



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

D 5415/6

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC07)

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

Date: 22 October 2008

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 22 / 10 / 2008
ម៉ោង (Time/Heure): 15 : 00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA

PUBLIC

DECISION ON NUON CHEA'S APPEAL REGARDING APPOINTMENT OF AN EXPERT

Co-Prosecutors

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

Charged Person

NUON Chea

Lawyers for the Civil Parties

HONG Kim Suon
LOR Chunthy
NY Chandy
KONG Pisey
Silke STUDZINSKY
YONG Phanith
KIM Mengkhy
Martine JACQUIN

Co-Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE

ឯកសារច្បាប់ចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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ថ្ងៃ ខែ ឆ្នាំ ការបញ្ជាក់ (Certified Date/Date de certification): 22 / 10 / 2008
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA



D54/II/6

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of an “Appeal against Order rejecting Application to Appoint Expert” filed by the Co-Lawyers for Nuon Chea (the “Charged Person”) on 17 April 2008 (the “Appeal”).

I. BACKGROUND

1. On 21 December 2007, the Co-Lawyers for the Charged Person filed before the Co-Investigating Judges an “Application to Appoint Expert” (the “Application”).¹ By their Application, the Co-Lawyers requested the Co-Investigating Judges to appoint an expert to assess the Charged Person’s fitness to stand trial and, more particularly, his “capacity to participate effectively in his defence”.² The Co-Prosecutors responded on 9 January 2008³ and the Defence replied on 18 January 2008.⁴
2. On 11 March 2008, the national Co-Lawyer for the Charged Person sent a letter to the Office of the Co-Investigating Judges requesting “an indication as to when [it] intend[ed] to dispose of the application”.⁵
3. On 14 March 2008, the Co-Investigating Judges responded as follows (the “Letter of 14 March 2008”):

“[...] At the outset, we wished to reassure you that we had not lost sight of your request but, given your recent letter, we can confirm the following:

1. The issue of your client’s fitness to stand trial does not arise at this stage since the question of your client being sent forward for trial is not a current one.
2. Neither is the question of your client’s fitness to participate in substantive investigations a relevant one as, for the moment, your client refuses to be interviewed.
3. Moreover, the fitness of your client to instruct counsel could not justify the carrying out of an expertise. You have not referred to any element whatsoever which could indicate that there is currently the least problem in this respect, and we would note that your client has been medically examined regularly (most recently last week) and none of the doctors have pointed to any relevant problem.

¹ Application to Appoint Expert, 21 December 2007, D54, p. 1

² Application, para. 27.

³ Prosecution’s Observations on NUON Chea’s Application for Appointment of an Expert and Interim Stay, 9 January 2008, D54/I, p. 9.

⁴ Reply to Prosecution’s Observations on NUON Chea’s Application for Appointment of an Expert and Interim Stay, 18 January 2008, D54/II, p. 6.

⁵ Letter from SON Arun to the Office of the Co-Investigating Judges, 11 March 2008, D54/III.



Having regard to the above, we will decide in due course on your request, in accordance with the provisions of Rules 31, 32 and 55.10 of the Internal Rules.”⁶

4. On 25 March 2008, the Co-Lawyers filed a Notice of Appeal against “the Co-Investigating Judges’ Response regarding the Request of Appointment of Expert for NUON Chea”⁷ and, on 17 April 2008, they filed their Appeal Brief titled “Appeal Against Order Rejecting Application to Appoint Expert”.⁸
5. The Co-Prosecutors filed their “Response to NUON Chea’s Appeal regarding Appointment of an Expert to assess his Fitness to Stand Trial” (the “Co-Prosecutors’ Response”) on 17 June 2008.⁹
6. No response was filed by the lawyers for the Civil Parties.
7. 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 Nuon Chea to file a reply to the Co-Prosecutors’ Response within five days.¹⁰ The Co-Lawyers did not file a reply.

III. ADMISSIBILITY OF THE APPEAL

8. The Pre-Trial Chamber observes that the Letter of 14 March 2008 was notified on that day which was a Friday, at 5:22 PM. As the notification was after 4:00 PM, it is deemed to have been notified on the next Monday, 17 March 2008. The Notice of Appeal was filed within ten days of the notification of the Letter of 14 March 2008, and in time.
9. The Co-Lawyers submit that the Appeal is admissible as “the [Co-Investigating Judges’] letter of 14 March 2008 amounts to an unequivocal rejection of the Application under Rule 31(10)”.¹¹ Alternatively, they submit that “pursuant to Article 170 of the CPC [Criminal Procedure Code of Cambodia], [the Pre-Trial Chamber] is competent to rule on the Application as a matter of first instance.”¹² In this respect, they argue that Internal Rule 31(10) should be declared invalid as it contravenes Article 162 of the Criminal Procedure Code which clearly imposes a time limit of thirty days for dispensing of applications to appoint an expert.

