

PARIS BAR COUNCIL**Disciplinary Board****DECISION OF 17 NOVEMBER 2015**

The Prosecuting Authority v. Anta GUISSÉ

Case No. 300/263629

**THE BOARD, SITTING AS ADJUDICATION PANEL NO.1****Whereas,**

Ms Anta GUISSÉ was summoned by extraordinary act of 23 September 2015, further to the disciplinary investigation report filed on 8 June 2015 by Mr Denis CHEMLA, member of the Bar Council, to appear at the hearing of the Disciplinary Board, at 9 a.m. on 13 October 2015 on account of the facts set out hereunder.

Subsequent to the hearing, which was held in public absent any objection thereto from the Defendant, and having heard, pursuant to the provisions of articles P.72.5.11 and P.72.5.12 of the Internal Rules of the Paris Bar,

- Mr Etienne LESAGE, member of the Bar Council, who gave an oral report and read out the summons;
- The President of the Bar, Mr Pierre-Oliver SUR, and Mr Jean-Marc FEDIDA, member of the Bar Council, for the Prosecution;
- Ms Anta GUISSÉ, who was afforded due time to avail herself of her administrative and disciplinary records, and had the last word.

The proceedings having concluded, and upon deliberation;

Hereby decides:**I – AS TO THE FACTS**

The facts are recited hereunder verbatim:

I – PROFESSIONAL STATUS

Ms Anta GUISSÉ took an oath on 22 September 1999 before the Paris Court of Appeal.

She practised with the Fort de France Bar from 13 December 1999 to 9 December 2002.

She was admitted to the roll of the Paris Bar on 10 December 2002.

[signed] [signed]

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She practises with *Cabinet groupé BSP RAPHAEL CONSTANT - Anta GUISSÉ*.

II – THE CHARGES

Mr Vercken and Ms GUISSÉ represent Mr Khieu Samphan, who stands accused of crimes against humanity, grave breaches of the 1949 Geneva Conventions and genocide before the Extraordinary Chambers in the Courts of Cambodia (ECCC).

(1) The Accused

Mr Khieu Samphan, 84 years of age, was Head of the State of Democratic Kampuchea, as Cambodia was known under the Khmer Rouge, from 1976 up until 1979, when the Khmer Rouge regime was overthrown. He stands trial with Mr Nuon Chea, 89 years of age, former Chairman of the People's Representative Assembly of Democratic Kampuchea and Deputy Secretary of the Communist Party of Kampuchea.

(2) The ECCC

The ECCC is an independent tribunal established by Cambodian law pursuant to an agreement concluded with the United Nations to try the Khmer Rouge leadership. The ECCC has been operating since 2007 and consists of international and Cambodian judges. In the case at issue, the five members of the Trial Bench include one French judge and one Austrian judge.

The ECCC have come under repeated criticism for the political influence of the Cambodian government – whose interests an expeditious trial of the former Khmer Rouge leadership does not necessarily suit – and for slowness and inefficiency. To date, only four cases lie before the ECCC for determination; the International Co-Prosecutor recently confirmed that he had no intention of instituting further prosecutions.

(3) The judicial case at issue

The case (no. 002) concerns Mr Khieu Samphan and Mr Nuon Chea. It commenced in 2007, when both Accused were placed under provisional detention and two other persons initially stood accused: Mr Ieng Sary and his wife Ms Ieng Thirith. However, Ieng Sary died in 2013 and Ieng Thirith was declared unfit to stand trial on account of senile dementia.

The Closing Order, which runs to some 800 pages, was handed down on 15 September 2010, whereupon Case 002 was split in two:

- **Case 002/01** concerning forced population movement as crimes against humanity and the execution of soldiers loyal to the government which the Khmer Rouge overthrew in 1975. According to the ECCC website (DC55):
“It also considers the roles of the Accused in relation to regime policies relevant to all charges, which will provide a foundation for examining the remaining charges in future trials.”
- **Case 002/02** concerning offences which were not considered in Case 002/01, including charges of genocide. As recalled above, the outcome of Case 002/01 may have repercussions on the charges brought in Case 002/02. Defendant counsel so confirmed at their hearing.

