should continue to be represented by his defence team, who are best-placed to represent his will and preferences**.[48] In some domestic jurisdictions, the court may appoint someone other than existing defence counsel if the court assesses that the accused's interests would be better protected by such an appointment.[49] However, where the accused has already provided instructions to counsel—as in Kabuga's case—there is a strong presumption that this counsel will best represent the accused's interests.[50] The benefits of continuity of representation also weigh in favour of retaining the same counsel.[51] In Kabuga's case, requiring his current defence team to continue their representation in the Examination of Facts would minimise delay and permit them to give effect to any instructions Kabuga may have provided whilst fit.

b. **The Chamber should pick up where the criminal trial left off by setting a regular court sitting schedule to commence forthwith**. It is in Kabuga's own interest as well as the interests of justice to conclude the Examination of Facts and for the Chamber to reach an outcome as quickly and efficiently as possible. Therefore, the Chamber

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[46] *See* New South Wales Law Reform Commission 2013 Report, paras. 0.10, 6.66-6.67, 6.69; UK Law Commission 2016 Report, para.3.171.
[47] UK Law Commission 2016 Report, para.1.11.
[48] *See* Registrar's Submission in Relation to the Oral Ruling of 14 December 2022, 6 March 2023 (confidential with confidential Annex), Annex, Registry Pagination ("RP.") 5029. *See also* T.11, 15 March 2023 (Kennedy).
[49] *See* England and Wales, Criminal Procedure (Insanity) Act 1964, as amended by Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and Domestic Violence, Crime and Victims Act 2004 ("England and Wales CP(I)A"), *available at* https://www.legislation.gov.uk/ukpga/1991/25, s.4A(2)(b); *R v. Norman*, [2008] EWCA Crim 1810, [2009] 1 Cr App R 192, *available at* https://www.casemine.com/judgement/uk/5b46f1f82c94e0775e7ef2c2, para.34(iii). *See also* UK Law Commission 2016 Report, para.5.133.
[50] *See* UK Law Commission 2016 Report, paras.5.136(2), 5.138(3).
[51] *See* UK Law Commission 2016 Report, para.5.136(2).

should consider accelerating the current sitting schedule to proceed at the pace of a regular trial.[52]

c. **Kabuga should be permitted but not required to attend**.[53] In accordance with the CRPD and best practices from domestic jurisdictions,[54] accommodations should continue to be made to support Kabuga's attendance, and the defence should continue to summarise and explain the evidence to him and include him in preparations to the extent Kabuga is able. However, given that the Chamber would have found that Kabuga is unable to participate meaningfully in the proceedings, it should not permit the progress of the Examination of Facts to be frustrated if he cannot or does not wish to attend, for whatever reason. Domestic jurisdictions take the same approach.[55]

d. **To the extent possible, the Chamber should apply the same Mechanism Rules of Procedure and Evidence to the Examination of Facts proceeding, as it would to a criminal trial**.[56] Proceedings should resume with the Prosecution presenting the remainder of its witnesses, who would be subject to cross-examination by Kabuga's defence. At the close of the Prosecution's case-in-chief, Kabuga's defence should have the opportunity to raise a motion for a judgement of acquittal pursuant to Rule 121. If that motion is unsuccessful, the Examination of Facts should proceed immediately to the defence case, if any. The Examination of Facts would conclude with final briefs submitted by the parties and an opportunity for final oral submissions. The Chamber would then issue a reasoned decision on whether or not to acquit Kabuga.

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[52] *E.g.* ICTY Weekly Update – 556, *available at* https://www.icty.org/x/file/Cases/Weeklyupdate/weekly_update_556.pdf; ICTY Weekly Update – 580, *available at* https://www.icty.org/x/file/Cases/Weeklyupdate/2010/weekly_update_580.pdf (examples of the weekly ICTY courtroom schedule reflects that according to a normal court schedule, hearings were held from 9:00am until 1:45pm, or 2:15pm until 7:00pm, up to five days per week depending on the case). Only 18.5 hours remain for the Prosecution's direct examination of witnesses, which could be completed within a month if the sitting schedule is appropriately accelerated.

[53] *E.g.* UK Law Commission, 2010 Consultation Paper, para.2.30 (an accused is not expected to participate in the hearing and their interests are protected by the person appointed to put their case), *available at* https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/cp197_Unfitness_to_Plead_web.pdf; New South Wales Act, s.56(8); *State v. Taylor*, 129 N.M. 376, 380 (N.M. Ct. App. 2000), *available at* https://casetext.com/case/state-v-taylor-1864. *Cf. People v. Williams*, 312 Ill. App. 3d 232 (Ill. App. Ct. 2000), *available at* https://casetext.com/case/people-v-williams-4555, 234-235. *See also* T.21-22, 17 March 2023 (Kennedy); T.44-47, 23 March 2023 (Mezey).

[54] UK Law Commission 2016 Report, para.5.162.

[55] *E.g.* Criminal Procedure (Scotland) Act 1995, UK Public General Acts, 1995 ("Scotland CPA"), *available at* https://www.legislation.gov.uk/ukpga/1995/46/section/55, s.55(5); New Zealand, Criminal Procedure (Mentally Impaired Persons) Act 2003 ("New Zealand Mentally Impaired Persons Act"), *available at* https://www.legislation.govt.nz/act/public/2003/0115/latest/DLM223818.html. s.15.

[56] *E.g.* Northern Territory Act, s.43W(2)(d); Victorian Act, *available at*: https://content.legislation.vic.gov.au/sites/default/files/2023-03/97-65aa080-authorised.pdf s.16(2)(d).

e. **The Prosecution should be required to prove both *mens rea* and *actus reus* for the charged crimes and modes of liability**. Domestic jurisdictions differ in their approaches. While some jurisdictions require the fact-finder to examine all elements of an offence—comprising *actus reus* as well as any *mens rea* basis for acquitting the accused[57]—several jurisdictions, including England and Wales, limit the fact-finder's consideration to *actus reus*.[58] The rationale for such limitation was grounded in the view that "where a person is unfit to be tried in the normal way because of his mental state, it would be unrealistic and contradictory" to require consideration of the accused's intent at the time of the crime,[59] a view which has since engendered critique.[60] Moreover, removing *mens rea* from the scope of consideration has resulted in difficulties where the criminality of an act or omission depends on the accused's mental state.[61] This limitation further renders unavailable defences linked to *mens rea* that are available in a criminal trial,[62] thereby disadvantaging an unfit accused in comparison to a fit accused undergoing criminal trial.[63] In some jurisdictions, defences related to mental state at the time of the charged crime are specifically precluded.[64]

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[57] *E.g.* Scotland CPA, section 55(1); New South Wales Act, ss.54, 56(6), *available at* https://legislation.nsw.gov.au/view/html/inforce/current/act-2020-012#pt.4-div.3; Northern Territory Act, ss.43V(1)(c)-(2), 43W(2)(b), 43X(3); Victorian Act, ss.16(2)(c), 17(2); Tasmanian Act, ss.15(3), 16(3)(c); *State v. Gallegos*, 111 N.M. 110, 117 (N.M. App. Ct. 1990), *available at* https://casetext.com/case/state-v-gallegos-36; *State v. Taylor*. *See also,* UK Law Commission 2016 Report, paras.6.76, 6.81-6.82 (interpreting that all the elements of the offence, including mental elements, must be proved to the requisite standard).

[58] *E.g.* England and Wales CP(I)A, ss.4A(2)-(3); *R v. Antoine* [2001] 1 AC 340 ("*R v. Antoine*"), *available at* https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd000330/ant-1.htm (construing section 4A to require that the fact-finder only determine the "external elements"); UK Law Commission 2016 Report, para.5.9, fn 11 (explaining that the "external elements" include conduct, consequence and circumstance elements); Ireland Criminal Law Insanity Act, s.4(8); Criminal Law Consolidation Act 1935 (SA) ("South Australia Act"), *available at* https://www.legislation.sa.gov.au/lz?path=%2FC%2FA%2FCRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935, ss.297, 269M.B; Australian Capital Territory Act, s.316(c); New Zealand Mentally Impaired Persons Act, ss.10(2), 11(2), 12(2); Republic of Ireland, Criminal Law Insanity Act, Number 11 of 2006, *available at* https://www.irishstatutebook.ie/eli/2006/act/11/enacted/en/pdf, s.4(8). *Also* UK Law Commission 2016 Report, paras.6.61-6.62, 6.68 (indicating in respect of the Australian Capital Territory, that the prosecution was not required to prove the mental elements of the offence; and in respect of South Australia, that in effect, the scope of the hearing is limited to the conduct element of the offence).

[59] *R v Antoine*, 370.

[60] UK Law Commission 2016 Report, paras.5.67-5.70, 5.77-5.83. In particular, the UK Law Commission determined that it would not be "inappropriate" to require the prosecution to prove the mental element in a case against a defendant who was competent at the time of the crime but later deemed unfit to stand trial. UK Law Commission 2016 Report, para.5.79.

[61] *See R v. Wells and Others*, [2015] EWCA Crim 2 ("*R v Wells and Others*"), para.12, *available at* https://www.casemine.com/judgement/uk/5a8ff6fc60d03e7f57ea54dc; UK Law Commission 2016 Report, paras.5.10, 5.15, 5.28-5.35, 5.65; UK Law Commission 2010 Consultation Paper, paras.6.7, 6.24-6.26, 6.36-6.41.

[62] *See R v Antoine*, 376; *R v Wells and Others*, para.15.

[63] UK Law Commission 2016 Report, paras.5.36, 5.125-5.127.

[64] *E.g.* Hawaii Revised Statutes, section 704-407(2), *available at* https://casetext.com/statute/hawaii-revised-statutes/division-5-crimes-and-criminal-proceedings/title-37-hawaii-penal-code/chapter-704-penal-responsibility-and-fitness-to-proceed/section-704-407-special-hearing-following-commitment-or-release-on-

Such relative disadvantage contravenes the CRPD.[65] Moreover, limiting the Chamber's assessment to *actus reus* would effectively reduce the scope of what the Prosecution has to prove. The Prosecution's position is that such a limitation is not warranted in an international proceeding. Kabuga, the victims, and the international community[66] have an interest in a Chamber decision that adjudicates both *mens rea* and *actus reus* in reaching acquittal or non-acquittal.

f. **The Prosecution's burden of proof should remain the same for an Examination of Facts as in a criminal trial, requiring the Prosecution to prove the charges beyond a reasonable doubt**. Domestic jurisdictions have taken different approaches to burden of proof in analogous proceedings. In the jurisdictions surveyed, while some require proof beyond reasonable doubt,[67] it is not unusual for such factual proceedings to apply a lower burden to at least part of the fact-finder's determination:[68] for example, in New Zealand, the accused's causation of the act or omission that forms the basis of the charged offence must be proven on the balance of probabilities,[69] while in Scotland the absence of any ground for excluding liability must be proven on the balance of probabilities.[70] In Australia, in respect of Commonwealth offences, the court must consider whether there has been established a *prima facie* case that the accused committed the offence.[71] The rationale for applying a lower standard of proof is that the purpose of the hearing is not to determine criminal responsibility but

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conditions; Massachusetts General Laws, section 123(17)(b), *available at* https://casetext.com/statute/general-laws-of-massachusetts/part-i-administration-of-the-government/title-xvii-public-welfare/chapter-123-mental-health/section-12317-periodic-review-of-incompetence-to-stand-trial-petition-hearing-continued-treatment-defense-to-charges-release; *State v. Taylor*, 380-381; South Carolina Code (2022), section 44-23-440, *available at* https://casetext.com/statute/code-of-laws-of-south-carolina-1976/title-44-health/chapter-23-provisions-applicable-to-both-mentally-ill-persons-and-persons-with-intellectual-disability/article-5-fitness-to-stand-trial/section-44-23-440-finding-of-unfitness-to-stand-trial-shall-not-preclude-defense-on-merits; West Virginia Code, section 27-6A-6, *available at* https://casetext.com/statute/west-virginia-code/chapter-27-mentally-ill-persons/article-6a-competency-and-criminal-responsibility-of-persons-charged-or-convicted-of-a-crime/section-27-6a-6-judicial-hearing-of-defendants-defense-other-than-not-guilty-by-reason-of-mental-illness.

[65] *See* CRPD, Article 12(2); General Comment No.1, para.38.

[66] *See* UK Law Commission 2016 Report, para.5.84.

[67] *E.g. R v. Chal*, [2007] EWCA 2647, *available at* https://www.casemine.com/judgement/uk/5a8ff7a760d03e7f57eb0db4, para.25; Australian Capital Territory Act, s.316(c); Tasmanian Act, s.16(1); Victorian Act, s.17(2); *People v. Lang*, 805 N.E.2d 1249, 1257 (Ill. App. Ct. 2004), *available at* https://casetext.com/case/people-v-lang-59.

[68] *See also, e.g.*, Annex A: United States of America.

[69] New Zealand Mentally Impaired Persons Act, ss.10(2), 11(2),12(2).

[70] Scotland CPA, s.55(1)(b).

[71] Crimes Act 1914 (Cth) ("Commonwealth Act"), *available at* https://www.legislation.gov.au/Details/C2023C00023, ss.20B(1), 20B(6); *R (Cth) v. Sharrouf* [No 2] [2008] NSWSC 1450, *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2008/1450.html, paras.39, 51.

whether the accused should be directed into treatment or not.[72] However, applying a burden of proof that is less than beyond a reasonable doubt would have the effect of disadvantaging an unfit accused when compared with a fit accused undergoing criminal trial,[73] which would run contrary to the CRPD.

g. **The Chamber should provide a comprehensive, reasoned written decision supporting its determination of acquittal or non-acquittal**.[74] It is the Prosecution's position that in an international proceeding, it is in the interests of justice—including Kabuga's rights and the interests of the victims and international community—for this Chamber's decision on the Examination of Facts to be as rigorous as a traditional trial judgment, and subject the Prosecution's case to the same level of scrutiny.

D. Proceeding with an Examination of Facts is consistent with the Trial Chamber's mandate and is within its discretion

22. In accordance with Articles 18 and 19 of the Mechanism's Statute, it is within the Trial Chamber's inherent power to exercise its mandate, and its discretion to manage the proceedings, to proceed with an Examination of Facts if it considers Kabuga unfit for trial.

23. Certain inherent powers "accrue to a judicial body even if not explicitly provided for in the statute or rules of procedure of such a body, because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice".[75] The Trial Chamber is empowered to determine an appropriate procedure to be followed in the event Kabuga is found unfit in order to properly discharge its judicial function to reach a determination and ensure that justice is done in this case.[76] The exercise of the Trial Chamber's judicial role

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[72] Sarah Baird, "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform", 30 New Zealand Universities Law Review (2022) 247, 252.

[73] *See* UK Law Commission 2010 Consultation Paper, paras.6.118, 6.120.

[74] *E.g.* New South Wales Act, s.59(2).

[75] *See Prosecutor v. Tadić*, Case No.IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* AJ"), para.322. *See also Prosecutor v. Mukić et al.*, Case No.IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003 ("*Mukić et al.* AJ"), para.16; *Prosecutor v. Bagosora et al.*, No.ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 8 June 1998 ("*Bagosora et al.* Appeal Decision"), paras.44-45; *Prosecutor v. Blaškić*, Case No.IT-95-14-ARl08*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para.25, fn.27; *Prosecutor v. Tadić*, Case No.IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras.14-15.

[76] *Cf. Tadić* AJ, paras.317, 326; *Prosecutor v. Rwamakuba*, Case No.ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007 ("*Rwamakuba* Appeal Decision"), paras.24-27.

through an Examination of Facts will not prejudice Kabuga.[77] On the contrary, the possibility of an acquittal is in Kabuga's interest. In case of non-acquittal, an Examination of Facts would lead to a reasoned decision, which would not ascribe criminal responsibility but justify Kabuga remaining under the Mechanism's jurisdiction in an appropriate setting.[78] Within the framework of its considerable discretion to manage proceedings before it,[79] with the benefit of the parties' submissions, the Trial Chamber can implement a procedure for presentation of relevant evidence that is fair and respects the rights of the accused.[80]

24. An Examination of Facts is consistent with the objects and the purpose of the Mechanism Statute[81] and, as the successor of the ICTR, the Mechanism's mandate to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda.[82] The procedures proposed by the Prosecution would be almost entirely consistent with, and permit the Trial Chamber to follow those set out in the Rules of Procedure and Evidence. In the context of an unfit accused, the Prosecution's request for the Trial Chamber to proceed with an Examination of Facts resulting in a reasoned decision on Kabuga's acquittal or non-acquittal is consistent with its function within the Mechanism.

V. IF KABUGA REGAINS FITNESS, HIS CRIMINAL TRIAL SHOULD RESUME

25. Kabuga's criminal trial should resume if he regains fitness at any time unless the Examination of Facts process has already resulted in an acquittal. Kabuga's mental and/or physical impairments are not static,[83] and cutting-edge research on treatments to slow or reverse dementia shows promising results.[84] Moreover, even in the absence of any change in his impairments, additional supports and accommodations may become available that could

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[77] *See Mukić et al.* AJ, paras.17, 18. *See also* T.19-21, 15 March 2023; T.1-3, 19-21, 17 March 2023; T.16, 45, 23 March 2023.
[78] *See* T.16, 30 March 2023.
[79] *See Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Judgement, 20 March 2019 (public redacted) ("*Karadžić* AJ"), paras.26, 72 and references cited therein. *See also Prosecutor v. Mladić*, Case No.MICT-13-56-A, Judgement, 8 June 2021 (public redacted) ("*Mladić* AJ"), para.63 and references therein.
[80] *See Karadžić* AJ, para.26.
[81] *See Bagosora et al.* Appeal Decision, para.45.
[82] *See* Security Council Resolution 955 (1994), S/RES/955, 8 November 1994 ("ICTR Statute"), Article 1; Security Council Resolution 1996 (2010), S/RES/1966, 22 December 2010 ("Mechanism Statute"), Article 1.
[83] *See* T.8, 16 March 2023 (Kennedy); T.13-14, 17 March 2023 (Kennedy); T.36-37, 23 March 2023 (Mezey); T.38, 29 March 2023 (Cras).
[84] *E.g.* BBC, New Alzheimer's drug slows disease by a third, *available at* https://www.bbc.com/news/health-65471914.

enable him to meaningfully participate. In the event that the criminal trial resumes, Kabuga should be afforded all accommodations and supports necessary to ensure his effective participation.

VI. CONCLUSION

26. For the foregoing reasons, should the Chamber consider Kabuga unable to meaningfully participate in his trial, regardless of the level of support, the Chamber should proceed immediately to an Examination of Facts. Fit or unfit, Kabuga remains under the Mechanism's jurisdiction. If Kabuga regains fitness, his trial should resume immediately with all appropriate accommodations.

Word Count: 7300

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Dated this 9th day of May 2023
At Arusha, Tanzania

INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS

Case No. MICT-13-38-T

THE PROSECUTOR
v.
FÉLICIEN KABUGA

PUBLIC

ANNEX A

SURVEY OF NATIONAL JURISDICTIONS

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I. AUSTRALIA

1. In Australia, most criminal prosecutions fall within the jurisdiction of its (six) states and (two) territories. In all state and territory jurisdictions, save for Queensland and Western Australia, where a person is charged with an indictable offence but is found unfit to stand trial, legislation provides for some form of "Examination of Facts" to be conducted. The Crimes Act 1914 (Cth), applicable to offences against the Commonwealth of Australia, also provides for a similar procedure.[1]

A. Legal basis for the proceeding (legislation and/or jurisprudence)

1. <u>Australian Capital Territory</u>

2. Part 13, Division 13.2 of the Crimes Act 1900 (ACT)[2] sets out the scope of, and procedure for, "special hearings" in circumstances where a court finds an accused is unfit to plead, and is unlikely to become fit to plead within the next 12 months.[3]

2. <u>New South Wales</u>

3. Part 4, Division 3 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)[4] sets out the scope of, and procedure for, "special hearings" in circumstances where a court finds that an accused is unfit to be tried in accordance with normal procedures, and will not, for a period of 12 months thereafter, become fit to be tried.[5]

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[1] In practice most federal offenders are tried in state and territory courts. *See* ss.71 and 77(iii) of the Commonwealth of Australia Constitution Act ("Commonwealth Constitution"), *available at* https://www.legislation.gov.au/Details/C2013Q00005. The Judiciary Act 1903 (Cth) ("Judiciary Act"), *available at* https://www.legislation.gov.au/Details/C2022C00081, invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions. The Act makes specific provision for the exercise of federal criminal jurisdiction by both state and territory courts. Importantly, under the Act, state and territory laws, including those relating to 'procedure, evidence and the competency of witnesses' are applied to federal prosecutions in state and territory courts. *See* Judiciary Act s.39(2).

[2] Crimes Act 1900 (ACT) ("Australian Capital Territory Act"), *see especially* ss.315C-319A, *available at* https://www.legislation.act.gov.au/a/1900-40.

[3] Australian Capital Territory Act, s.315C.

[4] Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No.12 (NSW) ("New South Wales Act"), *available at* https://legislation.nsw.gov.au/view/html/inforce/current/act-2020-012#pt.4-div.3.

[5] New South Wales Act, ss.54, 55(1).

3. Northern Territory

4. Part IIA, Division 4 of the Criminal Code Act 1983 (NT)[6] sets out the scope of, and procedure for, "special hearings" in circumstances where a court finds, or it is agreed by the parties, that an accused is unfit to stand trial, and will not become fit to stand trial within the next 12 months.[7]

4. South Australia

5. Sections 269M and 269N of the Criminal Law Consolidation Act 1935 (SA)[8] set out the scope of, and procedure for, "trials of the objective elements of the offence" in circumstances where a court orders an investigation into an accused's mental fitness to stand trial.[9]

5. Tasmania

6. Part 2 of the Criminal Justice (Mental Impairment) Act 1999 (Tas)[10] sets out the scope of, and procedure for, "special hearings" in circumstances where a court finds that an accused is unfit to stand trial, and is not likely to become fit to stand trial within the next 12 months.[11]

6. Victoria

7. Part 3 of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic)[12] sets out the scope of, and procedure for, "special hearings" in circumstances where a court finds that an accused is unfit to stand trial, and will not become fit to stand trial within the next 12 months.[13]

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[6] Criminal Code Act 1983 (NT) ("Northern Territory Act"), *available at* https://legislation.nt.gov.au/en/Legislation/CRIMINAL-CODE-ACT-1983.
[7] Northern Territory Act, ss.43R(3), 43S(b), 43(T).
[8] Criminal Law Consolidation Act 1935 (SA) ("South Australian Act"), *available at* https://www.legislation.sa.gov.au/lz?path=%2FC%2FA%2FCRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935.
[9] *See* South Australian Act, ss.269L-269N.
[10] Criminal Justice (Mental Impairment) Act 1999 (Tas) ("Tasmanian Act"), *available at* https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-021.
[11] Tasmanian Act, s.15(1).
[12] Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic) ("Victorian Act"), *available at* https://content.legislation.vic.gov.au/sites/default/files/2023-03/97-65aa080-authorised.pdf.
[13] Victorian Act, s.14F(5).

7. Commonwealth

8. Part IB, Division 6 of the Crimes Act 1914 (Cth)[14] sets out the scope of, and procedure for determining whether there is a "prima facie case" that an accused found unfit to be tried committed the offence charged.

B. Mechanics of proceedings

1. Australian Capital Territory

9. A special hearing is to be conducted as nearly as possible as if it were an ordinary criminal proceeding.[15] A special hearing shall be a trial by jury unless the accused (if determined by the judge to be capable) or any guardian of the accused notifies the court that, in his or her opinion, it is in the best interests of the accused for a special hearing to be a trial by single judge without jury.[16]

2. New South Wales

10. A court must hold a "special hearing" as soon as practicable after the court or the Mental Health Review Tribunal determines that an accused will not, during the period of 12 months after a finding that the accused is unfit to be tried for an offence, become fit to be tried for the offence.[17] A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings,[18] including with a formal arraignment of the accused.[19] However, the court may, if it thinks it appropriate in the circumstances of the case, modify court processes to facilitate the effective participation by the accused.[20] The proceedings are conducted by a judge alone unless an election to have the matter determined by a jury is made by the accused, the accused's counsel, or the prosecutor.[21]

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[14] Crimes Act 1914 (Cth) ("Commonwealth Act"), *available at* https://www.legislation.act.gov.au/a/1900-40.
[15] Australian Capital Territory Act, s.316(1).
[16] Australian Capital Territory Act, s.316(2).
[17] New South Wales Act, s.55(1).
[18] New South Wales Act, s.56(1). *See R v. Zvonaric* [2001] NSWCCA 505 ("*R v. Zvonaric*"), *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCCA/2001/505.html, para. 19.
[19] *R v. Zvonaric*, para.38.
[20] New South Wales Act, s.56(2).
[21] New South Wales Act, s.56(9).

3. Northern Territory

11. A special hearing must be conducted within three months after the date of the judge's determination that the accused is unfit to stand trial.[22] A special hearing is to be conducted as nearly as possible as if it were a criminal trial.[23] It is held before a jury.[24] The rules of evidence apply.[25]

4. South Australia

12. If the court orders an investigation into the accused's mental fitness to stand trial, the court has discretion to either[26]:

(a) first assess the accused's mental fitness, and if the accused is found to be mentally unfit to stand trial, then conduct a "trial of objective elements of offence"[27]; or

(b) first conduct a "trial of objective elements of offence", and if the court finds that they are established, then proceed to assess the accused's mental fitness to stand trial.[28]

13. In a "trial of objective elements of offence" the court must hear evidence and representations put to the court by the prosecution and the defence relevant to the question of whether the court should find that the objective elements of the offence are established.[29]

[22] Northern Territory Act, s.43(R)(3).
[23] Northern Territory Act, s.43W(1).
[24] Northern Territory Act, ss.43V(2), 43(W)(3), 43X.
[25] Northern Territory Act, s.43W(2)(d).
[26] South Australian Act, s.269L.
[27] South Australian Act, s.269M.
[28] South Australian Act, s.269N.
[29] South Australian Act, ss.269M.B(1), 269N.A(1).

5. Tasmania

14. A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings.[30] In the case of proceedings in the Supreme Court, the question whether an accused is not guilty of the offence must be determined by a jury.[31]

6. Victoria

15. The court must hold a special hearing within three months after the date of determination that the accused is unfit to stand trial.[32] A special hearing—which is heard before a jury[33]—is to be conducted as nearly as possible as if it were a criminal trial.[34] The rules of evidence apply.[35]

7. Commonwealth

16. If the court finds the accused unfit to be tried, the court must determine whether there has been established a prima facie case that the accused committed the offence.[36] Contrary to state legislation, the Commonwealth Act contains no provision requiring that formal trial procedures generally apply.[37] The relevant procedure, which was followed in the key case of *R v Sharrouf (No. 2)*, is as follows:

a. The Crown is not required to lead its evidence in the normal way by calling witnesses;[38]

b. The Crown may provide the court with a statement of facts or case statement and the brief of evidence that the Crown would rely on at trial;[39]

d. The defence can indicate its view on whether the evidence identified establishes a prima facie case against the person;[40]

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30 Tasmanian Act, s.16(1).
31 Tasmanian Act, s.15(3).
32 Victorian Act s.14F(5).
33 Victorian Act ss.16(1), 16(3). *See* Juries Act 2000 (Vic), *available at* https://content.legislation.vic.gov.au/sites/default/files/2020-02/00-53aa052%20authorised.pdf.
34 Victorian Act s.16(1).
35 Victorian Act s.16(2)(d).
36 Commonwealth Act, ss.20B(1),(3).
37 *See R (Cth) v. Sharrouf [No 2]* [2008] NSWSC 1450 ("*R v. Sharrouf (No.2)*"), *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2008/1450.html, para.45.
38 *R v. Sharrouf (No.2)*, paras.27-28, 49.
39 *R v. Sharrouf (No.2)*, para.55,.

e. The court has a broad power to seek any other evidence, whether oral or in writing, as it considers likely to assist in determining the matter;[41]

f. The accused may give evidence, make an unsworn statement, or raise any defence that could properly be raised if the proceedings were a trial, and the court may seek such other evidence, whether oral or in writing, as it considers likely to assist;[42]

g. With regard to any committal previously conducted, the court can take into account the material relied upon by the committing magistrate, and can take into account the basis on which the magistrate has made a committal order, provided that the Court makes its own analysis of the evidence;[43]

h. The Court must consider the evidence at its highest without engaging in an assessment of the credibility or reliability of such evidence.[44]

i. The judge makes a determination.

C. Role of the accused

1. Australian Capital Territory

17. It is unclear from the Australian Capital Territory Act whether the accused must attend proceedings. However, a special hearing is to be conducted as nearly as possible as if it were an ordinary criminal proceeding.[45] The accused is to be taken to have pleaded not guilty in respect of the offence charged.[46]

2. New South Wales

18. A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings,[47] including with the formal arraignment of the accused.[48] The

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[40] *R v. Sharrouf (No.2)*, para.237.
[41] Commonwealth Act, s.20B(7)(c).
[42] Commonwealth Act, s.20B(7)(a)-(b); *R v. Sharrouf (No.2)*, para.238.
[43] *R v. Sharrouf (No.2)*, para.47.
[44] *R v. Sharrouf (No.2)*, para.39.
[45] Australian Capital Territory Act, s.316(1).
[46] Australian Capital Territory Act, s.316(8).
[47] New South Wales Act, s.56(1).

accused is entitled to give evidence.[49] The court may, if it thinks it appropriate in the circumstances of the case, modify court processes to facilitate the effective participation by the accused.[50] The court may permit the accused not to appear, or may exclude the accused from appearing, if the court thinks it appropriate in the circumstances and the accused, or if the accused's counsel agrees.[51]

3. Northern Territory

19. It is unclear from the Northern Territory Act whether the accused must attend proceedings. However, a special hearing is to be conducted as nearly as possible as if it were a criminal trial.[52] The accused is taken to plead not guilty,[53] and may give evidence.[54]

4. South Australia

20. It is unclear from the South Australian Act whether the accused must attend proceedings, or whether the accused may give evidence.

5. Tasmania

21. It is unclear from the Tasmanian Act whether the accused must attend proceedings. However, a special hearing is to be conducted as nearly as possible to criminal proceedings.[55] The accused is taken to have pleaded not guilty to the offence[56] and is entitled to give evidence.[57]

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[48] *R v. Zvonaric*, paras.13, 38.
[49] New South Wales Act, s.56(7).
[50] New South Wales Act, s.56(2).
[51] New South Wales Act, s.56(8).
[52] Northern Territory Act, s.43W(1).
[53] Northern Territory Act, s.43W(2)(a).
[54] Northern Territory Act, s.43W(2)(e).
[55] Tasmanian Act, s.16(1).
[56] Tasmanian Act, s.16(3)(a).
[57] Tasmanian Act, s.16(3)(d).

6. Victoria

22. A special hearing is to be conducted as nearly as possible as if it were a criminal trial.[58] The accused and his or her legal practitioner are to be present in the courtroom.[59] The accused must be taken to have pleaded not guilty to the offence.[60]

7. Commonwealth

23. It is unclear from the Commonwealth Act whether the accused must attend proceedings. However, the Commonwealth Act specifies that the accused may give evidence or make an unsworn statement.[61]

D. Representation by defence counsel

1. Australian Capital Territory

24. Unless the Supreme Court otherwise orders, the accused shall have legal representation at a special hearing.[62] A decision that the accused is unfit to plead to the charge is not to be taken to be an impediment to his or her being represented at a special hearing.[63]

[58] To that end, the Juries Act 2000 (Vic) and the Criminal Procedure Act 2009 (Vic) (““Victorian Criminal Procedure Act”), *available at* https://content.legislation.vic.gov.au/sites/default/files/2023-03/09-7aa093-authorised.pdf., ss.197 and 232A, apply. *See* Victorian Act s.16(1); Judicial College, Bench Notes: Special Hearings, 20 May 2022, para.14, *available at* https://www.judicialcollege.vic.edu.au/media/763/file.

[59] Victorian Criminal Procedure Act, para.372. Note that the Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Report*, June 2014 (“Victorian Law Reform Commission 2014 Report”), *available at* https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Review_of_the_Crimes_Mental_Impairment_and_Unfitness_to_be_Tried_Act_0.pdf, p.Iiii, paras.66, 9.24-9.25 proposes that the legislation be amended to enable a judge or magistrate to excuse an accused from attending a special hearing with the consent of both parties, and provide that an accused may “attend” a special hearing by audiovisual link, with the consent of both parties. *Also* Victorian Criminal Procedure Act, ss.3 (definition of “attend”), 330(3). Note that while section 3 defines “attend” to include being brought to the court by audiovisual link, section 330 refers to section 3 as defining “attend” to mean being physically present in court.

[60] Victorian Act, s.16(2)(a).

[61] Commonwealth Act, s.20(B)(7)(a).

[62] Crimes Act 1900 (ACT), s.316(6).

[63] Crimes Act 1900 (ACT), s.316(7).

2. New South Wales

25. At a special hearing, the accused must, unless the court otherwise allows, be represented by an Australian legal practitioner.[64] The fact that the accused has been found unfit to be tried for an offence is presumed not to be an impediment to the accused's representation,[65] notwithstanding any challenges pertaining to the receipt of instruction from the accused.[66]

3. Northern Territory

26. The scope of the role of defence counsel is not specified in the Northern Territory Act. However, the legislation states that "the accused person's legal representative (if any) may exercise the accused person's right of challenge."[67] This indicates that the accused *may* be represented by counsel, but that this is not obligatory.

4. South Australia

27. The scope of the role of defence counsel is not specified in the South Australian Act beyond that the court must hear evidence and representations put to the court by "the defence" relevant to the question whether the accused should be found to have committed the objective elements of the offence.[68]

5. Tasmania

28. The scope of the role of defence counsel is not specified in the Tasmanian Act. However, the fact that the accused has been found to be unfit to stand trial is taken not to be an impediment to his or her representation,[69] and an accused's legal

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[64] New South Wales Act, s.56(3).
[65] New South Wales Act, s.56(4).
[66] *See R v. Zvonaric*, paras. 12, 15: it is expected that a special hearing will occur with the assistance of legal representation on behalf of the person found to be unfit. Questions of instruction from an accused are necessarily problematic in such circumstances. Nevertheless the legislative scheme assumes such representation and, in its practical operation, the scheme requires the Court to rely on the professionalism of that legal representation […] in the circumstances the Court must be, as the legislative scheme contemplates, particularly reliant on the legal practitioner representing the accused person.
[67] Northern Territory Act, s.43W(2)(b).
[68] South Australian Act, ss.269M.B(1), 269N.A(1).
[69] Tasmanian Act, s.16(2).

representative may exercise the accused's rights to challenge jurors or the jury.[70] In light of this, and that a special hearing is to be conducted as nearly as possible to criminal proceedings,[71] in practice it appears that the accused may (continue to) be represented by defence counsel.

6. Victoria

29. The scope of the role of defence counsel is not specified in the Victorian Act. However, the legislation states that "the legal representative (if any) of the accused may exercise rights of the accused to challenge jurors or the jury."[72] This indicates that the accused *may* be represented by counsel, but that this is not obligatory.

30. Further, section 197 of the Criminal Procedure Act 2009 (Vic)—which applies as if the special hearing were a criminal trial[73]—provides that if a court is satisfied that it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented, and the accused is unable to afford the full cost of legal representation, the court may order Legal Aid to provide legal representation to the accused, and may adjourn the trial until that legal representation has been provided.[74]

7. Commonwealth

31. The Commonwealth Act does not specify the role of defence counsel. However, in practice, the jurisprudence suggests that the accused continues to be represented by defence counsel,[75] and that counsel can, *inter alia* indicate their views on whether the evidence identified establishes a prima facie case against the accused and raise defences.[76]

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[70] Tasmanian Act, s.16(3)(b).
[71] Tasmanian Act, s.16(1).
[72] Victorian Act s.16(2)(b).
[73] Victorian Act s.16(2)(e).
[74] Victorian Criminal Procedure Act, s.197(3).
[75] *See e.g. R v. Sharrouf (No.2)*.
[76] *R v. Sharrouf (No.2)*, paras.237-238.

32. The Rules of various federal courts also provide for the appointment of a "litigation representative" or "guardian" where the accused does not have capacity to conduct litigation,[77] including an inability to give adequate instruction.[78]

E. Standard of proof

1. Australian Capital Territory

33. The accused is acquitted—despite the unfitness of the accused to plead in accordance with ordinary criminal procedures—unless it can be proved **beyond reasonable doubt** that, on the evidence available, that the accused engaged in the conduct required for the offence charged.[79]

2. New South Wales

34. The accused is acquitted unless it can be proved to the required criminal standard of proof[80] (**beyond reasonable doubt**[81]) that, on the limited evidence available,[82] the accused committed the offence charged.

