

Just how far can two new cases at the Khmer Rouge tribunal go?

After over five years of investigation fraught with infighting, government interference and legal drama, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has charged two more Khmer Rouge officials with a slew of crimes. They include murder, enslavement, extermination and grave breaches of the Geneva Convention.

The freshly accused are Meas Muth, once head of the Khmer Rouge navy, and Im Chaem, who allegedly oversaw slave labour and purges as the chief of a district in the country's north-west. Another two Khmer Rouge figures are also under investigation in what are known as Cases 003 and 004, which deal with mid-level military and civilian officials and are intractably opposed by the Cambodian government.

News of the charges was greeted with excitement among many information-starved court observers. The controversial cases have been investigated in strict secrecy, with not even the defendants' lawyers allowed access to the slowly expanding files. But Judge Mark Harmon's move to charge Meas Muth and Im Chaem was actually anticlimactic. The case has been hugely confusing for observers, who have been unsure of the status of the defendants as the probe has crept forward. The pair had seemingly already been charged by Harmon's predecessor in a move not readily accepted by Cambodian officials in the hybrid court.

Internal court battles

How much difficulty the ECCC's UN side has had pressing forward with these cases cannot be overstated. As a hybrid court, the tribunal coalesces international and national staff, procedures and laws. The Cambodian government and its long-time leader, former Khmer Rouge cadre Hun Sen, have insisted since the tribunal's inception that only a few of the most notorious Khmer Rouge leaders and torturers should stand trial. The UN has always insisted on absolute freedom for the court to pursue as

many suspects as prosecutors see fit.

Cases 003 and 004 originated among UN staff in the office of co-prosecutors, which conducts preliminary investigations into alleged international crimes before referring cases to the office of co-investigating judges. Their investigation was immediately and staunchly opposed by the office's Cambodian side, led by Chea Leang, who as chief prosecutor of the Cambodian Supreme Court is the country's highest-ranking prosecutor.

The court's first UN investigating judge, a Canadian, quit shortly after the cases were passed to his office, simply saying he had had enough. He was replaced by a German, Siegfried Blunk, who quickly incurred the enmity of staff with his eagerness to strike a deal with his Cambodian counterpart, You Bunleng, and scuttle some parts of the cases. He quit abruptly in 2011.

His successor, Laurent Kasper-Ansermet of Switzerland, was eager to push onward. But his appointment was stalled when the Cambodian government said statements. Kasper-Ansermet made on Twitter revealed his compromised impartiality. He eventually quit the court too, but not before publishing a scorching exposé accusing You Bunleng and other Cambodian court staff of blocking his work at every opportunity.

When the news broke last week that charges had been laid, Kasper-Ansermet immediately tweeted the following message: "!"

"Going too far"?

In late February, perhaps anticipating the upcoming charges, Hun Sen once again publicly warned of impending civil war if the cases were brought to trial. Reviving a 15-year-old refrain, he said former cadre were likely to retreat to the forests, as they did during the conflict that presaged the Khmer Rouge takeover in 1975. He also accused the ECCC of "going too far".

However, the charges themselves do not change much. None of the suspects has yet been formally indicted. Perhaps more impor-

tantly, the charges were made in absentia. Harmon tried and failed to get judicial police to bring both suspects to appear before him, according to the Open Society Justice Initiative. The charges were also laid unilaterally, without the cooperation of Judge You Bunleng. If Harmon wants to formally indict any of the suspects, which he is expected to decide upon later this year, a struggle is likely because You Bunleng can formally oppose the move, triggering a legal battle.

In interviews with local media last week, Meas Muth denied the accusations, while Im Chaem denounced the court process and said Harmon should be jailed.

Meas Muth's lawyer said his client was cooperating with the court. "He has rights and he intends, as he and anyone in his situation [would], to exercise his rights," Michael Karnavas wrote in an email to IJT. The lawyer said he would argue that it was "legally and procedurally unsound" for Harmon to issue a unilateral charge and would "challenge everything we deem necessary" to protect Meas Muth's rights. "[T]o start with, we do question the legality of the 'in absentia' charging as well as the arrest warrant, issues which will be appealed," Karnavas added.