⁶ Letter from Co-Investigating Judge Marcel Lemonde to Son Arun, 14 March 2008, D54/IV.

⁷ Notice of Appeal, 24 March 2008, D54/V and Record of Appeals, 25 March 2008, D54/V.

⁸ Appeal Against Order Rejecting Application to Appoint Expert, 17 April 2008, D54/V/1 (the “Appeal Brief”).

⁹ Co-Prosecutors’ Response to NUON Chea’s Appeal regarding Appointment of an Expert to assess his Fitness to Stand Trial, 17 June 2008, D54/V/2.

¹⁰ Decision on the Request to Determine Nuon Chea’s Appeal on Appointment of Expert on the basis of Written Submissions Only, 7 August 2008, D54/V/4.

¹¹ Appeal Brief, para. 11.

¹² Appeal Brief, para. 11.



10. The Co-Prosecutors did not make any submissions with respect of the admissibility of the Appeal.
11. 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)
12. Rule 74(3)(d) of the Internal Rules further 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)
13. The Pre-Trial Chamber notes that the Co-Investigating Judges decided that “the [Charged Person’s] fitness [...] to instruct counsel could not justify the carrying out of an expertise” as the Co-Lawyers “have not referred to any element whatsoever which could indicate that there is currently the least problem in this respect”.
14. The Application was, however, not limited to the issue of the Charged Person’s capacity to instruct his counsel. The Application in fact encompassed more broadly the capacity of the Charged Person to “participate ‘effectively’ in criminal proceedings”¹³ and, notably, “to plead, to testify, to instruct counsel, and to understand the nature of the charges, the details of the evidence, and the course and consequences of the proceedings”.¹⁴
15. The Pre-Trial Chamber considers that by saying “[n]either is the question of your client’s fitness to participate in substantive investigations a relevant one as, for the moment, your client refuses to be interviewed”, the Co-Investigating Judges suggested that the involvement of the Charged Person during the investigation is limited to his participation in interviews. In essence, the Co-Investigating Judges decided that only the Charged Person’s ability to instruct counsel was an issue since he refused to participate in interviews.
16. As a result, the Charged Person has been denied the possibility of having his mental capacity to participate in his defence during the investigation examined by an expert. The Co-Investigating

¹³ Application, para. 15.

¹⁴ Application, para. 16.



Judges' decision amounts to a refusal of the entire Application. Such a refusal can be appealed against under Internal Rule 74(3)(d). The Pre-Trial Chamber finds the Appeal admissible.

17. In these circumstances, there is no need for the Pre-Trial Chamber to address the alternative argument put forward by the Co-Lawyers.

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

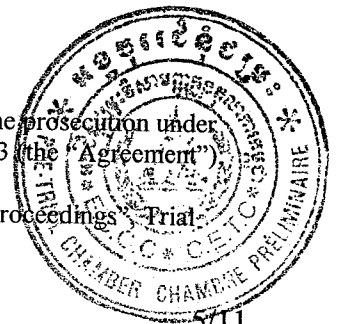
18. Internal Rule 32 provides:

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

19. 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.
20. The Pre-Trial Chamber further observes that the ECCC constitutive documents¹⁵, 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.
21. In the case of *Prosecutor v. Strugar*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") was seized of a defence request to terminate the proceedings on the grounds that the accused was not fit to stand trial.¹⁶ 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

¹⁵ 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").

¹⁶ *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").



mental and physical capacity”.¹⁷ 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.”¹⁸ 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.”¹⁹

22. 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 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”.²⁰

23. In relation to the fact that the accused was represented by a lawyer, 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.”²¹

24. The Pre-Trial Chamber notes that in its 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.²²

25. 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.²³ A number of provisions in the Internal Rules also confirm that charged persons

¹⁷ *Strugar* Decision, para.21. See also: *Prosecutor v. Stanisic*, Case No. IT-03-69, “Decision on Stanisic Defence’s 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.

¹⁸ *Strugar* Decision, para. 23.

¹⁹ *Strugar* Decision, para. 25.