3. Northern Territory

35. A jury can enter a finding that the accused committed the offence charged, or an offence available as an alternative to the offence, if it is satisfied **beyond**

[77] *See* Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, Report 124, August 2014 ("Australian Law Reform Commission 2014 Report"), *available at* https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf, para.7.96, with reference to the rules of High Court of Australia, Federal Circuit Court of Australia, Federal Court of Australia and Family Court of Australia. Recommendations 7-3 and 7-4 of the Australian Law Reform Commission 2014 Report further address the possible scope of the role of litigation representatives, *see* pp.211-220.

[78] Australian Law Reform Commission 2014 Report, para.7.97, referring to the rules of the Federal Circuit Court of Australia.

[79] Australian Capital Territory Act, ss.316(9)(c), 317(1).

[80] New South Wales Act, s.54.

[81] *E.g. R v. Aller* [2015] NSWSC 178, *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2015/178.html, para.1.

[82] The term "on the limited evidence available" has been interpreted as 'recognition of the fact that a person who is unfit to be tried is not able to participate in a special hearing to the same extent as an accused person can in a normal criminal trial. *See R v. Thomas (No 2)* [2015] NSWSC 561, *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2015/561.html, para.1.

reasonable doubt, on the evidence available, that the accused committed the offence (or an alternative offence).[83]

4. South Australia

36. If the court is satisfied **beyond reasonable doubt** that the objective elements of the offence are established, the court must record a finding to that effect.[84]

5. Tasmania

37. A special hearing is to be conducted so that the onus of proof and standard of proof are the same as in a trial of criminal proceedings (**beyond reasonable doubt**).[85]

6. Victoria

38. To make a finding that the accused committed the offence charged (or an offence available as an alternative) the jury must be satisfied **beyond reasonable doubt**, on the evidence available, that the accused committed the offence charged or an offence available as an alternative.[86]

7. Commonwealth

39. The court is "not determining the guilt of the accused",[87] but rather whether there has been established a **prima facie case** that the accused committed the offence.[88] A prima facie case is established if there is evidence that would (except for the circumstances by reason of which the accused is unfit to be tried) provide sufficient grounds to put the accused on trial in relation to the offence.[89] What is critical is, first, the identification of evidence; and secondly an examination of its capacity, or its incapacity, to sustain the charge in the indictment. This does not require the Court to assess the credibility or reliability of any witness. The evidence is

[83] Northern Territory Act, s.43V(1)(c)-(2).
[84] South Australian Act, ss.269M.B(2), 269N.A(2).
[85] Tasmanian Act, s.16(1).
[86] Victorian Act, s.17(2).
[87] *See R v. Sharrouf (No.2)*, paras.28, 49.
[88] Commonwealth Act, s.20B(3).
[89] Commonwealth Act, s.20B(6). *See R v. Sharrouf (No.2)*, paras. 39, 51.

taken at its highest.[90] Whether there is a prima facie case is a question of law and the question is whether there is sufficient evidence upon which the accused may be convicted, that is, whether there is evidence capable of proving each of the elements of the offence beyond reasonable doubt.[91]

F. Scope of adjudication: actus reus/*mens rea*

1. Australian Capital Territory

40. The court must consider whether it can be proved beyond reasonable doubt that, on the evidence available, the accused "engaged in the ***conduct required*** **for the offence charged**," or an alternative offence.[92] This language indicates that the Prosecution is only required to prove the physical elements of the offence; not the *mens rea* of the offence.[93]

2. New South Wales

41. The court must consider whether it can be proved to the required criminal standard of proof that, on the limited evidence available, the accused committed the "**offence charged**," or another offence available as an alternative to the offence charged.[94] This language indicates that all the elements of the offence, including the *mens rea*, must be proved to the requisite standard.[95]

3. Northern Territory

42. The court must consider whether it is satisfied beyond reasonable doubt, on the evidence available, that the accused committed the **"offence he or she is charged**

[90] *R v. Sharrouf (No.2)*, para.39.
[91] *R v. Sharrouf (No.2)*, para.51.
[92] Crimes Act 1900 (ACT), s.316(9)(c) (emphasis added).
[93] *See* UK Law Commission 2010 Consultation Paper, para.6.61, citing the statement of Mr Stanhope (Attorney General) during the passage of the Crimes Amendment Bill (No 2): Hansard (Legislative Assembly for the Australian Capital Territory), 2 March 2004, pp.484-485.
[94] New South Wales Act, s.54.
[95] *See* UK Law Commission 2010 Consultation Paper, para.6.76 (construing identical language from previous NSW legislation). This is further supported by the requirement that the hearing is to be conducted "as nearly as possible as if it were a trial of criminal proceedings". UK Law Commission 2010 Consultation Paper, para.6.76 (construing identical language from previous NSW legislation). *Also* New South Wales Act, s.56(1).

with" (or an offence available as an alternative to the offence charged).[96] This language implies that the prosecution must prove all elements of that offence, including the *mens rea*.[97]

4. South Australia

43. The court must consider whether it is satisfied beyond reasonable doubt that the "**objective elements of the offence**" are established.[98] An "objective element" of an offence is defined as "an element of that offence that is not a subjective element".[99] A "subjective element" of an offence means "a mental element of the offence and includes voluntariness".[100] The scope of the hearing is therefore limited to the *actus reus*.[101]

5. Tasmania

44. The court must consider whether, despite the unfitness of the accused to stand trial, on the limited evidence available the accused is not guilty the "**offence**".[102] This, together with the fact that the accused may raise any defence that could be properly raised as if the special hearing were an ordinary trial of criminal proceedings,[103] suggest that all the elements of the offence, including the *mens rea*, must be proved to the requisite standard.[104]

6. Victoria

45. To make a finding that the accused committed the offence charged (or an offence available as an alternative) the court must be satisfied beyond reasonable doubt, on the evidence available, that the accused **committed the offence charged** or

[96] Northern Territory Act, s.43V(1)(c)-(2), 43X(3).
[97] *See* UK Law Commission 2010 Consultation Paper, para.6.81: "This is further supported by the requirement the hearing must be conducted as nearly as possible as if it were a criminal trial and the accused may give evidence and raise any defence that would be available at a normal criminal trial."
[98] South Australian Act, ss.269M.B, 269N.A.
[99] South Australian Act, s.267A.
[100] South Australian Act, s.267A.
[101] *See* UK Law Commission 2010 Consultation Paper, paras.6.62, 6.68.
[102] Tasmanian Act, ss.15(2)-(3).
[103] Tasmanian Act, s.16(3)(c).
[104] *Also e.g.* UK Law Commission 2010 Consultation Paper, para.6.76 (considering identical wording in the previous version of NSW legislation).

an offence available as an alternative.[105] This suggests that all the elements of the offence, including the *mens rea*, must be proved to the requisite standard.[106]

7. Commonwealth

46. The court must determine whether there has been established a prima facie case that the accused "**committed the offence**."[107] This language suggests that the Prosecution is not only required to prove the physical elements of the offence, but also the *mens rea* of the offence.[108] The court has clarified that "it cannot remotely be said that the determination of the prima facie case issue is, in any sense, a trial of the accused for the offence charged."[109]

G. Limitations on defences

1. Australian Capital Territory

47. The accused is taken to have pleaded not guilty in respect of the offence charged.[110] The Australian Capital Territory Act does not specify whether there are any limitations on defences. However, jurisprudence suggests that, as a minimum, the defences of mental impairment, provocation and diminished responsibility cannot be raised.[111]

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[105] Victorian Act, s.17(1)(c).
[106] *See* UK Law Commission 2010 Consultation Paper, para.6.82.
[107] Commonwealth Act, s.20B(1).
[108] *See e.g.* UK Law Commission, Consultation Paper No.197, Unfitness to Plead: A Consultation Paper ("UK Law Commission 2010 Consultation Paper"), *available at* https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/cp197_Unfitness_to_Plead_web.pdf, para.6.76 (construing similar language in the (now superseded) New South Wales Mental Health (Forensic Provisions) Act 1990).
[109] *R v. Sharrouf (No.2)*, para.49.
[110] Australian Capital Territory Act, s.316(8).
[111] *R v. Morris* [2002] ACTSC 12, *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTSC/2002/12.html, paras.19, 20, 22.; *R v. Ardler* [2004] ACTCA 4, *available at* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTCA/2004/4.html, para.90. *See* UK Law Commission 2010 Consultation Paper, para.6.60-6.61.

2. <u>New South Wales</u>

48. The accused is taken to have pleaded not guilty in respect of the offence charged.[112] The accused may raise any defence that could properly be raised if the special hearing were an ordinary trial of criminal proceedings.[113]

3. <u>Northern Territory</u>

49. The accused may give evidence,[114] and may raise any defence that could be raised if the special hearing were a criminal trial.[115]

4. <u>South Australia</u>

50. The court is to exclude from consideration any question of whether the accused's conduct is defensible.[116]

5. <u>Tasmania</u>

51. The accused may raise any defence that could be properly raised as if the special hearing were an ordinary trial of criminal proceedings.[117]

6. <u>Victoria</u>

52. The accused may raise any defence that could be raised if the special hearing were a criminal trial, including the defence of mental impairment.[118]

7. <u>Commonwealth</u>

53. The accused may raise any defence that could properly be raised if the proceedings were a trial for that offence.[119]

[112] New South Wales Act, s.56(5).
[113] New South Wales Act, s.56(6).
[114] Northern Territory Act, s.43W(2)(e).
[115] Northern Territory Act, s.43W(2)(c).
[116] South Australian Act, ss.269M.B(3), 269N.A(3).
[117] Tasmanian Act, s.16(3)(c).
[118] Victorian Act, s.16(2)(c).
[119] Commonwealth Act, s.20B(7)(b); *R v. Sharrouf (No.2)*, para.238.

H. Available dispositions/penalties

1. Australian Capital Territory

54. The verdicts available at a special hearing include:

a. Not guilty in respect of the offence charged (the accused shall be dealt with as though the accused had been found not guilty at an ordinary trial);[120]

b. A finding that the accused engaged in the conduct required for the offence charged, or an alternative offence.[121] This finding is not a basis in law for recording a conviction for the offence charged and bars further prosecution for any offence in relation to the conduct.[122]

55. In the case of "non-acquittal" at a special hearing for a serious offence, the court must order that the accused:[123]

a. Be detained in custody for immediate review by the Australian Capital Territory Civil and Administrative Tribunal ("ACAT")[124]; or

b. If it is more appropriate—submit to the jurisdiction of the ACAT to allow the ACAT to make a mental health order or a forensic mental health order under the Mental Health Act 2015.

56. In the case of "non-acquittal" at a special hearing for a non-serious offence, the Supreme Court may make orders it considers appropriate, including those listed in respect of serious offences.[125]

2. New South Wales

57. The verdicts available at a special hearing include:[126]

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[120] Australian Capital Territory Act, ss.317(2), 317(3).
[121] Australian Capital Territory Act, s.317(1).
[122] Australian Capital Territory Act, ss.317(1), 317(4).
[123] Australian Capital Territory Act, s.319.
[124] *See* Mental Health Act 2015 (ACT), s.180, *available at* https://www.legislation.act.gov.au/View/a/2015-38/current/html/2015-38.html.
[125] Australian Capital Territory Act, s., 318.

a. Not guilty of the offence charged[127] (the accused is to be dealt with as if they had been found not guilty of the offence at an ordinary trial of criminal proceedings[128]);

b. A special verdict of act proven but not criminally responsible[129] (if the judge is satisfied that at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment[130]);

c. That on the limited evidence available, the accused committed the offence charged,[131] or an offence available as an alternative to the offence charged[132] (this constitutes a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates, but enables a victim of the offence to make a claim for compensation[133]).

58. A judge who determines a special hearing must include in the determination the principles of law applied by the judge and the findings of fact on which the judge relied.[134]

59. If the court finds the accused committed the offence charged, and if it would have imposed a sentence of imprisonment had the special hearing been an ordinary trial of criminal proceedings, the court must nominate a term (a limiting term) that is the best estimate of the sentence that the court would have imposed on the accused in those circumstances.[135] The court may order that the accused be detained in a mental

[126] New South Wales Act, s.59(1).
[127] New South Wales Act, s.59(1)(a).
[128] New South Wales Act, s.60.
[129] New South Wales Act, ss.59(1)(b).
[130] New South Wales Act, ss.28, 59(3).
[131] New South Wales Act, s.59(1)(c).
[132] New South Wales Act, s.59(1)(d).
[133] New South Wales Act, s.62(a)-(c).
[134] New South Wales Act, s.59(2).
[135] New South Wales Act, ss.63(1), (2). *See* s.63(5) for factors the court may consider in determining a limiting term or penalty.

health facility, correctional centre, detention centre or other place pending the review of the accused by the Mental Health Review Tribunal.[136]

3. Northern Territory

60. The verdicts available at a special hearing include:

a. Not guilty of the offence[137] (taken to be a finding of not guilty at a criminal trial and the court must discharge the accused person[138]);

b. Not guilty of the offence because of mental impairment[139] (taken to be a finding of not guilty because of mental impairment at a criminal trial[140]); or

c. Committed the offence charged, or an offence available as an alternative,[141] (taken to be a qualified finding of guilt and does not constitute a basis in law for a finding of guilt of the offence to which the finding relates[142]).

61. Any alternative finding of guilt that would be available for a jury at a criminal trial is available to the jury at the special hearing.[143]

62. If the accused is found to have committed the offence, or to be not guilty because of mental impairment, the court must declare that the accused person is liable to supervision under Division 5, or order the accused person be released unconditionally.[144]A custodial supervision order may submit the person to custody in a correctional facility (but only if there is no practicable alternative given the circumstances of the person) or another place the court considers appropriate.[145] A non-custodial supervision order may release the accused.[146]

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[136] New South Wales Act, s.65.
[137] Northern Territory Act, s.43V(1)(a).
[138] Northern Territory Act, s.43X(1).
[139] Northern Territory Act, s.43V(1)(b).
[140] Northern Territory Act, s.43X(2).
[141] Northern Territory Act, s.43V(1)(c).
[142] Northern Territory Act, s.43X(3)(a).
[143] Northern Territory Act, s.43W(2)(f).
[144] Northern Territory Act, s.43X(2),(3).
[145] Northern Territory Act, s.43ZA(1),(2).

4. South Australia

63. The verdicts available at a "trial of the objective elements of the offence" include:

a. Not guilty of the offence (resulting in the discharge of the accused);[147] or

b. A finding that the objective elements of the offence are established.[148]

64. If the court records a finding that the objective elements of the offence are established, it must (subject to Division 3A) declare the accused to be liable to supervision under Division 4 Subdivision 2.[149] Under Division 4 Subdivision 2, the court by which an accused is declared to be liable to supervision may:[150]

a. release the accused unconditionally; or

b. make an order (a supervision order)—

i. committing the accused to detention under this Subdivision;

ii. releasing the accused on licence on conditions imposed by the court and specified in the licence,[151] for example (without limiting the generality of the subsection), a condition that: the accused reside at specified premises; undergo assessment or treatment (or both) relating to the accused's mental condition; be monitored by use of an electronic device; or any other condition that the court thinks fit.[152]

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[146] Northern Territory Act, s.43ZA(1)(b).
[147] South Australian Act, s.269M.B(2).
[148] South Australian Act, s.269M.B(2).
[149] South Australian Act, s.269M.B(2).
[150] South Australian Act, s.269O(1).
[151] South Australian Act, s.269O(1).
[152] South Australian Act, s.269O(1aa).

5. Tasmania

65. The findings available at a special hearing include:[153]

a. Not guilty of the offence charged or of any offence available as an alternative[154] (the accused is taken to have been found not guilty at an ordinary trial of criminal proceedings[155]);

b. Not guilty of the offence charged on the ground of insanity or a finding to the same effect;[156] or

c. A finding cannot be made that the accused is not guilty of the offence charged.[157]

66. In respect of the second and third available findings, the court is to:

a. Make a restriction order[158] (requiring the person to whom it applies to be admitted to and detained in a secure mental health unit until the order is discharged by the Supreme Court[159]); or

b. Make a treatment order;[160] or

c. Release the accused and make a supervision order (releasing the person to whom it applies under the supervision of the Chief Forensic Psychiatrist and on such conditions as to the supervision of that person),[161] or order such conditions it considers appropriate[162]; or

d. Release the accused unconditionally.[163]

[153] Tasmanian Act, s.17.
[154] Tasmanian Act, s.17(a).
[155] Tasmanian Act, s.18(1).
[156] Tasmanian Act, s.17(c).
[157] Tasmanian Act, s.17(d).
[158] Tasmanian Act, s.18(2)(a).
[159] Tasmanian Act, s.24.
[160] Tasmanian Act, s.18(2)(c), 18(4), as defined in the Mental Health Act 2013 (Tas).
[161] Tasmanian Act, s.18(2)(b), 29A(1).
[162] Tasmanian Act, s.18(2)(e).
[163] Tasmanian Act, s.18(2)(f).

6. Victoria

67. The following findings are available to the jury at a special hearing:

a. Not guilty of the offence[164] (the person is to be taken for all purposes to have been found not guilty at a criminal trial, i.e. a complete acquittal);[165]

b. Not guilty of the offence because of mental impairment[166] (to be taken for all purposes to be a finding at a criminal trial of not guilty because of mental impairment);[167] or

c. Committed the offence charged, or an offence available as an alternative,[168] (constitutes a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates).[169]

68. If a jury makes a finding that the accused committed the offence charged, the judge must either:

a. Declare that the person is liable to supervision under part 5.[170] A supervision order may be:

i. Custodial (in an "appropriate place", or prison, if there is no practicable alternative in the circumstances),[171] or

ii. Non-custodial[172]; or b. Order the person to be released unconditionally.[173]

[164] Victorian Act, s.17(1)(a). *Also* s.15(a).
[165] Victorian Act, s.18(1).
[166] Victorian Act, s.17(1)(b). *Also* s.15(b).
[167] Victorian Act, s.18(2).
[168] Victorian Act, s.17(1)(c), 17(2). *Also* s.15(c).
[169] Victorian Act, s.18(3)(a). There can be no further prosecution of the accused in respect of the same circumstances. The finding is subject to appeal as if the person had been found guilty in a usual criminal trial. Victorian Act, s.18(3)(b)-(c).
[170] Victorian Act, s.18(4)(a). Such an order is for an indefinite term, although a nominal term must be set as provided by the Act: Victorian Act, ss.27, 28.
[171] Victorian Act, s.26(2)(a), 26(4).
[172] Victorian Act, s.26(2)(b).
[173] Victorian Act, s.18(4)(b).

7. Commonwealth

69. Where the court determines that there has not been established a prima facie case that the person committed the offence, the court must, by order, dismiss the charge against the person and, if the person is in custody, order the release of the person from custody.[174]

70. If a prima facie case is established, the Court may either:

a. Dismiss the charge and order the release of person if they are in custody, having regard to the character, antecedents, age, health or mental condition of the person, extent (if any) to which the offence is of a trivial nature, or extent (if any) to which the offence was committed under extenuating circumstances;[175] or

b. Decline to dismiss the charge and it must then determine, on the balance of probabilities, if the person will become fit to be tried within 12 months.[176]

71. Where person is not likely to become fit within 12 months the court can order:

a. The person be detained in hospital for treatment (if the person is suffering from a mental illness or mental condition for which treatment is available in a hospital and the person does not object to being detained in the hospital).[177]

b. If the mental illness cannot be treated in a hospital (or if the illness could be treated in a hospital but the person objects to such treatment), the person can be detained in a place other than a hospital, including a prison.[178]

[174] Commonwealth Act, s.20BA(1).
[175] Commonwealth Act, s.20BA(2).
[176] Commonwealth Act, s.20BA(4).
[177] Commonwealth Act, s.20BC(2)(a).
[178] Commonwealth Act, s.20BC(2)(b).

c. Alternatively, the person may be released from custody to live in the community, with or without conditions.[179]

[179] Commonwealth Act, s.20BC(5).

II. ENGLAND AND WALES

A. Legal basis for the proceeding (legislation and/or jurisprudence)

72. The procedure for determining whether an accused is fit for trial was initially set out in section 4 of the Criminal Procedure (Insanity) Act 1964, which was amended in 1991 with the addition of section 4A, which provides for the procedure to be followed after an accused is found unfit for trial.[180] At that point, the trial does not proceed further[181] and the jury determines—on the basis of the evidence (if any) already given as well as on any evidence adduced by either the prosecution or a court-appointed defence advocate—whether it has been proven that the accused did the act or made the omission charged.[182]

B. Mechanics of proceedings

73. In England and Wales, a determination that an accused is unfit—which may occur at any point during trial, although if the issue is raised earlier, the determination may nevertheless be deferred until the opening of the case for the defence[183]—is followed by a hearing pursuant to section 4A.[184] The procedure is mandatory; the court has no discretion not to embark upon it.[185]

74. While the current interpretation of the current law effectively limits the fact-finding to the *actus reus* and some limited aspects of *mens rea* of the charged offence,[186] the UK Law Commission has recommended the amendment of legislation to provide for a hearing that more closely resembles a full trial.[187]

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[180] England and Wales, Criminal Procedure (Insanity) Act 1964, as amended by Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and Domestic Violence, Crime and Victims Act 2004 ("England and Wales CP(I)A"), *available at* https://www.legislation.gov.uk/ukpga/1991/25, s.4A.
[181] England and Wales CP(I)A, s.4A(2).
[182] England and Wales CP(I)A, s.4A(2).
[183] England and Wales CP(I)A, s.4(2).
[184] England and Wales CP(I)A, s.4A(1).
[185] *See* England and Wales CP(I)A, s.4(2) ("The trial shall not proceed or further proceed but it *shall* be determined by a jury…") (emphasis added). *Also* UK Law Commission 2016 Report, paras.5.43-5.61 (considering whether to amend legislation to provide courts with discretion).
[186] *See below* Section F.
[187] UK Law Commission, Unfitness to Plead Project website, *available at* https://www.lawcom.gov.uk/project/unfitness-to-plead/.

75. Because the section 4A hearings are "criminal proceedings" within the Criminal Justice Act 2003, the same rules of evidence—such as those pertaining to hearsay and character evidence—apply.[188]

C. Role of the accused

76. An accused is not expected to participate in the hearing and their interests are protected by the person appointed to put their case.[189]

D. Representation by defence counsel

77. Once a determination is made that the accused is unfit, the court has a duty under section 4A(2) of the England and Wales CP(I)A to consider who is the best person to be appointed by the court to put the case for the defence.[190] The court has a duty to consider this question afresh; "it should not necessarily be the same person who has represented the accused to date, as it is the responsibility of the court to be satisfied that the person appointed is the right person for this difficult task".[191]

78. The 2015 Criminal Procedure Rules provide the following factors for the court to consider when determining who should represent the accused in the section 4A proceeding: (i) the willingness and suitability (including the qualifications and experience) of that person; (ii) the nature and complexity of the case; (iii) any advantage of continuity of representation; and (iv) the accused's wishes and needs.[192] The UK Law Commission further recommended in 2016 that where a defence representative has already been instructed, the court should appoint that individual

[188] UK Law Commission, *Unfitness to Plead, Volume 1: Report* (2016) ("UK Law Commission 2016 Report"), para.5.22, *citing R v. Chal* [2007] EWCA 2647, [2008] 1 CR App R 18 CA (*"R v. Chal"*), *available at* https://www.casemine.com/judgement/uk/5a8ff7a760d03e7f57eb0db4.
[189] UK Law Commission, *Unfitness to Plead, A Consultation Paper*, CP No 197 (2010) ("UK Law Commission 2010 Consultation Paper"), para.2.30.
[190] *R v. Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 192 ("*R v. Norman*"), para.34(iii), *available at* https://www.casemine.com/judgement/uk/5b46f1f82c94e0775e7ef2c2. *Also* Criminal Procedure Rules 2015 (SI 2015 No. 1490) ("2015 Criminal Procedure Rules"), *available at* https://www.legislation.gov.uk/uksi/2015/1490/contents/made, r.25.10(3)(a).
[191] *R v. Norman* , para.34(iii). *Also* UK Law Commission 2016 Report, para.5.133.
[192] 2015 Criminal Procedure Rules , r 25.10(3)(a).

unless the court is satisfied that the advocate would not be competent to deal with the issues arising in the hearing.[193]

79. In *R v. Norman*, the Court of Appeal explained:

> The responsibility placed on the person so appointed is quite different to the responsibility placed on an advocate where he or she can take instructions from a client. The special position of the person so appointed is underlined by the fact that the person is remunerated not through the Criminal Defence Service, but out of central funds.[194]

The advantage of appointing a person to represent the accused in a Section 4A proceeding is that this representative has the power to make decisions on behalf of the accused,[195] and is not bound to follow the accused's instructions if they do not agree that those instructions further the accused's interests.[196] However, in 2016, the UK Law Commission recommended that legislation be adopted requiring the representative to give effect to the accused's instructions unless the representative concludes that to do so would be contrary to the accused's legal best interests.[197]

80. In practice, however, the court does not always formally appoint a distinct representative; rather, the representative already instructed continues to act without specific consideration of their suitability for the role occurring.[198] If, the court does not appoint a distinct representative and thus the defence advocate continues to represent the accused, this is considered not a material irregularity which would jeopardise the ultimate finding of the court.[199]

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[193] UK Law Commission 2016 Report, para.5.138.
[194] *R v. Norman*, para.34(iii).
[195] UK Law Commission 2010 Consultation Paper, para.2.25. *Also* UK Law Commission 2010 Consultation Paper, para.6.3.
[196] UK Law Commission 2010 Consultation Paper, para.6.3.
[197] UK Law Commission 2016 Report, para.5.138(4).
[198] UK Law Commission 2016 Report, para.5.136(2).
[199] UK Law Commission 2010 Consultation Paper, para.2.25, *citing R v. Egan* [1998] 1 Cr App R 121 (held to be matter of form not substance).

E. Standard of proof

81. The jury must be convinced beyond reasonable doubt that the accused did the act and must also be convinced to the same degree—majority or unanimity—as would have been required at trial.[200]

F. Scope of adjudication: actus reus/*mens rea*

82. Section 4A requires a jury to determine whether the accused "did the act or made the omission". meaning that the prosecution need only prove the conduct element of the offence.[201] In *R v. Antoine*, the House of Lords determined that a Section 4A jury need only determine the "external elements", which consist of

> […] conduct elements (what the defendant must do or fail to do); consequence elements (the result of the defendant's conduct); and circumstance elements (other facts affecting whether the defendant is guilty or not).[202]

83. Although this limitation has been considered to "strik[e] the most appropriate balance between protecting an unfit accused and the public interest",[203] it has also posed logistical adjudicatory challenges in cases where the lawfulness of an accused's conduct depends on their state of mind and has thus prompted criticism and calls for reform.[204] The purpose of such a reform would not be to establish the accused's

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[200] *R v. Chal* , paras.24-25.

[201] Law Commission 2016 Report, para.5.9, citing *R v. Antoine* [2001] 1 AC 340 (*"R v. Antoine"*), *available at* https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd000330/ant-1.htm.

[202] UK Law Commission 2016 Report, para.5.9, fn 11. *Also* UK Law Commission 2010 Consultation Paper, para.6.11.

[203] UK Law Commission 2010 Consultation Paper, para.6.69, citing *R v. Antoine*, 375.

[204] *E.g.* UK Law Commission 2010 Consultation Paper, paras.6.24-6.28, 6.36-6.41, 6.128-6.162; UK Law Commission 2016 Report, paras.5.11-5.12, *citing R v. B(M)* [2012] EWCA Crim 770, [2013] 1 WLR 499 (Court of Appeal holding that the appropriate section 4A hearing determination for the offence of voyeurism included the whether the defendant's purpose was to obtain sexual gratification in observing the private act of another while knowledge that the observed person did not consent was part of the fault element and thus outside the scope of the section 4A determination); *R v. Young* [2002] EWHC 548 (Admin), [2002] 2 CR App R 12 (Court of Appeal holding that the appropriate section 4A hearing determination for the offence of dishonest concealment of a material fact was that both the defendant's purpose in the concealment and his dishonesty were part of the fault element and thus not for the jury's consideration in the section 4A hearing). *Also* UK Law Commission 2016 Report, paras.5.13, 5.28-5.35, 5.37-5.39, 5.65, 5.67-5.70, 5.77-5.85; *R v. Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 2797 ("*R v. Wells*"), paras.12, 15, *available at* https://www.casemine.com/judgement/uk/5a8ff6fc60d03e7f57ea54dc (acknowledging "no bright line"

culpability, but to ensure that the defendant can enjoy the same opportunities for acquittal as the defendant who is fit for trial.[205]

G. Limitations on defences

84. As the section 4(A)(2) proceeding is only concerned with the determining whether the accused did the act or made the omission charged, the House of Lords held in *R v. Antoine* that an accused who has been found unfit for trial and is subject to a Section 4A proceeding may not raise a diminished capacity defence, and may raise the issue of mistake, accident or self-defence only where there is objective evidence—such as a witness's account—to that effect.[206] What may amount to objective evidence has been the subject of multiple appeals, with the Court of Appeal in 2015 finding that numerous types of evidence, such as CCTV or forensic evidence, would also qualify as "objective" and that, conversely, what would not would be the accused's own testimony post-dating the point at which they became unfit.[207] Nevertheless, the interview of a defendant at a time when they were not impaired would be admissible in a section 4A hearing, with appropriate warnings.[208] An accused may not raise a defence of lack of intent or provocation, as both concern the fault element.[209]

H. Available dispositions/penalties

85. The "means of disposal" provided in Section 4A(5) of the England and Wales CP(I)A are not intended to be punitive.[210] The available disposals include a hospital

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between *actus reus* and *mens rea* in many offences but finding that the more limited range of available disposals in section 4A hearings mitigated the risk of disadvantaging unfit accused compared to fit accused).

[205] UK Law Commission 2016 Report, para.5.64.

[206] *R v. Antoine*. *Also* UK Law Commission 2016 Report, paras.1.66, 5.14-5.17.

[207] *R v. Wells*, para.15.

[208] *R v. Jagnieszko* [2008] EWCA Crim 3065, *cited in* Law Commission 2016 Report, para.5.82. *Also* UK Law Commission 2010 Consultation Paper, para.6.99, fn 119.

[209] *R v. Grant* [2001] EWCA Crim 2611, *available at* https://www.casemine.com/judgement/uk/5a8ff7aa60d03e7f57eb0ffb.

[210] UK Law Commission 2010 Consultation Paper, para.2.30.

order with or without a restriction order,[211] a supervision order, or an order for absolute discharge.[212]

[211] Section 24(1) of the Domestic Violence Crime and Victims Act 2004 gave the same meaning to a "hospital order" under section 5 of the England and Wales CP(I)A as under section 37 of the Mental Health Act 1983: UK Law Commission 2010 Consultation Paper, para.2.39. Section 37 of the Mental Health Act 1983 requires a court to be satisfied, on the basis of two registered mental practitioners that the offender has a mental disorder of a nature or degree that renders detention in a hospital appropriate; this is consistent with the European Convention on Human Rights' requirement that hospital orders for unfit accused found to have done the act to be grounded on the basis of "objective medical expertise": UK Law Commission 2010 Consultation Paper, para.2.40.

[212] UK Law Commission 2010 Consultation Paper, para.2.36, *citing* England and Wales CP(I)A, ss.5, 5A.

III. FRANCE

A. Legal basis for the proceeding (legislation and/or jurisprudence)

86. The *Code de procédure pénale* ("French CPP"), provides for a regime akin to an Examination of Facts in circumstances where the accused lacks criminal responsibility due to mental illness.[213] Under this regime, the court makes a "declaration of lack of criminal responsibility for reason of mental infirmity"[214] and determines the acts ("*faits*") charged in the case and their attribution to the accused. The court can order special measures if the accused is found to have been mentally unfit at the time of the commission of the acts. This process only applies where the accused has been found unfit at the time of the commission of the acts, but is included here as an example of how such a proceeding is handled.

B. Mechanics of proceedings

87. A procedure for declaration of lack of criminal responsibility for reason of mental infirmity can be initiated at the pre-trial[215] or trial[216] stage. At the pre-trial stage, the *juge d'instruction* can alone, based on the dossier, render an order "*ordonnance d'irresponsabilité pénale pour cause de trouble mental*" instead of dismissing the case. The order must indicate that there exist sufficient grounds to believe that the accused committed the acts charged.[217] More commonly, cases of suspected mental infirmity will be heard before the *Chambre de l'instruction* (the appeals jurisdiction at the pre-trial stage). Unless decided otherwise, the pre-trial detention will be maintained until the hearing.[218] The hearing is a regular hearing involving the accused, civil parties, experts and witnesses, and is in principle

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[213] *Code de procédure pénale* ("French FCPP"), '*Titre XXVIII, De la procédure et des décisions d'irreponsabilité pénale pour cause de trouble mental'* (Articles 706-119 à 706-140), *available at:* https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF. This Title was created by created by *Loi n° 2008-174 du 25 février 2008 relative à la rétention de sureté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental* ("*French Loi 174/2008*"), available at the 2008 Law n°2008-174 , *available at:* https://www.legifrance.gouv.fr/loda/id/JORFTEXT000018162705.

[214] Called "*déclaration d'irresponsabilité pénale pour cause de trouble mental*" in French.

[215] Articles 706-119 à 706-128 of the French CPP.

[216] Articles 706-129 à 706-134 of the French CPP.

[217] Article 706-120 para.3 of the French CPP.

[218] Article 706-121 of the French CPP.

public.[219] The court renders a judgement of lack of criminal responsibility for reason of mental infirmity[220] if it believes that there is sufficient evidence to establish that the accused committed the acts and that the person does suffer from a mental impairment.[221] This judgement can be appealed[222] and the court can decide on special measures.[223] Both the pre-trial order and judgment end the pre-trial detention.[224]

88. At the trial stage, the court[225] must determine whether (1) the acts of the case can be attributed to the accused,[226] and (2) the accused's mental state made him/her criminally irresponsible at the time of their commission.[227] The procedure is otherwise a regular hearing.[228] If the two prongs of the test are met, the court will render a judgement declaring the lack of criminal responsibility for reason of mental infirmity.[229] Such judgment ends the pre-trial detention of the accused[230] and can be appealed.[231] The court can further decide on special measures (see below).[232]

C. Role of the accused

89. At the pre-trial stage, the participation of the accused is ordered if his/her medical condition allows it.[233] At the trial stage, the accused must be present; the hearings can only proceed in his/her absence in exceptional circumstances.[234] Before the *tribunal correctionnel*, if the accused's health is incompatible with his/her presence, the tribunal can decide to hear the accused from his/her residence or from

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[219] Article 706-122 para.2 of the French CPP.
[220] In French, called an "*arrêt de déclaration d'irresponsabilité pénale pour cause de trouble mental*". *See* for example Article 706-126 para.1 of the French CPP.
[221] Article 706-125 of the French CPP.
[222] Article 706-126 of the French CPP.
[223] Articles 706-121 and 706-125 para.4 of the French CPP.
[224] Article 706-126 of the French CPP.
[225] The *cour d'assises* for the offenses punishable by 15 years or more of imprisonment and the *tribunal correctionnel* for offenses punishable by a maximum sentence of 10 years of imprisonment.
[226] *See* Article 349-1 para.2 of the French CPP.
[227] *See* Article 349-1 of the French CPP.
[228] *See* '*Livre II, Titre, Ier, Sous-Titre Ier, Chapitre VI: Des débats (Articles 306 à 354)*' and article 361-1 of the CPP (before the *Cour d'assises*) and '*Livre II, Titre II, Chapire Ier, Section 4: Des débats* (Articles 406 à 461)' of the French CPP (before the the *Tribunal correctionnel*).
[229] In French, called an "*arrêt portant déclaration d'irresponsabilité pénale pour cause de trouble mental*" (*see* Articles 361-1 and 706-129 of the French CPP) or a "*jugement de déclaration d'irresponsabilité pénale pour cause de trouble mental*" (*see* Article 706-133 of the French CPP).
[230] Articles 706-130 (*Cour d'assises*) and 706-133 (*Tribunal correctionnel*) of the French CPP.
[231] Articles 706-132 (*Cour d'assises*) and 706-134 (*Tribunal correctionnel*) of the French CPP.
[232] Articles 706-131 (*Cour d'assises*) and 706-133 (*Tribunal correctionnel*) of the French CPP.
[233] Article 706-122 para.1 of the French CPP.

the detention centre.[235] The accused may participate at the hearing and give evidence.[236]

D. Representation by defence counsel

90. The accused is required to be represented by defence counsel.[237] Note that before the *tribunal correctionnel*, the accused is required to be assisted by counsel only when he/she suffers from a disability that can jeopardize his/her own defense.[238]

E. Standard of proof

91. The prosecution must prove there is sufficient evidence that the accused committed the acts that form the basis of the charged offence.[239]

F. Scope of adjudication: actus reus/*mens rea*

92. The regime of the declaration of lack of criminal responsibility applies if the *actus reus* is established but not the *mens rea.* [240]

G. Limitations on defences

93. There are no limitations on defences.

H. Available dispositions/penalties

94. If the court finds that the accused did not commit the acts charged, the court must dismiss the charges[241] or acquit the accused.[242] If there is no dismissal/acquittal,

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[234] Articles 318 to 320-1 (*Cour d'assises*) and 409 to 411 (*Tribunal correctionnel*) of the French CPP.
[235] Articles 416 of the *Code de procédure pénale*.
[236] *See e.g.,* Articles 706-122 para.3 (*Chambre de l'instruction*), 328 (*Cour d'assises*) and 406 (*Tribunal correctionnel*) of the French CPP.
[237] At the pre-trial stage: Article 706-122 para.1 of the French CPP (if the accused does not have a Defence counsel, the *bâtonnier* must appoint one. At the trial stage: Articles 317 and 417 of the French CPP.
[238] Article 417 of the French CPP.
[239] Article 706-125 of the French CPP ("*charges suffisantes*"). Articles 349-1, 706-129 and 706-133 of the French CPP (at the trial stage – the general standard of proof applies).
[240] The French CPP refers to a determination of whether the accused committed the acts that form the basis of the charged offence ("*commis tel fait*", "*commis les faits qui lui étaient/sont reprochés*" – *see* articles 349-1, 706-125 and 706-133 of the CPP) and specifically excludes a determination on the *mens rea* by reference to article 122-1 of the *Code pénal* ("*French Penal Code*"), *available at*: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719?etatTexte=VIGUEUR&etatT

it can order special measures subject to expert input: hospitalisation in a psychiatric treatment facility,[243] and/or other measures ("*mesures de sûreté*").[244]

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exte=VIGUEUR_DIFF. On the lack of criminal responsibility (*see* articles 706-124, 706-129 and 706-133 of the CPP).