Cambodian court staff, possibly at the behest of the government, have argued for years that Meas Muth, Im Chaem and the other two suspects in Cases 003 and 004 do not fall under the jurisdiction of the ECCC. But most observers disagree.

The four all held positions of significant responsibility within the Khmer Rouge, and ample evidence points to grave crimes. As Khmer Rouge navy leader, Meas Muth sent hundreds of prisoners to be tortured and executed in the regime's brutal security centres. Im Chaem supervised the centre at Phnom Trayoung as well as the Spean Sreng forced labour site. According to initial allegations compiled by UN prosecutors, as many as 300,000 people died at sites overseen by her and Ta An and Ta Tith, the cases' other two suspects who have not yet been charged.

At the Lebanon tribunal, a renewed mandate for old politics

This month the Special Tribunal for Lebanon (STL) embarked on a newly reissued three-year mandate. Compared to other international courts, its principal task remains narrow: to try those accused of carrying out the 14 February 2005 assassination of ex-prime minister Rafik Hariri and 21 others in downtown Beirut. But since the Ayyash et al. trial opened in January 2014, expectations of what it might accomplish have soared beyond its headquarters in the Hague suburb of Leidschendam – and beyond Lebanon.

Regional experts venture that the STL's most significant outcome may not be convicting the five members of Hezbollah who are being tried in absentia, but rather producing a judgement that aids the international community in holding the Syrian regime accountable for a surging tally of alleged human rights abuses [IJT-169].

In November, the forensics and ballistics testimonies that had characterized the trial's first phase came to a sudden halt. The STL began hearing testimony describing Hariri's degenerating relationship with Syria [IJT-171]. To the chagrin of the defence, who pointed out that politics did not feature in their clients' indictment, Marwan Hamade took the stand as a first political witness. Lebanon's former telecommunications minister told the court in no uncertain terms how Syrian President Bashar al-Assad explicitly threatened Hariri.

Speculation that Syria was behind the attack is nothing new. Assad openly backs Hezbollah, a popular Lebanese political party, which refuses to endorse the STL, much less assist in arrests. But said anew under oath, such allegations carry more weight.

A case against Syria?

A judgement by the STL that Syria played a key role in any crimes over which it has jurisdiction could give the international community leverage when the time comes to try Assad, say analysts.

According to Joseph Bahout, a Lebanese scholar at the Carnegie Endowment for International Peace, if the STL rules that the "people who executed [Hariri] may be operatives from Hezbollah on the ground, but the order was given directly by the Syrian regime", then a new debate ensues. "The question will no more be if you arrest Mustafa Badreddine or not," he says, referring to the defendant suspected of supervising the crime. The question will be: "do you add this [assassination] file to the Assad regime's file with the chemical weapons, the barrel bombings, the executions, et cetera?"

The line of reasoning is shared by Faysal Itani, a Lebanese fellow at the Atlantic Council's Rafik Hariri Center for the Middle East, whose founding sponsor is the late statesman's eldest son, Bahaa Hariri. The STL's potential "to build a case against any members of the Syrian political security regime," explains Itani, could produce "one more tool in the arsenal" of existent "institutional momentum and presence" to prosecute "the regime on the level of international crimes atrocities".

Looking past Lebanon makes sense, moreover, in view of Hezbollah's antipathy towards the court.

"When you have the chief of Hezbollah, Hassan Nasrallah, saying that 'We'll chop off the hands of anyone that arrests the accused,' that's a serious threat," recalls former STL spokesperson Marten Youssef.

Itani's past conversations with associates in Hezbollah lead him to believe that by now the STL "has become marginal for them" and that "their energies are consumed by Syria" instead.

