



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

A189/J/8

**អង្គបុរេជំនុំជម្រះ**

PRE-TRIAL CHAMBER  
CHAMBRE PRELIMINAIRE

**Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC10)**

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

**Date:** 21 October 2008

<b>ឯកសារដើម</b>
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**PUBLIC**  
**DECISION ON IENG SARY'S APPEAL REGARDING THE APPOINTMENT OF**  
**A PSYCHIATRIC EXPERT**

**Co-Prosecutors**

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Robert PETIT  
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William SMITH  
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<b>ឯកសារចម្លងតាមប្រព័ន្ធគ្រប់គ្រងឯកសារ</b>
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**Charged Person**

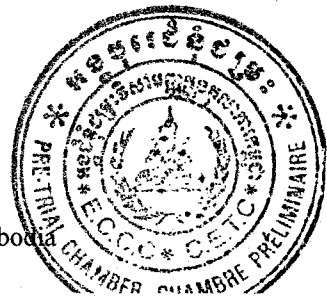
IENG Sary

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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Appeal against the constructive dismissal by the OCIJ [Office of the Co-Investigating Judges] of the *Request for Ieng Sary to be examined by a psychiatric specialist to determine fitness to stand trial*” filed by the Co-Lawyers for Ieng Sary (the “Charged Person”) on 2 July 2008 (the “Appeal”).

### I- BACKGROUND

1. On 14 March 2008, the Co-Lawyers filed before the Co-Investigating Judges a “Request for Ieng Sary to be examined by a Pshychiatric Specialist to Determine Fitness to Stand Trial” (the “Request”)<sup>1</sup>. In support of this Request, the Co-Lawyers asserted that due to the Charged Person’s deteriorating health condition and the medication he has been administered, “it is necessary to determine Mr. IENG Sary’s mental competence to assist in his own defence”.<sup>2</sup>
2. On 2 May 2008, during an interview on conditions of detention conducted by the Co-Investigating Judges, the Co-Lawyers raised the fact that their Request had remained undecided:

“We raised the question of Mr. IENG Sary’s health because we are very concerned. The hearing before the Pre-Trial Chamber [on the appeal against the Provisional Detention Order] is scheduled shortly and we have noticed that our client cannot remain seated for more than an hour. That is why we requested an expert examination on 14 March, in order to determine whether Mr. IENG Sary could participate in the proceedings. Until now, his request has not been answered.”<sup>3</sup>

3. The Co-Investigating Judges responded as follows:

“The request for expert examination dated 14 March 2008 does not apply to the hearing before the Pre-Trial Chamber. It is a request for psychiatric expertise aiming at assessing the capacity of the Charged Person to be tried. The Co-Investigating Judges have not ruled on that demand yet, since the question of sending him for trial does not yet arise at that stage. Naturally, they will respond

<sup>1</sup> Request for IENG Sary to be examined by a Psychiatric Specialist to Determine Fitness to Stand Trial, 14 March 2008, B7 (the “Request”).

<sup>2</sup> Request, para. 1.

<sup>3</sup> Written Record of Interview on Conditions of Detention, 2 May 2008, C32, p. 3.



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to the request before the end of the judicial investigation, as provided in Rules 31, 32 and 55(10) of the Internal Rules.”<sup>4</sup>

4. On 19 June 2008, the Co-Lawyers sent a letter to the Co-Investigating Judges stating that they “have not yet responded” to their Request.<sup>5</sup> They notably stressed that their Request aimed at evaluating the capacity of the Charged Person to “assist in his own defence” and “consult with his Defence Team”. The Co-Lawyers further mentioned that they had attempted to file a notice of appeal against the silence of the Co-Investigating Judges but due to the absence of a written order against which an appeal could be launched, it was refused by the greffier of the Office of the Co-Investigating Judges.
5. In a letter dated 19 June 2008, but notified on 23 June 2008, addressing different requests made by the Co-Lawyers for Ieng Sary, the Co-Investigating Judges responded as follows:

**“Requests dated 14 March 2008 (B7) and 19 June 2008**

We also refer you to the Written Record of Interview dated 2 May 2008 (C32).”<sup>6</sup>