[241] Article 706-123 of the CPP *(« non-lieu »)* – at the pre-trial stage.

[242] Articles 361-1, 470 and 470-2 of the CPP – at the trial stage.

[243] Article 706-135 of the *Code de procédure pénale*. See also articles L3211-1 to L3211-3, L3211-12 to L-3211-12-5 and L3213-7 of the *Code de la santé publique* ("*French Code de la santé publique*"), *available at*: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072665/2023-05-09/. A hospitalisation order can be lifted by the *juge des libertés et de la détention* following a positive assessment from two psychiatrist experts not working in the hospital where the person is kept.

[244] These measures are: prohibition from contacting the victim or from going to certain places, ban on possession of weapons, ban on certain professional activities, ban on driving – *see* article 706-136 of the French CPP. They are limited in time and must be justified by psychiatric expertise.

IV. GUATEMALA

A. Legal basis for the proceeding (legislation and/or jurisprudence)

95. Article 76 of the Guatemalan Criminal Procedure Code establishes that when the accused is unfit to stand trial, the trial is suspended until the accused recovers fitness. This article also contemplates the possibility of carrying out special proceedings akin to an examination of the facts for the purpose of ascertaining whether the accused committed the charged offences, and whether he poses a danger for the community such that certain coercive measures should be applied.[245] This special proceeding was used in the case of former dictator Efraín Ríos Montt, who faced charges of genocide and crimes against humanity after receiving a dementia diagnosis.[246]

B. Mechanics of proceedings

96. At the request of the parties, the court may decide to hold a hearing to determine whether the accused is fit to stand trial. At the fitness hearing, the accused is represented by a legal guardian. If the court finds that the accused is not fit to stand trial, the trial is generally suspended. However, if the prosecution requests the application of a coercive measure, the court may hold special proceedings aimed at ascertaining the facts of the case, and, consequently, whether a coercive measure should be ordered.[247]

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[245] Codigo Procesal Penal de Guatemala, Decreto Numero 51-92 ("*Guatemalan Criminal Procedure Code*"), available at: http://www.cicad.oas.org/fortalecimiento_institucional/legislations/pdf/gt/decreto_congresional_51-92_codigo_procesal_penal.pdf, art. 76 ("The defendant's mental disorder will cause the suspension of his criminal prosecution until that disability disappears. Without prejudice to the rules governing the trial for the exclusive application of a measure of security and correctness, the incapacity will prevent the intermediate and the sentencing phases of the trial, but it will not inhibit the investigation of the facts nor that the procedure be continued with respect to other defendants.") (unofficial translation).

[246] The Guatemala Genocide Trial Resumes, International Justice Monitor, 20 October 2017, *available at* https://www.ijmonitor.org/2017/10/the-guatemala-genocide-trial-resumes/; Court Orders Ríos Montt and Rodriguez Sanchez Retrial to Begin in January 2016, International Justice Monitor, 26 August 2015, *available at* https://www.ijmonitor.org/2015/08/court-orders-rios-montt-and-rodriguez-sanchez-retrial-to-begin-in-january-2016/.

[247] *Guatemalan Criminal Procedure Code*, art.484 ("When the Prosecutory, after the investigative phase, deems that it is only appropriate to apply a security and correction measure, it will require the opening of the trial according to the regular procedure, also indicating the circumstances that motivate the request.") (unofficial translation).

C. Role of the accused

97. The special proceedings take place *in camera* (and are therefore not publicly available) and the presence of the accused is not required.[248]

D. Representation by defence counsel

98. The accused is represented by counsel and by a legal guardian, who cannot plead on behalf of the accused.[249]

E. Standard of proof

99. The standard of proof is beyond reasonable doubt.[250]

F. Scope of adjudication: *actus reus*/*mens rea*

100. The scope of the special proceedings is to ascertain the facts of the case, including whether the accused committed the charged offence and, consequently, whether he poses a danger for the community such that the application of a coercive measure is warranted. The statute does not exclude consideration of *mens rea*.

G. Limitations on defences

101. No limitations on defences are indicated.

H. Available dispositions/penalties

102. If the court finds that the accused committed the charged offence, only coercive measures listed in Article 88 of the Penal Code (*e.g.* internment in a special treatment clinic) may be ordered.[251] The court cannot make a determination that the accused is guilty. Consequently, the court cannot apply a prison sentence.[252]

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[248] *Guatemalan Criminal Procedure Code*, art.485(5) ("The adversarial phase of the trial will be held behind closed doors, without the presence of the accused, when the accused cannot participate because of his health or for reasons of public order and security, in which case he will be represented by his guardian. The accused may be requested to attend when his presence is essential.") (unofficial translation).

[249] *Guatemalan Criminal Procedure Code*, art.485(1) ("When the accused is not fit to stand trial, he will be represented by his guardian or by whomever the court designates; the guardian can carry out all the necessary acts, except for acts of a personal nature.") (unofficial translation).

[250] *Guatemalan Criminal Procedure Code*, art.14 (4) ("any doubts will be interpreted in favour of the defendant") (unofficial translation).

[251] *Guatemalan Criminal Procedure Code*, art.485(6). *See also,* Codigo Penal de Guatemala, Decreto Numero 17-73 ("*Guatemalan Penal Code*"), available at:

V. HONG KONG

A. Legal basis for the proceeding (legislation and/or jurisprudence)

103. The provisions related to an accused person presumed unfit to plead and stand trial in Hong Kong form part of several Ordinances, in particular Criminal Procedure Ordinance Cap 221[253] and Mental Health Ordinance Cap 136.[254] Section 75A of the HK Criminal Procedure Ordinance establishes the procedure to determine whether an accused at trial suffers from a disability, constituting a bar to him being tried,[255] making him unfit for trial and, if so, the procedure for the determination as to whether the accused did the act or made the omission charged.[256]

> **75A. Determination as to whether accused person under disability did the act or made the omission charged**[257]
>
> (1) Where in accordance with section 75 it is determined by a jury that an accused person is under disability, then—
>
> (a) without prejudice to any proceedings for the purposes of paragraph (b)(ii), the trial shall not proceed or further proceed;
>
> (b) the jury shall determine—
>
> (i) on the evidence (if any) already given in the trial; and
>
> (ii) on such evidence as may be adduced or further adduced by the prosecution or adduced by a person

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https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GTM_codigo_penal.pdf, art.88.

[252] *Guatemalan Criminal Procedure Code*, art.485(6) ("The Chamber will either acquit or order a security measure") (unofficial translation).

[253] Hong Kong, Criminal Procedure Ordinance (Cap.221) (Amended 5 of 1924 s. 6) (Replaced 24 of 1950 Schedule) ("C") ("HK Criminal Procedure Ordinance") *available at:* https://www.elegislation.gov.hk/hk/cap221?xpid=ID_1438402850320_001.

[254] Hong Kong, Mental Health Ordinance (Cap.136) (Replaced 81 of 1997 s. 2) (Format changes—E.R. 4 of 2019) ("HK Mental Health Ordinance"), *available at:* https://www.elegislation.gov.hk/hk/cap136!en?xpid=ID_1438402702868_001.

[255] HK Criminal Procedure Ordinance, Section 75(1).

[256] *See* HK Criminal Procedure Ordinance, Section 75A.

[257] The provisions the HK Mental Health Ordinance have been modelled on English legislation, namely Criminal Procedure (Insanity) Act 1964 and subsequent revisions brought by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, and the Domestic Violence, Crime and Victims Act 2004. *See HKSAR v. Ng Mei Lan*, 2009 WL 313779 (CA), [2009] 3 HKLRD 193, paras.26-29.

> appointed by the court for the purpose of this section to put the case for the defence,
>
> whether they are satisfied, as respects the count or each of the counts on which the accused person was to be or was being tried, that he did the act or made the omission charged against him as the offence;
>
> (c) if the jury are so satisfied as respects that count or any of those counts, they shall make a finding that the accused person did that act or made that omission;
>
> (d) if the jury are not so satisfied as respects that count or any of those counts, they shall return a verdict of acquittal as if on the count concerned the trial had proceeded to a conclusion.
>
> […]

B. Mechanics of proceedings

104. The determination is made by the jury on the evidence (if any) already given in the trial and on such evidence as may be adduced or further adduced by the prosecution and the defence.[258] The law applicable in criminal proceedings shall be the law applicable to the determination.[259]

C. Role of the accused

105. The accused's interests are represented by a person appointed by the court for the purpose of the Section 75A determination who puts the case for the defence,[260] who can adduce evidence including the testimony of witnesses.[261] It "would seldom, if ever, be appropriate for the accused to give evidence (a jury having found him unfit to be tried)" but if there is objective evidence raising issues of mistake, accident or self-defence, the issue should be left to the jury to decide, and the prosecution must negate the possibility beyond reasonable doubt.[262]

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[258] *See* Criminal Procedure Ordinance, Section 75A(b)(i)-(ii).
[259] HK Criminal Procedure Ordinance, Section 75(A)(3)(b).
[260] HK Criminal Procedure Ordinance, 75(A)(1)(b)(ii).
[261] HK Criminal Procedure Ordinance, 75(A)(3)(a).
[262] *See HKSAR v. Shek Ka Chun*, 2019 WL 70019 (CFI), [2019] HKCFI 1323, paras.12, 14.

D. Representation by defence counsel

106. During a Section 75A determination, a person appointed by the court puts the case for the defence [263] and can adduce evidence including the testimony of witnesses.[264]

E. Standard of proof

107. While Section 75A does not expressly state that the jury must be satisfied beyond reasonable doubt that the accused did the act or made the omission charged, it does state that the law applicable in criminal proceedings shall be the law applicable to the determination.[265]

F. Scope of adjudication: actus reus/*mens rea*

108. For a Section 75A determination, it is only required for the jury to be satisfied that the accused did the act or made the omission charged against him as the offence.[266] Only *actus reus* is being adjudicated as the "'act' for this purpose refers to the actus reus of the offence and not to the *mens rea*".[267] The prosecution therefore "is not required to prove the *mens rea* of the offence of the crime alleged" and "[o]nce it is decided that the defendant is unfit at the time of his actions, *mens rea* becomes irrelevant."[268]

G. Limitations on defences

109. For a Section 75A determination, the ability of the accused to rely on common defences such as self-defence, accident or mistake is significantly restricted.[269] However, "if there is **objective evidence** […] which raises the issue of mistake or

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[263] HK Criminal Procedure Ordinance, 75(A)(1)(b)(ii).
[264] HK Criminal Procedure Ordinance, 75(A)(3)(a). *See also* Annex A: England and Wales Survey, paras.5-9 (for the court to consider whether counsel representing the accused should continue representing him for purposes of the determination).
[265] HK Criminal Procedure Ordinance, Section 75(A)(3)(b). *See also HKSAR v Shek Ka Chun*, 2019 WL 70019 (CFI), [2019] HKCFI 1323, para.14.
[266] HK Criminal Procedure Ordinance, Section 75(1)(b).
[267] *See HKSAR v. Shek Ka Chun*, 2019 WL 70019 (CFI), [2019] HKCFI 1323, para.13.
[268] *See HKSAR v. Shek Ka Chun*, 2019 WL 70019 (CFI), [2019] HKCFI 1323, para.13.
[269] *See* A. Le Roux-Kemp, "The Fair Trial Rights of Accused Persons Found 'Unfit to Plead and Stand Trial' in the Hong Kong Special Administrative Region", Cambridge Law Review (2019) Vol. IV, Issue 1 ("Unfitness to Plead and Stand Trial in Hong Kong"), p.29 *citing* the English Law Commission,

accident or self-defence, then the jury should not find that the defendant did the 'act' unless satisfied beyond reasonable doubt on all the evidence that the prosecution have negatived that possibility"[270]. Objective evidence include: "a wide range of evidence, such as independent eye witness evidence, CCTV, cell site, crime scene or expert forensic evidence […] as well as the background to the incident, the antecedents of the complainants and the circumstances of the fight as evidenced for example, by the injuries".[271]

H. Available dispositions/penalties

110. Pursuant to Section 75(1)(d) of HK Criminal Procedure Ordinance, "if the jury are not so satisfied as respects that count or any of those counts, they shall return a verdict of acquittal as if on the count concerned the trial had proceeded to a conclusion".

111. However, even where a not guilty verdict is returned "the presiding judicial officer may also make an appropriate order which is in the best interests and welfare of the acquitted person as well as for the protection of society in terms of the provisions of the Mental Health Ordinance Cap 136" and "in the least serious of cases a court may order for the absolute discharge of such an accused".[272]

112. If the jury is satisfied that the accused did the act or made the omission charged against him, they shall make a finding that the accused person did that act or made that omission.[273]

113. Where such finding is made, the court may then: admit the accused person to a mental hospital or a Correctional Psychiatric Centre (pursuant to evidence of two or more medical practitioners that admission is necessary in the interest or welfare of the

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Unfitness to Plead Summary (Law Com No 364, 2016), [1.20], *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392864.

[270] *See HKSAR v. Shek Ka Chun*, [2019] HKCFI 1323, [2019] HKCFI 1323, 2019 WL 70019 (CFI), para.14 (emphasis in the original).

[271] *See HKSAR v. Shek Ka Chun*, [2019] HKCFI 1323, [2019] HKCFI 1323, 2019 WL 70019 (CFI), para.15 *citing R v Wells et al.*, [2015] 1 Cr App R 402, pp.410-411, paras.15, 17.

[272] *See* Unfitness to Plead and Stand Trial in Hong Kong, pp.20-21 *citing HKSAR v Cheung Kam Yau* [2017] HKCFI 507; HCCC 413/2016 (22 March 2017). *See also* HK Mental Health Ordinance, Part IVA, Section 59 "Mental Health Review Tribunal".

accused person or for protection of other persons); or make alternative orders for guardianship, supervision and treatment, or absolute discharge.[274]

[273] HK Criminal Procedure Ordinance, Section 75(A)(3)(c).
[274] *See* HK Criminal Procedure Ordinance, Section 76.

VI. IRELAND

A. Legal basis for the proceeding (legislation and/or jurisprudence)

114. Section 4 of the Ireland Criminal Law (Insanity) Act 2006 covers fitness to be tried, subsection 8 of which also provides:

> (8) Upon a determination having been made by the court that an accused person is unfit to be tried it may on application to it in that behalf allow evidence to be adduced before it as to whether or not the accused person did the act alleged and if the court is satisfied that there is a reasonable doubt as to whether the accused did the act alleged, it shall order the accused to be discharged.

For ease of reference, this procedure will be referred to as a "trial of fact" in this section.

B. Mechanics of proceedings

115. The question of fitness may be deferred until "any time before" the opening of the Defence case (i.e. after the hearing of "no case to answer").[275] Once a person is determined to be unfit, the proceedings must be adjourned until further order[276] and, upon an application to the trial court—*i.e.* to the judge sitting alone[277]—the judge may allow evidence pertaining to whether the person did the act alleged.[278] The occurrence of the "trial of fact" procedure is therefore not automatic.

C. Role of the accused

116. It is not clear from the legislation or jurisprudence whether the accused must attend the "trial of fact", or whether in the course of such proceedings they may testify in their own defence.

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[275] Ireland Criminal Law Insanity Act, s.4(7).
[276] Ireland Criminal Law Insanity Act, s.4(5)(c).
[277] *See* Ireland Criminal Law Insanity Act, ss.(4)(4)(b), (4)(5)(b). *See also People* (*DPP) v. FX*, [2022] IECA 86, [2022] 3 JIC 3102, Court of Appeal Record Number: 65/2015, 31 March 2022 ("*DPP v. FX*"), para.8 (citing approvingly the trial judge's decision to try the issue alone), *available at* https://www.courts.ie/acc/alfresco/3b1f2d4a-d810-4cf5-b86a-be645d6b3518/2022_IECA_86.pdf/pdf#view=fitH.
[278] Ireland Criminal Law Insanity Act, s.4(8).

D. Representation by defence counsel

117. Although the legislation is silent on the issue of whether the court should appoint a separate representative to represent the accused's interests in a "trial of fact", it is clear from the jurisprudence that an accused may be represented by counsel during the proceeding.[279]

E. Standard of proof

118. The standard of proof is beyond reasonable doubt.[280]

F. Scope of adjudication: *actus reus*/*mens rea*

119. The court only determines "whether or not the accused person did the act alleged".[281]

G. Limitations on defences

120. The legislation is silent as to any defences which are not permitted. It is clear from the jurisprudence that the Defence may call witnesses.[282]

H. Available dispositions/penalties

121. Once the court determines that an accused person is unfit to be tried, the court – if it is satisfied on the basis of evidence that the accused person is suffering from a mental disorder – may: (i) commit them to a specified designate centre pending further review, if it is satisfied the accused is in need of in-patient care or treatment; or (ii) make such order as the court thinks proper for out-patient treatment in a designated centre, if it is satisfied the accused is in need of such treatment.[283] If the accused successfully invokes the "trial of fact" procedure and the court is satisfied that there is reasonable doubt that the accused did the act alleged, it must then order the accused to be discharged.[284] If the court is not so satisfied, any existing orders

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[279] *DPP v. FX*, para.13 (recounting the arguments of counsel for the accused at the trial of fact).
[280] Ireland Criminal Law Insanity Act, s.4(8). *See also DPP v. FX*, para.58.
[281] Ireland Criminal Law Insanity Act, s.4(8).
[282] *DPP v. FX*, para.14 (recounting the trial judgement's mention of a pathologist called as a witness for the Defence).
[283] Ireland Criminal Law Insanity Act, s.4(5)(c)(i)-(ii). *See also* Criminal Law Insanity Act, s.4(4)(d).
[284] Ireland Criminal Law (Insanity) Act, s.4(8).

would remain in force. Additionally, if the person is not discharged following a "trial of fact", no reports of the evidence or the decision may be made until such time, if any, as (i) the trial of the person concludes, or (ii) the trial does not proceed.[285]

[285] Ireland Criminal Law (Insanity) Act, s.4(9).

VII. NEW ZEALAND

A. Legal basis for the proceeding (legislation and/or jurisprudence)

122. Sections 10 to 12 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 ("CPMIP")[286] govern the process known as an "involvement hearing", which takes place after an accused is found to be unfit in order to determine whether, on the balance of probabilities, the accused "caused the act or omission that forms the basis of" the charged offence.[287] Section 10 governs involvement hearings which occur before trial,[288] while Sections 11 and 12 pertain to involvement hearings which take place during a trial before a judge[289] or before a jury.[290]

B. Mechanics of proceedings

123. Regardless of the stage of criminal proceedings at which the involvement hearing occurs, the latter is mandatory.[291] However, the involvement hearing is considered a "relaxed evidential inquiry".[292] Although the CPMIP specifically provides for the admission of certain types of evidence—such as formal statements or oral evidence taken in advance of trial,[293] as well as any evidence presented during trial or any new evidence presented during the involvement hearing[294]— that may be admitted, courts retain discretion in determining admissible evidence, such as by limiting cross-examination.[295]

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[286] Criminal Procedure (Mentally Impaired Persons) Act 2003 ("NZ CPMIP"), *available at* https://www.legislation.govt.nz/act/public/2003/0115/latest/DLM223818.html.
[287] NZ-CPMIP, ss.10(2), 11(2), 12(2).
[288] NZ-CPMIP, s.10(1).
[289] NZ-CPMIP, s.11(1).
[290] NZ-CPMIP, s.12(1).
[291] NZ-CPMIP, s.10(2) ("The court must decide whether the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged."), s.11(2) (same), s.12(2) (same).
[292] W. Brookbanks, "Special Hearings Under CPMIPA", New Zealand Law Journal (2009) 30, 40, *cited with approval in R v. McKay*, [2009] NZCA 378, paras.46, 48. Also, *R v. Tongia*, [2019] NZHC 3278, para.10, *cited in* W. Brookbanks, "Evidential Sufficiency Hearings: Is Section 10 of the CP (MIP) Act Fit for Purpose?", 29 New Zealand Universities Law Review (2020) 31, fn.38.
[293] NZ-CPMIP, ss.10(3), 12(3).
[294] NZ-CPMIP, ss.11(3), 12(3).
[295] NZ-CPMIP, ss.10(3)(c) ("any other evidence submitted"), 11(3)(b) ("any new evidence"), 12(3)(d) ("any new evidence at any stage before the commencement of the closing addresses"); *R v. Jeffries*, [2012] NZCA 608, paras.33-36. *Also R v. Tongia*, [2019] NZHC 2378, para.11, *quoted in* W.

C. Role of the accused

124. The accused is not required to attend, and the hearings may proceed in the accused's absence if "the court is satisfied that the accused is too mentally impaired to come to court".[296] As a result of the discretionary evidence provisions, an accused is not entitled to testify in their own defence,[297] although this may be permitted.[298]

D. Representation by defence counsel

125. The CPMIP does not specify that the court must designate a person to represent the accused for the purpose of the involvement hearing.[299] In practice, defence counsel frequently continues representation.[300]

E. Standard of proof

126. Regardless of whether the involvement hearing takes place before or during trial, and whether the trial is before a jury or a judge, the Prosecution must prove the accused caused the act or omission that forms the basis of the charged offence on a balance of probabilities.[301]

F. Scope of adjudication: actus reus/mens rea

127. The CPMIP refers to a determination of whether the accused "cause[d] the act or omission forming the basis of" the charged offence,[302] rather than whether the accused actually committed the charged offence.

Brookbanks, "Evidential Sufficiency Hearings: Is Section 10 of the CP (MIP) Act Fit for Purpose?", 29 New Zealand Universities Law Review (2020) 31, 32.

[296] NZ-CPMIP, s.15.

[297] *See* S. Baird, "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform", 30 New Zealand Universities Law Review (2022) 247, 257.

[298] *See,* NZ-CPMIP, ss.10(3), 11(3), 12(3).

[299] *See,* NZ-CPMIP, ss.10-12.

[300] *See* S. Baird, "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform", 30 New Zealand Universities Law Review (2022) 247, 267.

[301] NZ-CPMIP, ss.10(2), 11(2), 12(2).

[302] NZ-CPMIP, ss.10(2), 11(2), 12(2).

128. There is disparate practice regarding the extent to which some aspects of *mens rea* may be considered: while a conservative approach generally excludes such consideration,[303] there is some indication that this approach may be changing to permit such consideration under certain circumstances.[304]

G. Limitations on defences

129. Although the text of the CPMIP is silent regarding the availability of defences or lack thereof, defences that rely on an accused's state of mind may be precluded if the scope of adjudication does not extend to aspects of *mens rea*,[305] as explained above.

H. Available dispositions/penalties

130. If the court finds that the accused did not cause the act or omission charged, the court must dismiss the charge against the defendant under section 147 of the Criminal Procedure Act 2011.[306]

131. If the court finds that the accused caused the act or omission charged, the court must first order that inquiries be made to determine the most suitable method of dealing with the person under section 24 (as a compulsory order that the defendant is to be detained in a hospital as a special patient or in a secure facility as a special care recipient) or section 25 (alternative orders).[307] As a part of this inquiry, the court must either make it a condition of a grant of bail that the person go to a place approved by the court for the purpose of the inquiries or remand the person to a hospital or a secure facility.[308]

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[303] *R v. Tongia*, [2019] NZHC 3278, para.18, *cited in* S. Baird, "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform", 30 New Zealand Universities Law Review (2022) 247, 252.
[304] *R v. Tongia*, [2019] NZHC 3278, para.36, *cited in* S. Baird, "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform", 30 New Zealand Universities Law Review (2022) 247, 253.
[305] *R v. Tongia*, [2019] NZHC 3278, para.18, *cited in* S. Baird, "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform", 30 New Zealand Universities Law Review (2022) 247, 252.
[306] NZ-CPMIP, s.13(2).
[307] NZ-CPMIP, s.23(1).
[308] NZ-CPMIP, ss.23(2), 24-25.

132. The maximum duration that a defendant can be detained under section 24 CPMIP is 10 years where the offence carried a sentence of life imprisonment,[309] or a period equal to half the maximum term of imprisonment for the charged crime.[310] If the accused was charged with multiple offences, this calculation is based on the offence that carries the longest term of imprisonment.[311]

133. If an order under section 24 is deemed unnecessary, under section 25, the court may deal with the accused in the following ways: (i) by ordering that the accused be treated as a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992, or (ii) by ordering that the defendant be cared for as a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003,[312] (iii) if the person is liable to be detained under a sentence of imprisonment, by deciding not to make an order,[313] or (iv) by ordering the immediate release of the defendant.[314] The first and second of these are compulsory care orders.[315]

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[309] NZ-CPMIP, s.30(1)(a).
[310] NZ-CPMIP, s.30(1)(b).
[311] NZ-CPMIP, s.30(2).
[312] NZ-CPMIP, s.26.
[313] NZ-CPMIP, s.25(1)(c).
[314] NZ-CPMIP, s.25(1)(d).
[315] NZ-CPMIP, s.26.

VIII. NORTHERN IRELAND

A. Legal basis for the proceeding (legislation and/or jurisprudence)

134. Under Article 49A of the Mental Health (Northern Ireland) Order 1986, once the court finds an accused unfit to plead, a proceeding often described as a "trial of the facts" takes place.[316] This involves the jury determining based on evidence adduced whether the accused did the act or made the omission charged against him as the offence.[317]

B. Mechanics of proceedings

135. Once an accused is found unfit, the criminal trial stops, and the trial of the facts takes place before a jury. The jury considers any evidence already given in the trial as well as any additional evidence adduced by the prosecution or by the person representing the case for the defence.[318] If the unfitness determination takes place after the accused has been arraigned, the determination is made by the same jury that was already trying the accused.[319]

C. Standard of proof

136. The Prosecution must prove beyond a reasonable doubt that the accused committed the act or omission charged against him.[320]

D. Scope of adjudication: actus reus/mens rea

137. The jury only assesses "whether it is satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or

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[316] *The Queen v Samuel Morrison* [2018] NICC 19, *available at*: https://www.casemine.com/judgement/uk/638138480cef1833440478bc ("*Queen v Morrison*"), para.1; Mental Health (Northern Ireland) Order 1986 ("*Northern Ireland Order*"), *available at:* https://www.legislation.gov.uk./nisi/1986/595, Article 49(A)(2).
[317] Northern Ireland Order, Article 49A.
[318] Northern Ireland Order, Article 49A(2).
[319] Northern Ireland Order, Article 49A(5).
[320] *Queen v Morrison*, para.19.

made the omission charged against him as the offence".[321] This emphasis on the acts excludes *mens rea* from consideration.[322]

E. Limitations on defences

138. If there is objective evidence raising the issue of mistake or accident or self-defence as defences, "the jury should not find that the defendant did the act unless it is satisfied beyond reasonable doubt on all the evidence that the prosecution has negatived that defence".[323]

F. Available dispositions/penalties

139. If the jury is not satisfied that the accused committed the act or omission charged, the jury shall return a verdict of acquittal.[324]

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[321] Northern Ireland Order, Article 49A(2).
[322] *Queen v Morrison*, para.15.
[323] *Queen v Morrison*, para.19.
[324] Northern Ireland Order, Article 49A(4).

IX. PORTUGAL, ANGOLA, MOZAMBIQUE AND SÃO TOMÉ AND PRÍNCIPE

140. Article 105(1) of the Portuguese Criminal Code[325] establishes that if the accused is suffering from a "psychic anomaly" that happens after the accused committed the crime, and he or she is considered dangerous, the court should order the interment of the accused for the time corresponding to the duration of the punishment.[326] That means that the criminal trial would run its course normally until reaching the point of ascertaining the accused's culpability. If deemed guilty, the accused would be admitted into a psychiatric ward.

141. On the other hand, Article 106(1) of the Portuguese Criminal Code establishes that, if the accused is not deemed dangerous due to their posterior psychic anomaly, any sentence passed against the accused would be suspended until the basis for the suspension ceases.[327]

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[325] Código Penal, Decreto-Lei n. 48/95, Diário da República n.º 63/1995, Série I-A de 1995-03-15 ("Portuguese Criminal Code"), *available at* https://dre.pt/dre/legislacao-consolidada/decreto-lei/1995-34437675.

[326] Unofficial translation of Article 105(1) of the Portuguese Criminal Code This provision is similar to Art. 116(1) of Código Penal, Lei n. 38/20 de 11 de Novembro 2020 ("Angolan Criminal Code"), *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/110651/137676/F-933265966/Lei%2038_2020.pdf: "If an anomaly, with the effects foreseen in number 1 of article 115 or in article 101, befalls the agent after the commission of the crime, the Court shall order the internment in an establishment destined to non-imputable persons for the time corresponding to the duration of the criminal sentence" (unofficial translation); Art.100(1) of the Lei n.24/2019, de 24 de Dezembro ("Mozambican Criminal Code"), *available at* https://reformar.co.mz/documentos-diversos/lei-24-2019-lei-de-revisao-do-codigo-penal.pdf: "If a psychic anomaly with the effects foreseen in article 96 or in the previous article happens to the agent after the commission of the crime, the court orders the internment in an establishment destined to the non-imputable for the time corresponding to the duration of the sentence." (unofficial translation); Art. 101 (1) of Lei n.6/2012, de 6 de Agosto, ("St. Tome and Principe Criminal Code"), *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/113412/142196/F1509673893/L%2015%2021.pdf : "If the psychic anomaly, with effects provided for in articles 85.º or 100.º, befalls the agent after committing the crime, the court orders his/her internment in establishments intended for non-imputable persons for the time corresponding to the duration of the sentence." (unofficial translation).

[327] Unofficial translation of Article 106(1) of the Portuguese Criminal Code. This provision is similar to Art. 117(1) of the Angolan Criminal Code: "If the psychic anomaly that occurs to the agent after the commission of the crime does not make him criminally dangerous, in terms that, if the agent were unimputable, would determine his internment, the execution of the prison sentence to which he has been sentenced is suspended until cease the state that justified the suspension." (unofficial translation); Art.102(1) of the St. Tome and Principe Criminal Code: "If the psychic anomaly that occurs to the agent after the commission of the crime does not make him criminally dangerous, under the terms of article 85, the execution of the sentence is suspended until the state of psychic anomaly that gave rise to the suspension ceases. " (unofficial translation).

142. In either case, the admission into a psychiatric ward or the suspension of the proceedings cannot exceed the sentence that the accused person was convicted of.[328] If the anomaly ceases to exist, the convicted person will return to imprisonment for serving the remainder of the sentence or be granted early release.[329]

143. This procedure is identical in Angola, Mozambique and São Tomé and Príncipe, which adopted the Portuguese Criminal Code nearly verbatim as detailed in the footnotes herein.

[328] Portuguese Criminal Code, Art.106(4): "The duration of the sentence in which the agent was convicted cannot, under any circumstances, be exceeded." (unofficial translation). This provision is similar to Art. 117(4) of the Angolan Criminal Code: "The duration of the sentence in which the agent was convicted cannot, under any circumstances, be exceeded." (unofficial translation); Art. 100(1) of the Mozambican Criminal Code: "If a psychic anomaly with the effects foreseen in article 96 or in the previous article occurs to the agent after the commission of the crime, the court orders the internment in an establishment destined to non-imputable for the time corresponding to the duration of the sentence." (unofficial translation); Art. 101(1) of the St. Tome and Principe Criminal Code: "If the psychic anomaly that occurs to the agent after the commission of the crime does not make him criminally dangerous, under the terms of article 85, the execution of the sentence is suspended until the state of psychic anomaly that gave rise to the suspension ceases." (unofficial translation).

[329] Portuguese Criminal Code, Art.106(3): "The duration of suspension is deducted from the time of penalty that he still has to fulfil, the prescription of number 2, 3, 4 and 5 of the article 99 being correspondingly applicable." (unofficial translation). This provision is similar to Art. 117(3) of the Angolan Criminal Code: "The duration of the suspension is deducted from the time of the sentence to be served, the provisions of paragraphs 2, 3, 4 and 5 of article 109 being correspondingly applicable." (unofficial translation); Art. 100(3) of the Mozambican Criminal Code: "The hospitalization referred to in number 1, resulting from a psychological anomaly with the effects provided for in article 96, is deducted from the penalty, the provisions of article 97 being correspondingly applicable." (unofficial translation); Art. 101(2) of the St. Tome and Principe Criminal Code: "The previously mentioned confinement is deducted from the penalty, but regardless of its duration, the court may grant parole to the offender" (unofficial translation).

