



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

- 4 -

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.

Case File N° 002/29-10-2009-ECCC/PTC(04)

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

Date: 23 March 2010

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..... 06 / 04 / 2010	
ម៉ោង (Time/Heure):..... 14:30	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Ratanak	

PUBLIC(REDACTED)

DECISION ON NUON CHEA'S APPLICATION FOR DISQUALIFICATION OF JUDGE MARCEL LEMONDE

Co-Prosecutors

CHEA Leang
Andrew CAYLEY
YET Chakriya
William SMITH

Charged Person

NUON Chea

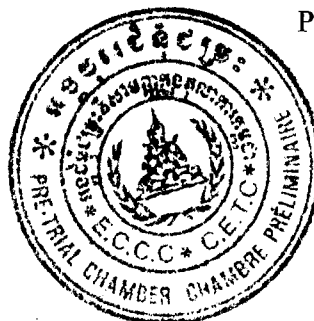
Co-Investigating Judge

Marcel LEMONDE

Co-Lawyers for the Charged Person

SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla

ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់ដើម	
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of Nuon Chea’s “Application for Disqualification of Judge Marcel Lemonde”, filed 29 October 2009 (respectively “Charged Person” and “Application”).¹

I. PROCEDURAL BACKGROUND

1. The Co-Lawyers for the Charged Person filed the Application on 29 October 2009.²
2. On 25 November 2009, Judge Marcel Lemonde (“Judge Lemonde”) presented his written submissions pursuant to Internal Rule 34(7) (“Rules”),³ and in accordance with Article 8 of the relevant Practice Direction.⁴

II. SUMMARY OF SUBMISSIONS

3. The Application seeks the disqualification of Judge Lemonde on the basis of the following:
 - a. the failure of the Co-Investigating Judges to provide information requested by the Defence in its Third Request for Investigative Action, concerning the investigative strategy of the Office of the Co-Investigating Judges (“OCIJ”), the qualifications and experience of investigators and the collection and analysis of exculpatory evidence;⁵

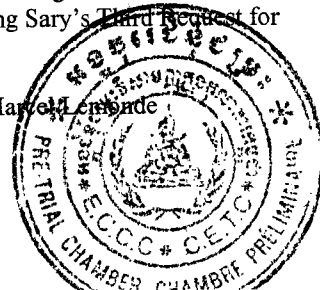
¹ Application for Disqualification of Judge Marcel Lemonde, Case No. 002/29-10-2009-ECCC/PTC(04), 29 October 2009, doc. no. 1.

² *Ibid.*

³ Response of Co-Investigation Judge Marcel Lemonde to Nuon Chea’s Application for Disqualification, Case No. 002/29-10-2009-ECCC/PTC(04), 25 November 2009, doc. no. 2.

⁴ Filing of Documents Before the ECCC, Practice Direction ECCC/01/2007/Rev.4.

⁵ Application, para. 4(a), referring to Ieng Sary’s Third Request for Investigative Action, 21 May 2009, D171. This request was joined by Nuon Chea: Notice of Joinder to Ieng Sary’s Third Request for Investigative Action, 9 June 2009, D171/2.



- b. the content of the Co-Investigating Judges' order on the Co-Lawyers' request for investigative action to seek exculpatory evidence in the shared material drive, also referred to as the "SMD" ;⁶
- c. the decision of the Co-Investigating Judges on the use of statements obtained by torture, and their alleged failure to address concerns on this issue expressed in letters to the Co-Investigating Judges;⁷
- d. the process employed by the Co-Investigating Judges in seeking to interview ██████████, in particular the failure of Co-Investigating Judge You Bunleng to sign the letters to ██████████, the Co-Investigating Judges' dealing with the ██████████ via an intermediary, and the requirement of the Co-Investigating Judges that ██████████ testify at the ECCC premises rather than at the ██████████;⁸ and
- e. the remark said to have been made by Judge Lemonde at a meeting of OCIJ staff held at his private residence in August 2009,⁹ that in relation to the judicial investigation "I would prefer that we find more inculpatory evidence than exculpatory evidence". The Defence relies on a statement made on 8 October 2009 by Wayne Bastin, former Chief of the Intelligence and Analysis Unit of the OCIJ ("Statement"). The Statement annexed to the Application contains a declaration, apparently signed by Mr Bastin and witnessed at an Australian police station, whereby he acknowledges that his statement is true, correct and made in the belief that a person making a false declaration in the circumstances is liable to the penalties of perjury.¹⁰

⁶ Application, para. 4(b), referring to Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2.

