

# GLOBAL BRIEF

**On international criminal justice: interview with Andrew Cayley  
September 9, 2011**

**GB discusses all things international criminal justice – from the prosecution of the Khmer Rouge leadership in Cambodia to the ICC arrest warrant against Qaddafi – with top international prosecutor Andrew Cayley**

**GB** What have been the successes to date of the Extraordinary Chambers in the Courts of Cambodia (ECCC)?

**AC** The ECCC has, in my view, two critical roles. Its first and expressly mandated function is to bring some level of restorative justice to the countless victims of the Pol Pot regime. Its second function is to build legal capacity in a country in which the court system disappeared during the early stages of the Democratic Kampuchea. The judiciary and legal profession were utterly wiped out by the Khmer Rouge. The foundations of the legal system that one sees today in Cambodia are less than 20 years old. By and large, the ECCC is successfully meeting these two critical roles.

The ECCC completed its first case last year, in July 2010 – Case 001. That case is now on appeal in the Supreme Court Chamber. The case concerned the trial of Kaing Guek Eav (alias “Comrade Duch”). Duch was the effective commandant of S21, or Toul Sleng – the central security centre in Phnom Penh, tasked with interrogating and exterminating perceived opponents of the Democratic Kampuchea between 1975 and 1979. The net for ‘perceived opponents’ was cast very wide. Upward of 12,000 men, women and children were murdered at S21. The trial of Duch, and the subsequent judgement, exposed the truth about S21 for the first time in over 30 years. It condemned a man who, for three and half years, while seemingly living a normal, happy family life outside of the security centre, went to work every day and authorized the torture and murder of largely innocent people. Kaing Guek Eav, who is 68 years old, was sentenced to 30 years’ imprisonment. The Prosecution, on appeal, has sought the imposition of a life sentence. In March of this year, the appeal of Case 001 was heard. We are awaiting the Supreme Court Chamber’s judgement.

Case 002 concerns the trial of the four most senior living members of the Democratic Kampuchea, including Pol Pot’s deputy, Nuon Chea; the regime’s president, Khieu Samphan; the foreign minister, Ieng Sary, and his wife and minister for social affairs, Ieng Thirith. The initial hearing in the case took place in June 2011, and it is my hope that the judges will start hearing evidence later this year.

The ECCC is an internationalized court inside the domestic Cambodian court system. Cambodian courts confront many challenges. A lack of experienced judges and lawyers, and also meagre resources, strain the proper implementation of internationally recognized fair-trial rights. The ECCC, with its international component of judges, prosecutors, defence lawyers and support staff – integrated into what is an internationalized domestic court – provides the support and experience required for major international trials. The international element also provides the Cambodian judges, prosecutors and defenders with the support and experience that they can take back with them into the domestic system when the ECCC finally dissolves. These are some of the notable successes to date of this unique hybrid judicial system.

**GB** What are some of the current and future challenges that the ECCC faces?

**AC** Case 002 is a complex case of extraordinary magnitude. During the reign of the Khmer Rouge, over 1.8 million people perished in less than four years in Cambodia. There were literally tens of thousands of criminal episodes. We can only address a representative sample of the crimes in the limited time that we have. There are the victims who survived, and then there are the countless relatives of the dead – both in Cambodia and scattered around the globe – seeking justice for their loved ones. We are trying four elderly people, and hence we need to move very quickly with the trial. The tension that we face is in trying to meet the expectations of the Cambodian people, the victims, and the relatives, pitched against the need to conclude the case as quickly as possible. It is often a painful balance, and it is imperative that a discourse with the public be maintained so that they understand why decisions are being made as they are, and what we are trying to achieve.

Another challenge is ensuring adequate funding for the Court. The ECCC budget is based on voluntary financial contributions by member states of the UN. A number of states have been very supportive in this regard – in particular, Japan, the US, Australia, France, the UK and Germany. After the recent tsunami and severe earthquake that devastated Japan, the country will need to spend over US \$300 billion in rebuilding projects, and, naturally, its public purse will be limited. The US has serious public finance challenges, as does much of Europe, due to the ongoing financial crisis. While UN member states will certainly not abandon the ECCC, securing adequate funding for the remaining life of the Court will be a major challenge.