X. SCOTLAND

A. Legal basis for the proceeding (legislation and/or jurisprudence)

144. The Criminal Procedure (Scotland) Act 1995 ("Scotland CPA"), Sections 55 and 56 provide for a process known as an "examination of facts", where, under Section 54(1) of Scotland CPA, the court is satisfied that a person charged with the commission of an offence is unfit for trial.[330]

> **55 Examination of facts.**
>
> (1) At an examination of facts ordered under section 54(1)(b) of this Act the court shall, on the basis of the evidence (if any) already given in the trial and such evidence, or further evidence, as may be led by either party, determine whether it is satisfied—
>
> (a) beyond reasonable doubt, as respects any charge on the indictment or, as the case may be, the complaint in respect of which the accused was being or was to be tried, that he did the act or made the omission constituting the offence; and
>
> (b) on the balance of probabilities, that there are no grounds for acquitting him.
>
> (2) Where the court is satisfied as mentioned in subsection (1) above, it shall make a finding to that effect.
>
> (3) Where the court is not so satisfied it shall, subject to subsection (4) below, acquit the person of the charge.
>
> […]

B. Mechanics of proceedings

145. An examination of facts can take place where the trial cannot proceed, or, if it has commenced, cannot continue.[331] It is decided on the basis of the evidence (if any) already given in the trial and such evidence, or further evidence, as may be led by either party.[332] The role of the court is determine whether it is satisfied beyond

[330] *See* Scotland CPA, ss.54-56.
[331] Scotland CPA, s.54(1)(a), (b).
[332] Scotland CPA, s.55(1).

reasonable doubt that the accused did the act or made the omission constituting the offence[333] and on the balance of probabilities, that there are no grounds for acquitting.[334] For an examination of facts, the rules of evidence and procedure and the powers of the court shall be as nearly as possible those applicable in respect of a trial.[335]

C. Role of the accused

146. Where it appears to the court that it is not practical or appropriate for the accused to attend an examination of facts the court may, if no objection is taken by or on behalf of the accused, order that the examination of facts shall proceed in his absence.[336] The judge has discretion—on the advice of psychiatrists—to allow or refuse to permit the accused to give evidence.[337]

D. Representation by defence counsel

147. Where an accused person is not legally represented at an examination of facts the court shall appoint counsel or a solicitor to represent his interests.[338]

E. Standard of proof

148. The Prosecution must prove beyond reasonable doubt that the accused did the act or made the omission constituting the offence[339] and on the balance of probabilities, that there are no grounds for acquitting.[340]

F. Scope of adjudication: *actus reus*/*mens rea*

149. The Scotland CPA provides that the court must be satisfied beyond reasonable doubt, as respects any charge on the indictment that the accused did the act or made the omission constituting the offence.[341] It also requires the court to be satisfied, on

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[333] Scotland CPA, s.55(1)(a).
[334] Scotland CPA, s.55(1)(b).
[335] Scotland CPA, s.55(6).
[336] Scotland CPA, s.55(5).
[337] UK Law Commission 2010 Consultation Paper, para.6.115.
[338] Scotland CPA, s.56(3).
[339] Scotland CPA, s.55(1)(a).
[340] Scotland CPA, s.55(1)(b).
[341] Scotland CPA, s.55(1)(a).

the balance of probabilities, that there are no grounds for acquitting the accused,[342] which some have interpreted to encompass the mental element.[343]

G. Limitations on defences

150. The absence of any grounds excluding liability must be proven on the balance of probabilities.[344]

H. Available dispositions/penalties

151. If the court is satisfied that the accused did the act or made the omission constituting the offence and that there no grounds for acquitting, it shall make a finding to that effect.[345] Where the court is not so satisfied it shall acquit the person of the charge.[346] Where, as respects a person acquitted, the court is satisfied that the accused did the act or made the omission constituting the offence but is not criminally responsible by virtue of being unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct, the court shall state whether the acquittal is by that reason.[347]

152. Where the court has made a finding under Section 55(2) of Scotland CPA, the following disposals are available: (a) a compulsion order; (b) a restriction order in addition to the compulsion order under (a); (bb) an interim compulsion order; (c) a guardianship order; (d) a supervision and treatment order; (e) no order.[348]

153. If the accused is acquitted, then criminal proceedings come to an end, but the accused may still be subject to a mental health disposal under civil law.[349]

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[342] Scotland CPA, s.55(1)(b).
[343] *See* Gerry Maher, "Chapter 5: Unfitness for Trial in Scots Law" in Ronnie Mackay and Warren Brookbanks, eds., *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, 2018) ("Unfitness for Trial in Scots Law"), p.90 (the absence (or presence) of *mens rea* would be a matter for consideration on the second issue, the lack of a defence which would lead to an acquittal). *Also* UK Law Commission 2010 Consultation Paper, para.6.117 (the consideration of (b) encompasses consideration of mental elements).
[344] Scotland CPA, Section s.55(1)(b).
[345] Scotland CPA, Section s.55(2).
[346] Scotland CPA, Section s.55(3).
[347] *See* Scotland CPA, ss.51(A) (criminal responsibility of persons with mental disorder) and 55(4).
[348] Scotland CPA, s.57(2).
[349] Unfitness for Trial in Scots Law, p.92.

XI. SOUTH AFRICA

A. Legal basis for the proceeding (legislation and/or jurisprudence)

154. Section 3(b) of the Criminal Matters Amendment Act 68 of 1998 ("*South African Amendment Act 1998*") amended section 77 of the Criminal Procedure Act 51 of 1977 ("*South African Criminal Procedure Act*")[350] by providing for a trial on the facts to determine whether an unfit accused committed the acts they are charged with.

B. Mechanics of proceedings

155. Following a finding that an accused is unfit to stand trial, a trial on the facts may be held to establish whether the unfit accused committed the crime/act for which he or she stands charged.[351] Here, the court considers evidence only to determine whether the unfit accused committed the act in question. The purpose of the trial on the facts is not to reach an official verdict on the guilt of the accused but for the court to inquire and satisfy itself of what *actus reus*, if any, the accused has committed.[352]

156. After the trial on the facts, the court makes an order of detention under section 77(6)(a)(i) or (ii) of the amended *South African Criminal Procedure Act* depending on the seriousness of the charges. The trial on the facts therefore aids the court in making the relevant detention order under section 77(6):[353] detention either as a state patient in a prison or psychiatric hospital, where the court found on a balance of probabilities that the accused committed murder, culpable homicide, rape or other crimes involving

[350] The amended section 77(6) of the *South African Criminal Procedure Act* provides for the detention of an unfit accused in a mental hospital or a prison pending the signification of the decision. Sections 25-58 of the Mental Health Care Act 17 of 2002 ("*South African Mental Care Act*") provide for the care of mentally ill persons and the procedure to be followed in the admission of such persons whether as state patients or as involuntary mental health care user. Finally, the Constitutional Court judgement in *De Vos NO et al. v. Minister of Justice and Constitutional Development* (2017) 59 SA Crime Q 39 ("*De Vos* case") ushered in amendments in the law relating to the trial on the facts and the handling of unfit accused persons.

[351] Section 77(6)(a) of the *South African Criminal Procedure Act* as amended by section 3(b) of the *South African Amendment Act 1998*.

[352] L. Pienaar, "The unfit accused in the South African criminal justice system: From automatic detention to unconditional release", SACJ 58 (2018) ("*Unfitness for Trial in South African Law*"), p.61, citing *S v. Sithole* (2005) (1) 311 (W).

[353] *Unfitness for Trial in South African Law*, pp.61-62.

violence;[354] or as an involuntary mental health care user in a psychiatric facility, where the unfit accused is found to have committed an act other than the aforesaid violent acts or not to have committed the act in question.[355]

C. Role of the accused

157. The right to be present is not absolute. As such, one of the exceptions to the general right to be present is "where an accused cannot attend the trial on account of his own physical condition or illness".[356] However, state patients are required to be present when the order pursuant to section 77(6)(a)(ii) is made.[357] In any case an unfit accused may be represented in these proceedings, as discussed in Section D below.

D. Representation by defence counsel

158. A mental health care user is entitled to a representative, including a legal representative, when submitting an application, lodging an appeal, or appearing before a magistrate, judge or a review board, subject to the laws governing rights of appearances at a court of law. Legal aid is also provided by the state where the mental health care user is indigent.[358]

E. Standard of proof

159. Whereas the burden of proof for the purposes of guilt is beyond reasonable doubt, the standard of proof for a trial on the facts requires the accused's involvement in the charged act (*actus reus*) to be proved only on a balance of probabilities.[359]

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[354] Section 77(6)(a)(i) of the *South African Criminal Procedure Act* as amended by section 3(b) of the *South African Amendment Act 1998*; *Unfitness for Trial in South African Law*, p.63.
[355] Section 77(6)(a)(ii) of the *South African Criminal Procedure Act* as amended by section 3(b) of the *South African Amendment Act 1998*; *Unfitness for Trial in South African Law*, p.65.
[356] F. Cassim, "The accused's right to be present: a key to meaning participation in the criminal process", Comparative and International Law Journal of Southern Africa (2005) Vol. 38, No.2, p.295.
[357] *Unfitness for Trial in South African Law*, p.63 fn.23, citing *S v. Eyden* (1982) (4) SA 141 (T).
[358] *See* Section 15 of the *South African Mental Care Act.*
[359] Section 77(6)(a) of the *South African Criminal Procedure Act* as amended by section 1(b) of the Criminal Procedure Amendment Act 4 of 2017 ("*South African Amendment Act 2017*"); *Unfitness for Trial in South African Law*, p.61.

F. Scope of adjudication: *actus reus*/*mens rea*

160. Given that the purpose of the trial on the facts procedure is not to reach an official verdict but only to inquire into the accused's involvement in the acts for which he or she stands charged, the court would adjudicate only the *actus reus*.[360]

G. Limitations on defences

161. There is no indication of any limitations on available defences.

H. Available dispositions/penalties

162. The now-amended law provides for the possibility of conditional or unconditional release following a trial of facts, depending on the circumstances. This provides an adequate procedural safeguard against arbitrary detention.[361]

163. An order of detention as a state patient has no limit on the period of detention since it is uncertain how long it will take to stabilise the patient's illness or whether it will respond to the treatment at all. A review can be done within 6 months from the detention order and then every 12 months.[362] If a state patient regains his ability to follow trial proceedings to the extent that he or she is discharged from treatment as state patient, his or her trial may resume.[363] A judge may reclassify the accused and order that his or her treatment continues on an involuntary mental health care basis.[364]

164. Regarding an order for detention in an institution as an involuntary mental health care user,[365] the mental health of the said unfit person is reviewed six months after the commencement of the treatment and thereafter every 12 months.[366] Once the Review Board establishes that involuntary mental health care is no longer needed, the person may be discharged. It is easier to secure the discharge of involuntary mental

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[360] *Unfitness for Trial in South African Law*, p.61.
[361] *Unfitness for Trial in South African Law,* pp.81-82; sections 77(6)(a)(i) and (ii) of the *South African Criminal Procedure Act* as amended by section 1(b) of the *South African Amendment Act 2017*. *See also De Vos* case.
[362] Section 46(1) of the *South African Mental Care Act*. *See Unfitness for Trial in South African Law*, p.63.
[363] *Unfitness for Trial in South African Law*, pp.64-65.
[364] *Unfitness for Trial in South African Law*, p.65.
[365] Section 77(6)(a)(ii) of the *South African Criminal Procedure Act* as amended by section 1(b) of the *South African Amendment Act 2017*.
[366] Section 37(1) of the *South African Mental Care Act*.

health care user than it is for a state patient. A discharged involuntary health care user will probably be deemed to have regained his or her fitness to stand trial, at which point his or her criminal trial may continue.[367]

[367] *Unfitness for Trial in South African Law*, p.66.

XII. SPAIN

A. Legal basis for the proceeding (legislation and/or jurisprudence)

165. Article 383 of the 1882 Criminal Procedure Code[368] establishes that if the defendant is unfit to stand trial, the trial must be suspended until the defendant regains fitness.[369] However, the draft of the new Criminal Procedure Code envisages special proceedings akin to an Examination of Facts to determine whether to apply coercive security measures to an accused who is unfit to stand trial. This follows the theory that it would be unconstitutional to order any restriction of personal freedom without a trial.

B. Mechanics of proceedings

166. Articles 79 and 80 of the draft of the new Criminal Procedure Code establish that the investigative phase of the trial shall take place even when the accused is not fit to stand trial. During this phase, the accused is represented by counsel. At the end of the investigative phase, the Prosecutor can either press charges, in which case the trial remains suspended, or request the application of a coercive security measure. In the latter case, the oral and adversarial phase of the trial takes place for the purpose of ascertaining whether the accused committed the *actus reus* and should remain in detention pursuant to a coercive measure of security.[370]

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[368] Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal, available at https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036 ("*Spanish Criminal Procedure Code*"), art.383 ("If the defendant becomes unfit to stand trial after the crime was committed, once the initial phase is completed, the trial is suspended until the defendant regains fitness and the Penal Code provisions concerning insanity apply.") (unofficial translation).

[369] Fiscalía General del Estado, Consulta 1/1989, de 21 de abril, sobre enajenación mental del imputado sobrevenida tras el auto de apertura del juicio oral y antes de la celebración de éste: sus efectos sobre el proceso ("*Spanish State Prosecutor Consultation Paper on Mental Insanity*"), available at: https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-Q-1989-00001.pdf.

[370] Anteproyecto de Ley de Enjuiciamiento Criminal, *available at:* https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf ("*Spanish New Criminal Procedure Code Draft*"), art.79(1) ("If a disability completely prevents the defendants from understanding the meaning and the consequences of the trial, the Chamber terminate the proceedings.") (unofficial translation); art.79.2(2) ("When the Prosecutor requests the application of a security measure, the Chamber will terminate the investigative phase and proceed to trial") (unofficial translation); art.80.

C. Role of the accused

167. The presence of the accused is not required.[371]

D. Representation by defence counsel

168. During the oral and adversarial phase, the accused is represented by a legal guardian. A guilty plea cannot be entered on behalf of the accused.[372]

E. Standard of proof

169. The standard of proof is beyond reasonable doubt.[373]

F. Scope of adjudication: *actus reus/mens rea*

170. The scope of the examination of the facts is to ascertain whether the accused committed the *actus reus* and, consequently, whether the application of a coercive security measure is warranted. However, if the commission of the *actus reus* by the accused is not controversial, only the application of a coercive security measure will be litigated, taking into consideration the danger posed by the accused.[374]

G. Limitations on defences

171. There is no indication of any limitation on defences.

H. Available dispositions/penalties

172. If the accused is found not to have committed the acts charged, the accused is acquitted. If the court finds the accused committed the acts, only coercive measures of security may be applied.[375]

[371] *Spanish New Criminal Procedure Code Draft,* art.80(1) ("The presence of the accused is not may be excepted if the health conditions so require, but the legal guardian will always be present.") (unofficial translation).
[372] *Spanish New Criminal Procedure Code Draft,* art.80(1)-(5).
[373] *Spanish New Criminal Procedure Code Draft,* art.8(1) ("presumption of innocence") (unofficial translation).
[374] *Spanish New Criminal Procedure Code Draft,* art.80(5) ("A guilty plea cannot be entered. However, when there is no dispute about the authorship of the punishable act and the court deems it appropriate, the oral phase may be held exclusively for the purpose of determining, with testimonial evidence and pertinent expert reports, the dangerousness of the accused person and the security measure that may be appropriate.") (unofficial translation).
[375] *Spanish New Criminal Procedure Code Draft,* art.80(5). *See also,* Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal ("*Spanish Penal Code*"), art.95-96.

XIII. UNITED STATES OF AMERICA

173. The United States is not a single jurisdiction but rather consists of federal and state jurisdictions, each with its own applicable law and procedures. Although a procedure akin to the proposed Examination of Facts does not exist federally or across all states, the United States Supreme Court has signalled its approval for such a procedure.[376] The American Law Institute's Model Penal Code, a model legislation that has formed the basis for legislation across many states, provides for a similar procedure, which it calls "a special post-commitment hearing".[377] As set out below, the Prosecution has identified eight state jurisdictions that apply variations of a process for ascertaining the merits of the case against an unfit accused. All of these processes offer the opportunity to acquit or dismiss charges if the prosecution cannot meet its evidentiary burden, but cannot result in finding guilt.

A. Legal basis for the proceeding (legislation and/or jurisprudence)

1. Hawaii

174. Pursuant to Section 704-407 of the Hawaii Penal Code, a "special post-commitment or post-release hearing" for an accused who has been found unfit (and therefore committed to the director of health) is permitted in Hawaii to adjudicate legal objections without the participation of the accused.[378]

2. Illinois

175. In Illinois, the criminal procedure code Section 104-25 provides that a "discharge hearing" may be held for an accused who has been found unfit for trial,

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[376] *Jackson v. Indiana*, 406 U.S. 715, 740-741 (1972), *available at* https://casetext.com/case/jackson-v-indiana-8212-5009 ("Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's incompetency. […] Some States have statutory provisions permitting pretrial motions to be made or even allowing the incompetent defendant a trial at which to establish his innocence, without permitting a conviction. We do not read this Court's previous decisions to preclude the States from allowing at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel").

[377] American Law Institute Model Penal Code (1962), § 4.06, alternative subsections (3)-(4), *available at* https://archive.org/details/ModelPenalCode_ALI/page/n85/mode/1up.

[378] Hawaii Revised Statutes ("Haw. Rev. Stat."), § 704-407, *available at* https://casetext.com/statute/hawaii-revised-statutes/division-5-crimes-and-criminal-proceedings/title-37-hawaii-penal-code/chapter-704-penal-responsibility-and-fitness-to-proceed/section-704-407-special-hearing-following-commitment-or-release-on-conditions.

which is "a hearing to determine the sufficiency of the evidence".[379] This is "an žinnocence only' hearing, that is to say, a proceeding to determine only whether to enter a judgment of acquittal, not to make a determination of guilt."[380]

3. Massachusetts

176. As part of the Massachusetts General Laws Chapter 123 (relating to mental health), Section 17 provides for an accused who is found unfit to have an opportunity to offer a defence on the merits.[381]

4. New Mexico

177. In New Mexico, where an accused who is charged with an enumerated violent and/or sexual crime is found unfit for trial, "a hearing to determine the sufficiency of the evidence" can be held pursuant to Section 31-9-15 of New Mexico's Mental Illness and Competency statute.[382]

5. Ohio

178. Ohio Revised Code § 2945.39(A)(2) provides that if an accused remains unfit after the statutory maximum treatment time for attempting to rehabilitate an unfit accused has expired, the prosecution or the court may bring a motion to retain jurisdiction over the accused.[383] To satisfy this motion, the court must hold a hearing to establish that the accused committed the offence with which he/she is charged. The

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[379] Illinois Compiled Statutes, § 104-25 ("725 ILCS 5/104-25"), *available at* https://casetext.com/statute/illinois-compiled-statutes/rights-and-remedies/chapter-725-criminal-procedure/act-5-code-of-criminal-procedure-of-1963/title-i-general-provisions/article-104-fitness-for-trial-to-plead-or-to-be-sentenced/section-725-ilcs-5104-25-discharge-hearing.

[380] *People v. Waid*, 221 Ill.2d 464, 470 (Ill.2006), *available at* https://casetext.com/case/people-v-waid-3; *People v. Rink*, 97 Ill.2d 533, 543 (Ill.1983), *available at* https://casetext.com/case/people-v-rink.

[381] Massachusetts General Laws, Chapter 123 ("Mass. Gen. Laws ch.123"), § 17(b), *available at* https://casetext.com/statute/general-laws-of-massachusetts/part-i-administration-of-the-government/title-xvii-public-welfare/chapter-123-mental-health/section-12317-periodic-review-of-incompetence-to-stand-trial-petition-hearing-continued-treatment-defense-to-charges-release.

[382] New Mexico Statutes 1978 ("N.M. Stat."), § 31-9-1.5, *available at* https://casetext.com/statute/nexw-mexico-statutes-1978/chapter-31-criminal-procedure/article-9-mental-illness-and-competency/section-31-9-15-determination-of-competency-evidentiary-hearing.

[383] Ohio Revised Code ("Ohio Rev. Code"), § 2945.39(A)(2), *available at* https://casetext.com/statute/ohio-revised-code/title-29-crimes-procedure/chapter-2945-trial/section-294539-expiration-of-the-maximum-time-for-treatment-for-incompetency; *State v. Williams*, 126 Ohio St. 3d 65, 68 (Ohio 2010), *available at* https://casetext.com/case/state-v-williams-5257.

hearing must also establish that the accused is a person with a mental illness or intellectual disability subject to court order.[384]

6. South Carolina

179. The South Carolina statute relating to mental health and intellectual disability provides that if an unfit accused or his counsel "believes he can establish a defense of not guilty to the charges other than the defense of insanity, he may request an opportunity to offer a defense on the merits to the court".[385]

7. West Virginia

180. Under West Virginia Code § 27-6A-6, if an unfit accused "believes that he or she can establish a defense of not guilty to the charges pending against him or her, other than the defense of not guilty by reason of mental illness, the defendant may request an opportunity to offer a defense thereto on the merits before the court which has criminal jurisdiction".[386]

8. Wisconsin

181. In Wisconsin, the state supreme court has held that an inquiry into an accused's fitness (competency) for trial may not take place until after the court has found probable cause to believe that the accused is guilty of the charged offence.[387] If this has not been satisfied through a "preliminary examination or verdict or finding of guilt prior to the time the competency issue is raised, a special probable cause determination is required".[388] Once competency is raised, the proper procedure is to hold a hearing to establish whether it is probable that the accused committed the

[384] Ohio Rev. Code § 2945.39(A)(2).
[385] South Carolina Code ("S.C. Code"), § 44-23-440, *available at* https://casetext.com/statute/code-of-laws-of-south-carolina-1976/title-44-health/chapter-23-provisions-applicable-to-both-mentally-ill-persons-and-persons-with-intellectual-disability/article-5-fitness-to-stand-trial/section-44-23-440-finding-of-unfitness-to-stand-trial-shall-not-preclude-defense-on-merits.
[386] West Virginia Code ("W. Va. Code"), § 27-6A-6, *available at* https://casetext.com/statute/west-virginia-code/chapter-27-mentally-ill-persons/article-6a-competency-and-criminal-responsibility-of-persons-charged-or-convicted-of-a-crime/section-27-6a-6-judicial-hearing-of-defendants-defense-other-than-not-guilty-by-reason-of-mental-illness.
[387] *State v. McCredden*, 33 Wis. 2d 661, 669-671 (Wis. 1967), *available at* https://casetext.com/case/state-v-mccredden.
[388] Judicial Council Committee Note on West's Wisconsin Statutes Annotated 971.14, available with Westlaw subscription.

charged crime.[389] This is codified in Wisconsin's criminal procedure statute 971.14(1r)(c).[390]

B. Mechanics of proceedings

1. Hawaii

182. After an accused is found unfit and ordered for commitment into the custody of the director of health,[391] an accused, his counsel, or the director of health may apply for a special hearing. The application "shall be granted only if the counsel for the defendant satisfies the court…that, as an attorney, the counsel has reasonable grounds for a good faith belief that the counsel's client has an objection based upon legal grounds to the charge".[392] If granted, the hearing is before the court without a jury.[393] Since the special hearing is concerned with legal insufficiencies in the Prosecution's case, it is unclear to what extent the parties present factual evidence.

2. Illinois

183. Under Section 104-23(a) of Illinois' criminal procedure code,[394] when an accused is unfit to stand trial and there is not a substantial probability that he will attain fitness within one year from the original finding of unfitness, the court shall hold a discharge hearing pursuant to Section 104-25. This is a hearing "to determine the sufficiency of the evidence" and is conducted by the court without a jury. The prosecution and defence "may introduce evidence relevant to the question of defendant's guilt of the crime charged". The discharge hearing permits deviating from the criminal procedure rules applicable in a criminal trial to the extent that hearsay or

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[389] *State v. McCredden*, 669.

[390] Wisconsin Statutes ("Wis. Stat."), § 971.14(1r)(c), *available at* https://casetext.com/statute/wisconsin-statutes/criminal-procedure/chapter-971-criminal-procedure-proceedings-before-and-at-trial/section-97114-effective-until412022competency-proceedings.

[391] Haw. Rev. Stat. § 704-406, *available at* https://casetext.com/statute/hawaii-revised-statutes/division-5-crimes-and-criminal-proceedings/title-37-hawaii-penal-code/chapter-704-penal-responsibility-and-fitness-to-proceed/section-704-406-effect-of-finding-of-unfitness-to-proceed-and-regained-fitness-to-proceed.

[392] Haw. Rev. Stat. § 704-407(1).

[393] Haw. Rev. Stat. § 704-407(2).

[394] 725 ILCS 5/104-23(a), *available at* https://casetext.com/statute/illinois-compiled-statutes/rights-and-remedies/chapter-725-criminal-procedure/act-5-code-of-criminal-procedure-of-1963/title-i-general-provisions/article-104-fitness-for-trial-to-plead-or-to-be-sentenced/section-725-ilcs-5104-23-unfit-defendants.

affidavit evidence is permissible on "secondary matters", with examples provided in the statute.[395] These deviations are permitted because a "defendant in a discharge hearing is not accorded, under the due process clause, the same degree of protections available at a criminal trial".[396] A decision that does not result in acquittal may be appealed in the same way as from a criminal trial.[397]

3. Massachusetts

184. The relevant provision states:[398]

> If either a person or counsel of a person who has been found to be incompetent to stand trial believes that he can establish a defense of not guilty to the charges pending against the person other than the defense of not guilty by reason of mental illness or mental defect, he may request an opportunity to offer a defense thereto on the merits before the court which has criminal jurisdiction. The court may require counsel for the defendant to support the request by affidavit or other evidence. If the court in its discretion grants such a request, the evidence of the defendant and of the commonwealth shall be heard by the court sitting without a jury.

185. This proceeding includes the right to call and cross-examine witnesses.[399] The full panoply of rights that pertain to a criminal trial does not necessarily pertain to the unfit accused's Section 17 proceeding to provide a defence on the merits.[400]

4. New Mexico

186. Where an accused is determined unfit, a hearing to determine the sufficiency of the evidence shall be held if the accused is charged with one of the enumerated violent and/or sexual crimes. The hearing is conducted by the court without a jury. The prosecution and defence may introduce evidence relevant to the accused's guilt of

[395] 725 ILCS 5/104-25(a).
[396] *People v. Waid*, 470; *People v. Rink*, 543.
[397] 725 ILCS 5/104-25(f).
[398] Mass. Gen. Laws ch.123 § 17(b).
[399] *Commonwealth v. Hatch*, 438 Mass. 618, 624-25 (Mass. 2003), *available at* https://casetext.com/case/commonwealth-v-hatch.
[400] *See, e.g., Spero v. Commonwealth*, 424 Mass. 1017, 1018 (Mass. 1997) ("we note that the rights on which she relies (speedy trial and confrontation) pertain to a trial, and they would not necessarily be served by a hearing under G.L. c. 123, § 17"), *available at* https://casetext.com/case/spero-v-commonwealth.

the crime charged.[401] The court may admit hearsay or affidavit evidence on secondary matters, which is a departure from the procedural protections available in criminal trials.[402]

5. Ohio

187. The hearing at issue in Ohio takes place only after the period allotted for an unfit accused to be treated has expired, or after the court finds that there is "not a substantial probability that the defendant will become competent to stand trial" even if provided with treatment.[403] At that point, the prosecution or court may move for a hearing to retain jurisdiction, which requires showing by clear and convincing evidence that the accused committed the offence, and is subject to court order by virtue of mental or intellectual disability.[404] At the hearing, the court "may consider all relevant evidence", including any medical or psychiatric testimony or reports, "the acts constituting the offense charged", and "any history of the defendant that is relevant to the defendant's ability to conform to the law".[405]

6. South Carolina

188. The relevant provision states:[406]

> If either the person found unfit to stand trial or his counsel believes he can establish a defense of not guilty to the charges other than the defense of insanity, he may request an opportunity to offer a defense on the merits to the court. The court may require affidavits and evidence in support of such request. If the court grants such request, the evidence of the State and the defendant shall be heard before the court sitting without a jury.

7. West Virginia

189. Once found unfit, an accused may request an opportunity to offer a defence on the merits before the court that has criminal jurisdiction. If the court grants the

[401] N.M. Stat. § 31-9-1.5(A).
[402] N.M. Stat. § 31-9-1.5(A); *State v. Spriggs-Gore*, 133 N.M. 479, 481 (N.M. Ct. App. 2003), *available at* https://casetext.com/case/state-v-spriggs-gore-1.
[403] Ohio Rev. Code § 2945.39(A).
[404] Ohio Rev. Code § 2945.39(A).
[405] Ohio Rev. Code § 2945.39(B).
[406] S.C. Code § 44-23-440.

request, the accused and the prosecution shall present evidence before the court sitting without a jury.[407] The evidence may include examination and cross-examination of witness testimony.[408] The "due process protections that attach to criminal proceedings, such as the right to a speedy trial, impartial jury, and the confrontation of witnesses are not invoked by such a hearing".[409] These rights are not denied, but are simply shelved until the accused regains competency to stand trial.[410]

8. <u>Wisconsin</u>

190. Where the issue of an accused's fitness/competency for trial is raised, the court must hold a proceeding to establish whether it is probable that the accused committed the crime charged.[411] The court's finding may be based upon the complaint alone. However, if the accused submits an affidavit alleging with particularity that the complaint is materially false, the parties may present at a hearing ordered by the court.[412] This hearing can include presentation and cross-examination of witnesses by the prosecution and defence,[413] "but the court shall limit the issues and witnesses to those required for determining probable cause".[414] "ŠTĆestimony may also be received into the record of the hearing by telephone or live audiovisual means".[415] At the conclusion of the hearing, the court decides whether probable guilt has been established. If so, then the court proceeds to consider the question of "insanity", *i.e.* whether the accused is competent to stand trial.[416]

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[407] W. Va. Code § 27-6A-6.
[408] *See generally State v. Gum*, 764 S.E.2d 794 (W. Va. 2014) (reviewing evidence given during the hearing held under § 27-6A-6 on both direct and cross-examination), *available at* https://casetext.com/case/state-v-gum-4.
[409] *State v. Gum*, 800.
[410] *State v. Gum*, 800.
[411] *State v. McCredden*, 669.
[412] Wis. Stat. 971.14(1r)(c).
[413] *State v. McCredden*, 669.
[414] Wis. Stat. 971.14(1r)(c).
[415] Wis. Stat. 971.14(1r)(c).
[416] Wis. Stat. 971.14(1r)(c); *State v. McCredden*, 670.

C. Role of the accused

1. Hawaii

191. The special hearing procedure in Hawaii is premised on the fact that the accused is not able to participate. According to the official commentary:[417]

> This section affords the defendant and the defendant's counsel the opportunity, notwithstanding the defendant's unfitness to proceed, to make any objection to the prosecution which is susceptible of a fair determination without the personal participation of the defendant. It seems clear that this is an eminently sensible provision in view of the fact that it is the defendant's inability to participate in the defendant's defense (either because the defendant lacks capacity to either understand the proceedings or to assist in the defendant's own defense) that has rendered the defendant unfit to be proceeded against.

2. Illinois

192. Illinois courts have permitted accused persons to be present at the discharge hearing.[418] Their presence is not absolute and may be restricted, for example if the accused is being disruptive.[419]

3. Massachusetts

193. From the jurisprudence it is clear that an accused may be present and participate at a Section 17 proceeding, including by calling witnesses.[420]

4. New Mexico

194. It is unclear the extent to which an accused may be present at and participate at a hearing on the sufficiency of the evidence. The jurisprudence reflects that the presence of an accused is not required.[421] The court has precluded an accused's

[417] Haw. Rev. Stat. § 704-407.
[418] *People v. Williams*, 312 Ill. App. 3d 232, 234-235 (Ill. App. Ct. 2000), *available at* https://casetext.com/case/people-v-williams-4555.
[419] *People v. Williams*, 235.
[420] *Commonwealth v. Hatch*, 626.
[421] *See State v. Taylor*, 129 N.M. 376, 378 (N.M. Ct. App. 2000), *available at* https://casetext.com/case/state-v-taylor-1864.

recorded statement from being admitted into evidence on the basis that the accused was not competent to voluntarily waive her rights when making the statement.[422]

5. Ohio

195. The role of the accused at a hearing to determine whether the court should retain jurisdiction is not specified.[423]

6. South Carolina

196. Based on the statutory language allowing "either a person found unfit to stand trial or his counsel" to request to offer a defence on the merits, it appears that an accused may personally be involved in his proceedings in some way.[424] However, the introductory remarks indicate that this procedure is intended to address legal objections "susceptible of fair determination prior to trial and without the personal participation of the defendant".[425] This suggests that the accused is not expected to participate.

7. West Virginia

197. It is not clear from the statute or jurisprudence what role the accused may play in a hearing to provide a defence on the merits.

8. Wisconsin

198. The role of an accused in a probable cause hearing is not clear, but the jurisprudence states that counsel should be provided if the accused is not represented.[426]

[422] *State v. Spriggs-Gore*, 485.
[423] *See* Ohio Rev. Code § 2945.39(A).
[424] S.C. Code § 44-23-440.
[425] S.C. Code § 44-23-440.
[426] *State v. McCredden*, 669.

D. Representation by defence counsel

1. Hawaii

199. An accused is represented by counsel during the special hearing. The accused has a reasonable opportunity to obtain counsel, and if the accused lacks funds to do so, counsel is assigned by the court.[427]

2. Illinois

200. Where an accused lacks capacity to defend himself/herself, the court will appoint counsel to represent him/her at the discharge hearing.[428]

3. Massachusetts

201. An accused may be represented by counsel during a Section 17 proceeding, but it appears that representation is not necessarily required.[429]

4. New Mexico

202. An accused may be represented by counsel during a hearing on the sufficiency of the evidence.[430]

5. Ohio

203. The role of the accused at a hearing to determine whether the court should retain jurisdiction is not specified.[431]

6. South Carolina

204. An accused may be represented by counsel during a hearing on the defence on the merits.[432]

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[427] Haw. Rev. Stat. § 704-407(1).

[428] *People v. Lavold*, 262 Ill. App. 3d 984, 988, 996-997 (Ill. App. Ct. 1994), *available at* https://casetext.com/case/people-v-lavold.

[429] *See Commonwealth v. Hatch*, 626 ("The fact that a defendant has been deemed incompetent *to stand trial* has no bearing on his ability, or that of his attorney, to present evidence"); Mass. Gen. Laws ch.123 § 17(b) ("either a person or counsel of a person").

7. West Virginia

205. The relevant statute provides that: "If the defendant is unable to obtain legal counsel, the court of record shall appoint counsel for the defendant to assist him or her in supporting the request by affidavit or other evidence".[433] This makes clear that the assistance of counsel is a key support for the accused.

8. Wisconsin

206. The Wisconsin supreme court stated that counsel should be provided if the accused is not represented, and counsel would have the right to call and cross-examine witnesses on the accused's behalf.[434]

E. Standard of proof

1. Hawaii

207. The applicable statute states simply that "ŠaĆfter the hearing, the court shall rule on any legal objection raised by the application".[435] There is no indication what standard of proof the court must apply.

2. Illinois

208. The burden of proof at a discharge hearing is the same as in a criminal trial, requiring the prosecution to establish the accused's guilt beyond a reasonable doubt

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[430] *See State v. Gallegos*, 111 N.M. 110, 117 (N.M. Ct. App. 1990), *available at* https://casetext.com/case/state-v-gallegos-36 (referencing the role of "a defendant's attorney"); *State v. Spriggs-Gore*, 481 (same).
[431] *See* Ohio Rev. Code § 2945.39(A).
[432] S.C. Code § 44-23-440.
[433] W. Va. Code § 27-6A-6.
[434] *State v. McCredden*, 669.
[435] Haw. Rev. Stat. § 704-407(3).

(notwithstanding that the court's determination that the prosecution has met its burden of proof does not constitute a technical determination of guilt).[436]

3. Massachusetts

209. "ŠTĆhe standard by which the judge must decide whether the indictment or other charges should be dismissed is whether there is "a lack of substantial evidence to support a conviction.""[437] This requires the judge to weigh all the evidence and assess the credibility of all witnesses.[438] "ŠTĆhe determination whether there is a lack of substantial evidence to support a conviction must not be based on the judge's personal view of the evidence, but on whether a rational jury could find the defendant guilty beyond a reasonable doubt".[439]

4. New Mexico

210. The standard of proof for a hearing on the sufficiency of the evidence is clear an dconvincing evidence, which is a lower standard of proof than beyond a reasonable doubt.[440] This standard "strikes a fair balance between the defendant's interest in avoiding an erroneous deprivation of liberty and the State's interest in treating the defendant, protecting the defendant from himself, and protecting society in general".[441]

5. Ohio

211. The standard of proof for establishing that the accused committed the offence charged at a hearing to determine whether the court should retain jurisdiction over him is clear and convincing evidence.[442]

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[436] *People v. Lang*, 805 N.E.2d 1249, 1257 (Ill. App. Ct. 2004), *available at* https://casetext.com/case/people-v-lang-59; *People v. Lavold*, 988, 995.
[437] *Commonwealth v. Hatch*, 621; Mass. Gen. Laws ch.123 § 17(b).
[438] *Commonwealth v. Hatch*, 623.
[439] *Commonwealth v. Hatch*, 623.
[440] N.M. Stat. § 31-9-1.5(B);
[441] *State v. Rotherham*, 122 N.M. 246, 263 (N.M. 1996) *available at* https://casetext.com/case/state-v-rotherham.
[442] *See* Ohio Rev. Code § 2945.39(A)(2).

6. South Carolina

212. The relevant statute states that if after hearing the accused's attempt to offer a defence on the merits, "the court finds the evidence is such as would entitle the defendant to a directed verdict of acquittal, it shall dismiss the indictment or other charges". South Carolina's Rules of Criminal Procedure provide that a directed verdict is warranted where "there is a failure of competent evidence tending to prove the charge in the indictment".[443] In ruling on a motion for directed verdict, "the trial judge shall consider only the existence or non-existence of the evidence and not its weight".[444] Read together, these statutory provisions indicate that the standard of proof for an unfit accused's defense on the merits is significantly lower than for a criminal trial.

7. West Virginia

213. The applicable standard of proof for a hearing to present a defence on the merits is sufficient evidence, which is below the criminal standard requiring evidence beyond a reasonable doubt.[445]

8. Wisconsin

214. Since the Wisconsin context is concerned with probable cause, the standard is whether there is evidence of probable guilt.[446]

F. Scope of adjudication: actus reus/*mens rea*

1. Hawaii

215. The statute is silent regarding the scope of permissible legal objections that can be raised during a special hearing, including what elements the court may adjudicate. However, the statutory prohibition to introducing any evidence on the

[443] South Carolina Rules of Criminal Procedure, Rule 19(a) ("S.C. R. Crim. P.19(a)"), *available at* https://casetext.com/rule/south-carolina-court-rules/south-carolina-rules-of-criminal-procedure/trial/rule-19-directed-verdict.
[444] S.C. R. Crim. P.19(a).
[445] W. Va. Code § 27–6A–6; *State v. Gum*, 800.
[446] *State v. McCredden*, 669-670;

issue of physical or mental defect suggests that the court may not consider *mens rea*.[447]

2. Illinois

216. Considering that the prosecution must prove the crime charged to the same standard of proof as in criminal trials,[448] the prosecution must prove both *actus reus* and *mens rea*.