6. On 30 June 2008, the Co-Lawyers requested the Pre-Trial Chamber to adjourn the proceedings in relation to the jurisdictional issues raised in the Appeal against the Provisional Detention Order since the Charged Person had not been examined by a psychiatric expert on his fitness to stand trial.<sup>7</sup> “[T]he Co-Lawyers submitted that based on their interaction with the Charged Person and the fact that the Charged Person did not appear to understand fully the jurisdictional issues, they are not sure that the Charged Person is able to participate and assist in the preparation of his defence.”<sup>8</sup>
7. The Pre-Trial Chamber denied the request for an adjournment on the ground that “the Co-Lawyers have not mentioned any facts or incidents on the basis of which they draw their above-mentioned conclusions”. The Pre-Trial Chamber found that “the mere fact that [the Co-Lawyers] noticed that the Charged Person was not able to fully understand the very complicated jurisdictional issues, is not sufficient to lead to the conclusion at this stage that

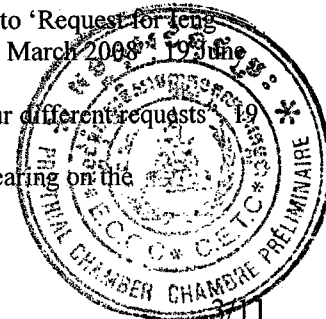
<sup>4</sup> Written Record of Interview on Conditions of Detention, p. 3.

<sup>5</sup> Letter from Ieng Sary Defence Team to the Co-Investigating Judges titled “Lack of Response to ‘Request for Ieng Sary to be examined by a Psychiatric Specialist to Determine Fitness to Stand Trial’ filed on 14 March 2008” 19 June 2008, B7/I.

<sup>6</sup> Letter from the Co-Investigating Judges to the Co-Lawyers titled “Recapitulative letter on your different requests” 19 June 2008, A189.

<sup>7</sup> Written Version of Oral Decision of 30 June 2008 on Co-Lawyers’ Request to Adjourn the Hearing on the Jurisdictional Issues, 2 July 2008, C22/I/49 (the “Decision of 30 June”), para. 3.

<sup>8</sup> Decision of 30 June 2008, para. 3.



- the Pre-Trial Chamber should appoint an expert to examine his mental capacity in respect of these proceedings”.<sup>9</sup>
8. The Pre-Trial Chamber noted that there was no appeal before it against any decision of the Co-Investigating Judges concerning the Charged Person’s fitness to stand trial but mentioned that “it may be possible to appeal against the failure of the Co-Investigating Judges to determine a request, since the conduct of the Co-Investigating Judges may be interpreted to amount to a constructive refusal of an application”.<sup>10</sup>
9. On 30 June 2008, the Co-Lawyers filed a notice of appeal against “the Co-Investigating Judges’ recapitulative letter dated 19 June 2008 answering to the Request of IENG Sary’s lawyers requesting for IENG Sary to be examined by a psychiatric specialist, dated 14 March 2008”.<sup>11</sup>
10. On 2 July, they filed their “Appeal against the constructive dismissal by the OCIJ of the *Request for Ieng Sary to be examined by a Psychiatric Specialist to Determine Fitness to Stand Trial*”<sup>12</sup> (the “Appeal Brief”).
11. The Co-Prosecutors filed their “Response to Ieng Sary’s Appeal regarding appointment of an expert to assess his fitness to stand trial” on 18 July 2008.<sup>13</sup>
12. No response was filed by the lawyers for the Civil Parties.
13. On 7 August 2008, the Pre-Trial Chamber decided that the Appeal would be determined solely on the basis of the written submissions of the Parties and allowed the Co-Lawyers for Ieng Sary to file a reply to the Co-Prosecutors’ Response within five days.<sup>14</sup> The Co-Lawyers did not file a reply.

## II- ADMISSIBILITY OF THE APPEAL

14. The Co-Lawyers submit that the Appeal is admissible as “the failure by the OCIJ to respond to this Request, over three and a half months after the Request was filed by the Defence, constitutes a constructive dismissal of the Request”.<sup>15</sup>

<sup>9</sup> Decision of 30 June 2008, para. 7.

<sup>10</sup> Decision of 30 June 2008, para. 5.

<sup>11</sup> Record of Appeals, 30 June 2008, A189/I.

<sup>12</sup> Appeal against the constructive dismissal by the OCIJ of the *Request for Ieng Sary to be examined by a Psychiatric Specialist to Determine Fitness to Stand Trial*, 2 July 2008, A/189/I/1 (the “Appeal Brief”).