[signed] [signed]

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(4) The proceedings

The trial in Case 002/01 was held from 21 November to 31 October 2013 before the Trial Chamber, composed of President, Mr NIL Nonn (Cambodian), Jean-Marc LAVERGNE (French), Mr YA Sokhan (Cambodian), Ms Claudia FENZ (Austrian) and Mr YOU Uttara (Cambodian).

In addition to Mr Vercken and Ms GUISSÉ, Mr Khieu Samphan's defence team consists of a Cambodian lawyer, Mr KONG, a legal consultant, a case manager and two interns. A similarly-composed team represents Mr Nuon Chea (including Dutch lawyer, Mr KOPPE).

According to the ECCC website, the prosecution team consists of 27 permanent staff – prosecutors, deputy prosecutors, assistants, investigators, analysts, researchers, greffiers, interpreters, 12 interns, and trainee Cambodian judges on secondment. According to Defendant Counsel, the Prosecution team for Case 002 includes at least five international counsel and as many Cambodian counsel.

Judgement was handed down on 7 August 2014. The Accused were found guilty of crimes against humanity and sentenced to life imprisonment.

Both accused appealed the judgement before the appellate jurisdiction of the ECCC, the Supreme Court Chamber. Deadlines for appeal are tight: notice of appeal and the appeal brief must be filed within 30 days and 60 days, respectively. Given the magnitude of the task before it – for instance, the judgement runs to over 750 pages – the Supreme Court Chamber accorded, by decision of 31 October 2014, the Accused a further 30 days, that is, until 29 December 2014, in which to file their appeal briefs.

On 19 September 2014, the Trial Chamber scheduled the hearings in Case 002/02, whose adjudication was to commence on 17 October 2014. Hence the problem which gave rise to the current disciplinary proceedings.

(5) The problem which gave rise to the current proceedings

Defendant counsel initially argued that given the connections between Cases 002/01 and 002/02, it was necessary to “await final judgement in Case 002/01 before commencing Case 002/02”. They filed submissions to that effect on 5 February 2014. The motion was dismissed by decision of 21 March 2014.

Thereafter, they requested that, were their client to be convicted in Case 002/01, the hearings in Case 002/02 would not start until the appeal brief against the judgement in Case 002/01 was written. At a trial management meeting on 30 July 2014, Ms GUISSÉ stated:

“[TRANSLATION] I do not think that it will come as a surprise to anyone when I restate what has been the Defence for Khieu Samphan's consistent position at previous meetings and trial management meetings, namely that given our human resources and the considerable workload that an appeal entails, we cannot see ourselves simultaneously writing an appeal, being in the courtroom and preparing for the

[signed] [signed]

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hearing. We therefore request that the trial in Case 002/02 commence only after the appeal briefs have been filed.”

The request went unanswered at the time.

On 25 August 2014, after sentence had been handed down, the Defence for Khieu Samphan filed a further motion for the suspension of the trial in Case 002/02 pending finality of the judgement in Case 002/01. The motion was denied by decision of 19 September 2014.

By order of the same day (DC47), the Trial Chamber scheduled hearings in Case 002/02, thereby ruling that trial would run from 17 October 2014 to 18 December 2014, but that the schedule of the hearings would be reduced (to three hearings a week) to allow the parties to write their appeal briefs against the judgement in Case 002/01.

On 3 October 2014, Counsel for Mr Khieu Samphan filed a new motion to postpone commencement of trial in Case 002/02, recalling that it was impossible for [them] “[TRANSLATION] without causing prejudice to Mr KHIEU Samphan, to both attend the proceedings in Case 002/02 and write the appeal brief.” The participation of Mr Khieu Samphan was, in the view of the Defence, paramount to the writing of the brief.

On 16 October 2014, the Trial Chamber dismissed the motion anew.

Of note is that, concurrently, in Case 002/02, Defence Counsel filed motions for the disqualification of the Trial Bench who had passed judgement in Case 002/01. The motion to that end was ultimately dismissed by decision of 14 November 2014.

Thereupon, Mr Khieu Samphan instructed Counsel to concentrate on writing the appeal brief, and to that end, not to appear before the Trial Chamber for the trial of Case 002/02.