3. Massachusetts

217. Notwithstanding that the defence of not guilty by virtue of mental defenct is not permitted under Section 17, the standard of proof, which requires the court to ascertain whether a rational jury could convict beyond a reasonable doubt, suggests that all elements of an offence are considered.[449]

4. New Mexico

218. Although certain defences related to mental state are not permitted—insanity and the inability to form specific intent—the prosecution must nonetheless prove all elements of a charged crime, including both *mens rea* and *actus reus*, to the required standard of clear and convincing evidence.[450]

5. Ohio

219. The Ohio supreme court has held that finding an accused committed the charged offence "does not require a finding of scienter".[451] This indicates that there may be some limitation to the extent *mens rea* should be assessed when determining whether an accused committed the charged offence.[452]

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[447] Haw. Rev. Stat. § 704-407(2).
[448] *People v. Lang*, 1257; *People v. Lavold*, 988, 995.
[449] *Commonwealth v. Hatch*, 623.
[450] *State v. Gallegos*, 117; *State v. Taylor*, 380.
[451] *State v. Williams*, 72.
[452] *See* Ohio Rev. Code § 2945.39(A).

6. South Carolina

220. Considering that the prosecution must present sufficient evidence to survive a directed verdict, it appears that all elements of a crime (*mens rea* and *actus reus*) must be established.[453]

7. West Virginia

221. The case law makes clear that both *mens rea* and *actus reus* must be established by sufficient evidence.[454]

8. Wisconsin

222. Neither the statute nor the jurisprudence indicates any limitation to the elements that should be considered in assessing whether the evidence shows probable guilt for the charged offence.[455]

G. Limitations on defences

1. Hawaii

223. "No evidence shall be offered at the hearing by either party on the issue of physical or mental disease, disorder, or defect as a defense to, or in mitigation of, the offense charged".[456]

2. Illinois

224. The defence of insanity (underpinning a potential finding of not guilty by reason of insanity) is explicitly permitted.[457] There is no indication of limitations on any other available defence.

[453] S.C. Code § 44-23-440.
[454] *See State v. Gum*, 800-801 (extensive discussion about establishing the mental state of malice as necessary to support the second degree murder charge).
[455] *See generally State v. McCredden*; Wis. Stat. 971.14(1r)(c).
[456] Haw. Rev. Stat. § 704-407(2).
[457] *People v. Waid*, 478; *People v. Rink*, 543.

3. Massachusetts

225. Section 17 permits a defence on the merits "other than the defense of not guilty by reason of mental illness or mental defect", thus limiting the available defences.[458] The basis for this limitation is that adjudicating this defence "would not significantly change the circumstances of an incompetent's confinement, so the use of judicial resources is not warranted".[459]

4. New Mexico

226. The defences of insanity and inability to form specific intent are not permitted at a hearing on the sufficiency of the evidence in New Mexico, even when the charge at issue requires the prosecution to show specific intent.[460] The court has considered this "anomaly" to be part of the "balancing process" woven into the legislation on this kind of hearing.[461]

5. Ohio

227. The statute contains no indication that there are any limitations to the available defences in assessing whether the accused committed the offence charged.[462]

6. South Carolina

228. The relevant statutory provision precludes an accused from presenting the defence of insanity.[463]

7. West Virginia

229. The statute proscribes the defence of not guilty by reason of mental illness.[464]

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[458] Mass. Gen. Laws ch.123 § 17(b).
[459] *Spero v. Commonwealth*, 1018.
[460] *State v. Taylor*, 380-381.
[461] *State v. Taylor*, 381.
[462] *See* Ohio Rev. Code § 2945.39(A).
[463] S.C. Code § 44-23-440.
[464] W. Va. Code § 27-6A-6.

8. Wisconsin

230. Neither the statute nor the jurisprudence indicates any limitation to the defences that may be considered in assessing whether the evidence shows probable guilt for the charged offence.[465]

H. Available dispositions/penalties

1. Hawaii

231. According to the official commentary: "If a valid objection to the continuance of the prosecution can be established without the participation of the defendant, there is no reason not to terminate it".[466] If the court finds in favour of the defence regarding any legal objection, it shall "quash the indictment or other charge, find it to be defective or insufficient, or otherwise terminate the proceedings on the law". "Unless all defects in the proceedings are promptly cured," the court shall "order the accused to be discharged", "order the accused to be committed to the custody of the director of health to be place in an appropriate institution for detention, care, and treatment "or "order the defendant to be released on conditions as the court deems necessary".[467]

2. Illinois

232. According to the Illinois Supreme Court:[468]

> A discharge hearing Š...Ć is an "innocence only" proceeding that results in a final determination of the charges against the defendant only if he is found not guilty, or not guilty by reason of insanity. If the evidence presented at a discharge hearing is sufficient to establish the defendant's guilt, no conviction results. Instead, the defendant is found *not* not guilty. The question of guilt is to be deferred until the defendant is fit to stand trial.

233. According to Section 104-25 of the criminal procedure code, following an acquittal, the court may nonetheless commit the accused to the Department of Human

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[465] *See generally State v. McCredden*; Wis. Stat. 971.14(1r)(c).
[466] Haw. Rev. Stat., Commentary on § 704-407.
[467] Haw. Rev. Stat. § 704-407(3).
[468] *People v. Waid*, 478; *People v. Rink*, 543.

Services.[469] If found not guilty by reason of insanity, further proceedings apply.[470] If the result is not not guilty, the accused may be remanded for further treatment for a period that depends on the seriousness of the charge, with up to five years for first degree murder.[471]

234. At the end of the treatment period, if the accused is found fit or can be rendered fit, trial will proceed.[472] In such a case, transcripts of the testimony given at the discharge hearing may be admitted if the witness has become unavailable.[473]

235. If the accused is not fit at the end of the treatment period, a complex statutory regime applies to determine whether and where he/she shall be civilly committed and subject to a court-monitored treatment plan.[474] The court is required to approve any conditional release or discharge, "for the period of commitment equal to the maximum sentence to which the defendant would have been subject had he or she been convicted in a criminal proceeding".[475]

3. Massachusetts

236. If after a Section 17 hearing, "the court finds a lack of substantial evidence to support a conviction it shall dismiss the indictment or other charges or find them defective or insufficient and order the release of the defendant from criminal custody".[476] Such dismissal is not an acquittal.[477]

237. If the accused does not prevail during the Section 17 hearing, he or she remains subject to the complex regime of custody, treatment and review set out in Section 16, under the court's jurisdiction.[478] Under Section 16(f), commitment may

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[469] 725 ILCS 5/104-25(c).
[470] 725 ILCS 5/104-25(d).
[471] 725 ILCS 5/104-25(d)(2).
[472] 725 ILCS 5/104-25(g)(1).
[473] 725 ILCS 5/104-25(e).
[474] 725 ILCS 5/104-25(g)(2).
[475] 725 ILCS 5/104-25(g)(2).
[476] Mass. Gen. Laws ch.123 § 17(b).
[477] *Commonwealth v. Hatch*, 623, n.1.
[478] Mass. Gen. Laws ch.123 § 16, *available at* https://casetext.com/statute/general-laws-of-massachusetts/part-i-administration-of-the-government/title-xvii-public-welfare/chapter-123-mental-health/section-12316-hospitalization-of-persons-incompetent-to-stand-trial-or-not-guilty-by-reason-of-mental-illness-examination-period-commitment-hearing-restrictions-dismissal-of-criminal-charges.

last up to a period equal to the maximum sentence that could have been imposed if the accused had been convicted.[479]

4. New Mexico

238. If the prosecution fails to establish by clear and convincing evidence that the accused committed the violent/sexual crime at issue, the court shall dismiss the case with prejudice.[480] If the court finds that the accused committed a crime but is not "dangerous" (as legally defined), the court shall dismiss the charges without prejudice.[481] In either of these circumstances, the prosecution may initiate civil proceedings that may result in commitment.[482]

239. If the court finds that the accused committed the charged violent/sexual crime and remains dangerous, a statutory regime for criminal commitment, treatment, and monitoring by the court applies.[483] Such detention can last up to the period of the maximum sentence that could have been imposed for the charged crime.[484] This is not punitive, but instead serves a regulatory function that achieves "an appropriate balance between a criminal defendant's liberty interest and the State's compelling interests of caring for its citizens when necessary and protecting its citizenry from danger".[485]

5. Ohio

240. If, following a hearing, the court does not make both required findings (that the accused committed the charged offence, and that the accused is subject to court order by virtue of mental or intellectual disability), the court shall dismiss the indictment and discharge the accused. The prosecution may still launch civil

[479] Mass. Gen. Laws ch.123 § 16(f).
[480] N.M. Stat. § 31-9-1.5(B).
[481] N.M. Stat. § 31-9-1.5(C).
[482] N.M. Stat. § 31-9-1.5(B)-(C).
[483] N.M. Stat. § 31-9-1.5(D).
[484] N.M. Stat. § 31-18-15.1; *State v. Quintana*, 485 P.3d 215, 217(6) (N.M. 2021), *available at* https://casetext.com/case/state-v-quintana-59.
[485] *State v. Spriggs-Gore*, 485-486.

commitment proceedings. The dismissal of charges does not bar further criminal proceedings on the same conduct.[486]

241. If the court makes both required findings, the court retains jurisdiction over the accused and commits him/or subject to a statutory scheme governing commitment, treatment and reporting.[487] The maximum term of commitment cannot exceed the maximum sentence that could have been applied to the charged crime.[488] The purpose of such commitment is not penal, but rather to protect society: "The type of offense charged is a reasonable indicator of the level of the offender's dangerousness".[489]

6. South Carolina

242. If after hearing the accused's defence on the merits the court "finds the evidence is such as would entitle the defendant to a directed verdict of acquittal, it shall dismiss the indictment or other charges".[490] If not, the accused remains subject to the complex statutory regime of commitment/hospitalization and restoration treatment under the court's jurisdiction.[491]

7. West Virginia

243. If the court finds insufficient evidence to support a conviction, "it shall dismiss the indictment and order the release of the defendant from criminal custody", at which point the prosecution may initiate civil commitment proceedings. If the court finds the evidence sufficient to support a conviction, the nature of the crime determines how long the court retains jurisdiction over him "for purposes of placement in a mental institution".[492] The period of detention may not exceed the maximum sentence for the

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[486] Ohio Rev. Code § 2945.39(C).
[487] Ohio Rev. Code § 2945.39(D); *State v. Williams*, 68.
[488] *State v. Williams*, 68-69, 79.
[489] *State v. Williams*, 71, 75-76, 78.
[490] S.C. Code § 44-23-440.
[491] S.C. Code § 44-23-430(A), *available at* https://casetext.com/statute/code-of-laws-of-south-carolina-1976/title-44-health/chapter-23-provisions-applicable-to-both-mentally-ill-persons-and-persons-with-intellectual-disability/article-5-fitness-to-stand-trial/section-44-23-430-hearing-on-fitness-to-stand-trial-effect-of-outcome.
[492] *See State v. Gum*, 796, n.9.

crime for which the court found sufficient evidence.[493] This is consistent with the goals of detention of an unfit accused in these circumstances:[494]

> Instead of seeking retribution or deterrence, our statute is directed at the joint purposes of protecting the public and ensuring appropriate treatment for individuals who are both incompetent and criminally violent. Š…Ć The least restrictive environment is mandated and the potential maximum prison sentence serves as a ceiling, rather than a floor, for the treatment period. And, despite the evidentiary proceeding that offers the defendant an opportunity to demonstrate a defense to the pending criminal charges and the possibility to escape future prosecution upon a finding of insufficient evidence, there is no finding of guilt that may result from such a proceeding.

8. Wisconsin

244. "If the court finds that any charge lacks probable cause, it shall dismiss the charge without prejudice and release the defendant",[495] unless the prosecution moves to hold him/her for 72 hours while the prosecution cures the indictment.[496] The prosecution may still initiate civil proceedings to determine the accused's competency.[497] If the court finds that there is probable cause, the court will proceed to determine the insanity (competency) issue.[498] If the accused is ultimately found incompetent for trial, he becomes subject to a complex statutory regime governing commitment, treatment and reporting to the court.[499]

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[493] *State v. Gum*, 799.
[494] *State v. Gum*, 800.
[495] Wis. Stat. 971.14(1r)(c).
[496] Wis. Stat. 971.31(6), *available at* https://casetext.com/statute/wisconsin-statutes/criminal-procedure/chapter-971-criminal-procedure-proceedings-before-and-at-trial/section-97131-motions-before-trial.
[497] *State v. McCredden*, 670.
[498] Wis. Stat. 971.14; *State v. McCredden*, 670.
[499] Wis. Stat. 971.14(5)-(6).

INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS

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PUBLIC

ANNEX B

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I. ICTY JURISPRUDENCE

Abbreviation	**Full citation**
Blaškić Decision	*Prosecutor v. Blaškić*, Case No.IT-95-14-ARl08*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997
Djukić Order for Provisional Release	*Prosecutor v. Djukić,* Case No.IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release*,* 24 April 1996
Djukić Order Terminating Proceedings	*Prosecutor v. Djukić*, Case No.IT-96-20-A, Order Terminating the Appeal Proceedings, 29 May 1996
Hadžić Decision on Remand on the Continuation of Proceedings	*Prosecutor v. Hadžić*, Case No.IT-04-75-T, Public Redacted Version of 24 March 2016 Decision on Remand on the Continuation of Proceedings, 5 April 2016
Hadžić Order Terminating the Proceedings	*Prosecutor v. Hadžić*, Case No.IT-04-75-T, Order Terminating the Proceedings, 22 July 2016
Mukić et al. AJ	*Prosecutor v. Mukić et al.*, Case No.IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003
Popović Decision Terminating Appellate Proceeding	*Prosecutor v. Popović et al.*, Case No.IT-05-88-A, Decision Terminating Appellate Proceeding in Relation to Milan Gvero, 7 March 2013
Strugar AJ	*Prosecutor v. Strugar*, Case No.IT-01-42-A, Appeal Judgement, 17 July 2008
Tadić AJ	*Prosecutor v. Tadić*, , Judgement, 15 July 1999
Tadić Jurisdiction Decision	*Prosecutor v. Tadić*, Case No.IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Talić Order Terminating Proceedings	*Prosecutor v. Talić*, Case. No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003

II. ICTR JURISPRUDENCE

Abbreviation	Full citation
Bagosora et al. Appeal Decision	*Prosecutor v Bagosora et al.*, No.ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 8 June 1998
Karemera Interlocutory Appeal	*Prosecutor v. Karemera et al.*, Case No.ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006
Rwamakuba Appeal Decision	*Prosecutor v. Rwamakuba*, Case No.ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007
Rwamakuba Remedy Decision	*Prosecutor v. Rwamakuba*, Case No.ICTR-99-44C-T, Decision on Appropriate Remedy, 31 January 2007

III. MECHANISM JURISPRUDENCE

Abbreviation	Full citation
Karadžić AJ	*Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Judgement, 20 March 2019 (public redacted)
Mladić AJ	*Prosecutor v. Mladić*, Case No.MICT-13-56-A, Judgement, 8 June 2021 (public redacted)
Munyarugarama Decision Referral on Appeal	*Prosecutor v. Munyarugarama*, Case No.MICT-12-09-ARI4, Decision on Appeal against the Referral of Pheneas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012

IV. ICTY, ICTR, AND MECHANISM DOCUMENTS

Abbreviation used in Prosecution Submission	**Full citation**
ICTR Statute	Security Council Resolution 955 (1994), S/RES/955, 8 November 1994
ICTY 556 Weekly Update	ICTY Weekly Update – 556 Available at: https://www.icty.org/x/file/Cases/Weeklyupdate/weekly_update_556.pdf
ICTY 580 Weekly Update	ICTY Weekly Update – 580 Available at: https://www.icty.org/x/file/Cases/Weeklyupdate/2010/weekly_update_580.pdf
Mechanism Statute	Security Council Resolution 1996 (2010), S/RES/1966, 22 December 2010
Prosecutor's Regulations No.2	Prosecutor's Regulations No.2 (1999)
Remarks of President Theodor Meron	Remarks of President Theodor Meron, Opening of the Arusha Branch of the Mechanism for International Criminal Tribunals, 2 July 2012 Availabe at: https://www.irmct.org/sites/default/files/statements-and-speeches/120702_president_meron_arusha_en.pdf.
SG Report on ICTY	Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. Doc S/25704, 3 May 1993 Available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf

V. ECCC JURISPRUDENCE

Abbreviation used in Prosecution Submission	Full citation
Ieng Thirith Decision on Immediate Appeal Against Unconditional Release	*Prosecutor v. Ieng Thirith*, Case No.002/19-09-2007ECCC-TC/SC, Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, 14 December 2012

VI. ECTHR JURISPRUDENCE

Abbreviation used in Prosecution Submission	Full citation
Juncal v United Kingdom	European Court of Human Rights, Juncal v United Kingdom, 1950, ETS 005. 132 Application No 32357/09, Admissibility, 17 September 2013 Available at: https://hudoc.echr.coe.int/eng#š%22fulltext%22:Š%22Đ%2232357/09Đ%22%22Ć,%22respondent%22:Š%22GBR%22Ć,%22itemid%22:Š%22001-127161%22Ćć

VII. HUMAN RIGHTS COMMITTEE AUTHORITIES

Abbreviation used in Prosecution Submission	Full citation
Fijalkowska v Poland	Human Rights Committee, Fijalkowska v Poland 1061/2002, Views, CCPR/C/84/D/1061/2002 Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsm4jlsJ3rYgYSihDkHOarQX75yv%2B61V92SuTYgUJCuvLpkjyjlSsDgdAoRf%2FkLku97yL5EjPwdLweNTvRAWYrp2M8UTvmFOq%2B3FQObDAN

	avJrwqgXr39xs9khw4NEsoQJw%3D%3D

VIII. INTER-AMERCAN COURT OF HUMAN RIGHTS

Inter-American Court of Human Rights	
Inter-American Court of Human Rights Advisory Opinion	Inter-American Court of Human Rights, Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States, 17 September 2003 Available at: https://www.unhcr.org/media/29525,

IX. SCHOLARLY PUBLICATIONS

Abbreviation used in Prosecution Submission	**Full citation**
Accused's Right to be Present in South African Law	F. Cassim, "The accused's right to be present: a key to meaning participation in the criminal process", Comparative and International Law Journal of Southern Africa (2005) Vol. 38, No.2 Available at: https://journals.co.za/doi/pdf/10.10520/AJA00104051_63
Unfitness to Plead and Stand Trial in Hong Kong	A. Le Roux-Kemp, "The Fair Trial Rights of Accused Persons Found 'Unfit to Plead and Stand Trial' in the Hong Kong Special Administrative Region", Cambridge Law Review (2019) Vol. IV, Issue 1 Available at : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392864
Unfitness for Trial in New Zealand	S. Baird, "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform", 30 New Zealand Universities Law Review (2022) Available at : Mechanism Legal Databases Westlaw subscription
Unfitness for Trial in Scots Law	G. Maher, "Chapter 5: Unfitness for Trial in Scots Law" in Ronnie Mackay and Warren Brookbanks, eds., *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, 2018)
Unfitness for Trial in South African Law	L. Pienaar, "The unfit accused in the South African criminal justice system: From automatic detention to unconditional release", SACJ 58 (2018) Available at: https://uir.unisa.ac.za/bitstream/handle/10500/25115/Unfit%20accused%20in%20the%20SA%20criminal%20justice%20system.pdf?isAllowed=y&sequence=1
N/A	W. Brookbanks, "Special Hearings Under CPMIPA", New Zealand Law Journal (2009)

Abbreviation used in Prosecution Submission	Full citation
	Available at : Mechanism Legal Databases Westlaw subscription
N/A	W. Brookbanks, "Evidential Sufficiency Hearings: Is Section 10 of the CP (MIP) Act Fit for Purpose?", 29 New Zealand Universities Law Review (2020) Available at : Mechanism Legal Databases Westlaw subscription
N/A	P. Gooding et al., "Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change", 40 Melbourne University Law Review 816 (2017) Available at : Mechanism Legal Databases Westlaw subscription

X. INTERNATIONAL LEGAL INSTRUMENTS

Abbreviation used in Prosecution Submission	Full citation
CRPD	United Nations Treaty Convention, Chapter IV, Human Rights, 15. Convention on the Rights of Persons with Disabilities Available at : https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en
Committee on the Rights of Persons with Disabilities	
Guidelines on Article 14	Committee on the Rights of Persons with Disabilities, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, September 2015, A/72/55 Available at:

Abbreviation used in Prosecution Submission	**Full citation**
	https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/114/97/PDF/G1711497.pdf?OpenElement
General Comment No.1	Committee on the Rights of Persons with Disabilities, General Comment No.1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement
Concluding observations on the Initial Report of Australia	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Australia, 21 October 2013, CRPD/C/AUS/CO/1 Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FAUS%2FCO%2F1&Lang=en
Concluding observations on the Initial Report of Belgium	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Belgium, 28 October 2014, CRPD/C/BEL/CO/1 Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjjHe7ia4QapdfXcn9RXjWGUnLq7lBzf6jZqm5v8d04CHmp7F4CYraPSGkq8DobTcdMA5AUGYfwBkUk1KR%2BYgxpR6t30QEJxpVOnTy2Txov%2F
Concluding observations on the initial report of Croatia	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Republic of the Croatia, 15 May 2015, CRPD/C/HRV/CO/1 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/098/80/PDF/G1509880.pdf?OpenElement
Concluding observations on the initial report of the Czech Republic	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Republic of the Czech Republic, 15 May 2015, CRPD/C/CZE/CO/1

Abbreviation used in Prosecution Submission	Full citation
	Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRPD%2FC%2FCZE%2FCO%2F1&Lang=en
Concluding observations on the initial report of Denmark	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Republic of Denmark, 30 October 2014, CRPD/C/DNK/CO/1 Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsrxgrMqyLrvLrl%2F6hod6mnZ5w6Or5OgmaXjKC%2BkJbNwXf58Tuqzhdo7nnm2ksXJYLVUELVMje6X74w4dYLO91T2%2FW%2Ft8G8g3rUbOPHhh%2F51P
Concluding observations on the initial report of the Dominican Republic	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Republic of the Dominican Republic, 8 May 2015, CRPD/C/DOM/CO/1 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/091/92/PDF/G1509192.pdf?OpenElement
Concluding observations on the Initial Report of Ecuador	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Ecuador, 27 October 2014, CRPD/C/ECU/CO/1 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/192/02/PDF/G1419202.pdf?OpenElement
Concluding observations on the initial report of Germany	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Germany, 13 May 2013, CRPD/C/DEU/CO/1 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/096/31/PDF/G1509631.pdf?OpenElement

Abbreviation used in Prosecution Submission	**Full citation**
Concluding observations on the Initial Report of Republic of Korea	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Republic of Korea, 29 October 2014, CRPD/C/KOR/CO/1 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/193/70/PDF/G1419370.pdf?OpenElement
Concluding observations on the initial report of Mexico	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Mexico, 27 October 2014, CRPD/C/MEX/CO/1 Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskE4iNFvKWCCGr4TiTUdbhp1hRBVKZKZHlLwRNlRdjmM5HXlP6Xo1vIipxOztb9bY7YaCPATa6I3Og%2FSZcx%2BDeSWfDGVkFbiCMhokYTvswk%2F
Concluding observations on the initial report of Mongolia	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Republic of Mongolia, 13 May 2015, CRPD/C/MNG/CO/1 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/096/25/PDF/G1509625.pdf?OpenElement
Concluding observations on the Initial Report of New Zealand	Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of New Zealand, 31 October 2014, CRPD/C/NZL/CO/1 Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?Lang=en&symbolno=CRPD%2FC%2FNZL%2FCO%2F1
General Comment No 35: Liberty and Security of Person	Human Rights Committee, General Comment No 35: Liberty and Security of Person (art. 9), 16 December 2014 Available at: https://digitallibrary.un.org/record/786613?ln=en

Abbreviation used in Prosecution Submission	**Full citation**
International Criminal Court	
ICC Rules of Procedure and Evidence	*International Criminal Court* Rules of Procedure and Evidence Available at: https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf
ICC Statute	Rome Statute of the International Criminal Court, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544 Available at: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf
International Law Commission	
2019 ILC Report	International Law Commission Report on the work of the seventy-first session (2019), Chapter V: Peremptory norms of general international law (jus cogens) Available at: https://legal.un.org/ilc/reports/2019/english/chp5.pdf,
Office of the High Commissioner for Human Rights	
Core International Human Rights Instruments	United Nations Office of the High Commissioner for Human Rights, *The Core International Human Rights Instruments and their monitoring bodies* Available at: https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies

XI. NATIONAL LAW COMMISSIONS' RECOMMENDATIONS

Abbreviation used in Prosecution Submission	**Full citation**
Australian Law Reform Commission 2014 Report	Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, Report 124, August 2014 Available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf
N/A	Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2022) Available at: https://jirs.judcom.nsw.gov.au/public/assets/benchbooks/equality/
N/A	Judicial College of Victoria, *Disability Access Bench Book* (2016) Available at: https://live-jcv-website.pantheonsite.io/eManuals/DABB/index.htm#59523.htm
New South Wales Law Reform Commission 2013 Report	New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences, Report 138 (2013)* Available at: https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-138.pdf
Spanish State Prosecutor Consultation Paper on Mental Insanity	Fiscalía General del Estado, Consulta 1/1989, de 21 de abril, sobre enajenación mental del imputado sobrevenida tras el auto de apertura del juicio oral y antes de la celebración de éste: sus efectos sobre el proceso Available at: https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-Q-1989-00001.pdf

Abbreviation used in Prosecution Submission	**Full citation**
Supreme Court of Queensland Bench Book	Supreme Court of Queensland, Equal Treatment Bench Book, (2016) Available at: https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf
N/A	UK Law Commission, Unfitness to Plead Project website Available at: https://www.lawcom.gov.uk/project/unfitness-to-plead/
UK Law Commission 2010 Consultation Paper	UK Law Commission, *Unfitness to Plead, A Consultation Paper*, CP No 197 (2010) Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/cp197_Unfitness_to_Plead_web.pdf
UK Law Commission 2014 Issues Paper	UK Law Commission , *Unfitness to Plead: An Issues Paper* (2014) Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/unfitness_issues.pdf
UK Law Commission 2016 Report	UK Law Commission, *Unfitness to Plead, Volume 1: Report* (2016) Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/01/lc364_unfitness_vol-1.pdf
UK Judicial College Equal Treatment Bench Book	United Kingdom Judicial College, Equal Treatment Bench Book, 28 February 2018. Available at: https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf
N/A	Judicial Council Committee Note on West's Wisconsin

Abbreviation used in Prosecution Submission	Full citation
	Statutes Annotated 971.14 Available at: Mechanism Westlaw subscription.
Victorian Law Reform Commission 2014 Report	Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Report*, June 2014 Available at: https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Review_of_the_Crimes_Mental_Impairment_and_Unfitness_to_be_Tried_Act_0.pdf

XII. NATIONAL LEGISLATION

Abbreviation used in Prosecution Submission	**Full citation**
Angolan Criminal Code	Código Penal, Lei n. 38/20 de 11 de Novembro 2020 Available at: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/110651/137676/F-933265966/Lei%2038_2020.pdf
Australian Capital Territory Act	Crimes Act 1900 (ACT) Availabe at: https://www.legislation.act.gov.au/a/1900-40
Australian Judiciary Act	Judiciary Act 1903 (Cth) Available at: https://www.legislation.gov.au/Details/C2022C00081
Brazilian Criminal Procedural Code	Código de Processo Penal, Decreto-Lei n. 3689, de 3 de Outubro de 1941 Available at: https://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm
Commonwealth Act	Australian Crimes Act 1914 (Cth) Available at: https://www.legislation.gov.au/Details/C2023C00023
Commonwealth Constitution	Constitution of the Commonwealth of Australia Available at: https://www.legislation.gov.au/Details/C2013Q00005

England and Wales CP(I)A	England and Wales, Criminal Procedure (Insanity) Act 1964, as amended by Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and Domestic Violence, Crime and Victims Act 2004 Available at: *https://www.legislation.gov.uk/ukpga/1991/25*
England and Wales CrimPR 2015	UK, Criminal Procedure Rules 2015 Available at: https://www.legislation.gov.uk/uksi/2015/1490/contents/made
French Code de la sante publique	*Code de la santé publique* Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072665/2023-05-09/.
French CPP	*Code de procédure pénale* Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF
French Loi 174/2008	*Loi n° 2008-174 du 25 février 2008 relative à la rétention de sureté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental* Available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000018162705
French Penal Code	*Code penal* Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF

Guatemalan Criminal Procedure Code	Codigo Procesal Penal de Guatemala, Decreto Numero 51-92 Available at: http://www.cicad.oas.org/fortalecimiento_institucional/legislations/pdf/gt/decreto_congresional_51-92_codigo_procesal_penal.pdf
Guatemalan Penal Code	Codigo Penal de Guatemala, Decreto Numero 17-73 Available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GTM_codigo_penal.pdf
HK Criminal Procedure Ordinance	Hong Kong, Criminal Procedure Ordinance (Cap.221) (Amended 5 of 1924 s. 6) (Replaced 24 of 1950 Schedule) ("C") Available at: https://www.elegislation.gov.hk/hk/cap221?xpid=ID_1438402850320_001
HK Mental Health Ordinance	Hong Kong, Mental Health Ordinance (Cap.136) (Replaced 81 of 1997 s. 2) (Format changes—E.R. 4 of 2019) Available at: https://www.elegislation.gov.hk/hk/cap136!en?xpid=ID_1438402702868_001
Ireland Criminal Law Insanity Act	Republic of Ireland, Criminal Law Insanity Act, Number 11 of 2006 Available at: https://www.irishstatutebook.ie/eli/2006/act/11/enacted/en/pdf
Mass. Gen. Laws ch.123 § 17	Massachusetts General Laws, Chapter 123, § 17. Available at: https://casetext.com/statute/general-laws-of-massachusetts/part-i-administration-of-the-government/title-xvii-public-welfare/chapter-123-mental-health/section-12317-periodic-review-of-incompetence-to-stand-trial-petition-hearing-continued-treatment-defense-to-charges-release

Mozambican Criminal Code	Lei n.24/2019, de 24 de Dezembro Availabe at: https://reformar.co.mz/documentos-diversos/lei-24-2019-lei-de-revisao-do-codigo-penal.pdf
New South Wales Act	Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) Available at: https://legislation.nsw.gov.au/view/html/inforce/current/act-2020-012#pt.4-div.3
Northern Ireland Order	Mental Health (Northern Ireland) Order 1986 Available at: https://www.legislation.gov.uk/nisi/1986/595
Northern Territory Act	Criminal Code Act 1983 (NT) Available at: https://legislation.nt.gov.au/en/Legislation/CRIMINAL-CODE-ACT-1983
NZ CPMIP	New Zealand, Criminal Procedure (Mentally Impaired Persons) Act 2003 Availabe at: https://www.legislation.govt.nz/act/public/2003/0115/latest/DLM223818.html
Portuguese Criminal Code	Código Penal, Decreto-Lei n. 48/95, Diário da República n.º 63/1995, Série I-A de 1995-03-15 Available at: https://dre.pt/dre/legislacao-consolidada/decreto-lei/1995-34437675

Scotland CPA	Criminal Procedure (Scotland) Act 1995, UK Public General Acts, 1995 c.46 Available at: https://www.legislation.gov.uk/ukpga/1995/46/data.pdf
Spanish Criminal Procedure Code	Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal Available at: https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036
Spanish New Criminal Procedure Code Draft	Anteproyecto de Ley de Enjuiciamiento Criminal Available at: https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf
Spanish Penal Code	Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal Available at: https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444
South African Amendment Act	Criminal Matters Amendment Act 68 of 1998 Available at: https://www.gov.za/documents/criminal-matters-amendment-act
South African Criminal Procedure Act	Criminal Procedure Act 51 of 1997 Available at: https://www.gov.za/documents/criminal-procedure-act-1977-26-mar-2015-1224
South African Mental Care Act	Mental Health Care Act 17 of 2002 Available at: https://www.gov.za/documents/mental-health-care-act
South Australian Act	Criminal Law Consolidation Act 1935 (SA) Available at:

	https://www.legislation.sa.gov.au/lz?path=%2FC%2FA%2FCRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935
St. Tome and Principe Criminal Code	Lei n.6/2012, de 6 de Agosto Available at: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/113412/142196/F1509673893/L%2015%2021.pdf
Tasmanian Act	Criminal Justice (Mental Impairment) Act 1999 (Tas) Available at: https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-021
US Model Penal Code	American Law Institute Model Penal Code (1962), § 4.06, alternative subsection (3) Available at: https://archive.org/details/ModelPenalCode_ALI/page/n85/mode/1up
725 ILCS 5/104-25	Illinois Compiled Statutes, § 104-25 Available at: https://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=072500050K104-25
Victorian Act	Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic) Available at: https://content.legislation.vic.gov.au/sites/default/files/2023-03/97-65aa080-authorised.pdf
Victorian Criminal Procedure Act	Criminal Procedure Act 2009 (Vic) Available at: https://content.legislation.vic.gov.au/sites/default/files/2023-03/09-7aa093-authorised.pdf

XIII. NATIONAL JURISPRUDENCE

Abbreviation used in Prosecution Submission	**Full citation**
Australia	
R v. Aller	*R v. Aller* (2015) NSWSC 178 Available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2015/178.html
R v. Adler	*R v. Ardler* [2004] ACTCA 4 Available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTCA/2004/4.html,https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTCA/2004/4.html
R v. Morris	*R v. Morris* [2002] ACTSC 12 Available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTSC/2002/12.html
R v. Sharrouf (No.2)	*R (Cth) v. Sharrouf* (No 2) (2008) NSWSC 1450 Available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2008/1450.html
R v. Thomas (No.2)	*R v. Thomas (No 2)* (2015) NSWSC 561 Available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2015/561.html
R v. Zvonaric	*R v. Zvonaric* (2001) NSWCCA 505, available at https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCCA/2001/505.html
Subramaniam v. R	*Subramaniam v. R* (2004) HCA 51 Available at: https://www.austlii.edu.au/cgi-

Abbreviation used in Prosecution Submission	Full citation
	bin/viewdoc/au/cases/cth/HCA/2004/51.html
	France
Cour de Cassation Criminelle	France: Cour de cassation, Chambre Criminelle, 5 septembre 2018, 17-84.402, Publié au bulletin Available at : *https://justice.pappers.fr/decision/5ef758c36cd3967df343c97378d52b61*
	Hong Kong
HKSAR v. Ng Mei Lan	*HKSAR v. Ng Mei Lan*, 2009 WL 313779 (CA), [2009] 3 HKLRD 193 Available at: Mechanism Legal Databases Westlaw subscription
HKSAR v. Shek Ka Chun	*HKSAR v. Shek Ka Chun*, 2019 WL 70019 (CFI), [2019] HKCFI 1323 Available at: Mechanism Legal Databases Westlaw subscription
	Ireland
DPP v. FX	*People (DPP) v. FX*, [2022] IECA 86, [2022] 3 JIC 3102, Court of Appeal Record Number: 65/2015, 31 March 2022 Available at: https://www.courts.ie/acc/alfresco/3b1f2d4a-d810-4cf5-b86a-be645d6b3518/2022_IECA_86.pdf/pdf#view=fitH.
	South Africa
De Vos case	*De Vos* NO et al. v Minister of Justice and Constitutional Development (2017) 59 SA Crime Q 39

Abbreviation used in Prosecution Submission	Full citation
	Available at: http://www.saflii.org/za/cases/ZACC/2015/21.html
United Kingdom	
R v Antoine	*R v. Antoine* [2001] 1 AC 340 Available at: https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd000330/ant-1.htm.
R v Chal	*R v. Chal*, [2007] EWCA 2647 Available at: https://www.casemine.com/judgement/uk/5a8ff7a760d03e7f57eb0db4
R v Grant	*R v Grant* [2001] EWCA Crim 2611 Available at: https://www.casemine.com/judgement/uk/5a8ff7aa60d03e7f57eb0ffb
R v Norman	*R v. Norman*, [2008] EWCA Crim 1810, [2009] 1 Cr App R 192 Available at: https://www.casemine.com/judgement/uk/5b46f1f82c94e0775e7ef2c2
R v Wells and Others	*R v. Wells and others* [2015] EWCA Crim 2, 12, 15 [2015] 1 WLR 2797 Available at: https://www.casemine.com/judgement/uk/5a8ff6fc60d03e7f57ea54dc
Queen v Morrison	*The Queen v Samuel Morrison* [2018] NICC 19 Available at: https://www.casemine.com/judgement/uk/638138480cef1833440478bc

Abbreviation used in Prosecution Submission	Full citation
United States	
Supreme Court of the United States of America	
Jackson v. Indiana	*Jackson v. Indiana*, 406 U.S. 715 (1972) Available at: https://casetext.com/case/jackson-v-indiana-8212-5009
Hawaii	
Haw. Rev. Stat. § 704-407	Hawaii Revised Statutes, § 704-407 Available at: https://casetext.com/statute/hawaii-revised-statutes/division-5-crimes-and-criminal-proceedings/title-37-hawaii-penal-code/chapter-704-penal-responsibility-and-fitness-to-proceed/section-704-407-special-hearing-following-commitment-or-release-on-conditions
Illinois	
People v. Waid	*People v. Waid*, 221 Ill.2d 464, 469 (2006). Available at: https://casetext.com/case/people-v-waid-3
People v. Rink	*People v. Rink*, 97 Ill.2d 533, 543 (1983). Available at: https://casetext.com/case/people-v-rink.
People v. Williams	*People v. Williams*, 312 Ill. App. 3d 232 (Ill. App. Ct. 2000). Available at: https://casetext.com/case/people-v-williams-4555.
People v. Lavold	*People v. Lavold*, 262 Ill. *App*. 3d 984 (Ill. App. Ct. 1994). Available at:

Abbreviation used in Prosecution Submission	Full citation
	https://casetext.com/case/people-v-lavold.
People v. Lang	*People v. Lang*, 805 N.E.*2d* 1249 (Ill. App. Ct. 2004). Available at: https://casetext.com/case/people-v-lang-59
Massachusetts	
Commonwealth v. Hatch	*Commonwealth v. Hatch*, 438 Mass. 618 (Mass. 2003). Available at: https://casetext.com/case/commonwealth-v-hatch.
Spero v. Commonwealth	*Spero v. Commonwealth*, 424 Mass. 1017 (Mass. 1997). Available at: https://casetext.com/case/spero-v-commonwealth.
New Mexico	
N.M. Stat.	New Mexico Statutes (1978), Chapter 31: Criminal Procedure, Article 9 Available at: https://casetext.com/statute/new-mexico-statutes-1978/chapter-31-criminal-procedure/article-9-mental-illness-and-competency
State v. Gallegos	*State v. Gallegos*, 111 N.M. 110 (N.M. Ct. App. 1990). Available at: https://casetext.com/case/state-v-gallegos-36?.
State v. Quintana	*State v. Quintana*, 485 P.3d 215, 217 (N.M. 2021). Available at: https://casetext.com/case/state-v-quintana-59.
State v. Rotherham	*State v. Rotherham*, 122 N.M. 246 (N.M. 1996). Available at:

Abbreviation used in Prosecution Submission	Full citation
	https://casetext.com/case/state-v-rotherham
State v. Spriggs-Gore	*State v. Spriggs-Gore*, 133 N.M. 479, 481 (N.M. Ct. App. 2003). Available at: https://casetext.com/case/state-v-spriggs-gore-1
State v. Taylor	*State v. Taylor*, 129 N.M. 376, 380 (N.M. Ct. App. 2000). Available at: https://casetext.com/case/state-v-taylor-1864
South Carolina	
S.C. Code § 44-23-440	South Carolina Code, § 44-23-440 (2022). Available at: https://casetext.com/statute/code-of-laws-of-south-carolina-1976/title-44-health/chapter-23-provisions-applicable-to-both-mentally-ill-persons-and-persons-with-intellectual-disability/article-5-fitness-to-stand-trial/section-44-23-440-finding-of-unfitness-to-stand-trial-shall-not-preclude-defense-on-merits
S.C. R. Crim. P.19(a)	South Carolina Rules of Criminal Procedure, Rule 19(a). Available at: https://casetext.com/rule/south-carolina-court-rules/south-carolina-rules-of-criminal-procedure/trial/rule-19-directed-verdict.
West Virginia	
W. Va. Code § 27-6A-6	West Virginia Code, § 27-6A-6. Available at: https://casetext.com/statute/west-virginia-code/chapter-27-mentally-ill-persons/article-6a-competency-and-criminal-responsibility-of-persons-charged-or-convicted-of-a-crime/section-27-6a-6-judicial-hearing-of-defendants-defense-other-than-not-guilty-by-reason-of-mental-illness.