<sup>13</sup> Co-Prosecutors’ Response to Ieng Sary’s Appeal regarding appointment of an expert to assess his fitness to stand trial, 18 July 2008, A189/I/5 (the “Co-Prosecutors’ Response”).

<sup>14</sup> Decision on the Requests to Determine Ieng Sary’s Appeal on the Appointment of Expert on the basis of Written Submissions Only, 7 August 2008, A189/I/7.

<sup>15</sup> Appeal Brief, p. 1.



15. The Co-Prosecutors argue that the doctrine of constructive refusal does not apply since the Co-Investigating Judges have responded to the Charged Person's request by stating that the request to appoint a psychiatric expert was premature. The Co-Prosecutors "request the Pre-Trial Chamber to consider the Co-Investigating Judges' action as a dismissal of the application on the grounds of it being premature" and further submit that this decision is appealable under Rule 31(10) of the Internal Rules (Rev. 1) of the ECCC (the "Internal Rules").<sup>16</sup>

16. Rule 31(10) of the Internal Rules provides:

"The Co-Prosecutors, the Charged Person or Accused, the Civil Party, or their lawyers may request the Co-Investigating Judges or the Chambers to appoint additional experts to conduct new examinations or to re-examine a matter already the subject of an expert report. The request must be in writing and give reasons. The request shall be ruled upon by the Co-Investigating Judges or the Chambers as soon as possible and in any event before the end of the investigation or proceedings. Where the Co-Investigating Judges reject such a request, the ruling may be appealed to the Pre-Trial Chamber." (emphasis added)

17. Rule 74(3)(d) of the Internal Rules provides that a charged person may appeal against orders of the Co-Investigating Judges "refusing requests for expert reports allowed under these [Internal Rules]" (emphasis added).

18. The Pre-Trial Chamber notes that by their Request, the Co-Lawyers asked that an expert be appointed immediately to evaluate the Charged Person's capacity to "assist in his own defence" and "effectively participate in any and all relevant proceedings".<sup>17</sup>

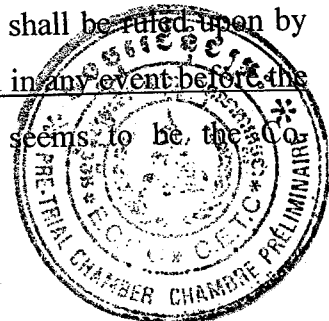
19. During the interview on conditions of detention, the Co-Investigating Judges stated that the issue raised by the Request did not arise at that stage so they deferred their decision. They confirmed this position in their letter dated 19 June 2008.

20. From the time the Request was filed until the Appeal was lodged, nearly four months elapsed without any decision on the merits of the Request being rendered by the Co-Investigating Judges.

21. Pursuant to Internal Rule 31(10), "request[s] [to appoint an expert] shall be ruled upon by the Co-Investigating Judges or the Chambers as soon as possible and in any event before the end of the investigation" (emphasis added). Contrary to what seems to be the case,

<sup>16</sup> Co-Prosecutors' Response, paras 23 to 25.

<sup>17</sup> Request, paras 1 and 2.



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Investigating Judges' position, the two conditions are cumulative and do not allow the Co-Investigating Judges to choose either to give a ruling as soon as possible or to give a ruling before the end of the investigation.

22. The Pre-Trial Chamber considers that by its nature, the Co-Lawyers' Request requires timely attention. The Pre-Trial Chamber notes by analogy that Article 170 of the Cambodian Code of Criminal Procedure allows charged persons to seize the Investigative Chamber directly when an investigating judge fails to issue an order responding to a request to appoint an expert within thirty days.
23. The Pre-Trial Chamber considers that with the passage of time, the failure of the Co-Investigating Judges to decide on the Request makes it impossible for the Charged Person to obtain the benefit which he sought. The Charged Person was asking that his mental capacity to assist in his own defence and participate effectively in any and all criminal proceedings be examined by an expert. The Pre-Trial Chamber notes that in the case of *Boodhoo and others v. Attorney General of Trinidad and Tobago*, the Privy Council found that "delay in producing a judgement would be capable of depriving an individual of his right to the protection of the law" in circumstances where "the parties were unable to obtain from the decision the benefit which they should".<sup>18</sup>
24. The Pre-Trial Chamber finds that the failure of the Co-Investigating Judges to rule on the Request as soon as possible, in circumstances where a delay in making a decision deprives the Charged Person of the possibility of obtaining the benefit he seeks, amounts to a constructive refusal of the application, which can be appealed against under Internal Rule 74(3)(d).
25. Therefore, the Pre-Trial Chamber finds the Appeal admissible.

