

mom: A-252

BEFORE THE CO-INVESTIGATING JUDGE  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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REQUEST FOR INFORMATION CONCERNING THE POTENTIAL EXISTENCE  
OF CONFLICT OF INTEREST OF OCIJ INVESTIGATOR STEPHEN HEDER

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Internal Rule 34(1) (“Rules”), hereby files this request seeking information concerning Dr. Stephen Heder’s ethical and professional fitness to occupy his current or former position as an investigator in the Office of the Co-Investigating Judges (“OCIJ”), given that the OCIJ, as an *independent office* within the ECCC<sup>1</sup> must carry out its investigative functions *impartially*.<sup>2</sup> This request is respectfully made for the following reasons:

1. It has recently come to the attention of the Defence that in a book proposal submitted on 18 December 2003 under the working title of ‘*Genocide and Auto-Genocide in Cambodia: Communism, Nationalism and Murder, 1975-1978*’, Investigator Heder referred to his qualifications as having “researched the CPK for 30 years, as a journalist, intelligence officer, human rights advocate, historian, UN official, legal scholar and political scientist” before working as an investigator for the OCIJ.<sup>3</sup> No further information is provided by Investigator Heder regarding when, where or by whom he was employed in this position. Assuming Investigator Heder made such a book proposal, as it is an admission by him about his own prior activities as an “intelligence officer” there would be scant reason to doubt its accuracy – unless Investigator Heder was deliberately embellishing or confabulating for the purpose of securing a book deal. While the possibility exists that the information provided to the Defence may be less than accurate, for the sake of due diligence the Defence is left with no choice but to probe into this matter.
  
2. As an intelligence agent, Investigator Heder would have taken instructions from a foreign government. Given Investigator Heder’s nationality, it would appear likely that he was employed by the United States Central Intelligence Agency (“CIA”), a country that has an unsavory history in South-East Asia. In the 1970s, the United States Government conducted extensive bombing of Cambodia resulting in untold

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<sup>1</sup> Rule 14.1.

<sup>2</sup> Rule 55.5.

<sup>3</sup> Through a confidential source the Defence was provided with documentation which appeared authentic, reflecting that Investigator Heder on 18 December 2003 submitted a book proposal: ‘*Genocide and Auto-Genocide in Cambodia: Communism, Nationalism and Murder, 1975-1978*’, Investigator Heder referred to his qualifications as having “researched the CPK for 30 years, as a journalist, intelligence officer, human rights advocate, historian, UN official, legal scholar and political scientist, which is my most recent professional reincarnation.”(emphasis added)

deaths and injuries and which massively destabilized Cambodian society.<sup>4</sup> In the judicial investigation against Mr. IENG Sary and others for crimes allegedly committed in this period, evidence of the scale of this bombing and its effects would have been uncovered. Unquestionably, the United States Government maintains a strong interest in minimizing its role in the bombing of the Cambodian people and its extensive intelligence operatives in the region.<sup>5</sup> If one of the investigators working for the OCIJ was employed as an intelligence agent, who had formerly or was still taking instructions from a foreign government spy agency, this would certainly affect his independence and impartiality in the investigation.<sup>6</sup>

3. While Investigator Heder is not one of the Co-Investigating Judges (“CIJs”), by virtue of the size and complexity of the investigation he has been delegated some of the Co-Investigating Judges’ investigative functions through the mechanism of Rogatory Letters.<sup>7</sup> As such he has interviewed witnesses on behalf of the CIJs as well as drafting the Report on the Execution of the Rogatory Letter, directly commenting on the witnesses interviewed.<sup>8</sup> In this role there can be little argument that he is not only advising the CIJs but actually carries out their functions. In the investigative phase, the CIJs, and those carrying out their functions such as Investigator Heder, are

[Redacted]

<sup>5</sup> A good example for instance is the United States’ rather infamous *Operation Menu*: a well known clandestine operation by the U.S. Strategic Air Command (SAC) where extensive carpet bombing was conducted in eastern Cambodia from March 1969 to May 1970 during the Vietnam War.

<sup>6</sup> Because “the fundamental human right to be tried before an independent and impartial tribunal” is considered to be “an integral component” of the fair trial guarantee (*Furundžija* Appeal Judgment, para. 177), the ICTY has held that its own rule must “be read broadly to permit any ground of impartiality to be raised [...] as a basis for disqualification” *Karemera* Decision, para. 7.