⁷ Application, para. 4(c), referring to Order on the use of statements which were or may have been obtained by torture, 28 July 2009, D130/8; Letter from Ieng Sary Defence Team to OCIJ, 17 July 2009, D130/7; Letter from Ieng Sary Defence Team to OCIJ, 7 August 2009, D130/7/2.

⁸ Application, para. 4(d), referring to Nuon Chea's Seventh Request for Investigative Action, 1 December 2008, D122.

⁹ Application, para. 4 e).

¹⁰ Statement, p. 3.



4. The Co-Lawyers submit that these matters have led them “to question the actual neutrality of the ECCC’s investigative process”¹¹. They further submit that these irregularities, individually and in totality, suggest the appearance of a lack of impartiality on the part of the Co-Investigating Judges.¹² The Co-Lawyers further submit that the words reported to have been spoken in August 2009 by Judge Lemonde indicate actual bias against the Charged Person.¹³ The Defence therefore seeks the disqualification of Judge Lemonde from all further proceedings.¹⁴
5. In response, Judge Lemonde submits that:
- a. a response to the Third request for Investigative Action is forthcoming;¹⁵
 - b. the order concerning the Defence request to seek exculpatory material in the SMD was appealed to the Pre-Trial Chamber, which in its Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive¹⁶ partly substituted its own reasoning for that of the Co-Investigating Judges;¹⁷
 - c. the order on statements obtained by torture is under appeal to the Pre-Trial Chamber;¹⁸
 - d. dealing with the [REDACTED] is a highly sensitive matter, and the Co-Investigating Judges are doing their best in a sensitive [REDACTED] environment;¹⁹ and
 - e. Judge Lemonde does not admit making the August 2009 remark attributed to him. He says that if he did make such a remark at the “relaxed, informal and light-hearted” August 2009 meeting, no one took it seriously, and no fair-minded observer would consider that the words constituted an

¹¹ Application, para. 4.

¹² Application, para. 14.

¹³ Application, para. 18.

¹⁴ Application, para. 20.

¹⁵ Response, para. 8.

¹⁶ 18 November 2009, D164/4/13.

¹⁷ Response, para. 11.

¹⁸ Response, para. 13.

¹⁹ Response, para. 15.



instruction to OCIJ staff to look for inculpatory over exculpatory evidence.²⁰

6. Judge Lemonde annexes to his written submissions in relation to the Application his consolidated response to previous disqualification motions filed by Ieng Sary and Khieu Samphan.²¹ In the consolidated response, Judge Lemonde states that he does not remember saying the words attributed to him, and that if he did say them it would only have been “in jest, as would have been obvious to everyone present”.²² Judge Lemonde also annexes to his written submissions in relation to the Application a signed “Witness Statement” setting out his own recollections of the August 2009 meeting. This statement was also annexed to his previous consolidated response.²³
7. Judge Lemonde submits in addition that the Application is out of time pursuant to Rule 34(3). He therefore requests the Pre-Trial Chamber to dismiss the appeal in its entirety.

III. ADMISSIBILITY OF THE APPLICATION

8. The jurisdiction of the Pre-Trial Chamber concerning the Application is defined by Internal Rule 34(2), which provides:

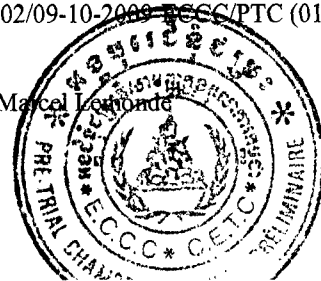
“Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had,

²⁰ Response, paras. 21-22.

²¹ Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan, Case No. 002/09-10-2009-ECCC/PTC (01) and Case No. 002/13-10-2009-ECCC/PTC (02), 5 November 2009 (“Consolidated Response”). The Pre-Trial Chamber dismissed both applications in its Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case No. 002/09-10-2009-ECCC/PTC (01), 9 December 2009 and in its Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case No. 002/13-10-2009-ECCC/PTC (02), 14 December 2009.

²² Consolidated Response, para. 8.

²³ “Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan – Annex A”, Case No. 002/09-10-2009-ECCC/PTC (01) and Case No. 002/13-10-2009-ECCC/PTC (02), 5 November 2009.



any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.”

