

HYBRID MODEL PROSPECTS FOR WAR CRIMES: NON-PARTY STATES TO THE ROME STATUTE (THE SRI LANKA CASE)

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ABSTRACT

This article discusses the possibility of non-ratifying states to the Rome Statute to be referred to International Criminal Court (ICC) with reference to Sri Lanka, where war crimes and crimes against humanity have been occurred. This study employed the doctrinal method to analyze the issue. Sri Lanka is unable to deal with perpetrators who must be responsible for humanitarian conflicts, despite of a sovereign State. This paper found that the United Nations has a responsibility in addressing war crimes and crimes against humanity in Sri Lanka when dealing with war crimes due to its non-ratification of the Rome Statute. Sri Lanka can propose the formation of an Ad Hoc Tribunal to the United Nations, adopting a judge composition inspired by hybrid models used in Sierra Leone and Cambodia. However, the legality of foreign judges must be clarified beforehand.

Keyword: Hybrid Model, War Crimes, Sri Lanka, Non-Ratifying States, Rome Statute

INTRODUCTION

International crime is a multifaceted and global issue, encompassing not only material concerns but also procedural justice challenges. Certain scholars argue that there is no universally recognized and comprehensive international criminal law system in place. While the United Nations plays a role in establishing courts to address international crimes, it is important to note that these courts are ad hoc in nature and have limitations in terms of their geographical and temporal scope (Thampi, 2020).

Along with the development of globalization and the development of law globally, developments also impact the conception of crime, including international

crimes. The applicability of the Rome statute itself is stated in Article 9 paragraph (1) if it has been adopting by two-thirds of the majority of the assemblies of states parties. As one of the courts with the right to handle cases of international criminal crimes, the International Criminal Court is a representative of the Rome Statute, which 123 countries have ratified. These countries do spread across several parts of the world, namely Africa as many as 33 countries, Asia Pacific as many as 19 countries, Eastern Europe as many as 18 countries, Latin America and the Caribbean as many as 28 countries, and 25 countries from Western Europe and others (*The State Parties to the Rome Statute*, 2021).

Most of the crimes that fall into the category of international crimes occurred before the formation of the ICC. The function of the International Criminal Court itself is as a convergence between the Common Law system and the civil law criminal justice system, taking examples from four countries, namely the United States, England, Wales, Germany and Poland (Kuczyńska, 2015).

A permanent international criminal court cannot deal with genocide, crimes against humanity and war crimes before they occurred in 2002. On the other hand, there are no international criminal conventions that are comprehensive and can be applied and accommodated in the national legal systems of States parties (Gilbert, 2006).

Countries experiencing armed conflict tend to look for models to punish the perpetrators of these crimes. From Bosnia to Burundi, from Argentina to Timor-Leste, millions of people worldwide have been brutally tortured, tortured, abducted. One of the countries experiencing armed conflict and currently working on post-conflict management in Sri Lanka. The armed conflict in Sri Lanka has been going on for a long time, starting from 1983 to 2009 between the Sri Lankan Army (SLA) and the Liberation Tigers of Tamil Eelam (LTTE). The humanitarian situation deteriorated rapidly following a ceasefire agreement between the Sri Lankan government and the LTTE, which Norway facilitates as a mediator but was cancelled by the Sri Lankan government in 2008 (*Sri Lanka: Humanitarian Aid for Victims of Civil War*, 2009). The assistance did not have a significant impact on resolving ethnic conflicts that occurred in Sri Lanka even though in 2001 the Responsibility To Protect (R2P) norm was born (Prameswari, 2016).

Dozens of civilians became victims of the civil war in Sri Lanka; as many as 80,000-100,000 civilians died during the 26-year civil war. Not only that, cases of persecution and enforced disappearances also occurred during armed conflict. At least fourteen media workers have been victims of murder since 2006 (*Sri Lanka Human Rights: Human Rights Concerns*, 2021).

As a result of the armed conflict for 25 years, Sri Lanka has reaped the sub-district of the international community. Even 12 years after the conflict, there has not been a single bright light regarding retribution for the criminals. Even national initiatives for accountability and reconciliation have been carried out repeatedly and have failed. This situation further worsened the victim's trust in the Sri Lankan government. Urges also came from UN members to impose possible sanctions for Sri Lanka, such as asset freezes and travel bans against perpetrators of human rights violations. Bachelet considered that the person who needed to be responsible for the conflict in Sri Lanka was the incumbent Army Commander and the secretary of the defence ministry (Mushtaq, 2021).

However, the Sri Lankan government rejected Bachelet's report. The reason for the Sri Lankan government is to prioritize the implementation of UN Human Rights Council resolutions 30/1 and 40/1. As a result of this reluctance, several countries worldwide pressed for a settlement to the Sri Lankan crisis, with the United Kingdom leading the charge. A total of 11 countries gave support, while China and Pakistan voted against and 14 countries abstained, including India (*UN to Collect Evidence of Alleged Sri Lanka War Crimes*, n.d.).