Abbreviation used in Prosecution Submission	Full citation
State v. Gum	*State v. Gum*, 764 S.E.2d 794 (W. Va. 2014). Available at: https://casetext.com/case/state-v-gum-4?.
Wisconsin	
State v. McCredden	*State v. McCredden*, 33 Wis. 2d 661, 669-671 (Wis. 1967). Available at: https://casetext.com/case/state-v-mccredden.
Wis. Stat. 971.14(1r)(c)	Wisconsin Statutes, Section 971.14(1r)(c). Available at: https://casetext.com/statute/wisconsin-statutes/criminal-procedure/chapter-971-criminal-procedure-proceedings-before-and-at-trial/section-97114-effective-until412022competency-proceedings.
Ohio	
Ohio Rev. Code § 2945.39	Ohio Revised Code, § 2945.39. Available at: https://casetext.com/statute/ohio-revised-code/title-29-crimes-procedure/chapter-2945-trial/section-294539-expiration-of-the-maximum-time-for-treatment-for-incompetency.
State v. Williams	*State v. Williams*, 126 Ohio St. 3d 65, 68 (Ohio 2010). Available at: https://casetext.com/case/state-v-williams-5257.

XIV. OTHER

Abbreviation used in Prosecution Submission	Full citation
N/A	The Guatemala Genocide Trial Resumes, International Justice Monitor, 20 October 2017 Available at: https://www.ijmonitor.org/2017/10/the-guatemala-genocide-trial-resumes/
	Court Orders Ríos Montt and Rodriguez Sanchez Retrial to Begin in January 2016, International Justice Monitor, 26 August 2015 Available at: https://www.ijmonitor.org/2015/08/court-orders-rios-montt-and-rodriguez-sanchez-retrial-to-begin-in-january-2016/
BBC Article on new Alzheimer's drug	BBC, New Alzheimer's drug slows disease by a third Available at: https://www.bbc.com/news/health-65471914

INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS

Case No. MICT-13-38-T

THE PROSECUTOR
v.
FÉLICIEN KABUGA

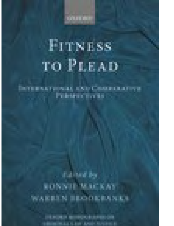
PUBLIC

ANNEX C

BOOK OF AUTHORITIES

BOOK OF AUTHORITIES FOR PROSECUTION SUBMISSION

1. G. Maher, "Chapter 5: Unfitness for Trial in Scots Law" in Ronnie Mackay and Warren Brookbanks, eds., *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, 2018)



Fitness to Plead: International and Comparative Perspectives
Ronnie Mackay (ed.), Warren Brookbanks (ed.)
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CHAPTER

5 Unfitness for Trial in Scots Law

Gerry Maher Author Notes

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Abstract

The plea of unfitness for trial in Scots law advances the goal of ensuring that criminal trials should not proceed against anyone whose mental or physical condition makes it unsuitable for them to be subject to such a process. This chapter traces the development of the common law version of the plea, namely insanity in bar trial. It then examines more recent reforms, which considered the plea in the context of human rights and comparative law. These reforms have resulted in statutory formulation of the three key issues, namely the test or definition of the plea, the procedures to be used in determining the existence of the plea in a particular case, and the disposal options appropriate for people who have been found to be unfit for trial.

Keywords: unfitness for trial, Scots law, fitness to plead, examination of facts, burden and standard of proof, law reform, insanity defence, mental health disposals unfitness for trial, Scots law, fitness to plead, examination of facts, burden and standard of proof, law reform, insanity defence, mental health disposals

Subject: Comparative Law

Introduction

The nature and name of the plea

Under the current law of Scotland there is a defence known as unfitness for trial. Scots law has long recognised a defence or plea that, given the mental or physical characteristics of an accused person, it would be inappropriate to subject the accused to a criminal trial. This plea is one of a more general category of defences in Scots law known as pleas in bar of trial. Following Robinson's classifications of criminal law defences, these pleas have been described as non-exculpatory defences, which arise where, despite the possible existence of proof of an accused's guilt, there are specific reasons why the state should be prevented from bringing the accused to trial.[1]

In respect of this particular plea in bar of trial, Chalmers and Leverick have identified a number of rationales, including minimising the risk of wrongful conviction and protecting the moral dignity of the criminal process.[2]

At common law the plea was known as insanity in bar of trial. But it has also been referred to as unfitness to plead, presumably as an unconscious borrowing from English law, though English law had played virtually no role in the development of Scots law.[3] Furthermore, the Scottish plea has always focussed on the trial process as a whole rather than the particular stage of pleading,[4] and statutory ↳ provisions have for a long time referred to a person being insane so that their trial cannot proceed.[5]

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In *Bain v Smith*[6] it had been recorded in the court minutes of procedure that the court had found the accused 'unfit to plead' in terms of the relevant statute and had made an order committing the accused to the State

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Hospital (a maximum-security hospital). It was argued that as the statute contained the expression 'insane so that the trial cannot proceed', the failure to use this terminology invalidated the making of the hospital order. The Appeal Court rejected this argument, holding that, as the phrase used in the minutes specifically referred to the statute, this was a finding of insanity in bar of trial.

Frequency

There is very little by way of data on how frequently the plea is resorted to.

A passage in the standard practitioner text on criminal procedure,[7] in referring to the report of the Thomson Committee (published in 1975) as '25 years ago', states that pleas of unfitness to plead by reason of insanity were more frequent then than they are nowadays, but no source is given for this proposition.

A research project did examine the provisions of the Criminal Procedure (Scotland) Act 1995 relating to insanity as a plea in bar of trial and as a substantive defence over a two-year period between 1996 and 1998.[8] During the period the researchers became aware of fifty-two cases. Thirty-seven of these cases involved the plea in bar, twelve the insanity defence, and in a further three the plea in bar and the defence were both raised. Of the thirty-seven cases involving only the plea in bar, the accused was found insane in bar of trial in twenty-nine, and after the resulting examinations of facts, the facts were established in twenty-two of these cases. Of the three cases involving both the plea and the defence, the accused in all cases was found to be both insane in bar of trial and at the time of the offence.

Current law on unfitness for trial

There are three main strands to the law on unfitness for trial: first, the test or criteria to be applied in establishing the plea; secondly the procedure to be used in proving and determining the plea; and thirdly the modes of disposal available once a plea has been proved.

The law on the last two of these issue stems from the Criminal Justice (Scotland) Act 1995 and the test for the plea is to be found in the Criminal Justice and Licensing (Scotland) Act 2010. The relevant provisions of these Acts are to be found in the Criminal Procedure (Scotland) Act 1995, which sets out a statutory code on criminal procedure.

Development of the Plea

There is very little case law of the development of the plea of insanity in bar of trial but there is useful discussion in the writings of the two major writers on Scots criminal law, David Hume in the eighteenth century and the contemporary writer, Sir Gerald Gordon.

Early discussion of the plea was characterised by several factors which have continued through to more modern times: first, a tendency to group consideration of the plea with that of insanity as a substantive defence (whilst recognising their different functions and rationales), and secondly greater focus on the possibly unjust outcomes rather than formulation of the test or definition of the plea. For example, Hume considers the 'miserable defence' of idiocy or insanity with a detailed survey of the definition of insanity as a defence, as well the effects of the acquittal where the defence is sustained.[9] In a long footnote at the end of his discussion he refers to the case of *HM Advocate v Jean Campbell or Bruce* (1817; a charge of murdering her three-year-old child), which he said was the first case in Scotland that addressed the question 'whether a person born deaf and dumb, is an object of trial and punishment'. Evidence had been obtained by the Crown that the accused knew right from wrong, was aware that punishment was a consequence of guilt, and could properly conduct herself in the ordinary affairs of life. Furthermore, there was evidence that, with the help of an interpreter, she could communicate her thoughts, fully understood the charge against her, and could provide an innocent explanation of her child's death.[10]

There have been some case-law developments since Hume that are worth noting. In *HM Advocate v Brown*,[11] there were references to an accused being incapable of pleading, which was noted as being the first step in a person being put on trial. The court noted that the procedure to be used was either for the court to hold a preliminary inquiry as to the accused's mental state before calling on him to plead or letting the accused plead and leaving to the jury the issue of whether he was capable of pleading. In this case the second course

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was followed. In this situation three possible issues were to be considered by the jury once all the evidence had been led.[12] The first was whether the accused was currently insane. If they held that to be the case, no other issues needed to dealt with. But if the accused was not currently insane the jury had to consider whether he had committed the crime. If the answer to that was no, then that was the end of the matter. But if the jury found that the accused had committed the crime, then a third question arose as to whether he was insane at the time of doing so.

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Two aspects of this procedure should be noted. The first is that two different aspects of insanity were being presented to the jury, with the possible consequence of the different tests being confused. The accused pleaded not guilty and the case proceeded to a trial before a jury. In his charge to the jury the trial judge mentioned the accused's medical condition (epilepsy) as going both to insanity in bar of trial[13] and to insanity as a defence.[14]

Secondly, the question whether the accused had committed the acts constituting the crime charged could arise only if the accused was not found to be insane in bar of trial, but there was no procedure for considering this issue where there was such a finding.[15]

In *HM Advocate v Wilson*,[16] where the accused was a deaf-mute and also described by medical witnesses as not of normal intellect, the court accepted that a person could be insane for the purpose of the plea in bar of trial even though he did not suffer from mental alienation. In this case, although the trial judge had made preliminary inquiries (on his own initiative) as to the state of the accused's health, no plea in bar had been raised and defence counsel requested that the case proceed before a jury rather than the issue of insanity in bar of trial be decided by a judge. The court accepted this submission on the basis that fuller evidence on the issue might be led at a trial than was presented to the judge as part of his preliminary inquiry. Although it is not made explicit in the report of the case, the jury held that the accused was not insane and found him not guilty.

Similar to Hume's account, Gerald Gordon, in his magisterial work on substantive Scots criminal law, added a section on insanity in bar of trial to his discussion of insanity as a defence.[17] He noted that although the plea was procedural in nature, it was worth discussing because most cases of insanity were dealt with by the plea, a characteristic which explained the lack of development of the defence in Scots law. His discussion deals first with the test for the plea, which he refers to as fitness to plead. He states the general principle as being that 'everyone is entitled to a fair trial'. In the case of unfitness based on insanity, he notes that the usual practice is for the courts simply to accept the evidence of medical experts but that in rare cases the matter is left for the jury to decide. He also considers cases where the plea is not based on insanity, as with amnesia of what occurred at the time of offence (which the courts have rejected as a basis for the plea) and the physical condition of deaf-mutism (which could found the plea where the accused had no means—such as an interpreter—of communication during a trial process).

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The second broad issue is the effect of a finding of unfitness. A legal effect is that the plea in bar of trial does not, in Scottish terminology, 'thole the assize'; that is, it does not act as *res judicata* to prevent a later trial if the condition underlying the plea is cured or otherwise disappears.[18] But his main focus is on the treatment of persons who have been found unfit to plead. At the time of writing his book, the usual effect was the making of a court order for the accused to be detained in the State Hospital, release from which could be made only by order of the Secretary of State. Gordon noted two fundamental problems with this scenario. The first was that the plea applied to 'insanity' in bar of trial, but where it was based on a physical condition, the effect was that the accused was deemed to be insane and was subject to compulsory measures under mental health legislation, a situation he described as 'highly artificial if not indeed ludicrous'. The second was that an accused could be subject to such an order without there being any proof that he committed the criminal acts he was charged with.[19]

He concluded his discussion with two brief proposals for change: first, different forms of detention for persons whose condition was not insanity but which might lead to repetition of dangerous behaviour; and, secondly, a requirement for the Crown to set a prima facie case against the accused before he could be detained in a hospital.

Accordingly, by the time of Gordon's book Scots law had developed on certain aspects of both the nature of the test for the plea in bar and the consequences of the plea being established. It was also accepted that there were serious deficiencies with the law. But Gordon was to play a key role in bringing change and

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modernisation to this topic, for he was a member of a departmental committee which made a wide-ranging review of Scots criminal procedure.[20]

The Thomson Committee picked up many of the points made by Gordon in his book.

In terms of the formulation of the test for the plea in bar it noted that the criterion of distinguishing between right and wrong, which was mentioned by Hume, had disappeared and the key issue was whether the accused could properly instruct his p. 86 ↳ defence.[21] This is of interest as separating out the plea in bar from the defence. The Committee suggested a test for the plea as:[22]

> Is the accused incapable by reason of mental disorder (including deficiency) of understanding the substance of the charge and the proceedings and of communicating adequately with his legal advisors?

The Committee noted that the advice given to them by psychiatrists was that the effect of such a test would be that only persons with severe mental disorder would be found unfit for trial.

As for procedural issues, the Committee noted objections to any change on the basis that the present approach worked well in practice, and in particular it was only in very rare cases that a person committed as a consequence of the plea complained that he had not committed the act charged. It was also the general practice of the Crown not to raise criminal proceedings in the absence of sufficiency of evidence, which in Scots law tended to mean corroboration of the Crown case.

The Committee was unimpressed with these arguments and took a principled objection to there being any possibility that someone could be made subject to compulsory detention under mental health law where there had been no proof that he had committed the acts charged against him.[23]

The Committee set out a detailed recommendation on the new procedure for determining the factual basis of the charge against the accused. The first question was whether the accused's condition meets the test for the plea in bar of trial. If it does, there would follow a limited type of inquiry, rather than a full trial, to establish the facts. The procedure envisaged for this inquiry was that the Crown would lead evidence. It would be a matter of judgment for the defence on how they would test the Crown case, for example cross-examination of the Crown evidence or leading defence evidence. But the defence would not be allowed to make any concession in respect of evidence. The judge (sitting without a jury) would make findings of fact established 'to his satisfaction', but the Committee did not specify which standard of proof was to apply. How the judge would then deal with these findings was not made entirely clear.

The Committee took the view that in most cases a person who was insane in bar of trial would probably have been insane at the time of the relevant offence. This view is not explored or explained, but the conclusion drawn is that the new procedure for determining the facts should allow for the consideration of any question of insanity as a defence. Where the facts showed that the accused committed the criminal act, the judge would then go on to consider whether the accused was insane at the time of the act, a procedure which would call for consideration of further evidence. Whether or not the defence applied, the court would order the detention of the accused in an appropriate hospital.

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If the findings of fact indicated that the accused did not commit the act, the judge would order the release of the accused or a remit to a hospital for assessment for possible detention under the non-criminal provisions of the mental health legislation.

So, by the mid-1970s problems (with some proffered solutions) had been identified with the three core elements of the plea in bar of trial, namely the test for the plea, the procedure in establishing it, and the disposal consequences of the plea being upheld.

There was little development since the time of the Thomson Report until the legislative intervention by the Criminal Procedure (Scotland) Act 1995, but there have been some subsequent reported decisions.

In *Stewart v HM Advocate*,[24] a case decided after the introduction of the new procedure for determining the plea in bar, the trial judge considered psychiatric evidence at a preliminary diet in respect of an accused who was mentally handicapped, had a low intelligence, and had a short concentration span. The judge accepted that there might be problems in the accused's understanding of the nature of the presentation of evidence in

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a trial, but following the decision in *HM Advocate v Wilson*,[25] the accused was able to instruct his counsel and to follow the proceedings against him and therefore was not insane in bar of trial.

The case is interesting as involving the test for the plea in bar of trial. A submission was made for the accused that as the range of disposal options following a finding of insanity in bar of trial had been broadened by the 1995 Act, a wider interpretation of what constituted insanity for this purpose should be adopted, but the trial judge pointed out that a change to the disposal regime carried no implication for the separate issue of the basis of the plea. A further submission was made by the Crown that the test for insanity in bar of trial was the same as that for the defence, and as the accused in this case had no alienation of reason (a key element of the then defence of insanity), it followed that there could be no finding that he was insane in bar of trial. The trial judge held that this submission was without foundation and pointed out that there were authorities going back to Hume to the effect that the tests for the plea in bar and the defence were different.

In *McLachlan v Brown*,[26] a plea in bar of trial was lodged on the basis that the accused had a mental impairment, which the defence claimed was a different plea from insanity in bar of trial. However, the judge held that the term 'insanity' in this context extended beyond mental illness and included mental impairment and handicap.[27]

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Procedure in Dealing with the Plea of Unfitness for Trial

Determining the plea

The decision whether an accused person falls within the scope of the plea in bar of trial is made by the court, which takes place during a preliminary hearing before a trial has started. Where the issue of unfitness is raised during a trial itself, proceedings are stopped to determine that issue, but here again the question is a matter for the judge, and does not involve a jury. It is not a barrier to deciding the issue of unfitness, either before or during a trial, that the question of the accused's unfitness has been considered earlier and the accused at that stage was found not to be unfit. A finding that an accused is unfit for trial must be raised before a trial has concluded by a verdict being returned. In *Murphy v HM Advocate*,[28] the accused was found guilty of rape, but during the pre-sentencing process doubts arose about his mental fitness to understand that process. The question then arose whether the accused had been fit to stand trial. The appeal court heard evidence from psychiatric experts and concluded that it was more probable than not that the accused had been unfit for his earlier trial, and the conviction was quashed.[29]

Where the possibility of the accused being unfit for trial has been raised but requires further investigation, the case can be adjourned to allow for examination of the accused's mental or physical condition.

The hearing on unfitness may proceed in the absence of the accused if it is not practicable or appropriate for him to be present, but this step must be agreed to by the accused or those acting on his behalf.[30]

The exact evidence relevant to the issue of fitness is variable, but in almost all cases the court would require evidence from an appropriate medical expert.[31]

Various medical conditions have been identified as potentially relevant to fitness for trial. Appropriate psychiatric conditions include dementia and other chronic organic conditions, delirium, schizophrenia and related psychoses, severe affective disorders such as mania and depression, and learning disability.[32]

Where a judge makes a finding that the accused is unfit for trial he must state the reasons for so finding.[33]

In *HM Advocate v Ward*,[34] an accused on a murder charge was found unfit for trial. The court noted that a possible consequence of such a finding was that the Crown could end proceedings altogether. This outcome would be appropriate where the accused had not been charged with a serious offence, but this was unlikely in the p. 89 ↳ present case, given the nature of the charge. If it was possible that accused's condition was likely to improve, the Crown could discontinue proceedings for the time being and re-indict the accused when he became fit to stand trial. However if, as in this case, the accused was unlikely to become fit for trial, that option would leave various parties (accused and members of the deceased's family) in a state of limbo for an indefinite period.

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Accordingly, in most cases a finding of unfitness for trial results in the trial diet being discharged and a hearing for an examination of facts is ordered. The accused may then be remanded in custody or released on bail. In addition, if the accused has a mental disorder for which (a) medical treatment would have an effect; and (b) if no medical treatment were provided, there would be a significant risk to his or anyone else's safety or to his health or welfare, the court may make a temporary compulsion order for his detention in a specified hospital.[35]

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The effect of the order is that the accused is detained in a hospital until the conclusion of the examination of facts.

Table 5.1 shows the use of temporary compulsion orders over the period 2010–2016:

Table 5.1 Number of Temporary Compulsion Orders

Order type	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Temporary compulsion order	13	12	17	7	20	19

Source: Mental Welfare Commission for Scotland, *Mental Health Act Monitoring 2015–16* (2016) 27, Table 6.2.

Examination of facts

The examination of facts proceeds as nearly as possible on the basis of the same powers of the court and the rules of evidence and procedure as used in a criminal trial,[36] which presumably means that corroboration is required to prove the prosecution case. The examination should be held immediately following the finding of unfitness for trial. As with the proceedings for determining unfitness, the examination of facts may take place in the absence of the accused if it appears to the court that it is not practicable or appropriate for him to be present and no objection had been made by or on behalf of the accused.[37]

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After hearing evidence, the court must acquit the accused of the charge against him unless two issues have been established.[38] First, the court must be satisfied beyond reasonable doubt that the accused did the act or made the omission constituting the offence with which he has been charged. Secondly, it must be satisfied on the balance of probabilities that there are no grounds for acquitting the accused. Where the court is satisfied on both of these issues, it makes a finding to that effect, but where it is not so satisfied it acquits the accused.[39]

There has been little guidance in the case law on the meaning of these provisions. One interpretation is that the Act is drawing a distinction between the conduct and mental elements of the offence with which the accused is charged, and it is only the former that has to be established beyond reasonable doubt. The absence (or presence) of *mens rea* would be a matter for consideration on the second issue, the lack of a defence which would lead to an acquittal. However, in some cases it is difficult to establish the conduct element without examining an aspect of the accused's mental state. An example is the offence of sexual exposure, which is defined as exposing one's genitals to another person with the purpose of either obtaining sexual gratification or of humiliating, distressing, or alarming that person.[40] It is a better reading of the 1995 Act provisions to hold that such a purpose is something which the court has to find proved beyond reasonable doubt, rather than its absence found on the balance of probabilities.

A further, and more significant, difficulty with this interpretation is that it seems unprincipled to hold that the absence of a defence which would lead to the accused's acquittal should only be established on the balance of probabilities, rather than beyond reasonable doubt.[41] The latter is the standard of proof used in many instances where a defence is an issue at a trial.

This criticism suggests an alternative way of interpreting the provisions in question, although this second approach is less easy to reconcile with the language of the statute. On this view, the Act is replicating the rules on burdens of proof in criminal trials. The first issue identified by the Act requires the prosecution to prove beyond reasonable doubt all of the essential prerequisites of proof of the accused's guilt, which would include disproving any defence which the accused has made an issue for determination. This situation would arise where an accused has satisfied an evidential burden by adducing enough evidence to require that the defence is to be considered. The second issue, of the court being satisfied on a balance of

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probabilities that there are no grounds for acquitting the accused, arises only where the accused has a legal burden of proving a defence.

This interpretation has been suggested in relation to the common law defence of insanity, and its more recent statutory replacement,[42] and in *HM Advocate v Ward*,[43] the judge in an examination of facts accepted it p. 91 would also apply to the plea of ↳ diminished responsibility. However, the same position would apply to any defence where the accused has a legal burden of proof. It follows that where an examination of facts involves a statutory reverse burden, the court will have to determine whether the burden on the accused is a legal or evidential one.[44]

The reference to acts (or omissions) constituting the offence and to acquittal in these provisions gives rise to a further problem. The focus of the examination of facts is on the crime charged on the indictment or complaint, but it is not clear whether an accused can be found guilty on an alternative charge. Consider s 50 of the Sexual Offences (Scotland) Act 2009, which allows for a wide range of alternative verdicts for offences under that Act (eg, common law assault as an alternative to rape). The procedure in s 50 of the 2009 Act refers to a 'trial' in which the jury finds that the accused committed the alternative offence rather than that charged against him, but the question arises as to whether an examination of facts is a trial for this purpose. As noted above, s 55(6) of the 1995 Act states that for an examination of facts, rules of evidence and procedure as well as the 'powers of the court' shall as far as possible be those applicable to a trial, which suggests that findings in relation to alternative verdicts are possible in an examination of facts.[45] So, if an accused is charged with rape, the court in an examination of facts could find that the accused did the act constituting a common law assault. But the issue here is whether this finding involves an 'acquittal' on the charge of rape.

The possibility of a finding of an alternative charge is an important factor in relation to the partial defences of provocation and diminished responsibility in cases of murder. The Scottish Law Commission argued that the common law defence of diminished responsibility would not be considered during an examination of facts because the defence would not be a ground for acquitting the accused.[46] However, it has been argued that this partial defence does result in an acquittal, or at least an implied acquittal, on the charge of murder.[47] But it would be absurd to hold that if the court in an examination of facts finds that there is the basis for the plea of diminished responsibility, it must acquit the accused of murder tout court, without examining the issue of culpable homicide. In any case, the argument about acquittal in cases of partial defences does not accurately capture Scottish legal practice in recording verdicts. Where a partial defence has been established, the verdict which is recorded is guilty of culpable homicide, but there is no verdict of not guilty in respect of the charge of murder. The similar approach is taken with alternative verdicts. So, in the example noted above, the recorded verdict would be that of guilty of assault, but there would be no acquittal recorded in respect of the charge of rape.

If, following an examination of facts, the court does not acquit the accused, this still allows the Crown to re-indict if the accused does later recover. If the accused is p. 92 ↳ acquitted, then criminal proceedings against him come to an end, but he may still be subject to a mental health disposal under civil law.

Special provision is made where the court in an examination of facts finds that the ground for acquitting the accused is that at the time of the conduct he was not criminally responsible in terms of s 51A of the 1995 Act.[48] In these circumstances, the court must state that the acquittal is by reason of that defence.[49]

Appeals

An accused may appeal against a finding that the accused is unfit for trial or the refusal of the court to make such a finding. An appeal can also be made against a finding that the accused committed the act charged or that there were no grounds for acquitting him (including the defence that the accused lacked criminal responsibility—the equivalent of the former insanity defence).[50] The appeal is made to the High Court of Justiciary sitting as a court of appeal where the accused had been charged on indictment, which includes cases where the proceedings were to be tried in the sheriff court. Where the charge was to be tried in summary proceedings, the appropriate appeal court is the Sheriff Appeal Court.

In disposing of an appeal, the appeal court has the power to affirm the decision made in determining unfitness or at the examination of facts, or it can make any other finding or order which the court could have made. Further, the appeal court can remit the case back to that court with directions to be followed.[51]

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An appeal can also be made by the prosecution to the same appeal courts, but only on a point of law.[52] The appeal can be made against a finding that the accused is unfit for trial or an acquittal based on a finding that the accused did not commit the act charged against him or that there was a ground for acquitting (including a finding of the special defence that the accused lacked criminal responsibility).

The powers of the appeal court in disposing of the appeal are broadly the same as those for an appeal by an accused.

The Test for the Plea

The developments in the Criminal Justice (Scotland) Act 1995 dealt with procedures for establishing that an accused committed the acts at the basis of the charge against him and of the disposal consequences if the relevant facts were found. However, the substantive test of what constituted insanity as a plea in bar remained governed by the common law. Reform did come about as a result of a law reform project by the Scottish Law Commission on wider aspects of mental disorder and the criminal p. 93 ↳ law.[53] Although it had long been recognised that the law on insanity (both as a defence and as a plea in bar of trial) and diminished responsibility were in need of modernisation and reform, this project was not part of any of the Commission's programmes of law reform. Rather, the Commission considered these topics as result of a reference from the Scottish Executive (now the Scottish Government). The spur for the reference was a report on civil aspects of mental health law.[54] The Committee which had carried out that review had received evidence from professional witnesses who reported that they had been encountering problems in using the tests for insanity and diminished responsibility. However, as issues of criminal law were beyond the remit of the Committee it recommended that the Scottish Law Commission should examine this area of the law.

It is fair to say that the focus of the Commission's project was insanity as a defence rather than as a plea in bar of trial.[55] The responses to the Commission's consultation paper almost uniformly accepted the proposals in relation to the plea in bar. What is more, the final recommendations were fully implemented by statute but with only a brief consideration of these provisions during the Parliamentary process.[56] Accordingly the Scottish Law Commission's considerations offer a good basis for a full description and interpretation of the current law.[57]

Name of the plea

At common law the plea was known as insanity in bar of trial. As part of its general strategy the Commission wished to get rid of the term 'insanity' in the criminal law as being pejorative and stigmatising in nature. As regards the plea in bar of trial there was a further objection that some of the conditions which the plea covered were physical in nature. As a replacement, the Commission had considered both 'incapacity' and 'disability' but each of these had meanings fixed in other areas of law. It saw advantages in adopting the term 'unfitness', which is widely used in legal systems based on English law, but saw the reference to pleading as too narrow and instead recommended the name as 'unfitness for trial'.

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Nature of the test

As a result of the Commission's recommendations the test is now to be found in s 53 F(1) of the Criminal Procedure (Scotland) Act 1995, which provides that a person is unfit for trial if he or she is incapable, by reason of a mental or physical condition, of participating effectively in a trial. Subsection (2) sets out a list of factors concerning the abilities of the accused which are to be considered in determining whether he or she is unfit for trial in this sense. These are the ability of a person to:

- (i) understand the nature of the charge;
- (ii) understand the requirement to tender a plea to the charge and the effect of such a plea;
- (iii) understand the purpose of, and follow the course of, a trial;
- (iv) understand the evidence that may be given against the person;
- (v) instruct and otherwise communicate adequately with his or her legal representative.

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It is clear that these particular competences are not exhaustive of matters which a court may consider, as the subsection further provides that the court shall also have regard to any other factor which it considers relevant.

The Commission saw the focus on competences of the accused in respect of the trial as developing the approach of the common law. At an earlier stage the test for the plea in bar of trial had used aspects of the test for the defence of insanity, especially the factor of knowing right from wrong. However, by the beginning of the twentieth century the law had developed to stressing aspects of understanding and engaging in the trial process. In *HM Advocate v Brown*,[58] the jury were directed that the plea:

> means insanity which prevents a man from doing what a truly sane man would do and is entitled to do—maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do.

A fuller account on the same lines was the jury direction used in *HM Advocate v Wilson*:[59]

> Now, what exactly is meant by saying that a man is unfit to plead? The ordinary and common case, of course, is the case of a man who suffers from insanity, that is to say, from mental alienation of some kind which prevents him from giving the instructions which a sane man would give for his defence, or from following the evidence as a sane man would follow it, and instructing his counsel as the case goes along upon any point that arises. Now, no medical man says, and no medical man has ever said, that this accused is insane in that sense. His reason is not alienated, but he may be insane [sc in bar of trial] … although his reason is not alienated, if his condition be such that he is unable either from mental defect or physical defect, or a combination of these, to tell his counsel what his defence is and instruct him so that he can appear and defend him; or if, again, his condition of mind and body is such that p. 95 ↳ he does not understand the proceedings which are going on when he is brought into Court upon his trial, and he cannot intelligibly follow what it is all about.

The Scottish Law Commission saw advantages in maintaining this approach of defining the plea in terms of the skills of an accused person arising from his or her involvement in a criminal trial.[60] Moreover, the Commission argued that the statutory formulation of the plea should in addition set out the general rationale of the plea in bar of trial. Such a rationale had been recognised in earlier Scottish cases,[61] which suggested that someone was fit for a trial provided that he or she could both understand and participate in a trial in some meaningful way. The Commission noted ways in which this broader rationale had been expressed in other legal systems, such as the notion of adjudicative competence formulated by the Supreme Court in the United States.[62] Likewise English law had referred to the ability of the accused to 'understand and reply rationally to the indictment'.[63] A further example is the stress in New Zealand law on the 'adequate' nature of an accused's understanding of the trial and its possible consequences, and of his ability to communicate with his lawyers for the purposes of conducting a defence.[64]

These formulations do not differ from each other in substance. Moreover, the Commission had examined the case law of the European Court of Human Rights (ECtHR) on this issue, especially the cases of *Stanford v United Kingdom*[65] and *T and V v United Kingdom*.[66] The Commission saw advantages in Scots law explicitly adopting the general rationale derived from that jurisprudence, which it identified as that of effective participation in the criminal process.[67]

The inclusion of physical factors

The common law recognised that the plea in bar of trial might apply to persons with a physical condition, as opposed to a mental condition, which precluded their ability to use or perform any of the skills which constituted the test for plea.[68] One p. 96 ↳ objection to this extension of the plea was the absurdity involved in labelling such a person as insane, but that issue no longer arises once the plea is given a different name. Indeed, s 53F of the 1995 Act expressly refers to someone being incapable of effective participation in a trial by reason of a mental or physical condition. In many cases involving an accused with a physical disability adaptations can be made to the physical lay-out of the court to allow the accused to better follow the proceedings. Where someone cannot understand the language used in court because of a physical condition, the services of an interpreter should be provided.[69]

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The inclusion of a lack of ability to participate because of a physical condition had previously led to the objectionable outcome that the accused in this situation was liable to be treated in the same way as someone with a mental disorder, which could lead to unlimited detention in the State Hospital. In the present law, any disposal following on from the plea in bar is governed by the mental disorder provisions of the1995 Act. For a person with a physical condition the disposal would almost always be that the court would make no order, but there remains the problem that the accused would still be considered as someone subject to a disposal under criminal mental health law.

Excluded conditions

At common law the plea in bar of trial could not be based on the fact that at the trial the accused was suffering from amnesia about the actings at the basis of the charge against him or her.[70] The court was clear in stressing that the reason for this rule was that this condition did not deprive the accused of the ability to understand or participate in the proceedings. Matters would be different where the accused suffered memory problems during the trial which could interfere with the exercise of the required abilities.