9. Internal Rule 34(5) provides in relevant part that “[a]n application for disqualification of a Co-Investigating Judge shall be submitted to the Pre-Trial Chamber”. These provisions together mean that the Pre-Trial Chamber has jurisdiction to consider the Application.

10. The obligations of a party filing an application for disqualification of a judge are set out in Internal Rule 34(3), which reads:

“A party who files an application for disqualification of a judge shall clearly indicate the grounds and shall provide supporting evidence. The application shall be filed as soon as the party becomes aware of the grounds in question.”

11. Judge Lemonde submits that the Application is out of time. He refers to a newspaper report dated 13 October 2009 in which the Co-Lawyers are reported as saying, when asked whether they intend to file a disqualification application, that the defence “is considering all of its options”. Judge Lemonde submits that the Co-Lawyers thereby “gave notice through the press”.²⁴ Judge Lemonde submits that this “raises questions about the admissibility of the Application having regard to Rule 34(3)”.²⁵

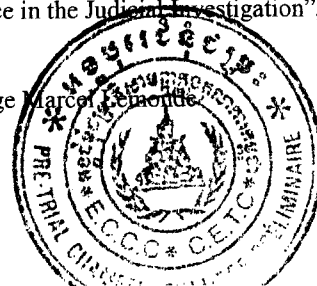
12. The Statement on which the Application is partly based was sworn by Mr Bastin on 8 October 2009. The Co-Lawyers wrote to the Co-Investigating Judges on 15 October 2009, requesting explanations of the Co-Investigating Judges’ approaches to certain aspects of the judicial investigation.²⁶ The Co-Investigating Judges replied on 27 October 2009.²⁷ The Application was filed on 29 October 2009.

²⁴ Response, para. 23.

²⁵ Response, para. 23.

²⁶ Letter to OCIJ re Lack of Confidence in the Judicial Investigation, 15 October 2009, D221.

²⁷ Your Letter of 15 October Expressing Your “Lack of Confidence in the Judicial Investigation”, Doc No. D221/1, 27 October 2009.



13. The Pre-Trial Chamber considers that the Co-Lawyers took action as soon as they became aware of one of the grounds for the Application. Although there is no provision in Rule 34 for a party to seek explanation from the judge concerned prior to filing an application for disqualification, it was not unreasonable for the Co-Lawyers to first seek an explanation from Judge Lemonde prior to filing the Application. The Pre-Trial Chamber held in a previous disqualification decision,²⁸ statements of a person as quoted by the press do not amount to reliable evidence. In this case it would not tend to prove that a party was aware of grounds for disqualification at a particular time. Accordingly the Application, filed on 29 October 2009, is timely pursuant to Rule 34(3). As no Closing Order has yet been made, the application is also timely pursuant to Rule 34(4)(a).

IV. CONSIDERATION OF THE APPLICATION

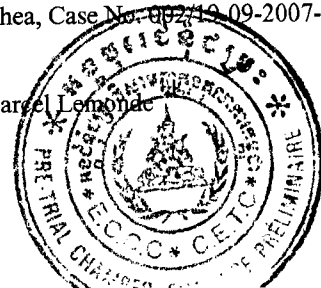
14. The Pre-Trial Chamber has set out the law relating to disqualification of judges in its decision concerning an application for disqualification of Judge Ney Thol (“*Ney Thol* decision”).²⁹ The test for bias to be applied is that provided in Internal Rule 34(2), which refers both to actual bias and to apprehended bias.

15. Paragraphs 15–21 of the Pre-Trial Chamber’s reasons in the *Ney Thol* decision (footnotes omitted) are as follows:

15. The Pre-Trial Chamber notes that “the starting point for any determination of a claim [of bias] is that “there is a presumption of impartiality which attaches to a Judge”. “This presumption derives from their oath to office and the qualifications for their appointment [...], and places a high burden on the party moving for the disqualification to displace that presumption”.

²⁸ Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case No. 002/13-10-2009-ECCC/PTC (02), 14 December 2009, doc. no. 7, para. 30.

²⁹ Decision on the Co-Lawyers’ Urgent Application for the Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 4 February 2008, C11/29.



16. *The Pre-Trial Chamber considers that this presumption of impartiality applies to the Judges of the ECCC. Article 3.3 of the 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 (“the Agreement”) provides:*

The Judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for ... appointment to judicial offices. They shall be independent in the performance of the[ir] functions and shall not accept or seek instructions from any Government or any other source.

