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Brussels School of International StudiesModule Title: International Humanitarian Law and International Criminal LawModule Covenor: Prof. Cedric RyngaertModule Code: LW 846Term: January TermDate: 1st May 2013Words count: 3918Question: Critically analyze the effectiveness of so – called ‘ mixed or internationalized’ war crimes tribunals (Cambodia and Sierra Leone). Name: Rene Ngulefac AteawungLLM in Public International LawStudent Number: 11903494Email: rna2@kent. ac. uk

Introduction

International criminal law refers to that body of international rules well designed to prohibit certain categories of conduct such as crimes of genocide, crimes against humanity, war crimes and crimes of aggression, and to make those who engaged therein to be criminally liable.[1]It slightly defers from public international law in that individuals are directly responsible for their acts or omissions unlike in the later where it is the state that is responsible for some acts of individuals acting as state agents. It would be inappropriate if we proceed without attempting a definition of other terms as used in the question. An internationalized or better still, mixed war crimes tribunal is one involving both national and international judges and prosecutors who investigate, prosecute, and adjudicate in the same war tribunal. This is clearly started on the law governing the international criminal tribunal of Cambodia, and Sierra Leone.[2]The term ‘ effectiveness’ here refers to how prepared and efficient the above courts have so far proven in rendering justice for crimes which they were established to adjudicate. That is, their adequacy in achieving the purpose for which they were respectively established. Although internationalized war crimes

tribunals include East Timor and Kosovo, our focus is on that of Cambodia and Sierra Leone as presented infra. This paper seeks to analyze critically the effectiveness of internationalized war crimes of two different tribunals; Cambodia and Sierra Leone. The former was established by an agreement between the United Nations and the Royal Government of Cambodia[3]for the prosecution of crimes committed in Cambodia during the period of Democratic Kampuchea. Its prior objective is to investigate and prosecute top ranking officials of Khmer Rouge regime who directed and or perpetrated the death of over 1. 7 million civilians of Cambodia between 17 April 1975 and January 7, 1979.[4]The later on the other hand, was established to try persons alleged to have committed crimes against humanity, war crimes, and other serious violations of international humanitarian law.[5]It equally has jurisdiction over crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. It is germane to note that they are both hybrid and ad – hoc tribunals. On the first part of this paper we will examine the past effectiveness of the Extraordinary Chambers of Courts of Cambodia (hereinafter referred to as the ECCC). Instilling faith in Cambodian institutions, capacity building within her judiciary couple with mass victim participation in criminal proceedings, and ensuring that such proceedings are accessible and relevant to Cambodians are at the lime line. We shall chronologically analyze that despite the fact that the court has been very effective it still faces lots of draw backs even right from its very inception. Observing through a lens, we notice apparent traces of insufficient legal protection, no clear judicial independence couple with political interference, corruption all culminating in time consumption and budget mismanagement.

The third part follows suit and articulates in an integrated approach the achievements and short comings of the Special Court for Sierra Leone (hereinafter referred to as the SCSL) which was established on 16 January 2002 by an agreement between United Nations and the government of Sierra Leone.[6]Among its achievements, the completion of its mandate, its excellent outreach mechanisms as well as its significant contributions to international criminal jurisprudence via its success to charge and prosecute the crimes of enlistment, recruitment and use of child soldiers will be examined. At the same time, recourse would be made to its failures especially its inadequacy of funds, its inexperience staff marred with corruption and bias attitudes. The last part of the work will deal with the conclusion, judging from what must have been presented above and affirming that despites their short comings, they are preferable to their predecessor international criminal tribunals of former Yugoslavia (hereinafter referred to as the ICTY) and the International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR). It’s worth to begin with the effectiveness of ECCC

The effectiveness measured so far by the Extraordinary Chamber in the Courts of Cambodia (ECCC)

Cognizance of failures of the ICTY and the ICTR[7]established in 1993 and 1994 respectively, mindful of the atrocities committed by officials of Khmer Rouge regime during April 1975 to January 1979, the ECCC was established. One of the areas where it has been so effective is instilling faith in domestic courts. For many post – conflict states, seeing the local judicial system at least partially involved in important trials is critical to rebuilding a sense of