The current law, as recommended by the Scottish Law Commission, expressly embodies a similar exclusion from the scope of the plea.[71] This seems odd, as the condition of amnesia about the facts charged is not an exception to the rule set out in the test for the plea. The test would not, in any case, apply to the condition. It may be that the provision on amnesia was added from an abundance of caution arising from the abolition of the common law on insanity in bar of trial.[72]

It is worthwhile returning to one of the general elements of the test. It is not enough that a person is incapable of participating effectively in a trial; rather that lack of capability must be by reason of a mental or physical condition. This requirement was important for the Commission in explaining that the test they were recommending p. 97 ↳ was not over-inclusive. The Commission was dealing with the objection that there were many reasons why people facing a trial could not fully understand the nature of the proceedings, as with someone with a poor education or a deprived social background. Even the presence of a lawyer might not help if the explanations given to an accused were not communicated in a way that the accused could follow.

The Commission argued that the requirement of a mental or physical condition as the cause of the failure to participate effectively would rule out the application of the plea in bar in these situations. Indeed, the Commission stated that there would have to be a clinically recognised condition at the basis of the plea. But the Commission did not recommend, nor is it now the law in the 1995 Act, that the accused had to have a mental or physical *disorder*, so it is difficult to see why the plea is said to be restricted to medical conditions.

Consider the case where someone with deaf-mutism has problems in following trial proceedings and in communicating with his or her lawyer. It is accepted practice that in this situation an interpreter should assist the accused. But there are other situations where an accused cannot speak the language of a trial. Indeed, Art 6(3)(e) of the European Convention on Human Rights (ECHR) provides the right to a person charged with a criminal offence to have the free assistance of an interpreter if he cannot understand or speak the language used in court. In the curious case of *Mikhailitchenko v Normand*,[73] the accused, a Ukrainian whose language was Russian, was a professional footballer who played for a Scottish club, and was described in court as having little or no understanding of the English language. An interpreter was provided at the trial who spoke Bulgarian but not Russian. The appeal court later found that these proceedings were unfair. Now this case did not involve a plea in bar of trial, but if the problems of language and lack of an interpreter had been raised prior to the start of the trial, then the trial could not have proceeded. Perhaps what would be involved here was some other plea in bar of trial,[74] but nonetheless the re-description of the plea as not being based on insanity may have unwittingly widened the scope of the plea beyond what the Commission had envisaged.

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Burden and standard of proof

At common law, there was little authority on the issues of burden and standard of proof in relation to insanity in bar of trial, but it seemed that the plea could be raised by the accused, by the Crown, and by the court itself.[75] In its consultation paper the Commission had suggested that these matters should be dealt with in the same way as the defence of insanity. The Commission had proposed that in relation to the defence the accused should bear an evidential burden to make the defence an issue and thereafter the Crown should have a legal burden to disprove it beyond ↳ reasonable doubt.[76] A similar proposal was made for the plea in bar of trial, namely that the ultimate burden would be on the Crown to establish an accused's fitness for trial beyond reasonable doubt.

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In response to the points raised during consultation the Commission changed its mind in respect of both the substantive defence and the plea in bar. Unlike the defence, the plea in bar concerned the appropriateness of the entire proceedings, and accordingly the burden of raising and proving the plea should not rest with any one party. Accordingly, the Commission recommended that there should be no change to the common law position, and where the issue of fitness for trial was raised by either party or by the court, the matter would be decided on the basis of all evidence before the court.

As regards the requisite standard of proof, the common law position was probably that insanity in bar or trial had to be proved on the balance of probabilities, even if the issue had been raised by the Crown. The Commission noted that Scots law recognised only two standards of proof, beyond reasonable doubt and on the balance of probabilities. As the issue of the plea in bar did not in itself involve proof of guilt, it recommended that the lower standard of proof should apply to the statutory plea. Section 53F expressly states that the issue of unfitness for trial has to be established on the balance of probabilities, but makes no provision about the burden of proof, presumably on the basis that the common law rule on this matter survives the abolition of the common law plea.

Disposal of Cases after the Examination of Facts

Where an accused has been found unfit for trial and has not been acquitted after an examination of facts, or has been acquitted on the ground of being not criminally responsible, he may be subject to any of the following orders as the court thinks fit:[77]

(1) a compulsion order authorising the detention of the person in a hospital;

(2) a compulsion order and a restriction order;

(3) an interim compulsion order;

(4) a guardianship order;

(5) a supervision and treatment order;

(6) no order.

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It should be noted that these are the same types of disposal applicable in the case of someone acquitted at a trial by reason on lack of criminal responsibility based on mental disorder at the time of the offence.

General criteria: ECHR compliance

The use of at least some of these disposals is subject to the requirements of the ECtHR. Article 5(1) provides for a general right to liberty and security of a person and states that no one 'shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. One of the specified cases is in paragraph (e) of that article, which provides for 'the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants'.

In the leading decision of the ECHR on this provision, *Winterwerp v The Netherlands*,[78] the Court noted that the 'lawful detention' of such persons required that 'no one may be confined as "a person of unsound mind" in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation'.[79]

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Accordingly, to be ECHR compliant, a disposal of a case where someone has been found unfit to plead but not acquitted after an examination of facts (or has been acquitted on the basis of the mental disorder defence) three pre-conditions must be satisfied: (a) there must be a mental condition at the time of making the disposal; (b) the mental condition must be established by medical evidence; and (c) the mental condition requires compulsory detention, including detention in a hospital.

Compulsion order

A compulsion order may be used where the offence which the accused was found to have committed is punishable by imprisonment but not one for which the sentence is fixed by law (ie, murder).[80] The appropriate medical criteria are that:

- the offender has a mental disorder;
- medical treatment which would be likely to prevent the mental disorder from worsening, or to alleviate any of the symptoms of effects of the disorder, is available;
- if no such treatment were provided there would be a significant risk to (a) the health, safety or welfare of the person in question,[81] or (b) the safety of any other person;
- the making of the order in respect of the person in question is necessary.

p. 100 These criteria require medical evidence from two medical practitioners, one of whom is an approved medical practitioner.[82] Both practitioners must agree that the person suffers from the same category of mental disorder and should also provide details of the compulsory measures which are to be set out in the order.

The compulsory measures may be carried out on the person in question in the community, in which case the order will require the person to reside at a specified place and attend for treatment and other services, and to allow access by mental health and other medical officers.

If compulsory powers in the community are not appropriate, the order may require detention in a specified hospital, but the treatment must be such that could only be provided in a hospital and there is a bed available within seven days of the making of the order.[83]

Before making a compulsion order the court must have regard to any alternative way of dealing with the person.

A compulsion order lasts for six months. After the initial period, it may be renewed for a further six months and thereafter can be renewed annually.

Compulsion order with a restriction order

A restriction order is an additional element of a compulsion order, which has the effect that the person may be detained in hospital without limit of time.[84] An order may be made if it appears to the court that it is necessary for the protection of the public from serious harm. In making the order the court must have regard to (a) the nature of the offence which the person was charged with; (b) the antecedents of the person; and (c) the risk that as result of his mental disorder he would commit offences if set at large. The mental disorder should play a substantial part in determining this risk.

Before making the restriction order the court must be presented with oral evidence on this issue from the approved medical practitioner whose evidence was taken into account in respect of the accompanying compulsion order.

The person is detained in hospital until he or she is conditionally or absolutely discharged by the direction of the Mental Health Tribunal for Scotland.[85]

The suspension of detention or transfer of the person to another hospital must be approved by the Scottish Ministers.[86]

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Interim compulsion order

These orders are used where the person in question has been found to have committed an offence which is punishable by imprisonment but not where such a sentence p. 101 is fixed by law (ie, murder).[87] Their purpose is to allow for more information about the person's mental health to be obtained where, because of a significant risk of harm to that person's own health, safety, or welfare or to the safety of other people, there is the possibility that the court will make a compulsion order with an added restriction order. They have been described as allowing for 'a thorough, prolonged inpatient assessment of serious offenders with mental disorder'.[88]

The order can be made on the basis of written or oral evidence from two registered medical practitioners (one of whom must be an approved medical practitioner) that medical treatment is available which would prevent the person's mental disorder worsening or would alleviate the symptoms or effects of the disorder. The person is ordered to be detained in a hospital for up to twelve weeks, which can be extended for further periods of twelve weeks up to a total of one year.

The order comes to end when the court makes a final mental health or penal disposal.

Guardianship order

A guardianship order is appropriate where a person has lost the capacity to make decisions by reason of a mental disorder.

Where the person in question has been found to have committed an offence which is punishable by imprisonment but not where such a sentence is fixed by law (ie, murder), the court may place his or her personal welfare under the guardianship of a local authority (or someone else approved by the local authority).[89]

Before making an order, the court must be satisfied that there are no other means under the 1995 Act which would be sufficient to safeguard or promote the person's interest in his own welfare. There must also be evidence from two medical practitioners (one being an approved medical practitioner) that the person in question is incapable of making decisions about or acting to safeguard or promote his interests in his property, financial affairs, or personal welfare.

A further requirement is that the person in question had earlier been interviewed and assessed by a mental health officer who has given an opinion on the general appropriateness of an order.

Supervision and treatment order

This type of order places the person in question under the supervision of a social worker, requiring the person to comply with instructions given by the social worker and to submit to treatment by a medical practitioner with a view to improving his mental condition.[90] Treatment may include being a non-resident patient at any p. 102 place or institution specified in the order, but an order cannot require the person to be a resident patient in a hospital. An order cannot be made where the person does not have a mental condition. An order can be made for any period up to three years.

To make this order the court must be satisfied that, having regard to all the circumstances of the case, this would be the most suitable means of dealing with the person. The court must also be satisfied that the person's mental condition requires and may be susceptible to treatment but that it would not warrant the making of a compulsion order (with or without a restriction order), nor a guardianship order. The evidence on these mental condition issues must be given by two or more approved medical practitioners.

The court has power to amend an order on the basis of a medical report indicating that (a) the treatment should continue beyond the period of the order; (b) the person needs different treatment; (c) the person is not susceptible to treatment; or (d) the person does not require further treatment.

The order may be revoked where it appears to the court, in light of circumstances since the making of the order, that it would be in the interests of the health or welfare of person, to revoke it.

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Use of disposals

Table 5.2 shows the use of these various orders over the period 2010–2016. However, these figures are combined totals for person acquitted by reason of the mental disorder defence as well as those found unfit for trial and not acquitted after an examination of facts.

Table 5.2 Use of Disposal Orders over the Period 2010–2016

Order type	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Compulsion order	8	8	11	15	21	24
Compulsion order—community	1	0	0	1	0	0
Compulsion order with restriction order	0	4	4	8	7	3
Guardianship	0	1	0	0	0	1
Supervision and treatment order	0	0	0	0	1	0

Source: Mental Welfare Commission for Scotland, *Mental Health Act Monitoring 2015–16* (2016) 27, Table 6.3.

There are also figures available for interim compulsion orders, but these deal with orders applying not only to persons unfit for trial or acquitted on the non-responsibility ground but also to anyone convicted of an offence where no issue of unfitness or mental disorder arose at the trial (see Table 5.3).

Table 5.3 Interim Compulsion Orders 2010–2016

Order type	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Interim compulsion order	17	18	26	31	21	24

Source: Mental Welfare Commission for Scotland, *Mental Health Act Monitoring 2015–16* (2016) 27, Table 6.4.

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Conclusion

The defence of unfitness for trial in contemporary Scots law reflects a lengthy development of the legal system's aim of ensuring that criminal trials should not proceed against anyone whose mental or physical condition makes it inappropriate for them to be subjected to such a process. Initially the common law plea of 'insanity in bar of trial' was not clearly distinguished from the idea of insanity as a substantive defence. Although the common law was unclear in certain key respects, it came to be recognised that the plea involved three different but related elements, namely the test or definition of the plea, the procedures to be used in determining the existence of the plea in a particular case, and the proper ways of dealing with people who had been found to be unfit for trial.

Partly because of the relatively small number of cases where insanity in bar of trial was in issue, the common law remained undeveloped, yet at the same time this was not a topic on which the Scottish courts were prepared to look at other jurisdictions for guidance, and critical discussion was mainly the preserve of academic commentators and law reform bodies. Reform eventually arrived by way of statutory changes in 1995 and 2010.

These changes established the procedural arrangements for dealing with the plea, by a two-stage process which involved determining whether an accused was insane in bar of trial and if he was found to be so, a new procedure of an examination of facts to inquire whether or not the accused would have been acquitted if a trial had been held.

A further set of changes concerned the disposal options to be used where an accused who was insane in bar of trial would not have been acquitted at a trial. These new disposals were focussed on providing the correct medical treatment for the accused's current condition and removed the objectionable outcome of the previous law whereby an accused in this situation was automatically committed to a mental hospital.

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The final piece of reform resulted from the wide-ranging recommendations of the Scottish Law Commission on the test for the plea, not the least of which was removing the term 'insanity' from the name of newly defined test for a defence of unfitness for trial.

One point of major significance about these reforms was the extent to which Scots law was now willing to consider the law and practice in other legal systems, and as the law in Scotland on unfitness for trial p. 104 continues to develop it will continue to benefit by maintaining this comparative outlook. ↳

Introduction

The nature and name of the plea

Under the current law of Scotland there is a defence known as unfitness for trial. Scots law has long recognised a defence or plea that, given the mental or physical characteristics of an accused person, it would be inappropriate to subject the accused to a criminal trial. This plea is one of a more general category of defences in Scots law known as pleas in bar of trial. Following Robinson's classifications of criminal law defences, these pleas have been described as non-exculpatory defences, which arise where, despite the possible existence of proof of an accused's guilt, there are specific reasons why the state should be prevented from bringing the accused to trial.[1]

In respect of this particular plea in bar of trial, Chalmers and Leverick have identified a number of rationales, including minimising the risk of wrongful conviction and protecting the moral dignity of the criminal process.[2]

At common law the plea was known as insanity in bar of trial. But it has also been referred to as unfitness to plead, presumably as an unconscious borrowing from English law, though English law had played virtually no role in the development of Scots law.[3] Furthermore, the Scottish plea has always focussed on the trial p. 82 process as a whole rather than the particular stage of pleading,[4] and statutory ↳ provisions have for a long time referred to a person being insane so that their trial cannot proceed.[5]

In *Bain v Smith*[6] it had been recorded in the court minutes of procedure that the court had found the accused 'unfit to plead' in terms of the relevant statute and had made an order committing the accused to the State Hospital (a maximum-security hospital). It was argued that as the statute contained the expression 'insane so that the trial cannot proceed', the failure to use this terminology invalidated the making of the hospital order. The Appeal Court rejected this argument, holding that, as the phrase used in the minutes specifically referred to the statute, this was a finding of insanity in bar of trial.

Frequency

There is very little by way of data on how frequently the plea is resorted to.

A passage in the standard practitioner text on criminal procedure,[7] in referring to the report of the Thomson Committee (published in 1975) as '25 years ago', states that pleas of unfitness to plead by reason of insanity were more frequent then than they are nowadays, but no source is given for this proposition.

A research project did examine the provisions of the Criminal Procedure (Scotland) Act 1995 relating to insanity as a plea in bar of trial and as a substantive defence over a two-year period between 1996 and 1998.[8] During the period the researchers became aware of fifty-two cases. Thirty-seven of these cases involved the plea in bar, twelve the insanity defence, and in a further three the plea in bar and the defence were both raised. Of the thirty-seven cases involving only the plea in bar, the accused was found insane in bar of trial in twenty-nine, and after the resulting examinations of facts, the facts were established in twenty-two of these cases. Of the three cases involving both the plea and the defence, the accused in all cases was found to be both insane in bar of trial and at the time of the offence.

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Current law on unfitness for trial

There are three main strands to the law on unfitness for trial: first, the test or criteria to be applied in establishing the plea; secondly the procedure to be used in proving and determining the plea; and thirdly the modes of disposal available once a plea has been proved.

p. 83 The law on the last two of these issue stems from the Criminal Justice (Scotland) Act 1995 and the test for the plea is to be found in the Criminal Justice and Licensing (Scotland) Act 2010. The relevant provisions of these Acts are to be found in the Criminal Procedure (Scotland) Act 1995, which sets out a statutory code on criminal procedure.

Development of the Plea

There is very little case law of the development of the plea of insanity in bar of trial but there is useful discussion in the writings of the two major writers on Scots criminal law, David Hume in the eighteenth century and the contemporary writer, Sir Gerald Gordon.

Early discussion of the plea was characterised by several factors which have continued through to more modern times: first, a tendency to group consideration of the plea with that of insanity as a substantive defence (whilst recognising their different functions and rationales), and secondly greater focus on the possibly unjust outcomes rather than formulation of the test or definition of the plea. For example, Hume considers the 'miserable defence' of idiocy or insanity with a detailed survey of the definition of insanity as a defence, as well the effects of the acquittal where the defence is sustained.[9] In a long footnote at the end of his discussion he refers to the case of *HM Advocate v Jean Campbell or Bruce* (1817; a charge of murdering her three-year-old child), which he said was the first case in Scotland that addressed the question 'whether a person born deaf and dumb, is an object of trial and punishment'. Evidence had been obtained by the Crown that the accused knew right from wrong, was aware that punishment was a consequence of guilt, and could properly conduct herself in the ordinary affairs of life. Furthermore, there was evidence that, with the help of an interpreter, she could communicate her thoughts, fully understood the charge against her, and could provide an innocent explanation of her child's death.[10]

There have been some case-law developments since Hume that are worth noting. In *HM Advocate v Brown*,[11] there were references to an accused being incapable of pleading, which was noted as being the first step in a person being put on trial. The court noted that the procedure to be used was either for the court to hold a preliminary inquiry as to the accused's mental state before calling on him to plead or letting the accused plead and leaving to the jury the issue of whether he was capable of pleading. In this case the second course was followed. In this situation three possible issues were to be considered by the jury once all the evidence had been led.[12] The first was whether the accused was currently insane. If they held that to be the case, no other issues needed to dealt with. But if the accused was not currently insane the p. 84 ↳ jury had to consider whether he had committed the crime. If the answer to that was no, then that was the end of the matter. But if the jury found that the accused had committed the crime, then a third question arose as to whether he was insane at the time of doing so.

Two aspects of this procedure should be noted. The first is that two different aspects of insanity were being presented to the jury, with the possible consequence of the different tests being confused. The accused pleaded not guilty and the case proceeded to a trial before a jury. In his charge to the jury the trial judge mentioned the accused's medical condition (epilepsy) as going both to insanity in bar of trial[13] and to insanity as a defence.[14]

Secondly, the question whether the accused had committed the acts constituting the crime charged could arise only if the accused was not found to be insane in bar of trial, but there was no procedure for considering this issue where there was such a finding.[15]

In *HM Advocate v Wilson*,[16] where the accused was a deaf-mute and also described by medical witnesses as not of normal intellect, the court accepted that a person could be insane for the purpose of the plea in bar of trial even though he did not suffer from mental alienation. In this case, although the trial judge had made preliminary inquiries (on his own initiative) as to the state of the accused's health, no plea in bar had been raised and defence counsel requested that the case proceed before a jury rather than the issue of insanity in bar of trial be decided by a judge. The court accepted this submission on the basis that fuller evidence on the

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issue might be led at a trial than was presented to the judge as part of his preliminary inquiry. Although it is not made explicit in the report of the case, the jury held that the accused was not insane and found him not guilty.

Similar to Hume's account, Gerald Gordon, in his magisterial work on substantive Scots criminal law, added a section on insanity in bar of trial to his discussion of insanity as a defence.[17] He noted that although the plea was procedural in nature, it was worth discussing because most cases of insanity were dealt with by the plea, a characteristic which explained the lack of development of the defence in Scots law. His discussion deals first with the test for the plea, which he refers to as fitness to plead. He states the general principle as being that 'everyone is entitled to a fair trial'. In the case of unfitness based on insanity, he notes that the usual practice is for the courts simply to accept the evidence of medical experts but that in rare cases the matter is left for the jury to decide. He also considers cases where the plea is not p. 85 ↳ based on insanity, as with amnesia of what occurred at the time of offence (which the courts have rejected as a basis for the plea) and the physical condition of deaf-mutism (which could found the plea where the accused had no means—such as an interpreter—of communication during a trial process).

The second broad issue is the effect of a finding of unfitness. A legal effect is that the plea in bar of trial does not, in Scottish terminology, 'thole the assize'; that is, it does not act as *res judicata* to prevent a later trial if the condition underlying the plea is cured or otherwise disappears.[18] But his main focus is on the treatment of persons who have been found unfit to plead. At the time of writing his book, the usual effect was the making of a court order for the accused to be detained in the State Hospital, release from which could be made only by order of the Secretary of State. Gordon noted two fundamental problems with this scenario. The first was that the plea applied to 'insanity' in bar of trial, but where it was based on a physical condition, the effect was that the accused was deemed to be insane and was subject to compulsory measures under mental health legislation, a situation he described as 'highly artificial if not indeed ludicrous'. The second was that an accused could be subject to such an order without there being any proof that he committed the criminal acts he was charged with.[19]

He concluded his discussion with two brief proposals for change: first, different forms of detention for persons whose condition was not insanity but which might lead to repetition of dangerous behaviour; and, secondly, a requirement for the Crown to set a prima facie case against the accused before he could be detained in a hospital.

Accordingly, by the time of Gordon's book Scots law had developed on certain aspects of both the nature of the test for the plea in bar and the consequences of the plea being established. It was also accepted that there were serious deficiencies with the law. But Gordon was to play a key role in bringing change and modernisation to this topic, for he was a member of a departmental committee which made a wide-ranging review of Scots criminal procedure.[20]

The Thomson Committee picked up many of the points made by Gordon in his book.

In terms of the formulation of the test for the plea in bar it noted that the criterion of distinguishing between right and wrong, which was mentioned by Hume, had disappeared and the key issue was whether the accused could properly instruct his p. 86 ↳ defence.[21] This is of interest as separating out the plea in bar from the defence. The Committee suggested a test for the plea as:[22]

> Is the accused incapable by reason of mental disorder (including deficiency) of understanding the substance of the charge and the proceedings and of communicating adequately with his legal advisors?

The Committee noted that the advice given to them by psychiatrists was that the effect of such a test would be that only persons with severe mental disorder would be found unfit for trial.

As for procedural issues, the Committee noted objections to any change on the basis that the present approach worked well in practice, and in particular it was only in very rare cases that a person committed as a consequence of the plea complained that he had not committed the act charged. It was also the general practice of the Crown not to raise criminal proceedings in the absence of sufficiency of evidence, which in Scots law tended to mean corroboration of the Crown case.

The Committee was unimpressed with these arguments and took a principled objection to there being any possibility that someone could be made subject to compulsory detention under mental health law where

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there had been no proof that he had committed the acts charged against him.[23]

The Committee set out a detailed recommendation on the new procedure for determining the factual basis of the charge against the accused. The first question was whether the accused's condition meets the test for the plea in bar of trial. If it does, there would follow a limited type of inquiry, rather than a full trial, to establish the facts. The procedure envisaged for this inquiry was that the Crown would lead evidence. It would be a matter of judgment for the defence on how they would test the Crown case, for example cross-examination of the Crown evidence or leading defence evidence. But the defence would not be allowed to make any concession in respect of evidence. The judge (sitting without a jury) would make findings of fact established 'to his satisfaction', but the Committee did not specify which standard of proof was to apply. How the judge would then deal with these findings was not made entirely clear.

The Committee took the view that in most cases a person who was insane in bar of trial would probably have been insane at the time of the relevant offence. This view is not explored or explained, but the conclusion drawn is that the new procedure for determining the facts should allow for the consideration of any question of insanity as a defence. Where the facts showed that the accused committed the criminal act, the judge would then go on to consider whether the accused was insane at the time of the act, a procedure which would call for consideration of further evidence. Whether or not the defence applied, the court would order the detention of the accused in an appropriate hospital.

p. 87 If the findings of fact indicated that the accused did not commit the act, the judge would order the release of the accused or a remit to a hospital for assessment for possible detention under the non-criminal provisions of the mental health legislation.

So, by the mid-1970s problems (with some proffered solutions) had been identified with the three core elements of the plea in bar of trial, namely the test for the plea, the procedure in establishing it, and the disposal consequences of the plea being upheld.

There was little development since the time of the Thomson Report until the legislative intervention by the Criminal Procedure (Scotland) Act 1995, but there have been some subsequent reported decisions.

In *Stewart v HM Advocate*,[24] a case decided after the introduction of the new procedure for determining the plea in bar, the trial judge considered psychiatric evidence at a preliminary diet in respect of an accused who was mentally handicapped, had a low intelligence, and had a short concentration span. The judge accepted that there might be problems in the accused's understanding of the nature of the presentation of evidence in a trial, but following the decision in *HM Advocate v Wilson*,[25] the accused was able to instruct his counsel and to follow the proceedings against him and therefore was not insane in bar of trial.

The case is interesting as involving the test for the plea in bar of trial. A submission was made for the accused that as the range of disposal options following a finding of insanity in bar of trial had been broadened by the 1995 Act, a wider interpretation of what constituted insanity for this purpose should be adopted, but the trial judge pointed out that a change to the disposal regime carried no implication for the separate issue of the basis of the plea. A further submission was made by the Crown that the test for insanity in bar of trial was the same as that for the defence, and as the accused in this case had no alienation of reason (a key element of the then defence of insanity), it followed that there could be no finding that he was insane in bar of trial. The trial judge held that this submission was without foundation and pointed out that there were authorities going back to Hume to the effect that the tests for the plea in bar and the defence were different.

In *McLachlan v Brown*,[26] a plea in bar of trial was lodged on the basis that the accused had a mental impairment, which the defence claimed was a different plea from insanity in bar of trial. However, the judge held that the term 'insanity' in this context extended beyond mental illness and included mental impairment and handicap.[27]

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Determining the plea

The decision whether an accused person falls within the scope of the plea in bar of trial is made by the court, which takes place during a preliminary hearing before a trial has started. Where the issue of unfitness is raised during a trial itself, proceedings are stopped to determine that issue, but here again the question is a matter for the judge, and does not involve a jury. It is not a barrier to deciding the issue of unfitness, either before or during a trial, that the question of the accused's unfitness has been considered earlier and the accused at that stage was found not to be unfit. A finding that an accused is unfit for trial must be raised before a trial has concluded by a verdict being returned. In *Murphy v HM Advocate*,[28] the accused was found guilty of rape, but during the pre-sentencing process doubts arose about his mental fitness to understand that process. The question then arose whether the accused had been fit to stand trial. The appeal court heard evidence from psychiatric experts and concluded that it was more probable than not that the accused had been unfit for his earlier trial, and the conviction was quashed.[29]

Where the possibility of the accused being unfit for trial has been raised but requires further investigation, the case can be adjourned to allow for examination of the accused's mental or physical condition.

The hearing on unfitness may proceed in the absence of the accused if it is not practicable or appropriate for him to be present, but this step must be agreed to by the accused or those acting on his behalf.[30]

The exact evidence relevant to the issue of fitness is variable, but in almost all cases the court would require evidence from an appropriate medical expert.[31]

Various medical conditions have been identified as potentially relevant to fitness for trial. Appropriate psychiatric conditions include dementia and other chronic organic conditions, delirium, schizophrenia and related psychoses, severe affective disorders such as mania and depression, and learning disability.[32]

Where a judge makes a finding that the accused is unfit for trial he must state the reasons for so finding.[33]

In *HM Advocate v Ward*,[34] an accused on a murder charge was found unfit for trial. The court noted that a possible consequence of such a finding was that the Crown could end proceedings altogether. This outcome would be appropriate where the accused had not been charged with a serious offence, but this was unlikely in the p. 89 ↳ present case, given the nature of the charge. If it was possible that accused's condition was likely to improve, the Crown could discontinue proceedings for the time being and re-indict the accused when he became fit to stand trial. However if, as in this case, the accused was unlikely to become fit for trial, that option would leave various parties (accused and members of the deceased's family) in a state of limbo for an indefinite period.

Accordingly, in most cases a finding of unfitness for trial results in the trial diet being discharged and a hearing for an examination of facts is ordered. The accused may then be remanded in custody or released on bail. In addition, if the accused has a mental disorder for which (a) medical treatment would have an effect; and (b) if no medical treatment were provided, there would be a significant risk to his or anyone else's safety or to his health or welfare, the court may make a temporary compulsion order for his detention in a specified hospital.[35]

The effect of the order is that the accused is detained in a hospital until the conclusion of the examination of facts.

Table 5.1 shows the use of temporary compulsion orders over the period 2010–2016:

Table 5.1 Number of Temporary Compulsion Orders

Order type	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Temporary compulsion order	13	12	17	7	20	19

Source: Mental Welfare Commission for Scotland, *Mental Health Act Monitoring 2015–16* (2016) 27, Table 6.2.

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Examination of facts

The examination of facts proceeds as nearly as possible on the basis of the same powers of the court and the rules of evidence and procedure as used in a criminal trial,[36] which presumably means that corroboration is required to prove the prosecution case. The examination should be held immediately following the finding of unfitness for trial. As with the proceedings for determining unfitness, the examination of facts may take place in the absence of the accused if it appears to the court that it is not practicable or appropriate for him to be present and no objection had been made by or on behalf of the accused.[37]

p. 90 After hearing evidence, the court must acquit the accused of the charge against him unless two issues have been established.[38] First, the court must be satisfied beyond reasonable doubt that the accused did the act or made the omission constituting the offence with which he has been charged. Secondly, it must be satisfied on the balance of probabilities that there are no grounds for acquitting the accused. Where the court is satisfied on both of these issues, it makes a finding to that effect, but where it is not so satisfied it acquits the accused.[39]

There has been little guidance in the case law on the meaning of these provisions. One interpretation is that the Act is drawing a distinction between the conduct and mental elements of the offence with which the accused is charged, and it is only the former that has to be established beyond reasonable doubt. The absence (or presence) of *mens rea* would be a matter for consideration on the second issue, the lack of a defence which would lead to an acquittal. However, in some cases it is difficult to establish the conduct element without examining an aspect of the accused's mental state. An example is the offence of sexual exposure, which is defined as exposing one's genitals to another person with the purpose of either obtaining sexual gratification or of humiliating, distressing, or alarming that person.[40] It is a better reading of the 1995 Act provisions to hold that such a purpose is something which the court has to find proved beyond reasonable doubt, rather than its absence found on the balance of probabilities.

A further, and more significant, difficulty with this interpretation is that it seems unprincipled to hold that the absence of a defence which would lead to the accused's acquittal should only be established on the balance of probabilities, rather than beyond reasonable doubt.[41] The latter is the standard of proof used in many instances where a defence is an issue at a trial.

This criticism suggests an alternative way of interpreting the provisions in question, although this second approach is less easy to reconcile with the language of the statute. On this view, the Act is replicating the rules on burdens of proof in criminal trials. The first issue identified by the Act requires the prosecution to prove beyond reasonable doubt all of the essential prerequisites of proof of the accused's guilt, which would include disproving any defence which the accused has made an issue for determination. This situation would arise where an accused has satisfied an evidential burden by adducing enough evidence to require that the defence is to be considered. The second issue, of the court being satisfied on a balance of probabilities that there are no grounds for acquitting the accused, arises only where the accused has a legal burden of proving a defence.

This interpretation has been suggested in relation to the common law defence of insanity, and its more recent statutory replacement,[42] and in *HM Advocate v Ward*,[43] the judge in an examination of facts accepted it would also apply to the plea of p. 91 ↳ diminished responsibility. However, the same position would apply to any defence where the accused has a legal burden of proof. It follows that where an examination of facts involves a statutory reverse burden, the court will have to determine whether the burden on the accused is a legal or evidential one.[44]

The reference to acts (or omissions) constituting the offence and to acquittal in these provisions gives rise to a further problem. The focus of the examination of facts is on the crime charged on the indictment or complaint, but it is not clear whether an accused can be found guilty on an alternative charge. Consider s 50 of the Sexual Offences (Scotland) Act 2009, which allows for a wide range of alternative verdicts for offences under that Act (eg, common law assault as an alternative to rape). The procedure in s 50 of the 2009 Act refers to a 'trial' in which the jury finds that the accused committed the alternative offence rather than that charged against him, but the question arises as to whether an examination of facts is a trial for this purpose. As noted above, s 55(6) of the 1995 Act states that for an examination of facts, rules of evidence and procedure as well as the 'powers of the court' shall as far as possible be those applicable to a trial, which suggests that findings in relation to alternative verdicts are possible in an examination of facts.[45] So, if an accused is charged with rape, the court in an examination of facts could find that the accused did the act

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constituting a common law assault. But the issue here is whether this finding involves an 'acquittal' on the charge of rape.

The possibility of a finding of an alternative charge is an important factor in relation to the partial defences of provocation and diminished responsibility in cases of murder. The Scottish Law Commission argued that the common law defence of diminished responsibility would not be considered during an examination of facts because the defence would not be a ground for acquitting the accused.[46] However, it has been argued that this partial defence does result in an acquittal, or at least an implied acquittal, on the charge of murder.[47] But it would be absurd to hold that if the court in an examination of facts finds that there is the basis for the plea of diminished responsibility, it must acquit the accused of murder tout court, without examining the issue of culpable homicide. In any case, the argument about acquittal in cases of partial defences does not accurately capture Scottish legal practice in recording verdicts. Where a partial defence has been established, the verdict which is recorded is guilty of culpable homicide, but there is no verdict of not guilty in respect of the charge of murder. The similar approach is taken with alternative verdicts. So, in the example noted above, the recorded verdict would be that of guilty of assault, but there would be no acquittal recorded in respect of the charge of rape.

If, following an examination of facts, the court does not acquit the accused, this still allows the Crown to re-indict if the accused does later recover. If the accused is p. 92 ↳ acquitted, then criminal proceedings against him come to an end, but he may still be subject to a mental health disposal under civil law.

Special provision is made where the court in an examination of facts finds that the ground for acquitting the accused is that at the time of the conduct he was not criminally responsible in terms of s 51A of the 1995 Act.[48] In these circumstances, the court must state that the acquittal is by reason of that defence.[49]

Appeals

An accused may appeal against a finding that the accused is unfit for trial or the refusal of the court to make such a finding. An appeal can also be made against a finding that the accused committed the act charged or that there were no grounds for acquitting him (including the defence that the accused lacked criminal responsibility—the equivalent of the former insanity defence).[50] The appeal is made to the High Court of Justiciary sitting as a court of appeal where the accused had been charged on indictment, which includes cases where the proceedings were to be tried in the sheriff court. Where the charge was to be tried in summary proceedings, the appropriate appeal court is the Sheriff Appeal Court.

In disposing of an appeal, the appeal court has the power to affirm the decision made in determining unfitness or at the examination of facts, or it can make any other finding or order which the court could have made. Further, the appeal court can remit the case back to that court with directions to be followed.[51]

An appeal can also be made by the prosecution to the same appeal courts, but only on a point of law.[52] The appeal can be made against a finding that the accused is unfit for trial or an acquittal based on a finding that the accused did not commit the act charged against him or that there was a ground for acquitting (including a finding of the special defence that the accused lacked criminal responsibility).

The powers of the appeal court in disposing of the appeal are broadly the same as those for an appeal by an accused.

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The developments in the Criminal Justice (Scotland) Act 1995 dealt with procedures for establishing that an accused committed the acts at the basis of the charge against him and of the disposal consequences if the relevant facts were found. However, the substantive test of what constituted insanity as a plea in bar remained governed by the common law. Reform did come about as a result of a law reform project by the p. 93 Scottish Law Commission on wider aspects of mental disorder and the criminal ↳ law.[53] Although it had long been recognised that the law on insanity (both as a defence and as a plea in bar of trial) and diminished responsibility were in need of modernisation and reform, this project was not part of any of the Commission's programmes of law reform. Rather, the Commission considered these topics as result of a reference from the Scottish Executive (now the Scottish Government). The spur for the reference was a report on civil aspects of mental health law.[54] The Committee which had carried out that review had received evidence from professional witnesses who reported that they had been encountering problems in using the tests for insanity and diminished responsibility. However, as issues of criminal law were beyond the remit of the Committee it recommended that the Scottish Law Commission should examine this area of the law.

It is fair to say that the focus of the Commission's project was insanity as a defence rather than as a plea in bar of trial.[55] The responses to the Commission's consultation paper almost uniformly accepted the proposals in relation to the plea in bar. What is more, the final recommendations were fully implemented by statute but with only a brief consideration of these provisions during the Parliamentary process.[56] Accordingly the Scottish Law Commission's considerations offer a good basis for a full description and interpretation of the current law.[57]

Name of the plea

At common law the plea was known as insanity in bar of trial. As part of its general strategy the Commission wished to get rid of the term 'insanity' in the criminal law as being pejorative and stigmatising in nature. As regards the plea in bar of trial there was a further objection that some of the conditions which the plea covered were physical in nature. As a replacement, the Commission had considered both 'incapacity' and 'disability' but each of these had meanings fixed in other areas of law. It saw advantages in adopting the term 'unfitness', which is widely used in legal systems based on English law, but saw the reference to pleading as too narrow and instead recommended the name as 'unfitness for trial'.