**GB** **Countless families of the victims of the Khmer Rouge live in rural villages in Cambodia - far from Phnom Penh, the seat of the ECCC. Has the ECCC been effective in bringing the Court's work to these communities?**

**AC** Cambodia is a developing country and, while it is growing rapidly, many areas of the country are still fairly remote and lack modern infrastructure. Not everyone has access to television or radio. Here, I think, the Court has been a great success. Its outreach to communities across the country is coordinated by national staff. Both national and international staff participate in outreach gatherings. I have attended a number of these events, and have been impressed by both the presentations that the Court makes, and by the interest and questions from large Cambodian audiences. The Court and a number of non-governmental organizations have also organized the transportation of members of the Cambodian public from the provinces to attend court hearings. At every hearing where I have been present, the public gallery has been full with the presence of several hundred members of the Cambodian public.

**GB** **Can the ECCC realistically help to heal a country so devastated by the Khmer Rouge?**

**AC** There are limitations to justice. All of us who are engaged in the international criminal process know this. It is not a panacea for all of the remaining communal and individual pain. But I think that the Court has successfully brought this period of Cambodian history, and the utter tragedy that went with it, into sharp focus. Individuals are being held accountable for crimes of such magnitude and horror that they are often difficult to envisage and express in words from this vista – some 30 years on. It has taken three decades, but now the accounting time has come, and that is recognized by Cambodians – old and young alike. People are talking about the Court in connection with putting the past to rest, and moving on.

Moreover, other organizations are investing heavily in teaching the current generation about the Democratic Kampuchea period. The Documentation Centre of Cambodia (DC-Cam) has organized – countrywide – the training of high school teachers about the Khmer Rouge. The Khmer Rouge period – thanks to DC-Cam – is now part of the national education curriculum. Previously, this period of history was shrouded in silence. Few spoke about it publicly. DC-Cam has reached out to communities all over Cambodia to explain the work of the Court and the reasons for its existence. Under the leadership of their director, Youk Chang – himself a child victim of the Khmer Rouge – DC-Cam's stated purpose is "to help Cambodians heal the wounds of the past by documenting, researching and sharing the history of the Khmer Rouge period."

The ECCC alone cannot ameliorate all of the grief and wounds of the past. But by working together with many decent and committed individuals – both from Cambodia and overseas – one will see a different nation in a matter of years. The trials will be completed, the people rightly will never forget, but they will be more at peace with themselves and with each other.

**GB Is there any support base for former Khmer Rouge senior leadership now being prosecuted by the ECCC, as was the case, for instance, with Slobodan Milosevic and others indicted by the Yugoslav Tribunal (ICTY) in The Hague?**

**AC** The Khmer Rouge regime fell in 1979, but went on fighting the present government from remoter parts of the country for 20 years. In order to end the civil war, and to bring peace to the country, it was necessary to come to terms with the Khmer Rouge. Former Khmer Rouge members were reintegrated into the national structures. In certain parts of the country – for example, Pailin – former members of the Khmer Rouge occupy senior positions in the police and the army. So while there is not vocal and vigorous support for the senior leadership, I have heard individuals speak sympathetically of those on trial. This, in my experience, is to be expected, and is nothing that will destabilize the Court or its mandate.

**GB What are some unique features of the ECCC that make it different from other international criminal jurisdictions like, say, the International Criminal Court (ICC)?**

**AC** The ICC is an international court based on both the common law and civil law systems. The ICTY, International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) were all courts broadly based on the common law system. The ECCC is an exclusively civil law model. This is because Cambodia was part of French Indochina until 1953; as such, the legal system is rooted in French civil law. The major difference at the ECCC is that the investigation at the Court is carried out by investigating judges, as opposed to by the Office of the Prosecutor, as in all other international courts. The prosecution, defence and civil parties all have access to the investigative case file as it is developed by the judges. The judges expressly must investigate – impartially – both incriminating and exonerating evidence. All parties to the proceedings can make requests for investigative action during the course of the judicial inquiry. Engaging the defence at an early stage in the legal process, and giving them the right to participate in the investigation on similar terms as the prosecution, reduces many of the less constructive, partisan elements of an Anglo- Saxon common law trial.