[Redacted]

<sup>8</sup> More information on the specific tasks carried out by investigators may be obtained from the job description for the position of a P-3 Investigator within the Office of the Prosecutor at the International Criminal Court. The duties listed for that position were: a) Performs tasks as instructed by the Prosecutor, the Deputy Prosecutor, the Head of Operational Unit or the designated Investigation team leader; b) Participates in the preparation of the intelligence and investigation plan prior to the start of any investigation; c) Gives, pursuant to the instructions of the Team leader, operational lead to the other members of the Investigation team; d) Develops an appropriate intelligence collection plan for the case under investigation; e) Assists the Head of Operational Support Unit and the Team leaders in relevant tasks; f) Provides expert advice on how to use existing international and other networks to further investigations of the Office of the Prosecutor; g) Advises the Investigation team leader on investigation procedures and techniques to be used; h) Conducts intelligence and evidence related duties and activities; i) Participates in field activities: interviews suspects, witnesses and victims, registers information and evidence. Job description available at: <http://www.icc-cpi.int/jobs/vacancies/786.html>.

responsible for the entirety of the investigation including searching for exculpatory evidence. Any lack of independence or impartiality of any investigator would therefore have very damaging effect on the entire investigation and the right of Mr. IENG Sary to fair and impartial judicial proceedings.

4. Investigator Heder has previously been employed by the Office of the Co-Prosecutors before moving to the OCIJ.<sup>9</sup> Although Investigator Heder recently resigned from his position within the OCIJ, it is believed that he is still employed as a consultant to that office, providing assistance and advice. His lack of impartiality may therefore continue to infect the judicial investigation. Even if Investigator Heder has completed his work with the OCIJ, his extensive involvement in compiling information for the drafting of the Introductory Submission for the OCP and in the judicial investigations for the OCIJ in Case Files 001 and 002, the damage has effectively been done.
5. In order to more fully determine whether the Defence should move for Investigator Heder's disqualification<sup>10</sup> and whether any further relief need be sought in order to avoid manifest injustice, the Defence respectfully requests any information in the possession of the OCIJ regarding:
  - a. Investigator Heder's prior employment as an intelligence agent including the precise role and activities of Heder in this position as well as anything else that might be relevant to the issue of Heder's fitness to be fair and impartial in carrying out his functions as an investigator; and

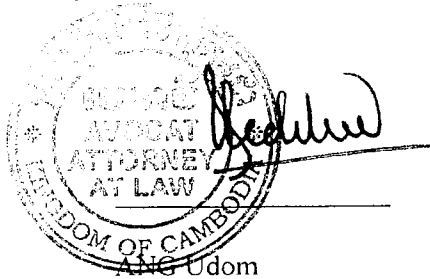
<sup>9</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information on Potential Conflict of Interest, 10 January 2008.

<sup>10</sup> A judge will be considered to lack independence and impartiality meriting disqualification if either "actual bias exists" (the "Subjective Test") or "[t]here is an unacceptable appearance of bias" (the "Objective Test"). See *Furundžija* Appeal Judgment, para. 189; see also *Prosecutor v. Karemera et al.*, ICTR-98-44-T, The Bureau's "Decision on Motion by Karemera for Disqualification of Trial Judges", 17 May 2004 ("Karemera Decision"), para. 8; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, "Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber", 13 March 2004 ("Sesay Decision"), para. 4; *Prosecutor v. Blagojević et al.*, IT-02-60, "Decision on Blagojević's Application Pursuant to Rule 15(B)", 19 March 2003, para. 8. The reasonable observer is "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background an appraised also of the fact that impartiality is one of the duties that Judges swear to uphold". *Furundžija* Appeal Judgment, para. 190 (quoting *R.D.S. v. The Queen* (1997) Can. Sup. Ct., 27 September 1997, para. 111); see also *Prosecutor v. Brđjanin and Talić*, IT-99-36-T, "Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brđjanin-Talić Trial (Presiding Judge)", 3 May 2002, para. 17. The SCSL has formulated the test as follows: "The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that [the Judge] lacks impartiality." *Sesay Decision*, para. 15.

- b. Whether this prior employment as an intelligence agent was disclosed to the Office of the Co-Prosecutors, for whom Investigator Heder worked initially, and subsequently to the OCIJ when Investigator Heder transferred to that office.<sup>11</sup>

**WHEREFORE**, due to the importance of the issues raised herein, it is respectfully urged that this request be acted upon as expeditiously as possible and that all relevant information be provided concerning Investigator Heder, so the Defence can determine whether in the interest of justice<sup>12</sup> to formally move for his disqualification before the Pre-Trial Chamber pursuant to Rule 34(5).

Respectfully submitted,



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 30<sup>th</sup> day of **January, 2009**

<sup>11</sup> Appointments which give rise to a risk of undue influence over the outcome of the case are impermissible, and where legitimate doubt exists as to a judge's impartiality, he must withdraw from the case. Indeed in making the assessment, *all facts that are publicly known* should be considered: appearances are crucial (*see* Simor and Emmerson § 6.119 - §6.124).

<sup>12</sup> Pursuant to Article 12(1) of the Agreement, "[w]here Cambodian law does not deal with a particular matter [...] guidance may also be sought in procedural rules established at the international level." Furthermore, Article 12(2) of the Agreement provides that all chambers of the ECCC "shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [(the "ICCPR")], to which Cambodia is a party". Article 14 (1) of the ICCPR, relevantly provides that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ..." (Emphasis added).