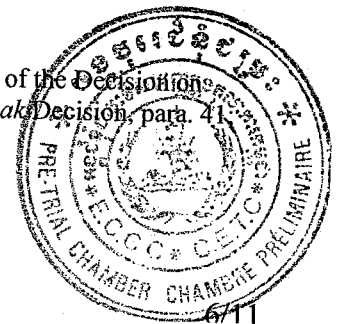
²⁰ *Strugar* Decision, para. 36. See also: *Prosecutor v. Kovacevic*, IT-01-42/2-I, “Public Version of the Decision on Accused’s fitness to enter a plea and Stand Trial”, Trial Chamber, 12 April 2006, para. 29; *Nahak* Decision, para. 41.

S.C. v. United Kingdom, para. 29.

²¹ *Strugar* Decision, para. 22.

²² *Stanisic* Decision.

²³ Article 35(new) of the ECCC Law.



are given the opportunity to play an active role during the investigative phase of the proceedings before the ECCC.²⁴

26. 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.²⁵

27. The Pre-Trial Chamber 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 issue of fitness does arise at this stage, contrary to the assertion by the Co-Investigating Judges.

B) The merits of the Appeal

28. The Co-Lawyers request that the Charged Person be evaluated by a "qualified psychiatrist, clinical psychologist, or geratologist"²⁶ based on the following facts:

- "[The Charged Person] is 82-years-old and suffers from a number of cardio-vascular ailments for which he is currently receiving medical treatment and a periodic monitoring"²⁷;
- The Charged Person has repeatedly complained about his mental capacities, saying that "his brain [was] not normal"²⁸, "[his] head [was] heavy and [he] cannot hear clearly"²⁹, "his thinking is generally unclear"³⁰; and
- The Charged Person was exhausted and dizzy at the Pre-Trial Chamber's public delivery of its decision on provisional detention, due to a night of not uncommon fitful sleep.³¹

²⁴ 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)).

²⁵ Appeal Brief, para. 17.

²⁶ Application, para. 27.

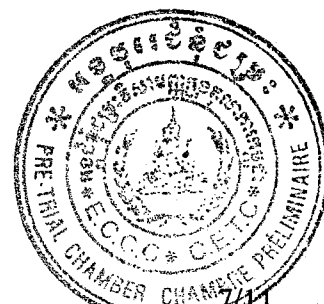
²⁷ Appeal Brief, para. 4.

²⁸ Written Record of Interview of Charged Person, 26 September 2007, D23, p. 3.

²⁹ Written Record of Interview of Charged Person, 17 October 2007, D27, p. 3.

³⁰ Letter from Son Arun to the OCIJ on Health Complaints, 4 April 2008, D54/VI, p. 1.

³¹ Appeal Brief, para. 5.



29. The Co-Lawyers emphasise that the Defence “does not (at this stage) seek to have Mr. Nuon *declared* unfit to stand trial” but ask that “*further evaluation*—of a markedly different nature than that of which has already been ordered by the OCIJ—needs to be undertaken”³². In the view of the Co-Lawyers, “[t]he bar of this preliminary hurdle is necessarily a low one”³³.
30. The Co-Prosecutors do not object to the appointment of a qualified forensic psychiatrist to assess Nuon Chea’s fitness to stand trial although they consider that the facts do not satisfy the test elaborated by the international jurisprudence.
31. 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 seek guidance in the procedural rules established at the international level.
32. 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”³⁴.
33. 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.”³⁵

34. 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 independent evaluation of the Defendant with respect to his mental competence to stand trial’”³⁶. The Court stated that to hold a competency hearing “there must be some degree of doubt as to the defendant’s competence to

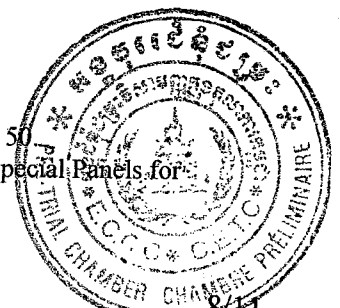
³² Appeal Brief, para. 18.

³³ Appeal Brief, para. 18.

³⁴ *Stanisic* Decision. See also: *Strugar* Decision, para. 24 and *Nahak* Decision, paras 24, 49 and 50

³⁵ *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.

³⁶ *Nahak* Decision, para. 7.



stand trial” and “the level of concern on the part of the Court relative to the defendant’s competence must be significant”.³⁷

35. Seeking guidance in this jurisprudence, the Pre-Trial Chamber will 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.
36. The Pre-Trial Chamber notes that the Co-Investigating Judges have ordered four cardiologists, at different periods, to conduct examinations as they considered it was “advisable to proceed with a medical expertise to determine the medical condition from which Mr. NUON Chea suffers and to determine the consequences for the future of the judicial investigation”. The Co-Investigating Judges assigned the cardiologists the following mission:

“[T]o carry out a medical examination of the detainee, NUON CHEA and, after having studied the medical file of the detainee at the ECCC Detention Center and at the CALMETTE Hospital and having gathered any other relevant information answer, in particular, the following questions:

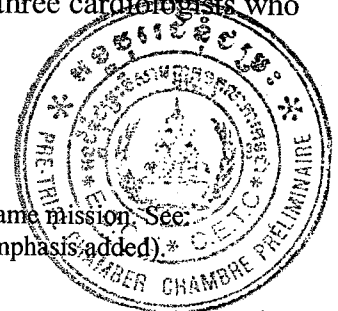
- 1- Does the examination of the detainee reveal any specific pathology. If so, describe them and indicate to which medical condition they relate, specifying their possible effects on the memory of the detainee and his capacity for comprehension.
- 2- State whether any such disorders require special treatment or care or whether they involve any counter-indications. More precisely, does the medical condition require specific measures, both with respect to the conditions of detention of detainee and his participation in the judicial investigation? In particular, are there any precautions to be taken during interviews and, in if yes [sic.], which?
- 3- If appropriate, provide a prognosis on possible modification, degradation or improvement of the condition.
- 4) Provide any other useful observations concerning the health of the detainee.”³⁸

37. The Pre-Trial Chamber notes that two paragraphs in the confidential version of the decision where the health condition of the Charged Person is discussed have been redacted and are replaced by paragraph 38 below.

38. In October 2007 and March 2008, the Charged Person was examined by three cardiologists who concluded that the Charged Person suffers from a number of ailments.

³⁷ *Nahak* Decision, paras 49 and 50.

³⁸ Expertise Order, 28 September 2007, D24, p. 2. Two further expertise orders contain the same mission. See: Expertise Order, 19 October 2007, D24/VI and Expertise Order, 4 March 2008, D24/VIII (emphasis added).

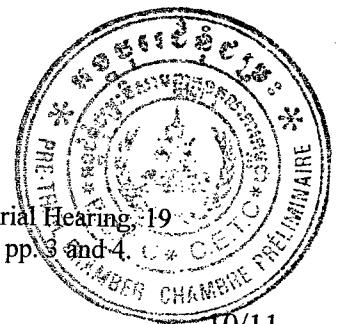


39. Although, as pointed out by the Defence, the experts were not specialists in psychiatry nor psychology, their reports all lead to the conclusion that the Charged Person's capacities are not significantly affected by his cardio-vascular ailments and that his cognitive functions are normal for a person of his age. The Co-Lawyers' assertion that "there is significant divergence on the question of Mr. NUON's *cognitive function*"³⁹ appears to be unfounded.
40. In the *Strugar* Decision, the judges of the Trial Chamber of the ICTY took into account their own observations of the accused's behaviour during hearings in reaching their conclusion on the accused's fitness to stand trial:
- "On each occasion the comments of the Accused appeared to the Trial Chamber to be quite collected, relevant, well structured and comprehensive. [...] We record these matters with the observation that the Accused's conduct during the course of the proceedings has not provided any reason for the Trial Chamber to hesitate in its acceptance of the opinion of the Prosecution experts that the Accused is fit to stand trial."⁴⁰
41. The Pre-Trial Chamber notes that the Charged Person made collected, relevant, well-structured and comprehensive statements during hearings before the Co-Investigating Judges and the Pre-Trial Chamber.⁴¹ The Charged Person's conduct during hearings before the Co-Investigating Judges and the Pre-Trial Chamber does not provide any reason to question the opinion expressed by the cardiologists.
42. The Pre-Trial Chamber finds that the Charged Person's subjective complaints about his mental capacities do not detract from this conclusion or in themselves justify the appointment of an additional expert. The opinions expressed by the four cardiologists appear to be compatible with the Charged Person's behaviour before the Co-Investigating Judges and the Pre-Trial Chamber.
43. For these reasons, the Pre-Trial Chamber finds that the request for the appointment of an expert to assess the Charged Person's fitness to stand trial and capacity to participate effectively in his defence is not justified.

³⁹ Application, para. 23.

⁴⁰ *Strugar* Decision, para. 51.

⁴¹ Written Record of Initial Appearance, 19 September 2007, D20; Written Record of Adversarial Hearing, 19 September 2007, C8; Written Record of Hearing of 8 February 2008 (public session), C11/61, pp. 3 and 4.



D54/V16

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

- 1) The Appeal is admissible;
- 2) The Application to appoint an expert is denied;
- 3) The Appeal is dismissed. mf

Phnom Penh, 22 October 2008


Pre-Trial Chamber


President


Rowan DOWNING


NEY Thol


Katinka LAHUIS


HUOT Vuthy


PRAK Kimsan