faith in courts. Besides restoring the legitimacy of devastated legal systems, local connections with well organized high - profile trials benefits transitional governments' credibility.[8]Moreover, the ECCC has succeeded in proving that a hybrid trial demonstrates not only to the local population, but also to the world at large that local members of the judiciary can mete out justice. The number of cases successfully adjudicated so far by the tribunal is evidence to this effectiveness. Another achievement has been in the domain of capacity building of Cambodian judiciary. Since it is a hybrid court, the local staff members easily provide their international colleagues with insights into local issues. The local staff is known to quickly lend hands on suspects and the necessary evidence especially at investigative instances. This cooperation justifies the early capture of many senior leaders of Democratic of Kampuchea believed to be most responsible for grave violations of national and international law. This has so far aided both in understanding and gaining legitimacy on facts at issues as well as in the eyes of the people. It facilitates the smooth functioning of the court and hence, speedy and effective achievement of the purpose for which it was established. So long as the successes of the ECCC are concerned, one cannot forget to mention the fact that it is the first internationalized criminal court to have provided active participation of victims as civil parties in criminal proceedings. This encouraging numbers of civil parties in direct criminal proceedings facilitate participation of local population. Given the informal rules of evidence that apply, and the different method of questioning witnesses, the trial resembles a truth commission much more than previous tribunals.[9]This is an overwhelming effectiveness of the court as it is established in Cambodia

where the alleged crimes were committed and for victims to ensure that justice does not only seem to be done but is seen to be done. Their mass active participation in the proceedings is therefore a breath of relieve as they believe that justice is finally meted. This privilege was not accorded to civil victims of other internationalized criminal tribunals like that of former Yugoslavia and Rwanda. Furthermore, ensuring that proceedings are accessible and relevant to Cambodians is another area where the ECCC has been very effective. Efforts are being made to ensure that the proceedings are as accessible as possible for victims, witnesses and local media throughout the country.[10]A Public Affair Section in charge of conducting all forms of public communication has been established within the Court.[11]It sometime relies on international NGOs in conducting bulk of outreach activities relating to the court. It is noted that over 130 Public Affairs Section has created a base of materials and messages including a booklet entitled " An Introduction to the Khmer Rouge Trials", a monthly newsletter, a series of four posters, and stickers with the phrase " I support the KR tribunal".[12]The location of the court at the capital Phnom Penh in the center, and the fact that proceedings are conducted in the language easily understood by the local population has not only created legitimacy but has provided speedy dissemination of information to victims. This is an effectiveness of the court because it was established for the people of Cambodia, and they are actually being disseminated with most information of what is ongoing with the proceedings. However, the above effectiveness, the court has equally witnessed some short comings as we chronologically analyzed infra.

The ineffectiveness of the Extraordinary Chamber in the Courts of Cambodia

From its very inception its states on the agreement establishing it that, ECCC is based on Cambodian law with minimal reference to international and its funding documents, and that it is bound to apply Cambodian law.[13]We submit that as the court is bound to apply domestic laws which are undoubtedly less efficient, there is insufficient legal protection. As men of the legal profession were among those who were entirely wiped out by the Khmer Rouge regime,[14]a proper understanding of Cambodian law by the few young legal professionals who survived is questionable. There is lack of experience with evidentiary issues that has often led courts to use shoddy police reports as the sole basis for convictions.[15]The court's jurisdiction is further limited to trying only those most responsible for the alleged crimes.[16]This implies denial of justice for victims of other widespread crimes, committed by the less popular figures as heir perpetrators are not called for justice. Political interference and lack of judicial independence have all contributed to making ECCC ineffective. The ability of Cambodian judges to provide fair and independent trials free from political interference is doubtful. This is corroborated with reasons why the Group of Experts appointed by the United States rejected the idea of domestic court by holding that: The level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials.[17]It is apparently difficult to find a Cambodian judge free of the appearances of bias and / prejudice. Again, there has been general acquiescence by the

Cambodia ECCC Staff to their Prime Minister’s wish that further list of trial be scrutinized. For instance, in January 2009, a national prosecutor deliberately refused signing some submissions to place new suspects before the investigating judge, as proposed by his international colleague.[18]This lack of proper corroboration among the judges aids in substantiating political interference and lack of judicial independence – a catalyst for the court’s ineffectiveness. The judicial conundrum of ECCC ineffectiveness is further compounded by the differences between national co-investigating judges and their international colleagues. There have been several instances where they disagree due to political interference by top government officials. It should be noted that the resignation of international a Co – investigating judge on October 8 2011[19]and the subsequent resignation of a Reserve Co-investigating Judge with effects from 4th May 2012,[20]contribute greatly in rendering the Court ineffective. The absence of such men with high moral character, impartiality and integrity impedes the Court from rendering quality services and justice as envisaged. Just like in many other developing countries, the high rate of corruption in Cambodia constantly renders the proceedings of ECCC ineffective. In fact, since the hearing of case 001, corruption allegations have been on the rise. One of such scandals came into lime line in January 2007 when an international audit revealed that the tribunal had failed to address allegations of corruptions with respect to funding United Nations Development Programme,[21]and that such funding was being " siphoned off as kickbacks" with most national employees being suspected of paying back part of their salaries to superiors. It is our submission that that with such corruption practices, national judges do not

perform their duties without impartiality and bias which is contrary to the objectives of the Court and hence, limits its effectiveness. Though imperfect proceeding systems are inevitable when working in less developed countries such as Cambodia, instances of its ineffectiveness are minimal. The above case of ECCC is similar but not identical to that of SCSL as we examined infra.

