

Wrangling ahead in Case 003

James O'Toole

DISAGREEMENTS at the Khmer Rouge tribunal over its controversial third case came into focus amid a flurry of activity at the court last week, though a number of legal steps remain before such disputes can be finally settled.

Last week, international co-prosecutor Andrew Cayley issued a statement saying that the alleged crimes set out by prosecutors in their submission for Case 003 "have not been fully investigated".

The statement followed an announcement from the court's co-investigating judges last month stating that they considered their Case 003 investigation closed. They failed to interview the suspects in the case and to conduct substantial field investigations during their probe, however, prompting critics to charge that a dismissal of the case had been pre-planned amid government pressure.

Cayley therefore listed a series of additional investigative steps he said he planned to request that the judges perform, as he is permitted to do under court rules. Among these requests were the questioning of the suspects, further examination of alleged crime sites and additional interviews with witnesses.

While the suspects in the case remain officially confidential, court documents reveal them

as former Khmer Rouge navy commander Meas Muth and air force commander Sou Met.

Cambodian co-prosecutor Chea Leang did not sign onto her foreign colleagues' initial request in 2009 that the case be investigated, and she reiterated her opposition last week, saying in a statement that the suspects in the case fell outside the court's mandate to investigate "senior leaders" and those "most responsible" for Khmer Rouge crimes.

Should Cayley's investigative requests be rejected by the judges, he has the right to appeal to the court's Pre-Trial Chamber.

In a 2009 ruling on the disagreement between Cambodian and foreign prosecutors over whether Cases 003 and 004 should be investigated, the Pre-Trial Chamber failed to reach a supermajority decision, with the three Cambodian judges arguing against the cases and the two foreign judges coming out in favour. In the absence of such a supermajority, by court rules, the cases moved ahead.

Should the investigating judges reject Cayley's Case 003 requests, the Pre-Trial Chamber may again be asked to weigh in. In the event that the chamber is again divided on foreign vs. Cambodian lines, however, it is not clear how the matter will be resolved, said Clair Duffy, a trial monitor with the Open Society Justice Initiative.



Co-prosecutor Andrew Cayley at the ECCC in March. ECCC/POOL

"In relation to requests for further investigative action, there are no precise provisions that say exactly how this will proceed," she said, though she added that considering the tribunal's laws "as a whole", "the presumption is always in favour of an investigation proceeding or a prosecution proceeding".

In a document posted online last week and titled "Frequently asked questions about Case 003", however, the court's public affairs section noted that the Pre-Trial Chamber has in the past given the investigating judges "broad discretion to decide requests for investigative actions".

"The Pre-Trial Chamber can only overturn [the investigating judges'] decision if the appellant can demonstrate that the decision made by the Co-

Investigating Judges was based on grave errors," the public affairs section said.

So far, it does not appear that Cayley's Case 003 requests have been well-received; a source at the court said last week that the investigating judges were considering initiating contempt-of-court proceedings against the Briton in relation to his disclosures of the investigation details.

Duffy said she believed such proceedings were "highly unlikely" to move forward because court staff are granted immunity from legal proceedings in relation to their work under the law establishing the court. This immunity, she said, would likely need to be waived by both Cambodian and UN officials for action against Cayley to move ahead.

Under court rules, however, the investigating judges are empowered to issue warnings and deal with judicial misconduct internally in addition to their option of referring such issues to the United Nations or Cambodian authorities.

However these matters are resolved, the larger issue of whether the Cambodian government will reverse its longstanding opposition to Cases 003 and the still-pending 004 remains. In response to Cayley's statement last week, Information Minister Khieu Kanharith repeated a warning to the court's international staff about these cases, saying those interested in investigating them should "pack their bags and return home".

Ou Virak, president of the Cambodian Centre for Human Rights, said last week that he believed it was still possible for the international community to convince the government to allow the additional cases to proceed. Given that donors may be unwilling to apply such pressure if it means providing several more years of funding to the tribunal, however, he added that prospects looked grim.

"I'm doubting whether this Case 003 could proceed because of not just the Cambodian government, but there's this sense of donor fatigue," he said. "Without the international pressure, there will not be a Case 003, period." ■