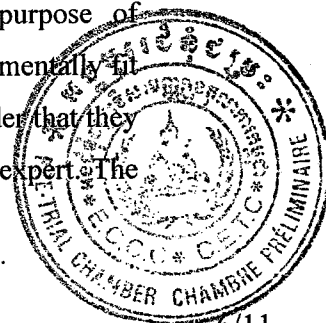
### III- CONSIDERATIONS

#### A) The Charged Person's right to request the appointment of an expert to evaluate his capacity to participate in the judicial investigation

26. Internal Rule 32 provides:

"The Co-Investigating Judges or the Chambers may, for the purpose of determining whether a Charged Person or Accused is physically and mentally fit to stand trial, or for any other reasons, or at the request of a party, order that they undergo a medical, psychiatric or psychological examination by an expert. The

<sup>18</sup> *Boodhoo and others v. Attorney General of Trinidad and Tobago*, [2004] UKPC 17, para. 12.



reasons for such order, and the report of the expert, shall be recorded in the case file.”

27. The Pre-Trial Chamber finds that the scope of Internal Rule 32, which notably provides that an expert can be appointed for “any other reasons”, is sufficiently broad to encompass the Co-Lawyers’ Request.
28. The Pre-Trial Chamber further observes that the ECCC constitutive documents<sup>19</sup>, the Internal Rules and Cambodian law do not define the precise meaning of “fitness to stand trial”. There is no indication either as to when a psychiatric evaluation can be requested, or if the mental capacity of a charged person might be raised as an issue at the pre-trial stage. As prescribed in Article 12 of the Agreement, the Pre-Trial Chamber will therefore seek guidance in procedural rules established at the international level.
29. In the case of *Prosecutor v. Strugar*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”) was seized of a defence request to terminate the proceedings on the grounds that the accused was not fit to stand trial.<sup>20</sup> The Trial Chamber noted the absence of any express statutory provision that could be relied upon but observed that the Statute of the ICTY grants an accused a number of procedural rights. The Court found that “[t]he enjoyment of these rights would appear to presuppose that an accused has a level of mental and physical capacity”.<sup>21</sup> The Court further stated that “[t]he nature of these rights indicates that their effective exercise may be hindered, or even precluded, if an accused’s mental and bodily capacities, especially the ability to understand, *i.e.* to comprehend, is affected by mental or somatic disorder.”<sup>22</sup> The Court concluded that “it is a necessary implication of the Statute of the Tribunal that, should there be adequate reason, any question whether the accused is fit to stand trial, *i.e.* has the necessary capacities, or is able with assistance to exercise them, should be determined by the Tribunal.”<sup>23</sup>
30. The Trial Chamber of the ICTY also found in *Strugar* that an individual’s fitness to stand trial encompasses his/her capacity “to plead, to understand the nature of the charges, to

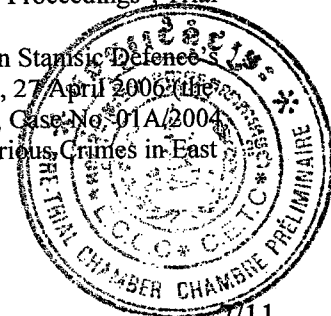
<sup>19</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea of 6 June 2003 (the “Agreement”); Law on the Establishment of the ECCC of 27 October 2004 (the “ECCC Law”).

<sup>20</sup> *Prosecutor v. Strugar*, Case No. IT-01-42-T, “Decision Re the Defence Motion to Terminate Proceedings”, Trial Chamber II, 26 May 2004 (the “*Strugar* Decision”).

<sup>21</sup> *Strugar* Decision, para. 21. See also: *Prosecutor v. Stanisic*, Case No. IT-03-69, “Decision on Stanisic Defence Motion on the fitness of the accused to stand trial with confidential annexes”, Trial Chamber II, 27 April 2006 (the “*Stanisic* Decision”), pp. 2 and 3 and *Deputy General Prosecutor for Serious Crimes v. Nahak*, Case No. 01A/2004, “Findings and Order on Defendant Nahak’s Competence to Stand Trial”, Special Panels for Serious Crimes in East Timor (Dili District Court), 1 March 2005, (the “*Nahak* Decision”), paras 32 to 48.