By Article 7.2 of the Agreement this provision applies equally to the judges of the Pre-Trial Chamber.

17. *Article 10 new of the ECCC Law provides that “the [j]udges of the Extraordinary Chambers shall be appointed from among the currently practising [j]udges or are additionally appointed in accordance with the existing procedures for appointment of [j]udges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law. Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.”*

18. *On 7 May 2006, the Judges of the Pre-Trial Chamber of the ECCC, including Judge Ney Thol, were appointed by Royal Decree and subsequently officially sworn in during an official ceremony.*

19. *It is for the applicant to adduce sufficient evidence to satisfy the Pre-Trial Chamber that the Judge in question can be objectively perceived to be biased. There is a high threshold to reach in order to rebut the presumption of impartiality.*



20. *The jurisprudence of the international tribunals is consistent in the test for bias applied here. The Appeals Chamber of the ICTY has held in the case of Furundzija that:*

A Judge is not impartial if it is shown that actual bias exists.

There is an appearance of bias if:

- *A Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or*
- *The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.*

This jurisprudence is applied generally by international tribunals.

21. *The reasonable observer in this test must be "an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and [apprised] also of the fact that impartiality is one of the duties that Judges swear to uphold".*

16. The *Code of Judicial Ethics* of the ECCC provides further guidance in this area. Article 2.1 states that "Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions".³⁰ Article 7.1 states that "Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality". The *Code of Judicial Ethics* of the International Criminal Court contains identical provisions.³¹

17. Article 2.2 of the *Bangalore Principles of Judicial Conduct* states that a judge "shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the

³⁰ *Code of Judicial Ethics*, adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, and amended at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 5 September 2008.

³¹ *Code of Judicial Ethics of the International Criminal Court*, articles 4.1 and



impartiality of the judge and of the judiciary”.³² The commentary to this article goes on to say that “a judge should avoid deliberate use of words or conduct which could reasonably give rise to a perception of an absence of impartiality” and that “remarks which the judge may consider to be ‘harmless banter’ may diminish the judge’s perceived impartiality”.³³

18. All evidence relied on by the applicant is to be provided upon the filing of an application for disqualification. The statement of Mr Bastin is the only evidence adduced by the Co-Lawyers in support of arguments based on the alleged comments of Judge Lemonde during the August 2009 meeting. Further, the statement provides the only account of the August 2009 meeting, other than Judge Lemonde’s own statement. Mr Bastin’s contemporaneous notes from the meeting are not produced. The Pre-Trial Chamber has received no evidence of other witnesses’ recollections of this meeting.

19. Considering all these circumstances the Pre-Trial Chamber finds the evidence supporting the application on this point is insufficient. Further evidence from other witnesses could have been sought to provide corroboration for the statement of Mr. Bastin. No such statements were filed with the Application. Judge Lemonde states he cannot remember the incident, but if the words had been spoken, they would have been in jest. Further, Judge Lemonde was speaking in English, which is neither his first nor his working language.

20. The Application itself states that “if true” the alleged remark “calls into question Judge Lemonde’s presumptive impartiality”.³⁴ The Pre-Trial Chamber has no power to order any investigation of allegations of partiality which are not

³² Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, the Hague, 25-26 November 2002. For the application of the Bangalore Principles in the Special Court for Sierra Leone, see “*Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT*”, *Prosecutor v. Sesay*, Case No. SCSL-04-15-PT, Trial Chamber, 11 May 2004, para. 38.

³³ Commentary on the Bangalore Principles of Judicial Conduct, Judicial Integrity Group, March 2007, para. 65.

³⁴ Application, para. 4(e).



supported by sufficient evidence.³⁵ On the basis of the evidence adduced by the Co-Lawyers regarding the existence of an instruction, the Pre-Trial Chamber finds that the words attributed to Judge Lemonde by the Co-Lawyers do not amount to such an instruction as asserted by the Co-Lawyers.