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Nature of the test

As a result of the Commission's recommendations the test is now to be found in s 53 F(1) of the Criminal Procedure (Scotland) Act 1995, which provides that a person is unfit for trial if he or she is incapable, by reason of a mental or physical condition, of participating effectively in a trial. Subsection (2) sets out a list of factors concerning the abilities of the accused which are to be considered in determining whether he or she is unfit for trial in this sense. These are the ability of a person to:

(i) understand the nature of the charge;

(ii) understand the requirement to tender a plea to the charge and the effect of such a plea;

(iii) understand the purpose of, and follow the course of, a trial;

(iv) understand the evidence that may be given against the person;

(v) instruct and otherwise communicate adequately with his or her legal representative.

It is clear that these particular competences are not exhaustive of matters which a court may consider, as the subsection further provides that the court shall also have regard to any other factor which it considers relevant.

The Commission saw the focus on competences of the accused in respect of the trial as developing the approach of the common law. At an earlier stage the test for the plea in bar of trial had used aspects of the test for the defence of insanity, especially the factor of knowing right from wrong. However, by the

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beginning of the twentieth century the law had developed to stressing aspects of understanding and engaging in the trial process. In *HM Advocate v Brown*,[58] the jury were directed that the plea:

> means insanity which prevents a man from doing what a truly sane man would do and is entitled to do—maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do.

A fuller account on the same lines was the jury direction used in *HM Advocate v Wilson*:[59]

> Now, what exactly is meant by saying that a man is unfit to plead? The ordinary and common case, of course, is the case of a man who suffers from insanity, that is to say, from mental alienation of some kind which prevents him from giving the instructions which a sane man would give for his defence, or from following the evidence as a sane man would follow it, and instructing his counsel as the case goes along upon any point that arises. Now, no medical man says, and no medical man has ever said, that this accused is insane in that sense. His reason is not alienated, but he may be insane [sc in bar of trial] … although his reason is not alienated, if his condition be such that he is unable either from mental defect or physical defect, or a combination of these, to tell his counsel what his defence is and instruct him so that he can appear and defend him; or if, again, his condition of mind and body is such that p. 95 ↳ he does not understand the proceedings which are going on when he is brought into Court upon his trial, and he cannot intelligibly follow what it is all about.

The Scottish Law Commission saw advantages in maintaining this approach of defining the plea in terms of the skills of an accused person arising from his or her involvement in a criminal trial.[60] Moreover, the Commission argued that the statutory formulation of the plea should in addition set out the general rationale of the plea in bar of trial. Such a rationale had been recognised in earlier Scottish cases,[61] which suggested that someone was fit for a trial provided that he or she could both understand and participate in a trial in some meaningful way. The Commission noted ways in which this broader rationale had been expressed in other legal systems, such as the notion of adjudicative competence formulated by the Supreme Court in the United States.[62] Likewise English law had referred to the ability of the accused to 'understand and reply rationally to the indictment'.[63] A further example is the stress in New Zealand law on the 'adequate' nature of an accused's understanding of the trial and its possible consequences, and of his ability to communicate with his lawyers for the purposes of conducting a defence.[64]

These formulations do not differ from each other in substance. Moreover, the Commission had examined the case law of the European Court of Human Rights (ECtHR) on this issue, especially the cases of *Stanford v United Kingdom*[65] and *T and V v United Kingdom*.[66] The Commission saw advantages in Scots law explicitly adopting the general rationale derived from that jurisprudence, which it identified as that of effective participation in the criminal process.[67]

The inclusion of physical factors

The common law recognised that the plea in bar of trial might apply to persons with a physical condition, as opposed to a mental condition, which precluded their ability to use or perform any of the skills which constituted the test for plea.[68] One p. 96 ↳ objection to this extension of the plea was the absurdity involved in labelling such a person as insane, but that issue no longer arises once the plea is given a different name. Indeed, s 53F of the 1995 Act expressly refers to someone being incapable of effective participation in a trial by reason of a mental or physical condition. In many cases involving an accused with a physical disability adaptations can be made to the physical lay-out of the court to allow the accused to better follow the proceedings. Where someone cannot understand the language used in court because of a physical condition, the services of an interpreter should be provided.[69]

The inclusion of a lack of ability to participate because of a physical condition had previously led to the objectionable outcome that the accused in this situation was liable to be treated in the same way as someone with a mental disorder, which could lead to unlimited detention in the State Hospital. In the present law, any disposal following on from the plea in bar is governed by the mental disorder provisions of the1995 Act. For a person with a physical condition the disposal would almost always be that the court would make no order, but there remains the problem that the accused would still be considered as someone subject to a disposal under criminal mental health law.

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Excluded conditions

At common law the plea in bar of trial could not be based on the fact that at the trial the accused was suffering from amnesia about the actings at the basis of the charge against him or her.[70] The court was clear in stressing that the reason for this rule was that this condition did not deprive the accused of the ability to understand or participate in the proceedings. Matters would be different where the accused suffered memory problems during the trial which could interfere with the exercise of the required abilities.

The current law, as recommended by the Scottish Law Commission, expressly embodies a similar exclusion from the scope of the plea.[71] This seems odd, as the condition of amnesia about the facts charged is not an exception to the rule set out in the test for the plea. The test would not, in any case, apply to the condition. It may be that the provision on amnesia was added from an abundance of caution arising from the abolition of the common law on insanity in bar of trial.[72]

It is worthwhile returning to one of the general elements of the test. It is not enough that a person is incapable of participating effectively in a trial; rather that lack of capability must be by reason of a mental or physical condition. This requirement was important for the Commission in explaining that the test they p. 97 were recommending ↳ was not over-inclusive. The Commission was dealing with the objection that there were many reasons why people facing a trial could not fully understand the nature of the proceedings, as with someone with a poor education or a deprived social background. Even the presence of a lawyer might not help if the explanations given to an accused were not communicated in a way that the accused could follow.

The Commission argued that the requirement of a mental or physical condition as the cause of the failure to participate effectively would rule out the application of the plea in bar in these situations. Indeed, the Commission stated that there would have to be a clinically recognised condition at the basis of the plea. But the Commission did not recommend, nor is it now the law in the 1995 Act, that the accused had to have a mental or physical *disorder*, so it is difficult to see why the plea is said to be restricted to medical conditions.

Consider the case where someone with deaf-mutism has problems in following trial proceedings and in communicating with his or her lawyer. It is accepted practice that in this situation an interpreter should assist the accused. But there are other situations where an accused cannot speak the language of a trial. Indeed, Art 6(3)(e) of the European Convention on Human Rights (ECHR) provides the right to a person charged with a criminal offence to have the free assistance of an interpreter if he cannot understand or speak the language used in court. In the curious case of *Mikhailitchenko v Normand*,[73] the accused, a Ukrainian whose language was Russian, was a professional footballer who played for a Scottish club, and was described in court as having little or no understanding of the English language. An interpreter was provided at the trial who spoke Bulgarian but not Russian. The appeal court later found that these proceedings were unfair. Now this case did not involve a plea in bar of trial, but if the problems of language and lack of an interpreter had been raised prior to the start of the trial, then the trial could not have proceeded. Perhaps what would be involved here was some other plea in bar of trial,[74] but nonetheless the re-description of the plea as not being based on insanity may have unwittingly widened the scope of the plea beyond what the Commission had envisaged.

Burden and standard of proof

At common law, there was little authority on the issues of burden and standard of proof in relation to insanity in bar of trial, but it seemed that the plea could be raised by the accused, by the Crown, and by the court itself.[75] In its consultation paper the Commission had suggested that these matters should be dealt with in the same way as the defence of insanity. The Commission had proposed that in relation to the defence the accused should bear an evidential burden to make the defence an issue and thereafter the Crown p. 98 should have a legal burden to disprove it beyond ↳ reasonable doubt.[76] A similar proposal was made for the plea in bar of trial, namely that the ultimate burden would be on the Crown to establish an accused's fitness for trial beyond reasonable doubt.

In response to the points raised during consultation the Commission changed its mind in respect of both the substantive defence and the plea in bar. Unlike the defence, the plea in bar concerned the appropriateness of the entire proceedings, and accordingly the burden of raising and proving the plea should not rest with any one party. Accordingly, the Commission recommended that there should be no change to the common law

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position, and where the issue of fitness for trial was raised by either party or by the court, the matter would be decided on the basis of all evidence before the court.

As regards the requisite standard of proof, the common law position was probably that insanity in bar or trial had to be proved on the balance of probabilities, even if the issue had been raised by the Crown. The Commission noted that Scots law recognised only two standards of proof, beyond reasonable doubt and on the balance of probabilities. As the issue of the plea in bar did not in itself involve proof of guilt, it recommended that the lower standard of proof should apply to the statutory plea. Section 53F expressly states that the issue of unfitness for trial has to be established on the balance of probabilities, but makes no provision about the burden of proof, presumably on the basis that the common law rule on this matter survives the abolition of the common law plea.

Disposal of Cases after the Examination of Facts

Where an accused has been found unfit for trial and has not been acquitted after an examination of facts, or has been acquitted on the ground of being not criminally responsible, he may be subject to any of the following orders as the court thinks fit:[77]

(1) a compulsion order authorising the detention of the person in a hospital;

(2) a compulsion order and a restriction order;

(3) an interim compulsion order;

(4) a guardianship order;

(5) a supervision and treatment order;

(6) no order.

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It should be noted that these are the same types of disposal applicable in the case of someone acquitted at a trial by reason on lack of criminal responsibility based on mental disorder at the time of the offence.

General criteria: ECHR compliance

The use of at least some of these disposals is subject to the requirements of the ECtHR. Article 5(1) provides for a general right to liberty and security of a person and states that no one ‘shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law’. One of the specified cases is in paragraph (e) of that article, which provides for ‘the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants’.

In the leading decision of the ECHR on this provision, *Winterwerp v The Netherlands*,[78] the Court noted that the ‘lawful detention’ of such persons required that ‘no one may be confined as “a person of unsound mind” in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation’.[79]

Accordingly, to be ECHR compliant, a disposal of a case where someone has been found unfit to plead but not acquitted after an examination of facts (or has been acquitted on the basis of the mental disorder defence) three pre-conditions must be satisfied: (a) there must be a mental condition at the time of making the disposal; (b) the mental condition must be established by medical evidence; and (c) the mental condition requires compulsory detention, including detention in a hospital.

Compulsion order

A compulsion order may be used where the offence which the accused was found to have committed is punishable by imprisonment but not one for which the sentence is fixed by law (ie, murder).[80] The appropriate medical criteria are that:

- the offender has a mental disorder;

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- medical treatment which would be likely to prevent the mental disorder from worsening, or to alleviate any of the symptoms of effects of the disorder, is available;
- if no such treatment were provided there would be a significant risk to (a) the health, safety or welfare of the person in question,[81] or (b) the safety of any other person;
- the making of the order in respect of the person in question is necessary.

p. 100 These criteria require medical evidence from two medical practitioners, one of whom is an approved medical practitioner.[82] Both practitioners must agree that the person suffers from the same category of mental disorder and should also provide details of the compulsory measures which are to be set out in the order.

The compulsory measures may be carried out on the person in question in the community, in which case the order will require the person to reside at a specified place and attend for treatment and other services, and to allow access by mental health and other medical officers.

If compulsory powers in the community are not appropriate, the order may require detention in a specified hospital, but the treatment must be such that could only be provided in a hospital and there is a bed available within seven days of the making of the order.[83]

Before making a compulsion order the court must have regard to any alternative way of dealing with the person.

A compulsion order lasts for six months. After the initial period, it may be renewed for a further six months and thereafter can be renewed annually.

Compulsion order with a restriction order

A restriction order is an additional element of a compulsion order, which has the effect that the person may be detained in hospital without limit of time.[84] An order may be made if it appears to the court that it is necessary for the protection of the public from serious harm. In making the order the court must have regard to (a) the nature of the offence which the person was charged with; (b) the antecedents of the person; and (c) the risk that as result of his mental disorder he would commit offences if set at large. The mental disorder should play a substantial part in determining this risk.

Before making the restriction order the court must be presented with oral evidence on this issue from the approved medical practitioner whose evidence was taken into account in respect of the accompanying compulsion order.

The person is detained in hospital until he or she is conditionally or absolutely discharged by the direction of the Mental Health Tribunal for Scotland.[85]

The suspension of detention or transfer of the person to another hospital must be approved by the Scottish Ministers.[86]

Interim compulsion order

These orders are used where the person in question has been found to have committed an offence which is p. 101 punishable by imprisonment but not where such a sentence ↳ is fixed by law (ie, murder).[87] Their purpose is to allow for more information about the person's mental health to be obtained where, because of a significant risk of harm to that person's own health, safety, or welfare or to the safety of other people, there is the possibility that the court will make a compulsion order with an added restriction order. They have been described as allowing for 'a thorough, prolonged inpatient assessment of serious offenders with mental disorder'.[88]

The order can be made on the basis of written or oral evidence from two registered medical practitioners (one of whom must be an approved medical practitioner) that medical treatment is available which would prevent the person's mental disorder worsening or would alleviate the symptoms or effects of the disorder. The person is ordered to be detained in a hospital for up to twelve weeks, which can be extended for further periods of twelve weeks up to a total of one year.

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The order comes to end when the court makes a final mental health or penal disposal.

Guardianship order

A guardianship order is appropriate where a person has lost the capacity to make decisions by reason of a mental disorder.

Where the person in question has been found to have committed an offence which is punishable by imprisonment but not where such a sentence is fixed by law (ie, murder), the court may place his or her personal welfare under the guardianship of a local authority (or someone else approved by the local authority).[89]

Before making an order, the court must be satisfied that there are no other means under the 1995 Act which would be sufficient to safeguard or promote the person's interest in his own welfare. There must also be evidence from two medical practitioners (one being an approved medical practitioner) that the person in question is incapable of making decisions about or acting to safeguard or promote his interests in his property, financial affairs, or personal welfare.

A further requirement is that the person in question had earlier been interviewed and assessed by a mental health officer who has given an opinion on the general appropriateness of an order.

Supervision and treatment order

This type of order places the person in question under the supervision of a social worker, requiring the person to comply with instructions given by the social worker and to submit to treatment by a medical practitioner with a view to improving his mental condition.[90] Treatment may include being a non-resident p. 102 patient at any ↳ place or institution specified in the order, but an order cannot require the person to be a resident patient in a hospital. An order cannot be made where the person does not have a mental condition. An order can be made for any period up to three years.

To make this order the court must be satisfied that, having regard to all the circumstances of the case, this would be the most suitable means of dealing with the person. The court must also be satisfied that the person's mental condition requires and may be susceptible to treatment but that it would not warrant the making of a compulsion order (with or without a restriction order), nor a guardianship order. The evidence on these mental condition issues must be given by two or more approved medical practitioners.

The court has power to amend an order on the basis of a medical report indicating that (a) the treatment should continue beyond the period of the order; (b) the person needs different treatment; (c) the person is not susceptible to treatment; or (d) the person does not require further treatment.

The order may be revoked where it appears to the court, in light of circumstances since the making of the order, that it would be in the interests of the health or welfare of person, to revoke it.

Use of disposals

Table 5.2 shows the use of these various orders over the period 2010–2016. However, these figures are combined totals for person acquitted by reason of the mental disorder defence as well as those found unfit for trial and not acquitted after an examination of facts.

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Table 5.2 Use of Disposal Orders over the Period 2010–2016

Order type	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Compulsion order	8	8	11	15	21	24
Compulsion order—community	1	0	0	1	0	0
Compulsion order with restriction order	0	4	4	8	7	3
Guardianship	0	1	0	0	0	1
Supervision and treatment order	0	0	0	0	1	0

Source: Mental Welfare Commission for Scotland, *Mental Health Act Monitoring 2015–16* (2016) 27, Table 6.3.

There are also figures available for interim compulsion orders, but these deal with orders applying not only to persons unfit for trial or acquitted on the non-responsibility ground but also to anyone convicted of an offence where no issue of unfitness or mental disorder arose at the trial (see Table 5.3).

Table 5.3 Interim Compulsion Orders 2010–2016

Order type	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Interim compulsion order	17	18	26	31	21	24

Source: Mental Welfare Commission for Scotland, *Mental Health Act Monitoring 2015–16* (2016) 27, Table 6.4.

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Conclusion

The defence of unfitness for trial in contemporary Scots law reflects a lengthy development of the legal system's aim of ensuring that criminal trials should not proceed against anyone whose mental or physical condition makes it inappropriate for them to be subjected to such a process. Initially the common law plea of 'insanity in bar of trial' was not clearly distinguished from the idea of insanity as a substantive defence. Although the common law was unclear in certain key respects, it came to be recognised that the plea involved three different but related elements, namely the test or definition of the plea, the procedures to be used in determining the existence of the plea in a particular case, and the proper ways of dealing with people who had been found to be unfit for trial.

Partly because of the relatively small number of cases where insanity in bar of trial was in issue, the common law remained undeveloped, yet at the same time this was not a topic on which the Scottish courts were prepared to look at other jurisdictions for guidance, and critical discussion was mainly the preserve of academic commentators and law reform bodies. Reform eventually arrived by way of statutory changes in 1995 and 2010.

These changes established the procedural arrangements for dealing with the plea, by a two-stage process which involved determining whether an accused was insane in bar of trial and if he was found to be so, a new procedure of an examination of facts to inquire whether or not the accused would have been acquitted if a trial had been held.

A further set of changes concerned the disposal options to be used where an accused who was insane in bar of trial would not have been acquitted at a trial. These new disposals were focussed on providing the correct medical treatment for the accused's current condition and removed the objectionable outcome of the previous law whereby an accused in this situation was automatically committed to a mental hospital.

The final piece of reform resulted from the wide-ranging recommendations of the Scottish Law Commission on the test for the plea, not the least of which was removing the term 'insanity' from the name of newly defined test for a defence of unfitness for trial.

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One point of major significance about these reforms was the extent to which Scots law was now willing to consider the law and practice in other legal systems, and as the law in Scotland on unfitness for trial continues to develop it will continue to benefit by maintaining this comparative outlook.

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Notes

1 James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green & Son Ltd 2006) 12–14, founding on PH Robinson, *Criminal Law Defenses* (West Publishing Co 1984).

2 Chalmers and Leverick, *Criminal Defences and Pleas in Bar of Trial* (n 1) 287–88.

3 Virtually no English cases have been cited in Scottish decisions. In *HM Advocate v Wilson* 1942 JC 75 reference was made in argument to English decisions of unfitness to plead but these related to a specific point about the condition of deaf-mutism.

4 In its *Report on Insanity and Diminished Responsibility*, Scot Law Com No 195 (2004) para 4.9, n 10, the Scottish Law Commission noted that pleading to an indictment had a crucial importance in the development of English criminal law, as refusal to plead had the consequence that a trial could not proceed (referring to N Walker, *Crime and Insanity in England, Volume 1: The Historical Perspective* (Edinburgh 1968) 220).

5 Criminal Procedure (Scotland) Act 1995, s 54(1) as originally enacted. The Lunacy (Scotland) Act 1857, s 87 refers to 'where any person charged under any indictment or criminal libel shall be found insane, so that such person cannot be tried upon such an indictment'.

6 1980 SLT (Notes) 69.

7 RW Renton and HH Brown, *Criminal Procedure* (6th edn, W Green & Son Ltd 1996, with updating supplements), para 26-06.

8 M Burman and C Connelly, *Mentally Disordered Offenders and Criminal Proceedings* (The Scottish Office 1999). The research report is summarised in Scottish Law Commission, Scot Law Com No 195 (n 4) paras 1.18–1.19.

9 D Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th edn, Bell & Bradfute 1844), 37–45.

10 ibid 45. At the trial she was found not guilty.

11 1907 SC(J) 67, 73.

12 ibid 74–75.

13 In referring to the accused's medical history the question for the jury was whether 'it can be said that he is in a position to do what a sane man could do—that is to say, to be certain that in telling his counsel what he did he is really able to tell the true story of his life and action', ibid 77.

14 The jury was reminded of evidence that a 'minor attack' of epilepsy 'robs the patient of the full control of his faculties, and yet leaves him in many ways free to act, not, I think, automatically, but as of set purpose, while yet a purpose which is not controlled by a rational and sane will', ibid.

15 In his memoirs Lord Macmillan, who was junior counsel for the accused in this case, noted the problems which could follow in this situation (*A Man of Law's Tale* (Macmillan 1952) 109–10).

16 1942 SC 75.

17 GH Gordon, *The Criminal Law of Scotland* (1st edn, W Green & Son Ltd 1967) 330–32.

18 The leading case is *HM Advocate v Bickerstaff* 1926 JC 65, where a plea in bar on a charge of murder was upheld. The accused was committed to a hospital from which he was later released on the ground that he had recovered. He was then served with a fresh indictment for the same offence as originally charged. No objection was taken that this was incompetent. In *HM Advocate v Ward*, it was expressly noted by the judge that where the accused was not acquitted after an examination of facts the Crown may still re-indict the accused if he later recovers (High Court of Justiciary, 27 February 2015, unreported; available at: http://www.scotland-judiciary.org.uk/9/1395/Determination-following-examination-of-facts-in-Her-Majestys-Advocate-v-Paul-Francis-Ward).

19 Gordon, *The Criminal Law of Scotland* (n 17) 331.

20 Scottish Home and Health Department and Crown Office, *Criminal Procedure in Scotland (Second Report)*, Report by the Committee appointed by the Secretary of State for Scotland and the Lord Advocate (Chairman: The Honourable Lord Thomson). Cmnd 6218 (1975) ch 52.

21 ibid, para 52.13.

22 ibid.

23 ibid, para 52.14.

24 1997 JC 183.

25 1942 JC 75.

26 1997 JC 222.

27 The purpose of the defence submission was that under the then provisions of the 1995 Act evidence concerning insanity in bar of trial had to be given by two medical practitioners but in this case the evidence about mental impairment had been given by a psychologist who was not a medical practitioner. This anomalous provision about evidence was removed by the 2010 Act.

28 2017 SLT 143.

29 The Court commented on the duties of defence lawyers where an issue of fitness for trial might arise. It was a matter for professional judgment whether the circumstances of a case required consideration of the issue but if they did, legal advisers should obtain a medical report rather than rely on their own personal judgment.

30 1995 Act, s 54(5).

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31 *Murphy v HM Advocate* 2017 SLT 143 para [57].

32 R Darjee and L Robinson, 'Psychiatric Defences' in Lindsay Thomson and Joanna Cherry (eds), *Mental Health and Scots Law in Practice* (2nd edn, W Green & Son Ltd 2014) ch 10, 323–24.

33 1995 Act, s 54(1).

34 See n 18.

35 1995 Act, s 54(1)(c), (2A), (2B). Medical treatment is defined by s 329(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003, as including—(a) nursing; (b) care; (c) psychological intervention; (d) habilitation (including education, and training in work, social, and independent living skills); and (e) rehabilitation (read in accordance with (d)). An order can only be made on the evidence of two medical practitioners that the accused suffers from the relevant type of mental disorder and a suitable hospital is available.

36 1995 Act, s 55(5). Special provision is made where an accused person is not legally represented. The court must appoint a lawyer to represent his interests at the examination of facts (1995 Act, s 56(3)).

37 1995 Act, s 55(5).

38 1995 Act, s 55(1).

39 1995 Act, s 55(2), (3).

40 Sexual Offences (Scotland) Act 2009, s 8.

41 This criticism has been made by RD Mackay and WJ Brookbanks, 'Protecting the Unfit to Plead: A Comparative Analysis of the "Trial of Facts"' 2005 Jur Rev 173, 183–84.

42 Renton and Brown, *Criminal Procedure* (n 7) para 26-11.

43 See n 18.

44 On this issue Scots law has tended to follow the influential decisions of the House of Lords in *R v Lambert* [2002] 2 AC 545 and *Sheldrake v DPP* [2005] 1 AC 264. See *Glancy v HM Advocate* 2012 SCCR 52 and *Urquhart v HM Advocate* 2016 JC 93.

45 Chalmers and Leverick, *Criminal Defences and Pleas in Bar of Trial* (n 1) 298, advance this interpretation of s 55(6) but with some hesitation.

46 Scottish Law Commission, Scot Law Com No 195 (n 4) para 4.3, n 5.

47 Chalmers and Leverick, *Criminal Defences and Pleas in Bar of Trial* (n 1) 297.

48 This defence is the statutory replacement for the common law defence of insanity, introduced by the Criminal Justice and Licensing (Scotland) Act 2010.

49 1995 Act, s 55(4).

50 1995 Act, s 62.

51 1995 Act, s 62(6)(c).

52 1995 Act, s 63.

53 Scottish Law Commission, Scot Law Com No 195 (n 4). The Report followed on from an earlier consultation paper (Scottish Law Commission, Discussion Paper on Insanity and Diminished Responsibility, Discussion Paper No 122 (2003). The Commission stressed the importance of looking at the law in other jurisdictions and consulted a panel of internationally renowned academic specialists from England and Wales, Ireland, New Zealand, and the United States.

54 New Directions: Report on the Review of the Mental Health (Scotland) Act 1984 (2001). Chairman Rt Hon Bruce Millan (SE/2001/56).

55 By the time the project had started the law on diminished responsibility had been significantly developed by the decision in *Galbraith v HM Advocate* 2002 JC 1. The Commission's recommendations were that the law on diminished responsibility should be put on a statutory basis largely on the lines set out in *Galbraith*, subject to one major change to allow the defence to be based on the condition of psychopathic personality disorder.

56 Criminal Justice and Licensing (Scotland) Act 2010, which added a new section, section 53F, to the Criminal Procedure (Scotland) Act 1995.

57 Scottish Law Commission, Scot Law Com No 195 (n 4) Part 4 and paras 5.54–5.65.

58 1907 SC(J) 67, 77.

59 See n 3, 79. The accused in this case was a deaf-mute.

60 The formulation of the ability factors in the 1995 Act was based directly on that in the Commission's final Report but differed in one respect from the original drafting in the consultation paper. Instead of the ability to understand the evidence given against the accused, the earlier formulation was the ability to understand the substantial effect of such evidence.

61 *HM Advocate v Russell* 1946 JC 37, Lord Justice Clerk Cooper 46: 'A plea in bar of trial, as distinguished from a plea or special defence in exculpation, or in mitigation of the gravity of a charge, is a claim that the accused is not a fit object for trial—at least in the meantime.'

62 *Dusky v United States* 362 US 402, 406 (1960): 'the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him'. See Richard J Bonnie, 'The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*' (1993) 47 University of Miami Law Review 539.

63 *R v Friend* [1997] 1 WLR 1433, 1441.

64 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4.

65 Series A282-A.

66 (2000) 30 EHHR 121.

67 The validity of an Act of the Scottish Parliament requires that its provisions comply with the ECHR (Scotland Act 1998, s 29(2)(d)). The general principle of effective participation has been used to describe unfitness to plead in Jersey (*Attorney General v O'Driscoll* [2003] JLR 390 (Royal Court of Jersey (Samedi Division) 9 July 2003)).

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68 In the leading case *HM Advocate v Wilson* (n 3), the accused as a deaf-mute.

69 Providing an interpreter for a deaf-mute was used in the old case of *Jean Campbell*, discussed by Hume (n 9) 45.

70 *HM Advocate v Russell* (n 61); *Hughes v HM Advocate* 2002 JC 23.

71 1995 Act, s 53F(3): 'The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.'

72 Criminal Justice and Licensing (Scotland) Act 2010, s 171(c), which provides that any rule of law providing for insanity in bar of trial ceases to have effect.

73 1993 SLT 1138.

74 Recognised pleas in bar include oppression through prejudicial publicity or abuse of process, but as currently understood these pleas would not extend to language problems. For discussion of pleas in bar of trial, see Chalmers and Leverick, *Criminal Defences and Pleas in Bar of Trial* (n 1) chs14–19.

75 Scottish Law Commission, Scot Law Com No 195 (n 4) paras 5.54–5.59.

76 Under s 52(1) of the 1995 Act the Crown is under a duty to bring before the court any evidence it may have as to the accused's mental condition where it appears that the accused may be suffering from a mental disorder. This provision was not amended by the 2010 Act.

77 1995 Act, s 57(2). For a detailed discussion of these disposals, see R Darjee and G Skilling, 'Legislation for Mentally Disordered Offenders' in Lindsay Thomson and Joanna Cherry (eds) *Mental Health and Scots Law in Practice* (2nd edn, W Green & Son 2014), ch 11.

78 (1979) 2 EHRR 387.

79 ibid, para 39.

80 1995 Act, s 57A.

81 In the context of disposals, the 1995 Act use the term 'offender'. In this chapter that has been replaced by the phrase 'person in question' or 'person' (see 1995 Act, s 57(4)).

82 That is, a medical practitioner who has been approved under s 22 of the Mental Health (Care and Treatment) (Scotland) 2003 Act as having special experience in the diagnosis and treatment of mental disorder. An approved medical practitioner will often be a consultant psychiatrist.

83 In practice, the vast majority of compulsion orders are hospital rather than community based (see Tables 5.1–5.3).

84 1995 Act, ss 57A(7) 59.

85 2003 Act, s 193.

86 2003 Act, ss 224, 218.

87 1995 Act, s 53.

88 Darjee and Skilling, 'Legislation for Mentally Disordered Offenders' (n 77) 364.

89 1995 Act, ss 58–58A. Guardianship orders are governed generally by the Adults with Incapacity (Scotland) Act 2000, ss 57–61.

90 1995 Act, s 57(2)(d); Sch 4.

1 James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green & Son Ltd 2006) 12–14, founding on PH Robinson, *Criminal Law Defenses* (West Publishing Co 1984).

2 Chalmers and Leverick, *Criminal Defences and Pleas in Bar of Trial* (n 1) 287–88.

3 Virtually no English cases have been cited in Scottish decisions. In *HM Advocate v Wilson* 1942 JC 75 reference was made in argument to English decisions of unfitness to plead but these related to a specific point about the condition of deaf-mutism.

4 In its *Report on Insanity and Diminished Responsibility*, Scot Law Com No 195 (2004) para 4.9, n 10, the Scottish Law Commission noted that pleading to an indictment had a crucial importance in the development of English criminal law, as refusal to plead had the consequence that a trial could not proceed (referring to N Walker, *Crime and Insanity in England, Volume 1: The Historical Perspective* (Edinburgh 1968) 220).

5 Criminal Procedure (Scotland) Act 1995, s 54(1) as originally enacted. The Lunacy (Scotland) Act 1857, s 87 refers to 'where any person charged under any indictment or criminal libel shall be found insane, so that such person cannot be tried upon such an indictment'.

6 1980 SLT (Notes) 69.

7 RW Renton and HH Brown, *Criminal Procedure* (6th edn, W Green & Son Ltd 1996, with updating supplements), para 26-06.

8 M Burman and C Connelly, *Mentally Disordered Offenders and Criminal Proceedings* (The Scottish Office 1999). The research report is summarised in Scottish Law Commission, Scot Law Com No 195 (n 4) paras 1.18–1.19.

9 D Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th edn, Bell & Bradfute 1844), 37–45.

10 ibid 45. At the trial she was found not guilty.

11 1907 SC(J) 67, 73.

12 ibid 74–75.

13 In referring to the accused's medical history the question for the jury was whether 'it can be said that he is in a position to do what a sane man could do—that is to say, to be certain that in telling his counsel what he did he is really able to tell the true story of his life and action', ibid 77.

14 The jury was reminded of evidence that a 'minor attack' of epilepsy 'robs the patient of the full control of his faculties, and yet leaves him in many ways free to act, not, I think, automatically, but as of set purpose, while yet a purpose which is not controlled by a rational and sane will', ibid.

15 In his memoirs Lord Macmillan, who was junior counsel for the accused in this case, noted the problems which could follow in this situation (*A Man of Law's Tale* (Macmillan 1952) 109–10).

16 1942 SC 75.

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17 GH Gordon, *The Criminal Law of Scotland* (1st edn, W Green & Son Ltd 1967) 330–32.

18 The leading case is *HM Advocate v Bickerstaff* 1926 JC 65, where a plea in bar on a charge of murder was upheld. The accused was committed to a hospital from which he was later released on the ground that he had recovered. He was then served with a fresh indictment for the same offence as originally charged. No objection was taken that this was incompetent. In *HM Advocate v Ward*, it was expressly noted by the judge that where the accused was not acquitted after an examination of facts the Crown may still re-indict the accused if he later recovers (High Court of Justiciary, 27 February 2015, unreported; available at: http://www.scotland-judiciary.org.uk/9/1395/Determination-following-examination-of-facts-in-Her-Majestys-Advocate-v-Paul-Francis-Ward).

19 Gordon, *The Criminal Law of Scotland* (n 17) 331.

20 Scottish Home and Health Department and Crown Office, *Criminal Procedure in Scotland (Second Report)*, Report by the Committee appointed by the Secretary of State for Scotland and the Lord Advocate (Chairman: The Honourable Lord Thomson). Cmnd 6218 (1975) ch 52.

21 ibid, para 52.13.

22 ibid.

23 ibid, para 52.14.

24 1997 JC 183.

25 1942 JC 75.

26 1997 JC 222.

27 The purpose of the defence submission was that under the then provisions of the 1995 Act evidence concerning insanity in bar of trial had to be given by two medical practitioners but in this case the evidence about mental impairment had been given by a psychologist who was not a medical practitioner. This anomalous provision about evidence was removed by the 2010 Act.

28 2017 SLT 143.

29 The Court commented on the duties of defence lawyers where an issue of fitness for trial might arise. It was a matter for professional judgment whether the circumstances of a case required consideration of the issue but if they did, legal advisers should obtain a medical report rather than rely on their own personal judgment.

30 1995 Act, s 54(5).

31 *Murphy v HM Advocate* 2017 SLT 143 para [57].

32 R Darjee and L Robinson, 'Psychiatric Defences' in Lindsay Thomson and Joanna Cherry (eds), *Mental Health and Scots Law in Practice* (2nd edn, W Green & Son Ltd 2014) ch 10, 323–24.

33 1995 Act, s 54(1).

34 See n 18.

35 1995 Act, s 54(1)(c), (2A), (2B). Medical treatment is defined by s 329(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003, as including—(a) nursing; (b) care; (c) psychological intervention; (d) habilitation (including education, and training in work, social, and independent living skills); and (e) rehabilitation (read in accordance with (d)). An order can only be made on the evidence of two medical practitioners that the accused suffers from the relevant type of mental disorder and a suitable hospital is available.

36 1995 Act, s 55(5). Special provision is made where an accused person is not legally represented. The court must appoint a lawyer to represent his interests at the examination of facts (1995 Act, s 56(3)).

37 1995 Act, s 55(5).

38 1995 Act, s 55(1).

39 1995 Act, s 55(2), (3).

40 Sexual Offences (Scotland) Act 2009, s 8.

41 This criticism has been made by RD Mackay and WJ Brookbanks, 'Protecting the Unfit to Plead: A Comparative Analysis of the "Trial of Facts"' 2005 Jur Rev 173, 183–84.

42 Renton and Brown, *Criminal Procedure* (n 7) para 26-11.

43 See n 18.

44 On this issue Scots law has tended to follow the influential decisions of the House of Lords in *R v Lambert* [2002] 2 AC 545 and *Sheldrake v DPP* [2005] 1 AC 264. See *Glancy v HM Advocate* 2012 SCCR 52 and *Urquhart v HM Advocate* 2016 JC 93.

45 Chalmers and Leverick, *Criminal Defences and Pleas in Bar of Trial* (n 1) 298, advance this interpretation of s 55(6) but with some hesitation.

46 Scottish Law Commission, Scot Law Com No 195 (n 4) para 4.3, n 5.

47 Chalmers and Leverick, *Criminal Defences and Pleas in Bar of Trial* (n 1) 297.

48 This defence is the statutory replacement for the common law defence of insanity, introduced by the Criminal Justice and Licensing (Scotland) Act 2010.

49 1995 Act, s 55(4).

50 1995 Act, s 62.

51 1995 Act, s 62(6)(c).

52 1995 Act, s 63.

53 Scottish Law Commission, Scot Law Com No 195 (n 4). The Report followed on from an earlier consultation paper (Scottish Law Commission, Discussion Paper on Insanity and Diminished Responsibility, Discussion Paper No 122 (2003). The Commission stressed the importance of looking at the law in other jurisdictions and consulted a panel of internationally renowned academic specialists from England and Wales, Ireland, New Zealand, and the United States.

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