For his part, Bahout doubts anyone expects the accused to ever appear in court, dismissing calls by Lebanese authorities to transfer them as "rhetorical". "This is not a criminal case in Ohio or in Brooklyn," he emphasizes. "You are talking about intelligence games, covert operations, big monsters playing in the dark and play of

nations, you see? So you will never find the knife with fingerprints on it."

Absentia as the mother of innovation

But the STL knew what it was getting into, suggests Youssef, who was spokesperson from 2011 to 2014. "There's a very significant portion in the trial chamber's decision to proceed with in absentia that ultimately says that Lebanon's inability to arrest the accused stems out of the political climate in Lebanon," he explains. An empty defendant's dock is not uncommon in Lebanese criminal law, which the STL, a hybrid court, applies. This, however, is the first international tribunal to permit in absentia since the 1946 Bormann trial at Nuremberg.

There are other novelties, too. The STL is the first international court dealing with terrorism. To ensure a fair trial for all parties, present or not, it has a defence office with equal status to the prosecution's. Plus, its case hangs on very 21st-century, precedent-setting technological evidence: the intricate mapping-out of multiple phone networks allegedly used to track and finally kill Hariri.

Despite the innovations, apprehending the accused still seems Sisyphean. And for the STL's findings to one day help bring Syria to book, "the political stars", as Itani puts it, would have to be effectively – not to mention dramatically – "aligned".

So far, the STL has heard 47 witnesses' testimonies and seen 611 exhibits submitted into evidence. It runs on an approximately 60 million-euro annual budget, 49 percent of which Lebanon pays. Replying to IJT's question concerning what the court envisages for its renewed mandate, an email from the registrar reads: "Within the next three years, the Tribunal would like to see the conclusion of the Ayyash et al. trial. We also aim to further contribute to promoting the rule of law in Lebanon and in the region while setting an example of achieving justice."

Prosecution of Guatemala's human rights violators faces uncertain future

The road to justice for the victims of human rights violations committed during Guatemala's 36-year civil war has been long and fraught with obstacles. Prosecuting wartime violators has proven slow. And with the September elections looming and the UN-sponsored International Commission Against Impunity in Guatemala (CICIG) about to conclude its mandate, the outcome of current and future trials grows increasingly uncertain.

Recent successes do include convicting former high-ranking police official Pedro García Arredondo for his role in a 1980 embassy assault that left 37 people dead and, more recently, the Constitutional Court clearing obstacles for the prosecution of former dictator Efraín Ríos Montt for the Dos Erres massacre. However, Ríos Montt's retrial in another criminal prosecution for the genocide perpetrated against the Mayan Ixil people remains stalled and deteriorating health makes his participation unlikely.

On 19 January, García Arredondo was sentenced to 90 years in prison. A court determined that he was key among the military and police officers who ordered a brutal attack on Spanish embassy occupiers desperate to draw attention to the massacres perpetrated by the army in the highlands. Indigenous leaders, student protestors and embassy staff were burnt alive after officers attacked them with a flamethrower and prevented firemen from rescuing them.

After García Arredondo was found guilty of homicide and crimes against humanity, his defence team appealed the verdict. They argued that the presiding judge, Jeannette Valdés, showed bias by expressing condolences to a relative of one of the victims. But legal experts say a successful appeal and overturned verdict are extremely unlikely.

That would contrast with how the Constitutional Court overturned – on a legal technicality – the verdict in 2013 against Ríos Montt [JIT-175], who was convicted of genocide against the Mayan Ixil ethnic group.

Polarized debate

Edgar Gutiérrez, who directed the Catholic Church's Recovery of Historical Memory Project (REHMI), a report on human rights violations committed by the armed forces during the civil war, points out major differences between the two cases.

"Overturning the verdict against Ríos Montt was a political decision. The García Arredondo trial does not generate the same degree of polarization, and there is a price – damage to the country's image – that powerful sectors that opposed the Ríos Montt trial are not willing to pay every day," he explains.