Similar to the ICC, the ECCC allows for the intervention of civil parties – victims – who can come to the Court to give evidence regarding the moral and physical damage that they have suffered, as well as to claim moral and collective damages. In the world of international criminal law, the ICC and ECCC are unique in this respect. In effect, victims are empowered and given a voice in the proceedings, as opposed to being restricted solely to the role of prosecution witnesses.

**GB You are now intensely engaged in the trial of Nuon Chea, the highest-ranking former Khmer Rouge official to be tried by the ECCC. Now 85 years old, he was allegedly the chief political ideologist of the Khmer Rouge, and Pol Pot's trusted adviser. What is the most challenging aspect of this case?**

**AC** The difficulty of this case, which in fact includes Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, is its sheer scale; that is, the need to properly address the crimes, but also to ensure that the case is manageable – bearing in mind the ages of the accused and the need to abbreviate matters as much as possible.

**GB You were recently a panellist at the first regional diplomatic conference on the ICC in the Middle East, hosted by the State of Qatar and the League of Arab States. Do you support a closer partnership between the Middle East, the Arab world and the ICC? How likely is it that this marriage will take place in the near future?**

**AC** Seismic changes are taking place in many Arab states, and more generally in the Middle East. Central to the people's demands is a call for justice, rule of law and accountability. The ICC is now regarded by the international community as a powerful instrument to be employed to limit the inevitable unlawful violence and destruction that often accompanies great political upheaval. The ICC is already in Libya – where it should investigate all sides responsible for the commission of war crimes and crimes against humanity. It may well soon be in Syria as well.

The League of Arab States has evolved in its views of the ICC since the Prosecutor applied for a warrant of arrest against President Omar Al-Bashir of Sudan. In 2008, the League described the legal process against Omar Al-Bashir as serious and dangerous and not well considered. Al-Bashir was hosted a year later in Qatar at the Arab League Conference, where he received full support.

And then in May 2011, the ICC held its first regional diplomatic conference in Qatar, where the Court was publicly – although not unconditionally – backed by the delegates present, including senior officials of the League of Arab States. On May 24th, 2011, the Attorney General of Qatar, Dr. Ali Ben Fetais Al Marri, stated that Qatar and many other Arab states were considering acceding to the Rome Statute. So the ICC is now acting in the complex matrix of rapid change in the Arab world and the Middle East, and regional states are actively reaching out to the Court.

Closer relationships with and ratification of the Rome Statute by many more Arab and Middle Eastern nations is inevitable, in my view. Arab League states alone count nearly 340 million people. Adding the populations of Iran, Turkey and other regional states to the mix multiplies this figure significantly. Together, they represent – through language, history, religion and culture – unique and ancient parts of human civilization. They bring a different perspective to bear. They represent a powerful political interest. The legitimacy and efficacy of the ICC is the sum total of the States Parties. The ICC needs the Arab world and the Middle East. And vice-versa.

**GB On the whole, what change or changes do you think are needed to make international criminal tribunals and special courts more effective?**

**AC** The disability of all of the international courts and special courts has consistently been the initial absence of effective enforcement mechanisms. What is interesting, and what I have observed in every international jurisdiction in which I have worked, is how the legal muscle of these courts grows – almost imperceptibly: as the years pass, the docket increases, and the case law expands. Doubt concerning these courts' jurisdiction dwindles as time goes on. The lesson from this is that legal muscle expands faster when it is vigorously exercised. Officials who are prepared to be bold, and to take calculated risks to extend the legal reach of these courts, will ultimately make them more effective.

