



## **UN prosecutor: ‘the law ties me to do this’ November 4, 2011**

*[Editor’s note: On Oct. 26, Andrew Cayley, the international prosecutor for the UN-backed Khmer Rouge tribunal, gave a lecture at Rutgers University, in Newark, New Jersey. Cayley, who came to the court in 2009, has been closely involved in the prosecution of two contentious cases at the court, called 003 and 004. In April, he filed an appeal against the sudden conclusion of Case 003 by the court’s investigating judges, calling on them to reopen the case, visit key crime sites and interview its two suspects. On Friday, Nov. 4, the court rejected the appeal, after a split decision. Meanwhile, court observers and victims groups have roundly criticized the handling of both cases 003 and 004 by the Office of the Co-Investigating Judges, and their full prosecution is publicly opposed by Prime Minister Hun Sen and other key government leaders. This has led to widespread concerns that the cases are falling victim to political interference and will not be completed. Cayley addressed these concerns and other in an interview with VOA Khmer following his lecture at Rutgers.]*

### **You’ve been in Cambodia for two years, trying to prosecute suspects. What is your evaluation? What has been done and what has been achieved?**

I think a lot has been achieved. I mean I’ve only been with the court for two years. My predecessor, Robert Petit, laid strong foundations for the office of the co-prosecutors. I think the achievements that have been made have been the trial and conviction of Duch in the first case. That case is now under appeal. I think that appeal [decision] will come out very shortly. I think that’s going to be another major milestone for the court. I think the whole of the pretrial process and the completion of the investigation and closing order in Case 002 was an immense achievement, actually, for the court. I mean when you look at the documentation that was produced and the number of crimes that were addressed, it’s one of the biggest cases that’s ever been done in international criminal law, a case that will begin in November. As I said at the talk [today], outreach has been done extremely well at the court. I think the combination of national and international actors in that and the involvement of the Cambodian people in the court, that’s a major success of the court. The thing that is the shadow of course over that is cases 003 and 004, and I think that’s probably diminished the very positive perceptions that everybody should have about Case 001 and Case 002 and the work that was done around those cases.

### **You have submitted for prosecution a third submission to the co-investigating judges and they kind of deny about that. So what is your next step to deal with that?**

As you know, the investigation in Case 003 was closed at the end of April. It was my view that inadequate investigation had been done. I still hold that view. That’s why I applied for investigative steps to be taken by the co-investigating judges. That’s my right under the rules. The judges rejected that particular application. I appealed it and it’s gone on to appeal at the pre-trial chamber. I’m still waiting for that appeal to come back. *[Note: In a split decision, Friday, Nov. 4, the Pre-Trial Chamber rejected the appeal, after a split decision along national and international lines.]*

But of course now we do find ourselves in a somewhat interesting situation in that Judge [Siegfried] Blunk has resigned from his position [as international co-investigating judge], and he’ll be replaced by another judge very shortly, Judge [Laurent] Kasper-Ansermet from Switzerland, and I anticipate that he may well have a different view about the way these cases have been handled by the OCIJ, but we have to wait and see until he arrives.

### **Political interference and corruption issues in the court, are these things harming the tribunal process?**

The issue of political interference was addressed by [UN Undersecretary-General for Legal Affairs Patricia] O'Brien when she came to the court last week. She made it very clear to the government that whatever political interference is taking place in the process of the court needs to stop. Obviously, though I was not involved in those discussions, but as a prosecutor, I fully support what the undersecretary-general says. There shouldn't be political interference in a judicial process. It's supposed to be carried out independently and transparently, so the people in the country have actually confidence that individuals within the court are making decisions based on law and conscience.

I know there have been comments about delays. I think now frankly the judges and the Trial Chamber need to move as quickly as they possibly can. I think the issue of delay is now the specter that is essentially overlooking all of the work that we're doing at the moment. We have to move fast, and I think delay is a problem. We're dealing with people who are very elderly. We're dealing with a huge case. It needs to move quickly, and I think it is. The case is beginning in just over three weeks' time. We'll be opening the case, so I think we will be addressing the issue of delay.

**You mentioned in the conference here the difficulty with evidence and witnesses, some of whom have died lately. So, is that difficult during the confrontation or testimony of the defendants? Because right now, Ieng Sary, for example, declares that he will not testify at the court.**

I mean, yes, the concern about delays and also concern about witnesses dying, and indeed, Vann Nath, the painter, was the individual that everybody became very concerned about. He was an extremely important witness. He was one of the few known survivors of S-21. I sometimes sensed that he wasn't that old. He was only 69. I suspect that his health had been very severely affected by the time he actually spent in S-21. This is another reason that we need to move quickly: because the witnesses are getting old. We do need to move.