The retrial of Ríos Montt, along with his military intelligence chief, had been scheduled for 5 January. But it remains suspended after his defence attorneys endeavoured to convince the court that its president should step down because Judge Valdés had written an academic treatise on the crime of genocide, which, in their view, meant she could not deliver an impartial verdict. She recused herself from the trial and, two months later, a replacement has not been named.

Another criminal prosecution for Ríos Montt, meanwhile, appears to be moving forward. The Constitutional Court cleared obstacles for him to be prosecuted as the alleged intellectual author of the 1982 massacre of 201 people in the village of Dos Erres. Yet, according to forensic experts' latest report on Ríos Montt's health, delivered on 23 January, irreversible damage from a bone infection will likely hinder his participation in both trials.

Derailing investigations

Potential obstacles to justice also include the persistent efforts made by military sympathizers mobilized together under Guatemala's Fundación Contra el Terrorismo (Foundation Against Terrorism). Led by Ricardo Méndez Ruíz, the son of Ríos Montt's former interior minister, the group seeks to derail other on-going cases and pressure the authorities to halt further investigations into wartime human rights violations.

Just last month, Méndez Ruiz launched a lawsuit, widely regarded as an intimidation tactic, against Thelma Aldana, the replacement of former attorney general Claudia Paz y Paz, who played an instrumental role in Ríos Montt's prosecution and was controversially removed in May 2014. Méndez Ruiz accuses Aldana of ordering his telephone to be tapped without a court order.

In the meantime, a bizarre petition has been made by former police director Héctor Bol de la Cruz, convicted in 2013 for the disappearance of student leader Edgar Fernando García. He is asking that his case be tried by the International Criminal Court (ICC).

Gutiérrez dismisses the idea as a "legal ruse" because the ICC cannot prosecute anyone for crimes in Guatemala before 2012, when it became a member state. He says it is a move designed to expose what military sympathizers regard as the international community's "double standards": urging Guatemalan authorities to move forward with the prosecution of human rights violators while even the ICC is unwilling to take on this case.

Future for transitional justice?

At present, two key factors could influence the outcome of Guatemala's transitional justice process.

First, the CICIG's mandate will expire this year, absent another renewal. Foreign donors are willing to keep funding the commission, and civil society groups and opposition parties support its prolongation because it is regarded as the last remaining bulwark of judicial independence in Guatemala. Yet, President Otto Pérez Molina, a retired army general, has had a tense relationship with the CICIG since the Ríos Montt trial and opposes its continuation.

The second factor is the general elections, scheduled for 13 September. Neither the ruling Patriotic Party (PP) holding onto the presidency nor a win by the right-wing populist Renewed Democratic Liberty Party (LIDER), the current favourite, would bode well for human rights violations trials in Guatemala.

The office of the prosecutor and intermediaries: a controversial relationship

The term 'intermediaries' has littered nearly all trials at the International Criminal Court (ICC).

The OTP has been relying on locals in its cases to contact witnesses. This practice of using these intermediaries has proved to be problematic, experts say. Several intermediaries have also been suspected by judges of influencing witnesses.

ICC cases so far reveal how the Office of the Prosecutor (OTP) has sought to undertake short investigative missions and to depend on local intermediaries for their contacts with witnesses. The OTP's investigators barely set foot in Kenya during its first years of investigating six Kenyans, says Caroline Buisman, lawyer for journalist Joshua Sang. "Investigators came sporadically and instead of conducting their own independent investigations, they relied on ... human rights reports," she tells IJT. Security concerns kept the prosecution from travelling to Darfur.

In its current strategic plan, the OTP explains that security issues were why "up until now" the office "mainly relied on a limited field presence". Pascal Turlan, the OTP's international cooperation advisor, agrees a steady presence was missing, but says that is changing. "Progressively we felt the need and we developed tools to do it. We are moving to having a permanent presence if the security allows it," he tells IJT.

The OTP now has a permanent investigator in Ivory Coast. "We hope to have more," Turlan says. But even with a wider network of its own personnel, "the OTP will still need intermediaries," he maintains, emphasizing that local persons have the knowledge and ability to safely and less visibly contact witnesses and liaise with communities than officials from The Hague.