**GB Do you have a view on the merits of an ICC arrest warrant on Qaddafi versus a negotiated political solution in Libya that does not include such an arrest warrant?**

**AC** This is an interesting question. Less than a month ago, certain states that so admirably pressed for court action in Libya were bogged down in their support of a military campaign against Qaddafi – a campaign that had gone on far longer, and had been less decisive, than was originally anticipated. Tensions between peace and justice were emerging. There were murmurs of an exit strategy and amnesty for the Libyan leader. Richard Dicker of Human Rights Watch called on states not to abandon principle in trying to bring their role in Libya to a conclusion. Now, weeks later, there is a new perspective. The capital, Tripoli is in the hands of the Rebels, who are now pushing towards Sirte, Qaddafi's hometown. At this juncture, it is certain that the war will end with Rebels victorious. Peace – one hopes – will come, and Qaddafi, if he is still alive, will face justice in The Hague.

The future of Libya could be bright if the will of the people is respected through an independent and representative democratic system of governance – founded by and for all Libyans.

**GB What has been the impact of the evolution of international criminal law on the conduct of war since the war crimes trials in Nuremberg and Tokyo?**

**AC** While the period from 1946 to 1994 was fairly barren as regards the development of international criminal law, the period from 1994 to the present day – by contrast – has been extraordinarily vibrant in terms of advancement. This has given the law efficacy that it did not hitherto possess. War and conflict will still take place, and atrocities will still be committed. We cannot stop that. But I do sense that a certain civilizing effect has taken place. The planned or conceived atrocity or crime is less likely today than it was 20 years ago. Crimes committed in the heat of battle under the strain of conflict will still happen, but images of Mubarak on a stretcher in a Cairo courtroom, and serious talk of Qaddafi and Al-Bashir facing justice in The Hague, are making those who plan or might plan crimes in conflict or unrest – from wherever they hail – more cautious and reflective about the consequences of their actions.

**GB You used to be a military prosecutor and legal adviser in the British army. Is the British army a disciplined army, as concerns laws of armed conflict?**

**AC** I served in the British army from 1991 to 1998, retiring as a major in 1998. I spent three years on secondment to the ICTY before joining the UN. I served in the infantry on attachment in Central America after I attended the Royal Military Academy Sandhurst. I can say with confidence that the British army is well-disciplined, and that the laws of armed conflict are widely disseminated and enforced throughout all ranks. Of course, British military personnel may commit acts of misconduct both in times of war and peace, which is why the UK has a robust disciplinary system in which I was a prosecutor for three years. I saw it functioning first-hand. Some unacceptable crimes were committed in Iraq by British Forces. These have been largely addressed in the British military courts, and there are number of public inquiries that have taken place – and will take place – in order to address these events.

**GB There have been some concerns expressed by states and their citizens that governments may oftentimes pressure international courts into not indicting otherwise culpable defendants. What is your take on this?**

**AC** Political influence over decisions in international courts has always been seen to be inappropriate and unseemly. I think that in a number of international courts in which I have worked, states might deny trying to exercise influence, but still do so, to varying degrees, behind the scenes. Such political influence is not always motivated by bad faith. Sometimes intervention takes place for well-founded reasons. But lawyers instinctively feel strongly against external influence because we know that, in domestic courts, political influence strangles judicial independence and fair-trial rights. It makes a mockery of justice. Still, we have to accept that we live in the real world, where politics plays a part in these special courts. As prosecutors, we have to guard against the potential damage that it may do, and ensure as much as we can the integrity of the proceedings with which we are entrusted.

**GB What are the critical traits that an effective international prosecutor must possess, given the complexities of international courts?**

**AC** Dealing with the choppy waters of the political context in which he or she operates, an international prosecutor must have some of the required qualities of a diplomat, as long as truth and courage temper the dictates of diplomacy. As for being a prosecutor, I have always admired the following description by the late Robert Jackson, former chief US prosecutor at Nuremberg (all the while realizing the challenge of even being a fraction of what Jackson describes): “The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against abuse of power, and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”