Now, in terms of Ieng Sary refusing to give evidence, I must emphasize that's his right under the rules. He doesn't have to give evidence. And that's perhaps something that we need to explain to the Cambodian people, that he has the right to remain silent. That's a fundamental right both in the Cambodian system and also within international law generally. He doesn't have to speak, and nobody can actually look at that fact, the judges, nobody can actually draw adverse inferences. So I think that needs to be very clear. We would rather that he does give evidence, and I'm sure the Cambodian people would too because they want an explanation from these people as to why these things happened. But he doesn't have to do that. That's his right.

**The Cambodian government still maintains a policy of national reconciliation and peace, and you as prosecutor are charged with more than that. Has it influenced you, or blocked you from doing work?**

To be absolutely frank, I've said this many, many times to journalists: the government has never blocked any actions that I have wanted to take on cases. It was made clear to me when I arrived that cases 003 and 004 were not particularly wanted by the government for the reasons, as you said, because of the national reconciliation issue and the risk of civil war, but I've never been told by the government, 'You mustn't do this, you mustn't do that.' I've always been able to carry out my duties. It's been very stressful at times and very challenging, but I have always been able to do what I needed to do and I consistently said I would follow the law and rules. That's my duty and I will do my duty.

**Mr. Cayley, I've been to Cambodia and met with Khmer Rouge suspects, three of them, and I told them some facts in the confidential documents, says that you killed these people, killed thousands of people like this, but they all denied what the documents really stress about their involvement in the crimes in the past. So, what do you think about their denial?**

Well, let's face it; I think it's very common for people who have been accused of very serious crimes to deny them. I think these matters are often resolved at trial because the evidence is heard, an individual is defended. So the person accused has a defense lawyer who can examine the witnesses and essentially put to them what this individual said to you: 'Look, I'm not responsible for this; I didn't do it; I didn't know about

it.' And then the judges decide whether that person is responsible or not. But I think in my career I can't remember any case, except for the Duch case, every case I prosecuted, the accused have claimed the same thing: that they were not responsible.

**In terms of the civil party complainants and the victims, the question about the healing and reconciliation, do you think they are satisfied now that the first case is almost done?**

It's very difficult for me to measure how much justice the victims actually require. That really is a matter for the Cambodian people. I think the expectation is, at least at the moment, that Case 002 must come to some kind of conclusion. These are the most senior living members of the Khmer Rouge regime. These are the people who were the top of the power pyramid in the country. I think ultimately, as I say, it will be a matter for the Cambodian people how much justice they need in order to go through this process of reconciliation. I mean it's absolutely also clear that the country wants to move on. They don't want to be bogged down in these trials forever. And I think frankly the quicker that we can complete the job of doing these cases and the court ultimately dissolving, it's better for the country, because the country needs to move on and it needs to address other economic and social issues, which exist in the country, which need to be addressed as much as the past.

**Lately, there's heavy criticism from court observers, internationally and nationally, basically critical against the UN and also partly Cambodia too. As you are inside the court, is it that UN side's leadership that needs to be fixed? Because there's the problem of resignations, many times, and right now conflict among the prosecutors, national and international, and the judges, national and international.**

It is certainly a problem. And I warned people a while back that if cases 003, 004, were dealt with in that way they were being dealt with, we would end up in this situation with fairly critical judgments. You've seen the pretrial judgment in respect to OCIJ action on the civil parties. Today I think, or yesterday, Judge You Bunleng issued a press statement explaining or trying to explain criticism that had been made in pretrial judgment about those issues.

Unfortunately, this is what happens when things are not addressed properly. That's why the law has to be followed. Because then you don't have to end up constantly explaining why things are being done as they are. Then you don't end up with people having to resign in the midst of investigations or cases.

I would say that I think the commencement of Case 002 is going to be an issue that keeps everybody very busy. It's a case that needs to move forward. I hope that it will lift some of the clouds that are hanging over the court in respect to cases 003 and 004. But I still maintain, what I've said all along, cases 003, 004, need to come some kind of legitimate conclusion. There needs to be due process. The law needs to be followed. The rules need to be followed. Otherwise it's going to create a huge mess in the court. And nobody wants that, on the national side or on the international side. I will tell you that in my office, for all of this, I would emphasize, I'm not just saying this, you can ask [Cambodian prosecutor] Chea Leang, we have an extremely good working relationship. We don't agree about everything. There are times when I've had to make applications which she doesn't agree with. She's had to make applications which I didn't agree with. But it is all very civilized and dignified. You know we talk regularly and the national and international staffs work very well together in [the Office of Co-Prosecutors]. That is the truth. That is genuinely the truth. Thank goodness.