Benefits and dangers

"Intermediaries are often the first responders," reads the summary of a 2014 conference in Arusha on the relationship between NGOs and the ICC, organized by the International Refugees Rights Initiative (IRRI) and Open Society Justice Initiative (OSJI). Intermediaries are capable of "gathering evidence and working with witnesses long before the court is able to start its own investigations," it continues.

Intermediaries are low-cost, too. Of its annual 108-million euro budget in 2012, the ICC spent only 5,490 euros on intermediary remuneration. The modest transaction may help avoid "corruption allegations", says the Arusha report, though notes that "many intermediaries carried out the work for the court voluntarily while struggling financially".

There are also concerns about the quality of their work. Intermediaries are not professional investigators and "may lack the skills and expertise to investigate and preserve evidence", the report warns.

"Intermediaries have been a key feature of all international criminal proceedings to date, including past UN tribunals such as ... for Rwanda and the former Yugoslavia," says Alison Cole, a legal officer at OSJI, who helped draft the report. She lauds the "brave and important work" done by go-betweens, but agrees the court must streamline its cooperation with them. "The ICC has recognized the need for official guidelines," she tells IJT.

Those guidelines will have to deal with a variety of issues. Safety was a "paramount concern" at the Arusha conference. The report notes that working for the ICC exposes intermediaries to "security threats and retaliatory attacks".

Ivorian NGOs complained that after the ICC issued arrest warrants against suspects of the Gbagbo government, OTP officials left them to fend for themselves, providing no security or information on potential threats.

Congolese intermediaries were insufficiently guided, according to Buisman. "In these sensitive cases, many people try to intervene and manipulate the evidence," she says. In the trial

against Congolese warlord Thomas Lubanga Dyilo, the judges ruled that the prosecution "should not have delegated its investigative responsibilities to the intermediaries". Due to "unsupervised actions" of three intermediaries, several witnesses' evidence was deemed unreliable. There was a risk, judges said, that intermediaries P-143, P-316 and P-321 "persuaded, encouraged, or assisted witnesses to give false evidence". The chamber insisted the prosecutor charge the trio with offences against the administration of justice. She declined to do so.

Buisman recognized the some of the code names who also worked in the case against her client Germain Katanga (convicted in 2014) and Congolese militia leader Mathieu Ngudjolo Chui (acquitted in 2015). The insider witnesses they provided in these instances again proved unreliable, Buisman says.

"Big lessons were learned from the Lubanga case," says Turlan. "We developed a protocol [on] how to screen, select and control intermediaries."

However, the Kenyan cases saw serious problems, too, with an intermediary allegedly changing sides and now accused of harassing and bribing OTP witnesses to weaken the prosecutor's case.

Waning enthusiasm

Initially, NGOs were eager to work with the ICC. But since the Lubanga scandal, in particular, their "enthusiasm has waned" due to "attacks on the credibility and motivations of intermediaries" in court and "threats and physical attacks on NGOs on the ground," IRRI notes in the Arusha report.

Both Turlan and Buisman stress how vital local sources are for investigations. "You need local persons whose ethics you can trust and who have a bit of power and enthusiasm," Buisman says. To become less dependent on intermediaries, she would advise the prosecution to hire fixed local investigators. She believes "the real issue is that [the OTP] still have no permanent presence in situation countries" who are available 24/7 to help witnesses and intermediaries.

The court is working on it, says Turlan who points to the ICC field office with OTP support staff in Kinshasa.

Last November prosecutor Fatou Bensouda promised Malians: "There will soon be an ICC presence in your capital." But she did not give a more precise timeframe.



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Published by
Justice Tribune Foundation
info@justicetribune.com

Director
Arjen van Dijkhuizen
arjenvandijkhuizen@justicetribune.com

Editor-in-chief
Stephanie van den Berg
stephanievandenbergh@justicetribune.com

Editors
Janet H. Anderson
Karina Hof