Thus, on 17 October 2014, at the first hearing Mr Khieu Samphan stated:

“[TRANSLATION] The Chamber is putting me in a position of doing things that I do not want to do. You are putting undue pressure on us. If, therefore, I am left with no choice I will have to ask counsel to concentrate on the appeal. (...) This, therefore, is why Counsel will not be able to take part in the hearings in Case 002/02. (...)

I hereby wish to respectfully to inform the Chamber that once my defence team and I will have fully prepared our appeal within the time imparted, we will be delighted to take part in the proceedings.”

At the same hearing, Ms GUISSÉ confirmed her client’s instructions. And so Defence Counsel left the courtroom. The Defence for Mr Nuon Chea espoused the same position.

Thereafter, the Trial Chamber invited Counsel for the parties to attend a trial management meeting on 21 October 2014 but they failed to materialise. Counsel were then given a warning on 24 October 2014 and a further trial management meeting was held on 28 October 2014, which they attended.

[signed] [signed]

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At the close of the hearing, the Trial Chamber, by decision of 31 October 2014, decided to curtail hearings to two days a week (*viz.*, four hearings in November and six in December), adding that it “would look favourably on this and any other [...] requests for additional resources advanced by the team” for the Defence of Mr Khieu Samphan.

In written submissions of 13 November 2014, the Defence restated its position:

“Mr KHIEU Samphân and his Defence hereby reaffirm their position not to participate in the hearings in Case 002/02 until they have completed the drafting of their appeal brief against the Judgement delivered on 7 August 2014 in Case 002/01, that is, until 29 December 2014, since that is the deadline set by the Supreme Court for filing the brief.”

On 21 November 2014, the President of the Trial Chamber took the decision to re-appoint Counsel for the Defence of Khieu Samphan as Court-appointed counsel with a view to securing their attendance of the hearings. By letter of 23 November 2014 (DC19), Mr VERCKEN, Mr KONG and Ms GUISSÉ declined the appointment as running counter to their rules of professional conduct, inasmuch as it was designed to “[TRANSLATION] prevent them from acting on the Accused’s instructions not to attend the hearings.”

By decision of 5 December 2014, the Trial Chamber subsequently ordered the Defence Support Section, an organ of the ECCC responsible for defence matters, to appoint standby counsel.

Finally, Case 002/02 was committed to trial on 8 January 2015, whereupon hearings resumed with the attendance of Defendant counsel.

(6) Referral to the Prosecuting Authority

By decision of 19 December 2014, conveyed in a memorandum dated 26 January 2015 from the President of the Trial Chamber, the Trial Chamber decided to “refer the misconduct of counsel Arthur VERCKEN and Anta GUISSÉ” to the President of the Paris Bar and the Principal Public Prosecutor [*Procureur Général*] of the Paris Court of Appeal. “[A]n obstruction of the proceedings” by virtue of their alleged “violation of court orders to attend scheduled hearings” is held against both Counsel. Such were the circumstances in which the disciplinary proceedings were instituted.

4. - THE DISCIPLINARY PROCEEDINGS

Acting pursuant to the referral and the institution of disciplinary proceedings on 3 April 2015, the President of the Bar, the Prosecuting Authority, decided to commence disciplinary proceedings against Ms Anta GUISSÉ for:

- Serious and deliberate professional misconduct by failing to abide by the directions of the Trial Chamber of the ECCC to appear and represent her client, Mr Khieu Samphan, thereby [signed] [signed]

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disrupting scheduled hearings and forcing the ECCC to defer the judgement in respect of which it had been seised;

Such acts being inconsistent with the fundamental principles of the profession of counsel – diligence, conscientiousness, faithfulness, public-spiritedness and service – as laid down by article 1.3 of the National Internal Rules.

The referral was served on Ms Anta GUISSÉ on 3 April 2015 by registered mail with acknowledgement of receipt.

By decision of 7 April 2015, the Bar Council appointed Mr Denis CHEMLA, member of the Bar Council and member of the Investigations Panel, as Investigator.

Ms Anta GUISSÉ was informed of the appointment by letter of 7 April 2015.

By registered letter of 13 April 2015, with acknowledgement of receipt dated, the Investigator summoned Ms Anta GUISSÉ to a hearing on 4 May 2015.