**Judge Blunk resigned, Case 002 is not finished yet, and Case 003 has not been moving forward? What is the impact on the court?**

To be frank, I know very little about the circumstances about Judge Blunk's resignation. He never spoke to me before he left. He wouldn't speak to me; I'm the international co-prosecutor. I don't think that his leaving the court is anything that particularly affects our office. There will be a new judge appointed under the rules, Judge Kasper-Ansermet from Switzerland, who was the reserve judge. He will come. I don't actually give it a tremendous amount of significance, other than that which the Pre-Trial Chamber,

international judges, have said about what has been going on at cases 003 and 004. I think that's probably more important: what's actually been taking place at OCIJ while Judge Blunk was a judge there, as opposed to his resignation. His tenure came to an end. He decided to leave.

**Senior leaders of the Cambodian government have said many times that there will be no cases 003 and 004, but you still forwarded the submissions to co-investigating judges. Why did you do that?**

Because of what I've said all along. I have to follow the rules. I can't take instructions from the government. The government can't say to me, and indeed they've never said to me directly, "Sorry, you can't file that document with the court." It has to be brought to a legal ending. It has to be due process. The rules have to be followed. The law has to be followed, and we have to come to some kind of judicial conclusion in that case. That's the law. That's my obligation. That's my duty, to follow the law. I can't do anything else. The law ties me to do this.

The retraction that the co-investigating judges ordered you to do, what is happening to the Pre-Trial Chamber right now?

In respect to that issue, they couldn't make a decision, actually. They split. In terms of whether I had to make a retraction or not, the court split. So the national judges said that I had to make a retraction order. The international said that I didn't. And the international judges said that I didn't because Judge Blunk in his order of retraction actually republished all of the information that I published. So they said there's no point in a remedy here. What's the point? If Blunk has basically re-published everything that he says you shouldn't have published, he's put everything out there anyway, it's pointless if you make a retraction order. The national judges came up with some other reasoning why I should. But because they didn't make a decision, the order of the OCIJ stands, so I actually have to make a retraction. *[Note: Cayley made the official retraction the following day.]*

**Has the court done enough to protect the confidential prosecution's introductory submissions?**

This is a very difficult question. First off, that document should not have been leaked to the press. And I maintain that not because I don't believe that the public should not be informed. The public should know what's going on. But documents like that should not be leaked to the press. I don't know who leaked it. It certainly did not come from my office, and everybody knows that, because I have a standing instruction to all staff in my office that documents are not to be leaked to the press under any circumstances. I don't think it's a good thing, even when there are problems, as with cases 003 and 004, that people start leaking documents. It doesn't improve the situation. We're better off following the law, following the rules. The law is a very strong refuge at the end of the day.

Mr. Cayley, cases 003 and 004, why are they so important? Because Case 002 has top leaders that will be prosecuted, and Duch is one already. That's what the Cambodian government says, that probably that's enough for low-ranking and high-ranking, we tried them already and justice has been found.

As I've said before, the decision on cases 003 and 004, to commence those cases, was made before I arrived. I'm not saying the decision by my predecessor is wrong. But he made that decision. I inherited these cases. Because I inherited these cases, I had to follow the rules. So whatever people think about which is the most important case, whether we only need so many cases, the difficult that we all have, including the government, is that we all have to follow the rules. And there's no rule in the rules of procedure or in the statute that allows for these cases to be dealt in any other way other than the procedure that was actually adopted. So there has to be an investigation. There has to be a consideration by the investigating judges of the evidence. And then there either has to be a dismissal order or a closing order, an indictment. That's what the rules say. There isn't any other way of dealing with these cases. That's the difficulty here. And for me, the importance of these cases, more than anything, whatever happens at the end, is that the Cambodian people see a proper legal process taking place, that things are being dealt with properly, that people are doing their job and their duty under the law and the rules. That's all. That's it, basically.

