

As ECCC resumes, Cases 003 and 004 remain inconclusive
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July 18, 2012

As the Extraordinary Chambers in the Courts of Cambodia (ECCC) ends its month-long summer recess today, all eyes will be focused on the presumed newest members of the court, and the seemingly ominous task of steering cases 003 and 004 to investigate closure. While the procedural history of these cases may appear as complicated as they have been controversial, their procedural outcomes, and how they will be decided, are relatively predictable.

Cases 003 and 004 were brought into being in 2009, when international prosecutors requested the investigation of five additional suspects beyond cases 001 and 002. These submissions were disputed by National Co-Prosecutor Chea Leang, and this dispute went up to the Pre-Trial Chamber for adjudication. Ultimately, the chamber split, with the two international judges deciding in favor of allowing the submissions and the three national judges decided in opposition. As the Pre-Trial Chamber could not reach the required four person super-majority the International co-prosecutor's action went forward, as required, under the ECCC's Internal Rules.

Under Internal Rules 71(4) and 72(4), if there is a disagreement within the Office of the Co-Prosecutors or the Office of the Co-Investigating judges (OCIJ) which cannot be resolved by a four-person super-majority of the five member Pre-Trial Chamber, by default, the co-prosecutor or co-investigating judge's disputed action must go forward.

In effect, when the Pre-Trial Chamber fails to reach a decision over a prosecutorial or investigative dispute, the one who initiated the action or decision wins. In the circumstance of opening cases 003 and 004, the International co-prosecutor's submission was admitted because he acted (or filed) first, thus resulting in the initiation of judicial investigations.

This scenario and the tricky nature of this rule would come up yet again.

On April 29, 2011, the co-investigating judges You Bunleng and Siegfried Blunk issued a "Notice of Conclusion of Judicial Investigation" in which they stated that Case 003's investigation was officially "concluded." However, under the ECCC's Internal Rules, a concluded investigation does not equal a closed case.

While the OCIJ may give notice of concluding an investigation, this is but only the first step in closing the case. Rule 67 expressly states:

“The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicating a Charged Persona and sending him or her to trial, or dismissing the case.”

This, the investigation cannot be closed or concluded without a closing order that expressly produces an indictment or dismissal. No such order followed the notice of concluding the investigation on April 29.

Rather, OCIJ’s notice that the investigation was closed initiated the 15-day clock in which the Office of the Co-Prosecutors could either accept the investigation as “closed” or file an appeal on the basis that more investigations are necessary.

On May 18, International Co-Prosecutor Andrew Cayley sought additional investigative action in Case 003. This request was rejected by the OCIJ on the grounds that the Internal Rules did not allow for unilateral submissions to absent a record of disagreement between the co-prosecutors or a delegation of power by the co-prosecutor’s counterpart. Ultimately this decision was upheld (on the basis of Rule 72’s default), the Pre-Trial Chamber’s decision only addressed the issue of additional investigations and documents.

Because OCIJ had not issued a “Closing Order” as required under Internal Rule 67 (1), Case 003’s investigation was still effectively open.

On October 9, 2011, Co-Investigating Judge Siegfried Blunk resigned under a cloud of controversy surrounding allegations of mishandling the investigations in cases 003 and 004 and claims of government interference. Judge Blunk’s resignation led to the brief tenure of Reserve Co-Investigating Judge Laurent Kasper-Ansermet, who assumed the task of moving cases 003 and 004 forward. In Dec. 2011, Judge Kasper-Ansermet issued an order to “reopen” (the still “unclosed”) Case 003. On the Cambodian side, Co-Investigating Judge You Bunleng contested Judge Kasper-Ansermet’s action – claiming that he did not have the authority to issue orders or speak on behalf of the OCIJ because he did not possess an official appointment by Cambodia’s Supreme Council of the Magistracy.