The investigation report filed on 8 June 2015 found:

“[TRANSLATION] It shall lie with the Adjudication Panel to determine whether in the light of the evidence gathered in the investigation Defendant Counsel acted in breach of our rules of professional conduct by acting on their client’s instructions not to attend the hearings convened by the Trial Chamber of the ECCC as of 17 October”.

WHEREFORE,

II- REASONS

Whereas fault is found with Ms Anta GUISSÉ for acts inconsistent with the fundamental principles of the profession of counsel – diligence, conscientiousness, faithfulness and service – as laid down by article 1.3 of the National Internal Rules on account of failure to abide by court orders;

Ms Anta GUISSÉ is alleged to have engaged in serious and deliberate professional misconduct by failing to abide by the directions of the Trial Chamber of the ECCC to appear and represent her client, Mr KHIEU Samphan, thereby disrupting scheduled hearings and forcing the ECCC to suspend the case in respect of which it had been seised.

At issue is whether failure to abide by court orders, irrespective of the circumstances, amounts to professional misconduct.

Ms Anta GUISSÉ and Mr Arthur VERCKEN represent Mr KHIEU Samphan, who stands accused of crimes against humanity, grave breaches of the 1949 Geneva Conventions and genocide for acts committed when he lead the erstwhile State of Democratic Kampuchea. His trial was

[signed] [signed]

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held before the ECCC, an independent tribunal, established by Cambodian law pursuant to an agreement concluded with the United Nations to try the Khmer Rouge leadership.

The ECCC consists of international and Cambodian judges, and is, therefore, a hybrid court.

The accused, including Mr KHIEU, were the subject of an 800-page Closing Order issued on 15 September 2010, which severed the proceedings into a first case concerning forced population movement and a second concerning, *inter alia*, the crime of genocide.

Judgement was handed down in the first case on 7 August 2014, whereby the Accused were found guilty of crimes against humanity and sentenced to life imprisonment.

The Accused, including Mr KHIEU, appealed the judgement before the Supreme Court Chamber of the ECCC. Deadlines for appeal are tight: notice of appeal and the appeal brief must be filed within 30 days and 60 days, respectively.

Given the magnitude of the task, Ms GUISSÉ and Mr VERCKEN sought further time in which to file their brief, entailing the procedural imbroglio, as rehearsed in the facts recited and as quoted .

So matters stood when the President of the Trial Chamber of the ECCC, acting pursuant to Internal Rule 38(2), made the referral to the Principal Public Prosecutor of the Paris Court of Appeal.

The referral concerns the conduct of Counsel for Mr KHIEU: fault is found with the behaviour of Mr VERCKEN and Ms GUISSÉ, which, it is alleged, amounts to an obstruction of the proceedings within the meaning of Internal Rule 38(1).

In sum, in his referral, the President of the ECCC complains that the refusal of Mr VERCKEN and Ms GUISSÉ to take part in the hearings of the second trial resulted in a loss of 25 trial days over the course of 10 weeks, and that, given the advanced age of the accused persons, the witnesses and the victims, any delay could seriously undermine the ability of said persons to participate in the trial.

Internal Rule 38(1) provides that the Co-Investigating Judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.

Internal Rule 38(2) provides that the Co-Investigating Judges or the Chambers may also refer such misconduct to the appropriate professional body, which is what happened here.

[signed] [signed]

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From exhibit no. 8 tendered at the hearings it is apparent that for the purposes of their participation in proceedings, Counsel signed a contract with the United Nations and a Legal Services contract (exhibit no. 32).

Of note is that counsel who practise before the ECCC do not swear an oath and are not bound by the common law rules of contempt of court.

Counsel have, however, sworn an oath before the Cambodian Bar (exhibit no. 16 from Ms GUISSÉ). Hence, all counsel practising before the Cambodian courts are subject to the rules of the Bar of the Kingdom of Cambodia and must comply with all of the rules of professional conduct it lays down, failing which proceedings shall be brought against them before the Bar Council of the Kingdom of Cambodia.

This was the case for Mr Sam On KONG, Cambodian counsel of the Defence team for Samphan KHIEU in the same judicial cases, who took the same position in his own defence: refusal to take part in the trial hearings unless Counsel were permitted to file their appeal brief against the judgement issued upon conclusion of the trial in case 002/01.