**You mentioned difficulties, not much evidence or concrete evidence. What is the link between the facts and the evidence, because if some evidence is removed or disappears, is that a big hole?**

I wouldn't say it's a big hole. I think that the case is a very strong one against these individuals because of the size and scope of the crimes that were committed. There is documentary evidence that links them with the crimes on the ground, including publications of the Khmer Rouge, and including other documentary evidence that you have seen. You know, we mentioned [the Documentation Center of Cambodia]. I mean, they have nearly 50,000 documents from the period that create this linkage of evidence that we are talking about. Ultimately, it's for the judges to decide whether or not these three individuals are connected with the crimes. They're presumed innocent until proven guilty. The prosecution has what's called the burden of proof. We [co-prosecutors] have to prove these crimes and [the suspects'] connections to them beyond a reasonable doubt. But I have every confidence that we will prove our case at trial.

**Has there been enough time for investigating judges to complete cases 003 and 004. Have they been moving forward?**

Very little has happened since Judge Blunk left, and I suspect very little will happen until Judge Kasper-Ansermet actually arrives at the court. But the problem, of course, talking about this, is that the investigation is confidential. Some of the issues in Case 003 have come out because the Pre-Trial Chamber has issued decisions in respect to some of the things that have gone wrong. I can't talk about Case 004 because it's confidential. And I can't talk about Case 004.

**How difficult is that, if it is in the public domain already?**

It is difficult. That shouldn't have happened basically. And unfortunately, part of the problem of why that happened is the manner with which these cases were being dealt with by the court. Some people started leaking documents. But just because those documents are leaked, doesn't actually take away from me my duty to respect the confidentiality requirements of the cases.

**Can you confirm those five names?**

No, I can't.

**Considering all the allegations of political interference in the court, and the focus on the younger generation of lawyers in Cambodia, how could you ensure the court will leave young lawyers with a good legacy?**

I think we just have to show a good example to young lawyers. We have to show them how to practice law in an honorable and decent way, and I think we can do that. Look, I've said to you and I said in the lecture, there are many good, young, decent lawyers in Cambodia. I've met them. I speak to them regularly. We have a special internship program in my office to basically encourage them and educate them. The Australian government very kindly gave us, I think, \$8,000 to pay salaries. So I think we've now had about 10 of these young lawyers, from the royal university, from the law school. All of them have gone on from the court and found jobs with law firms, with DC-Cam. They've done well. That's where I want to concentrate my efforts, because I think they are very open. They want to learn. They are the future of the country. So it's worth spending time with them, and they are nice people.

**On the negative side, problems exist in the legal system. As a prosecutor or a judge, you have to pay a bribe, or at least you have to be a member of a political party. Will that influence them or affect the legal system?**

It's inevitable. If the system works like that, you do get an effect. But it's going to change, isn't it? It can't be like that forever. I think many of these lawyers I've talked to, they are not actually going into the public

service system. They are going into private law or into NGOs. That is a shame, if that's taking place, that people have to pay money to get a job in public service. But it will take time to change.

**Perhaps 2 million people were killed during the Khmer Rouge regime. But there's only five, or possibly 10, people who will be prosecuted. So in your point of view as a prosecutor, how many do you feel will satisfy?**

I do not think you can put a number on it. You can't say if you prosecuted 100, it's enough, or 200. What difference is that going to make to the dead? The dead don't know how many people have been prosecuted. Frankly, the court was set up originally with a very limited mandate. It didn't have the same mandate as the [International Criminal Tribunal for the former Yugoslavia] or the [International Criminal Tribunal for Rwanda]. It was designed actually to prosecute a limited number of people for the very reason that the government didn't want the court to be here for 15 years, and frankly on that basis I agree with them, because I don't think it would be good for the country to have hundreds and hundreds of Khmer Rouge going through the court system, and I think we all agree on that, if we're talking about reconciliation and justice living together. So I think it's not a good idea to start saying, "Well, 20 is enough, 25, 30." It's not. The court is set up to try a limited number of people. That's what it should do, and it should be left freely to do that.

**The court is supposed to be a model for the Cambodian courts after it is dissolved. And the UN apparently sponsored the court because of that reason. Now it seems that the UN is not willing to get involved in political interference or any investigations of kickbacks. Do you think the UN should have done more to ensure its legacy as a map for tribunals around the world?**

The legacy of the court is important for the reasons that you said. Undersecretary-General O'Brien did actually say to the government that the political interference has got to stop. I can tell you that the UN wants the court to succeed. I know that Undersecretary-General O'Brien, because I've talked to her, she stated, "The court has to succeed." I think it's a very challenging situation for the UN. You have to remember it is a domestic court. It's not an international court. The UN is in a challenging position over this issue. But I can guarantee you that the officials that work in the court want the court to succeed in a fair and decent manner and O'Brien wants the court to succeed. I think there is a lot of good will within the UN. There is a lot of commitment to make this court work and leave some kind of decent legacy in the country. That's genuinely true.