The effectiveness and ineffectiveness of Special Court of Sierra Leone (SCSL)

The SCSL has on its part, witnessed some overwhelming credentials. One of it prominent achievements made so far has been completion of its mandate to prosecute those who bear greatest responsibility for horrific crimes committed against the people of Sierra Leone since 30 Nov. 1996.[22]This mandate is provided in Article 1 of SCSL Statute by stating that; The special court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violation of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of peace process I Sierra Leone.[23]It is imperative to note that the Court presented 13 indictments, charging senior leaders of the three main factions (which included the Civil Defense Force (CDF), the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) in the Sierra Leonean conflict. We cannot off course forget that it also indicted Charles Taylor, the then President of Liberia. Although some of those indicted died in the course of proceedings, and the

indictments were later reduced to 9, the court has succeeded to indict leaders from all factions thereby ensuring right of equality of accused. With this in mind, one would plausibly note that with the exception of the case against Charles Taylor, all the cases were completed through appeal by October, 2009 although it very first case was held just in 2004.[24]By contrast, any judicial decision or judgment that is diligently conducted would certainly have no grounds for appeal. The fact that majority of the cases have been taken on appeal implies that there have been at least, some lapses in the trial of those cases. What keeps me uncertain is the type of parameters used in determining who bore the greatest responsibility as well as who to and who not to prosecute. The Special Court was established not only to ensure that it meet up with it mandate, but to equally ensure that it meted out justice to the people of Sierra Leone. If many of its cases are being taken on appeal, then there are reasons to belief that such judgments are repugnant to natural justice – a short coming to the said court. More so, as its mandate is to try only those who bear the greatest responsibility, those other figures who were not top leaders but are known to have perpetrated same crimes are left to go free as was the case of Savage – a former sub-commander of AFRC.[25]In this light, it is understandable that justice is not being brought to victims of crimes committed by such unpopular figures in Sierra Leone. This an ineffectiveness of the Special Court because courts or tribunals as a whole all have a prior aim of rendering justice, whatsoever. The achievements of the SCSL are not only felt on the completion of its mandate but also on its excellent outreach programs. There exists a Special Court's Outreach Section within the court that links the people of Sierra

Leone with the Special Court. It functions in promoting understanding of the Special Court as well as respect for human rights and the rule of law in Sierra Leone. This has made the court very effective because the court was not only established to render justice to victims but also to ensure that they are informed of all that take place. Some of the Court's Outreach activities include the production of DVDs with audio-visual summaries of the trial proceedings which are then distributed to the various Outreach offices in Sierra Leone; the organization of town hall meetings, at which videos of the trial proceedings are screened and then followed by a general discussion; the role played by university students via public debates in promoting justice and accountability in Sierra Leone.[26]It was recently extended to Liberia to cover Charles Taylor proceedings. Not only has its outreach been very efficient, but over 85% of respondents from both urban and rural localities submitted that they were able to adequately speak about the Court's activities, based on information provided by the Outreach section.[27]This success is in contrast with what happened with the Court’s predecessor in Rwanda and in Yugoslavia where very little impact of outreach was felt. However, the outreach successes of the SCSL are not without some short comings. The program is not funded by the United Nations and other international donors. As a result, there is inadequate finance to effectuate such programs to its full entirety. This is further exacerbated by the fact that its staff is composed of mostly nationals who are not experts in that domain. Problems of constant electricity failure, poor infrastructures and advance technologies facing many developing countries are axiomatic in working negatively to the effectiveness of its outreach programs. SCSL has

