



## **The Value of Steve Heder’s Research on the ECCC’s Personal Jurisdiction, and an Afterword on the Purpose of the Dispute Settlement Mechanisms**

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**By**

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Last week Cambodia Tribunal Monitor posted Steve Heder’s deeply researched paper, “A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia.”

(<http://www.cambodiatribunal.org/blog/2011/08/review-negotiations-leading-establishment-personal-jurisdiction-extraordinary-chambers>) Acknowledging that my own role in the negotiations and recent communications with Heder are referenced in the paper, I only wish to express a few observations in this essay.

First, the Heder paper provides the most comprehensive record on how the personal jurisdiction of the ECCC was conceived, negotiated, and drafted into the constitutional documents of the tribunal. Whether or not it can be formally filed with the Pre-Trial Chamber in relation to the appeal by Mr. Andrew Cayley, the International Co-Prosecutor, of May 25, 2011 ([http://www.cambodiatribunal.org/sites/default/files/resources/d14\\_1\\_1\\_en.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/d14_1_1_en.pdf)), which resulted in the Pre-Trial Chamber suspending on June 13, 2011 ([http://www.cambodiatribunal.org/sites/default/files/resources/d14\\_1\\_2\\_en.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/d14_1_2_en.pdf)) the Co-Investigating Judges’ order to Mr. Cayley to retract his statement on Case 003 ([http://www.cambodiatribunal.org/sites/default/files/resources/d14\\_en.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/d14_en.pdf)), the judges should be aware of Mr. Heder’s research from public sources now, particularly the posting of the Heder paper on the website of the Cambodia Tribunal Monitor.

Second, it may be useful for me to emphasize one point I did not raise in my previous essay of May 22, 2011 (“The Negotiating History of the ECCC’s Personal Jurisdiction,” at [http://www.cambodiatribunal.org/sites/default/files/ctm\\_blog\\_5-22-2011.pdf](http://www.cambodiatribunal.org/sites/default/files/ctm_blog_5-22-2011.pdf)). Negotiators spent the first half of 2000 trying to determine how disputes between the two co-prosecutors, on the one hand, and disputes between the two co-investigating judges, on the other hand, would be resolved. The resulting dispute settlement mechanisms were codified in Article 20new and

Article 23new of the ECCC Law

([http://www.cambodiatribunal.org/sites/default/files/resources/Domestic\\_Cambodian\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/Domestic_Cambodian_Law_as_amended_27_Oct_2004_Eng.pdf)) and Article 7 of the UN/Cambodia Agreement

([http://www.cambodiatribunal.org/sites/default/files/resources/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/Agreement_between_UN_and_RGC.pdf)).

The prospect of disputes was driven primarily by the concern of key negotiators that the Cambodian Co-Prosecutor or the Cambodian Co-Investigating Judge, or both, might balk at investigating and indicting certain individuals who objectively fall within the personal jurisdiction of the court. Their international counterparts presumably would be less susceptible to political influence in the identification of two groups of individuals, 1) senior Khmer Rouge leaders and 2) those individuals most responsible for the crimes falling within the subject matter jurisdiction of the ECCC. If everyone thought that the only likely suspects would be a small number of long and prominently identified individuals (limited now to the surviving Khieu Samphan, Nuon Chea, Ieng Sary, Ieng Thirith, and Kaing Guek Eav (“Duch”)), the likelihood of disputes would have been seen as so minimal as to discourage such protracted negotiations over a dispute mechanism. It was precisely because negotiators foresaw a possible rift between the Co-Prosecutors, in particular, over additional individuals to bring to trial that the dispute mechanism was developed. We did not anticipate that the International Co-Investigating Judge might take a radically different view of the evidence from that held by the International Co-Prosecutor, but that is technically possible under the ECCC Law and may yet occur with respect to Case 003 and/or Case 004. We did not build into the constitutional framework how to resolve a dispute between one of the Co-Prosecutors and any joint determination of both Co-Investigating Judges to dismiss a case. However, the Internal Rules offer some possibility of appeal to the Pre-Trial Chamber (Rule 74(2)) provided the International Co-Prosecutor can prevail in lodging an appeal without the support of his Cambodian Co-Prosecutor.

It is perplexing that there appears to be such difficulty persuading the International Co-Investigating Judge of the value of the International Co-Prosecutor’s findings and of the clearly demonstrated intent of the negotiations, so skillfully revealed by Mr. Heder, to create a reasonably defined scope for the ECCC’s personal jurisdiction. I am left, as a former negotiator, with the obvious question, “If not these individuals (rumored to be under scrutiny in Case 003 and Case 004), then who else beyond those already convicted or on trial?”

**David Scheffer is managing co-editor of the Cambodia Tribunal Monitor and was the U.S. Ambassador at Large for War Crimes Issues (1997-2001). The views expressed herein are strictly his own. His book, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press) will be published later this year.**