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New KRT co-prosecutor checks in Robbie Corey Boulet December 22, 2009

Andrew Cayley, veteran war crimes prosecutor, discusses challenges he expects from new role

OF the cases he has tried, Andrew Cayley, the newly appointed international co-prosecutor at the Khmer Rouge tribunal, can identify only one that bears a strong resemblance to those at the Khmer Rouge tribunal: the case against Radislav Krstic, a Bosnian Serb Army commander who was charged in connection with the 1995 Srebrenica massacre, in which more than 8,000 men and boys were killed.

“That case really is the only one that is on the same scale of what happened here – dealing with mass graves, dealing with mass killing on an organised scale,” the veteran war crimes lawyer said in an interview during his first trip to Cambodia, which was scheduled to conclude Monday.

He added, though, that the parallels were limited. Reflecting on his first visit to the Tuol Sleng torture facility, which took place Saturday, he said: “For all I’ve done, with all the experience I have, I’ve never seen anything like this at all. Very serious crimes obviously were committed, and the photographic evidence is very distressing indeed. It really is. Because all of those people are, of course, dead.”

After arriving in Cambodia Thursday night, Cayley, whose resume includes stints leading the International Criminal Court’s investigation into crimes committed in Darfur and defending former Liberian president Charles Taylor, has spent the past few days getting oriented – introducing himself to judges, discussing case strategy with his staff and touring Tuol Sleng and the Choeung Ek killing fields.

Cayley commented at length on some of the challenges faced by his predecessor, Robert Petit, who was a vocal critic of what he described as government interference in the work of the tribunal, particularly with respect to requests for further indictments.

Though he has no hybrid tribunal experience, Cayley said he was prepared to navigate the sometimes-fraught relationship between the tribunal and the Cambodian government.

“I’ve worked for a long time in this field, and if you work in an international court you are confronted with the necessity for cooperation and collaboration with national authorities who are affected by what you do,” he said. “So I have a lot of experience dealing with national governments who may not always have the same view of things that I have. And this is done through diplomacy – by cajoling and persuading. Fighting people in these situations doesn’t get you anywhere. You have to talk because everybody has their interests. Justice is the ultimate interest, but sometimes you have to make compromises.”

Commenting on his expectations for his own relationship with Chea Leang, Cayley noted that their first few hours of meetings had gone very smoothly, and that they “haven’t had any problems”.

“We may have disagreements in the future – all good colleagues do – but I’m absolutely convinced that she and I can resolve these through intelligent discourse between us,” he said.

Cayley also touched on some of the criticism that dogged the prosecution during the tribunal’s first case, that of Tuol Sleng prison chief Kaing Guek Eav, alias Duch. A report released in November by the Asian International Justice Initiative, for example, faulted the prosecution for not having a senior trial attorney present in the courtroom every day, and pointed to a “noticeable lack of coordination between the different prosecutors assigned to different stages of the proceedings”.

Cayley said Sunday that he had “taken on board that criticism”.

“They’re absolutely right,” he said.

“You need to have consistency of representation because people that are actually in the courtroom need to understand the whole case. And unless you’re hearing all of the evidence, you don’t understand the whole case.”

Genocide charges

The Krstic case at the International Criminal Tribunal for the former Yugoslavia is one of four genocide cases in which Cayley has been involved. Despite doubts expressed by some scholars that Khmer Rouge-era crimes amounted to genocide, Cayley said he viewed the court’s recent decision to bring genocide charges against four regime leaders as appropriate in light of the abuses endured by minority groups, including the Khmer Krom.

“These people were targeted because of an ethnic quality,” he said of the Khmer Krom. “This is the basis of genocide.”

The genocide charges against Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith stem from crimes committed against Vietnamese and Cham Muslims.

Prosecutors have pushed for genocide charges with respect to Khmer Krom in a supplementary submission for the second case, Cayley said.

Cayley also said he supported the court's acceptance of joint criminal enterprise (JCE), a controversial doctrine of liability under which suspects can be held responsible for crimes committed under a common criminal plan. Investigating judges ruled earlier this month that all three forms of JCE could apply to international, but not domestic, crimes.

Noting that JCE has been central to "almost all" of his international criminal cases, Cayley said he believed it "accurately reflects the facts in these kinds of cases".

"Oftentimes, it's challenging to prove the involvement of high-level officials in crimes on the ground," he said. "Joint criminal enterprise is a vehicle that realistically represents a high level of responsibility for mass crimes committed on the ground."

Cayley said he expects to be permanently settled in Cambodia early next year. Asked about his timeline for his new job, he said he was "expecting to stay until the completion of the mandate of the court".