contributed immensely to international criminal jurisprudence which may be relied upon by other international and national courts. It has not only been first to convict former Head of State (Charles Taylor) since the Nuremburg Trial in 1946, but has equally been first to successfully charge and prosecute the crime of enlistment, recruitment and use of child soldiers as an international crime.[28]It has provided some useful clarifications regarding the meaning of conscription and enlistment of child soldiers. Broadly speaking, in the judgment of AFRC case by the Pre-trial Chamber, conscription, enlistment or use of child in armed force was defined to be; When the accused conscripted or enlisted one or more person(s) in armed force or used one or more person(s) to perpetrate hostilities; that such person(s) were under the age of 15 years; that the accused knew or should have known that the person(s) were under the age of 15 years; that the conduct occurred in the context of and was associated with armed conflict; and finally that the accused was aware of factual circumstances that demonstrated the existence of the crime.[29]We submit that by identifying the above mentioned crime and encoding it into international criminal law is an overwhelming success it has made both the people of Sierra Leone in particular and the world at large. This point is further corroborated by the fact that it was also the very first international tribunal to successfully rule on the crime of force marriage in an armed conflict, holding that force marriage to combatants is illegal as an element of sexual slavery. This success is an urge for the international criminal jurisprudence to explicitly include such types of extreme violations that were or are recently occurred or that are gradually emerging. This demonstrates the Special Court

effectiveness in rendering justice and inculcating new developments into the international criminal law as a whole. However, it has fallen short in some instances. Its lack of financial resources, a condition sine qua non for proper functioning of courts has forced her entering into short term contracts with her staff.[30]Few staff members who are recruited on such basis are very inefficient and more often turn to be bias due to the present in the government of top ranking persons who are closely linked to the various crimes. This is further compounded by acts of corruption and lack of real independent judiciary. Within the first 3 years, it could not balance its budget and is constantly seeking for additional donor contributions which are clear indications of fund mismanagement. This has created some far reaching consequences on the court from being effective as intended. It has been noted that many of the same issues that have faced the court since its inception will continue to challenge its prospects for success.[31]

Conclusion

From the foregoing, it is understandable that both the ECCC and the SCSL were established in a bit to overcome the failures of predecessors (ICTY and ICTR). We noticed from the work supra that the ECCC and the SCSL have been very effective in rendering justice to the people of Cambodia and Sierra Leone respectively. This observation is glaring through completion of their mandates on good time, successful trials and dissemination of courts proceedings to victims concerned as well as getting the local population actively involved in the proceedings of both courts. These achievements or effectiveness were among the purposes for which they were respectively extablished. Furthermore, with mixed staff, both tribunals have succeeded in

putting up formidable teams on judicial matters who seat and adjudicate on the same soils where the various criminal crimes were committed. In this light, justice for which both tribunals were established to render is not only seemed to be done but is seen to be done. This combination of staff has provided them with the opportunity to train their own judges up to international standard. This creates positive impacts in the future of the two legal systems which ultimately lie in the hands of those trained judges. It is hoped that by bringing to trial those responsible for serious crimes will help in post – conflict peace building process and can also serve to deter future commission of large – scale offences.[32]Small wonder that the above mentioned tribunals succeeded far more than their predecessors – ICTY and ICTR. This has been aided by the fact that they were concerned with investigating only those who bear the greatest responsibility for serious violation of international crimes as opposed to hundreds of cases faced with their predecessors. We also notice from the above that the SCSL was more effective than her Sister tribunal – ECCC. I hold the view that this was so because the composition of the former is dominated by national staff who could easily lay hands on suspects and evidence as opposed to the latter where majority of judges were international, and also because the former was more organized than the later where a lot of animosity existed among the judges. However, like many other judicial systems, the effectiveness of ECCC and SCSL cannot go without criticisms. There have been allegations of political interference by some government officials in both courts, impartiality of some judges as well as no judicial independence in the two systems. Other problems such as inadequate funds and corruption common

to judicial systems in developing countries have all join in rendering both systems ineffective from achieving their respective goals set out for. Also, i think that establishing hybrid tribunals to try only some particular categories of persons in the society is some sort of selective justice. Moreover, they are very expensive to run. This is evident by the fact that donor countries and institutions or international organizations are always donating funds which are hardly ever sufficient. It is my humble opinion that instead of establishing more hybrid international criminal tribunals like the ECCC and the SCSL, efforts should be make towards complete completion of mandates of the already existing hybrid criminal tribunals. This is supported by the fact that various crimes to be handled by such hybrid tribunals already fall within the jurisdiction of the International Criminal Court. To be precise, article 5 of the Rome Statute of the International Criminal Court[33]is clear and unambiguous in illuminating those crimes. It is our contention that those to be tried by the ECCC and SCSL undoubtedly fall within this provision and making almost needless for further establishment of hybrid criminal international tribunals. In view of all the above, we emphatically put it that ECCC and SCSL have created, and are currently creating great impacts in the milieu of international law, but further attempts for the establishing more of such tribunals be avoided. The International Criminal Court seems to be appropriate and capable of adjudicating on all such crimes before hybrid tribunals.