By decision of 13 July 2015, the Bar Council of the Kingdom of Cambodia found that Mr KONG's conduct did not amount to professional misconduct.

It remains the case that, at the request of the Principal Public Prosecutor, Ms GUISSÉ was duly referred to the Disciplinary Board of the Paris Bar for the offence alleged by the President of the ECCC.

If in the provision of their services to the ECCC, Counsel complied with Internal Rules of the ECCC – akin to parties to arbitration proceedings who act in compliance with arbitration regulations – non-compliance with the Internal Rules, assuming that such non-compliance is inconsistent with the fundamental principles of the profession of counsel, may give rise to proceedings before the Bar Council of the Kingdom of Cambodia and the Paris Bar Council.

The President of the Paris Bar recalled in a legal opinion (exhibit no. 9 from Ms GUISSÉ) that as regards professional conduct, counsel registered with the Paris Bar fall within its jurisdiction, irrespective of the national or international court where they practise, and even if they do so on an exceptional basis. The opinion further points out that according to the French legal system, which follows the continental Romano-Germanic legal tradition, counsel are, in contractual terms, bound by the representation agreement conferred by their client and, therefore, are not officers of a court of law but officers of justice inasmuch as they exclusively represent their client's interests.

Ms GUISSÉ and Mr VERCKEN filed written submissions with Mr Jean-Marc FEDIDA, Coordinator of the Prosecuting Authority, on 17 March 2015.

Ms GUISSÉ, appearing before the Adjudication Panel, advances the following grounds:

[signed] [signed]

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She strenuously contests the proceedings brought by the Extraordinary Chamber within the Courts of Cambodia on the ground of misconduct. She is of the view that the fault found with her arises not only from a particular misapprehension of the professional duties of counsel, but also from blatant contempt for the work which the Defence team has had to perform.

She recalls that she has been practising for many years with Mr Vercken before international criminal courts and tribunals and has never had to contend with what, in her opinion, constitutes disrespect for the profession in her role as defence counsel.

She points out that judicial investigations in the first case against Mr KHIEU Samphan lasted three years and that deliberations, which culminated in his receiving a life sentence, lasted 10 months. During those protracted deliberations, she points out, the Chamber denied the Prosecution motion to commence hearings in the second trial (002/2).

She also traces the procedural developments in the case which, she purports, prevented her preparation for the second trial, whereas the 7 August decision bound her concurrently to write a 230-page appeal brief within a very short space of time and to impugn two years' worth of hearings in which some 100 witnesses gave evidence and tens of thousands of pages of transcripts of hearings were produced.

Ms GUISSÉ explains that such were the circumstances in which her client strictly instructed his defence team to concentrate exclusively on writing the appeal brief and not to attend hearings in the second trial, should the Chamber not suspend the proceedings as requested so that the Defence could write the appeal brief.

She and the Defence team are of one mind with their client that the appeal against the first judgement was of such importance to the safeguarding of his interests that she had no choice but to seek suspension when the second trial resumed. Considerable tension between the Defence and the Chamber ensued.

It is her submission that the Chamber appears to incline to the view that the Defence is subject to the orders of the ECCC, whereas, in her opinion – an opinion shared by the continental legal system in its entirety – and in accordance with the principles of professional conduct, the Defence is independent and cannot take orders from a court, but acts instead upon the instructions of its client, provided that they are consistent with legal interests and do not constitute a violation of fundamental principles.

Ms GUISSÉ tenders a number of exhibits, specifically the contract between the Defence team and the United Nations, whereby she is bound by the professional duties of the respective bar associations of Cambodia and Paris, and argues that that contract can in no way be construed as an impediment her client's instructions.

[signed] [signed]

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That notwithstanding, as the foregoing makes clear, the Cambodian Chamber considered that the Rules with which the Defence team had necessarily complied and with which the Defence is acquainted, allowed for conduct to be referred to the relevant Council of the Bar of which Counsel is a member.

The Prosecuting Authority, represented by the President of the Paris Bar, recalls that counsel have not sworn to abide by the Internal Rules of the ECCC and submits that whereas the United Nations contract signed sets out the conditions of remuneration of counsel, it contains no statement of compliance with the Internal Rules.