21. The Pre-Trial Chamber observes that the acts attributed to Judge Lemonde in paras 4(a) to 4(c) of the Application are in fact acts attributable to both Co-Investigating Judges, working jointly pursuant to article 23 new of the *Establishment Law*. For an act to be grounds for disqualification of a judge, it must be an act attributable to that one judge, and not to several. Accordingly those acts of the Co-Investigating Judges done jointly cannot be used as grounds for disqualification of one judge. The Pre-Trial Chamber notes further that subsequent to the filing of the Application and Judge Lemonde's Reponse, the Co-Investigating Judges responded to Ieng Sary's Third Request for Investigative Action,³⁶ thus rendering para. 4(a) of the Application moot.
22. The only grounds involving an act of Judge Lemonde done alone are those relating to the letters to [REDACTED] set out in in para. 4(d) of the Application. The sending of letters to the [REDACTED] would appear to be a positive reponse to the request of the Co-Lawyers that the Co-Investigating Judges do so.³⁷ Rule 34(3) requires the applicant to clearly indicate the grounds for an application for disqualification of a judge. On the basis of the material contained in the Application it is not for the Pre-Trial Chamber to speculate as to any reason why only Judge Lemonde may have signed the letters to the [REDACTED].³⁸ On the basis of the lack of cooperation between the Co-Investigating

³⁵ Decision on Ieng Sary's Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, Case No. 002/20-10-2009-ECCC/OCIJ (PTC 03), 30 November 2009, doc. no. 5, para. 10.

³⁶ D171/5, 11 December 2009.

³⁷ See Nuon Chea's Seventh Request for Investigative Action, 1 December 2008, D122.

³⁸ The Pre-Trial Chamber takes notice also of the Note by the Co-Investigating Judge, 11 January 2010, D301, and Order on Nuon Chea and Ieng Sary's Request to Summon Witnesses, 13 January 2010, D314, both of which relate to the matters set out in para. 4(d) of the Application. The Co-Lawyers for Ieng Sary have appealed the Order on Request to Summons Witnesses: see Record of Appeals, 8 February 2010, D314/1.

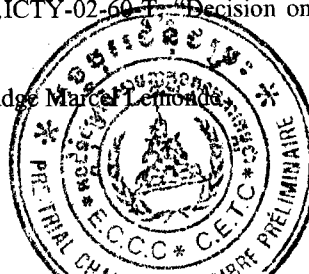


Judges or any disagreement between the Judges the Pre-Trial Chamber further cannot draw any conclusion considering the impartiality of a judge.

23. The Pre-Trial Chamber observes that it “has the duty to examine the content of the judicial decisions cited as evidence of bias” and that “the purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias based on the objective test”. The Pre-Trial Chamber further observes that “error, if any, on a point of law is insufficient. What must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law (on which there may be more than one possible interpretation) or to the assessment of the relevant facts”.³⁹
24. The Pre-Trial Chamber further notes that a judge’s work is to render decisions, and unavoidably one of the parties may not be satisfied. This does not, by itself, raise grounds for disqualification,⁴⁰ but rather for appeals or for exhaustion of other existing legal remedies during the pre-trial, trial and appellate stages of the proceedings.
25. As a consequence, none of the other arguments supporting the Application, are capable of establishing the conclusion that Judge Lemonde lacks impartiality. Taken individually, and also taken as a whole, the submissions of the Co-Lawyers do not demonstrate a lack of impartiality on the part of Judge Lemonde.

³⁹ Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case No. 002/13-10-2009-ECCC/PTC (02), 14 December 2009, doc. no. 7 quoting *Prosecutor v. Arsene Shalom Ntahobali*, ICTR-97-21-T, “Decision on Motion for Disqualification of judges” (Bureau), 7 March 2006, para. 12; *CF.*, *Seromba*, ICTR-2001-66-T, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para 12.

⁴⁰ *Prosecutor v. Arsene Shalom Ntahobali*, ICTR-97-21-T, “Decision on Motion for Disqualification of judges” (Bureau), 7 March 2006 para. 11; *Blagojevic et al.*, ICTY-02-60-T, “Decision on Blagojevic’s Application Pursuant to Rule 15 (B)”, 19 March 2003, para 14.



**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES
UNANIMOUSLY:**

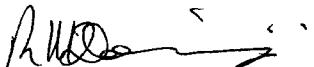
The Application is dismissed.

Pursuant to Internal Rule 34(8), this decision is not open to appeal.


Phnom Penh, 23 March 2010 *ch.*


Pre-Trial Chamber


President


Rowan DOWNING


NEY Thol


Katinka LAHUIS


HUOT Votha


PRAK Kimsan