<sup>22</sup> *Strugar* Decision, para. 23.

<sup>23</sup> *Strugar* Decision, para. 25.



understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify”.<sup>24</sup>

31. In relation to the fact that the accused was represented by a counsel, the Trial Chamber stated:

“The availability of counsel [...] may well adequately compensate for any deficiency of a relevant capacity. The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel efficiently for this purpose.”<sup>25</sup>

32. The Pre-Trial Chamber notes that in the decision in the case of *Prosecutor v. Stanisic*, the ICTY Trial Chamber applied the reasoning in *Strugar* when deciding on a request at the pre-trial stage involving the accused’s fitness to exercise his fundamental right to participate effectively in his defence.<sup>26</sup>

33. The Pre-Trial Chamber notes that from the beginning of a judicial investigation before the ECCC, charged persons enjoy procedural rights, as described in *Strugar*. Amongst these are the rights to be informed of the charges against them, to prepare their defence and to defend themselves.<sup>27</sup> A number of provisions in the Internal Rules also confirm that charged persons are given the opportunity to play an active role during the investigative phase of the proceedings before the ECCC.<sup>28</sup>

34. As the enjoyment of these rights requires that a charged person has a level of mental and physical capacity, the Pre-Trial Chamber considers that the issue of a charged person’s capacity to effectively participate in the proceedings is triggered from the very moment an individual is charged with a crime before the ECCC. As emphasised by the Co-Lawyers, a charged person’s capacity to cooperate with his counsel is of particular relevance during the investigative stage of the proceedings.

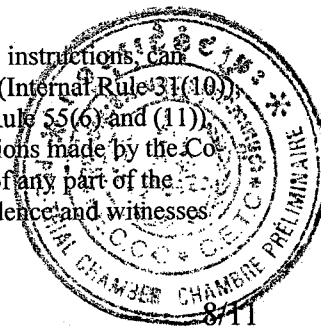
<sup>24</sup> *Strugar* Decision, para. 36. See also: *Prosecutor v. Kovacevic*, IT-01-42/2-I, “Public Version of the Decision on Accused’s fitness to enter a plea and Stand Trial”, Trial Chamber, 12 April 2006, para. 29; *Nahak* Decision, para. 41; *S.C. v. United Kingdom*, para. 29.

<sup>25</sup> *Strugar* Decision, para. 22.

<sup>26</sup> *Stanisic* Decision.

<sup>27</sup> Article 35(new) of the ECCC Law.

<sup>28</sup> Charged persons, with the assistance of their lawyers who act in accordance with their clients’ instructions, can notably seek investigative action (Internal Rules 55(10) and 66)), request assignment of experts (Internal Rule 31(10)), request disqualification of judges (Internal Rule 34), view documents on the case file (Internal Rule 55(6) and (11)), appear before the Co-Investigating Judges (Internal Rule 58), lodge appeal of a number of decisions made by the Co-Investigating Judges to the Pre-Trial Chamber (Internal Rules 73 and 74), apply for annulment of any part of the proceedings (Internal Rule 76), and, in general, participate in the investigation by providing evidence and witnesses (Internal Rule 58(6)).



35. The Pre-Trial Chamber therefore finds that charged persons are in principle entitled to have their capacity to exercise their procedural rights effectively during the investigation and pre-trial phase evaluated by an expert if their request is properly justified. In this respect, the Pre-Trial Chamber finds that the Request is not premature as stated by the Co-Investigating Judges.

#### B) The merits of the Appeal

36. The Co-Lawyers' Appeal is based on the following ground: "Unquestionably, Mr. IENG Sary is in a state of weak physical and mental capacity, due to his current illnesses and the medication he is receiving, and it is feared that his mental state may deprive him of this essential ability to consult with this Defence Team."<sup>29</sup>

37. The Pre-Trial Chamber notes that neither the Internal Rules nor Cambodian law specifies the prerequisites for a successful application for an order of examination by an expert. Therefore, the Pre-Trial Chamber will, again, seek guidance in the procedural rules established at the international level.