It further recalls that, by virtue of their hybrid nature, the international Cambodian courts allow for civil party applications, which exist only in continental law, but not in common law, and that this constitutes progress.

As regards the defence of the persons whose conduct has been referred, Counsel have not sworn allegiance to the Court and are not “officers of the court” as they are at common law, but retain their independence as officers of justice.

It further considers that Ms GUISSÉ and the entire Defence team have argued their right to unimpededly discharge the duty conferred upon them by their client and did not obstruct the work of the ECCC.

Finally, it is of the view that, faced with the pressing need to write an appeal brief within a very short space of time, whereas a second trial, which put their client in as considerable jeopardy as the first trial and whose hearings were as demanding, Ms GUISSÉ and the Defence team had no choice but to take that stance, which accords with their client’s instructions and which remained respectful to the Bench.

It thereby defers to the wisdom of the Disciplinary Board.

Upon consideration of the material laid before it and the documents and explanations furnished by the Defence, the Adjudication Panel finds that Ms GUISSÉ did not engage in professional misconduct, contrary to the allegation advanced in the referral that she obstructed the proceedings and violated court orders to attend hearings scheduled by the Chamber.

The Panel considers that the Defence merely sought the adjournment of a forthcoming trial which, in effect, was preventing it from turning its attention to the writing of the brief on the appeal in which the stakes entailed are considerable. In the Panel’s opinion, the Defence adhered to its remit, did not wilfully obstruct the course of justice and in declining to follow court orders, acted wholly independently.

[signed] [signed]

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Above all, the Defence complied with the strict and clear instructions of Mr KHIEU, who objected to his counsel's representing him in the second trial whilst the appeal brief for the first case had yet to be finalised.

Where representation by counsel is mandatory, a court may appoint counsel, even if the accused objects, but may not direct counsel to defend a person.

Moreover, Counsel's withdrawal was ephemeral – lasting only the time it took to finalise the appeal brief, *viz.* one month – and on 8 January 2015, Ms GUISSÉ and Mr Vercken returned to the courtroom so that the second trial could proceed with their attendance.

Whereas the disruption which may have been caused to the Trial Chamber of the ECCC may have been an irritant, it was very short-lived and did not undermine the judicial process – it bears recalling that in proceedings concerning the most serious crimes, the rights of the defence must be all the more safeguarded.

Accordingly, the Disciplinary Board finds, as did the Bar of Cambodia in adjudging the same matter, that Ms GUISSÉ did not engage in acts inconsistent with the fundamental principles of the profession of counsel – diligence, conscientiousness, faithfulness, public-spiritedness and service – as laid down by article 1.3 of the National Internal Rules.

Accordingly, it is hereby declared that the allegation held against her in the referral is not upheld.

[signed] [signed]

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FOR THESE REASONS

Ruling in public, in the presence of both parties and at first instance;

DECIDES AS FOLLOWS

Article 1: Takes note of the Prosecuting Authority's submission.

Article 2: Finds Ms Anta GUISSÉ not guilty of breach of the fundamental principles of the profession;

Article 3: Accordingly, acquits her of the charges.

Article 4: The present decision shall be served on Ms Anta GUISSÉ and a certified copy shall be provided to the Principal Public Prosecutor and the President of the Bar.

Article 5: The person concerned may, within ONE MONTH of service, refer the present decision to the Paris Court of Appeal, by way of notice to the Registry Secretariat of the Court of Appeal or by way of registered mail with acknowledgement of receipt to the Registry Secretariat of the Court of Appeal.

The Principal Public Prosecutor and the President of the Bar shall be apprised thereof by way of registered mail with acknowledgement of receipt.

DONE IN THE PRESENCE OF

President of the Bar Mr Paul-Albert IWEINS, President [of the Panel]; Mr Etienne LESAGE, Secretary and Member of the Bar Council; Mr Jean-Louis MAGNIER, Ms H  l  ne POIVEY-LECLERCQ and Mr Jean-Jacques UETTWILLER, former members of the Bar Council.

Secretary of Panel no. 1

[signed]

Etienne LESAGE

President of Panel no. 1

[signed]

President of the Bar, Paul-Albert IWEINS