While this argument appears to still be, political, “in-play,” from a procedural standpoint, Case 003’s disposition appears settled on the basis of the default built into Internal Rule 72.

On Dec. 15, 2011, Judge Kasper-Ansermet filed a Record of Disagreement, arguing that he did in fact hold an official appointment and he sought adjudication of the dispute within OCIJ regarding the reopening of Case 003’s investigation.

During the Pre-Trial Chamber’s deliberation on the matter, the President of the Chamber, Judge Prak Kimsan, curiously attempted to dismiss the application, administratively, by way of an interoffice memorandum.

Disturbed by the manner in which the application was handled, the Pre-Trial Chamber's international judges subsequently issued a judicial opinion, confirming the judicial nature of the matter and, most importantly, confirming the Pre-Trial Chamber's failure to reach a super-majority decision. Again, because the Pre-Trial Chamber was unable to reach a super-majority decision on the matter, Judge Kasper-Ansermet's action (to re-open Case 003), under Internal Rule 72 (4) was affirmed.

The counter-argument to this result is the claim that Judge Kasper-Ansermet's application was not even justiciable in the first place – thus nullifying his orders. While courts regularly dispense with matters on the basis of, among other things, standing, it is an incredible stretch to dismiss the clearly justiciable question of a reserve co-investigating judge's powers, administratively, amidst a deliberation on the merits. Nevertheless, this appears not to be where these cases rest today, and the struggle to delegitimize Judge Kasper-Ansermet's orders appears to have driven cases 003 and 004 into a procedural ditch.

From a procedural standpoint though, the twists and turns of Case 003 reveal the remarkable power of a "first filler." In simple terms, the first to file an action in the event of an intra-office dispute will likely carry the day, particularly when most intra-office disputes mirror the splits between national and international judicial lines within the Pre-Trial Chamber. We see this outcome time and again, from the filing of the introductory submission to the "reopening" of the case file.

Looking into the "what-ifs" of the past, we can see how the current predicament with Case 003 could have played out a different way – i.e., had the "first filler" been different. For example, had Judge Bunleng issued a "closing order" dismissing Case 003 under International Rule 67, while concomitantly filing a record of disagreement with his international counterpart, the familiar split between international and national judges would have triggered the default decision built into Rule 72 – that Judge Bunleng's order stands and Case 003 is dismissed.

But as badly as some would want Case 003 (and 004) to go away, procedural rules must be followed and the so the question we are faced with is, "What next?"

Judge Kasper-Ansermet resigned in March, due to an increasingly hostile work environment. Mark Harmon is expected to resume his duties shortly, and it is anticipated that he will be navigating rough waters as he takes on the task of investigating cases 003 and 004.

In terms of procedural outcomes in these cases, we can expect to see either a dismissal or an indictment. Ultimately, if there is a disagreement on this outcome the likely result will be determined by their action (with a record of disagreement) first.

In an alternative light, it is possible that co-investigating judges Bunleng and Harmon (if confirmed) come to an agreement on the dismissal on one or both of the cases. But while agreement is possible, it is improbable. At this point in the court's history, predicting a

split between the international and national co-investigating judges (as well as within the Pre-Trial Chamber) is rather easy; and, under Rules 71 and 72, predicting the default outcomes will be easy too.

What is far less certain is to what degree the new international judges will be able to conclude cases 003 and 004 in a way that upholds the integrity of the court's procedures, without losing the participation of Cambodian authorities.

The drafters of the UN were well aware of the risks inherent in a hybrid court and, to some degree, anticipated the need for overcoming this division by creating a default mechanism that awarded the first to act. Moreover, they also provided a mechanism for withdrawing cooperation in the event of action (or inaction) that would create paralysis within the ECCC. However, what drafters did not provide for. At least adequately, were mechanisms for navigating the space between contentious debate and brazen conduct. Unfortunately, for the future international judges of the OCIJ, cases 003 and 004 lie within this political ravine, and it will be their charge to move these cases forward.