38. In the *Stanisic* Decision, the Trial Chamber of the ICTY found that there must be "an 'adequate reason' to hold an inquiry into the Accused's competence to stand trial".<sup>30</sup>

39. The threshold for an accused to be declared fit to stand trial has been described by the Trial Chamber of the ICTY in the *Strugar* Decision as follows:

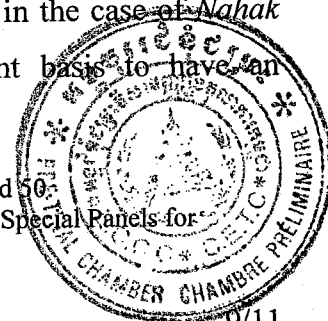
"It would be entirely inappropriate, and unjustified, and antithetical to the application of international criminal law, to require that each of these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity. [...] [W]hat is required is a *minimum* standard of overall capacity below which an accused cannot be tried without unfairness or injustice. [...] [T]he threshold is met when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence."<sup>31</sup>

40. Similarly, the Special Panels for Serious Crimes in East Timor ruled in the case of *Nahak* that "in light of the information supplied, there was a 'sufficient basis to have an

<sup>29</sup> Appeal Brief, para. 10. See also: Request, para. 1.

<sup>30</sup> *Stanisic* Decision. See also: *Strugar* Decision, para. 24 and *Nahak* Decision, paras 24, 49 and 50.

<sup>31</sup> *Strugar* Decision, para. 37; *Kovacevic* Decision, para. 27. This principle was applied by the Special Panels for Serious Crimes in East Timor in the *Nahak* Decision, para. 121.



independent evaluation of the Defendant with respect to his mental competence to stand trial”.<sup>32</sup> The Court further stated that to hold a competency hearing “there must be some degree of doubt as to the defendant’s competence to stand trial” and “the level of concern on the part of the Court relative to the defendant’s competence must be significant”.<sup>33</sup>

41. The Pre-Trial Chamber will therefore review the Appeal by determining whether there is an adequate reason to question the Charged Person’s capacity to participate, with the assistance of his Co-Lawyers, in the proceedings and sufficiently exercise his rights during the investigation.
42. The Pre-Trial Chamber acknowledges that the Charged Person is 82 years old and has been regularly examined by doctors who have identified that he suffers from several medical problems requiring him to take medication.<sup>34</sup> The Charged Person has been hospitalised on several occasions due to complications related to these ailments.<sup>35</sup> Upon order of the Co-Investigating Judges, the Charged Person’s physical condition has been evaluated by cardiologists<sup>36</sup> and urologists<sup>37</sup>, who have conducted extensive medical examinations to determine the nature and the gravity of his ailments.
43. The Pre-Trial Chamber notes that none of the medical or expert reports indicates that the ailments from which the Charged Person is suffering might have an effect on his mental capacity. There is no mention either of side-effects caused by any medication. On the contrary, the cardiologists Antoine Lafont and Chour Sok, appointed as experts, concluded in their report dated 5 March 2008 that the ailments that they have identified do not require particular measures with regard to the Charged Person’s participation in the investigation.<sup>38</sup>
44. The Case File contains no evidence indicating that the Charged Person’s mental capacities might be affected by his physical ailments.
45. The Pre-Trial Chamber notes that the mere assertion by the Co-Lawyers in the Appeal Brief that “due to his current illnesses and the medication he is receiving, [...] it is feared that [the Charged Person’s] mental state may deprive him of this essential ability to consult with his Defence team”, is not sufficient, in the light of the above-mentioned information contained in the medical reports, to warrant the appointment of a psychiatric expert.

<sup>32</sup> *Nahak* Decision, para. 7.

<sup>33</sup> *Nahak* Decision, paras 49 and 50.

<sup>34</sup> See notably: Medical Report, 20 December 2007, A100/I.

<sup>35</sup> Medical Reports from Calmette Hospital of 28 January 2008, 9 February 2008 and 7 March 2008, respectively, A134/I, B3 and B6.

<sup>36</sup> Expert Report from Antoine Lafont and Chour Sok, 5 March 2008, D/76/III (the “Cardiologists’ report”).

<sup>37</sup> Medical report of Philippe Mangin and Kouch Hach, 14 May 2008, D76/IV.

<sup>38</sup> Cardiologists’ report, p. 5.