Sri Lanka has carried out reconciliation, accountability and human rights with the United Nations, namely in 2015 and 2019. Based on resolution 30/1, UNHCR binds Sri Lanka to establish a judicial mechanism with special counsel to investigate allegations of human rights violations and violations of international humanitarian law.

Countries currently have various legal options known as transitional justice, including truth commissions, which are official panels investigating atrocities and maintaining official records of past abuses. This method considers being able to heal social reconciliation. Another way is to seek justice through international tribunals to protect human rights.

Several articles that have discussed the Hybrid Court Model include the writings of a holiday. This article compares the model applied in Sierra Leone and Cambodia (Cholidah, 2018). Arie Siswanto wrote the second study; his writing identified the formation of a hybrid court as an effort to deal with international crimes (Siswanto, 2016).

Unlike the two articles above, this paper discusses the enforcement of crimes against humanity in Sri Lanka after establishing the International Criminal Court and the impact on countries that did not ratify the Rome Statute. The purpose of this paper is to examine the model of an international criminal tribunal that Sri Lanka can apply as a non-ratifying country to the Rome Statute.

RESEARCH METHOD

The Doctrinal research used to discuss and analyze this paper (Muhdar, 2019). The approaches used include the history of establishing the International Criminal Court, the Rome Statute and international conventions related to human rights, crimes against humanity and international customs. Then analyze the conflict of norms between international customs and the status of a sovereign state.

RESEARCH OUTCOME AND DISCUSSION

1) Internationalization of the Courts, Efforts to Address War Crimes, Genocide and Crimes against Humanity

The international court model is currently experiencing rapid development, including regarding the formation of the judiciary itself. Several models and types of international courts and tribunals have varying degrees of relationship with the United Nations. Starting from the International Criminal Justice as the central organ of the organization. An *ad hoc tribunal* formed by the UN security council, then the International Criminal Court and ITLOS were formed by a convention designed by the United Nations but are independent entities that began with unique cooperation (*UN Documentation: International Law*, n.d.).

The search for an international criminal tribunal model is nothing but concerns about the normative legitimacy of the International Military Court and the

real political difficulties that hinder the establishment of a new international criminal tribunal. The *ad hoc tribunal* applied to two special courts, namely in 1993, the UN Security Council adopted resolution 808 for violations of international humanitarian law that occurred in Yugoslavia. Moreover, in 1994, the UN Security Council established an international tribunal for violations of international humanitarian crimes in Rwanda based on UN resolution 955.

The argument built for establishing a court with an *ad hoc* system after the first conflict was to prevent further crimes from being committed. The second is the need for victims' and community's justice. The third is the necessity to establish the truth regarding conflict episodes that occurred as part of the future process of peaceful coexistence.

The ICTY and ICTR tribunals, which are *ad hoc* in nature, have played an essential role in catalyzing the establishment of the International Criminal Court. The impact of the trial model is first that international criminal justice is possible, although not easy. Second, the establishment of *ad hoc* courts in response to atrocities is not a sustainable solution. The *ad hoc* tribunal also influenced the shape of the Rome Statute (Ford, 2019).

One of the court models widely used by several countries experiencing conflict is the mixed criminal court. This model is one potential mechanism for ensuring accountability for crimes committed during armed conflict. This paradigm creates through globalization; the institutional apparatus and the applicable law mix international and national law (Dickinson, 2003). It means that the composition of judges delegation of foreign and local judges who apply national laws drafted under international standards and taking into account *jus cogen* principles (Verhoeven, 2011). *Jus cogen* is significant because it reflects the world community's constitutional principles by considering the concept of the constitution, the peculiarities of the *jus cogen*, and its unique nature at the international level. The function of using the national Criminal Code and jurisdiction is to respect the State's sovereignty and maintain the cultural and political expectations of both perpetrators and victims (Yi, 2019).

Some countries that have implemented this model include Cambodia, Sierra Leone, East-Leste, Kosovo, Iraq and Lebanon (Williams, 2020). The nature of each

that occurs in conflict countries shapes the structure and operations of mixed courts that are applied. The formation of this model is also full of political interests because it determines the problem of structure, jurisdiction and especially funding. This agreement determines the composition of the judges who will carry out the trial. To make a difference, here are two mixed court models:

a. Extra Chamber in The Court of Cambodia (ECCC)

The Cambodian conflict inspired the mixed court approach. Due to different opinions and a tug of war between the Cambodian government and the United Nations, the creation of this court took a long time. As a result, the United Nations officially withdrew from the reconciliation process. The United Nations maintains that Cambodian courts will not be independent, impartial, or objective. Due to the different relationship between the ECCC Act and the collective agreement, a will be signing. The agreement stipulates the existence of UN assistance for the continuation of the court. The Cambodian government and the UN secretariat will continue to work together for about one diplomatic year thanks to a resolution agreed by the committee at the general assembly (Meisenberg & Stegmiller, 2016).

The application of the ECCC based on the decision of the Cambodian government on October 27, 2004, stipulates that the ECCC aims to prosecute Kampuchea's senior democratic leaders. Furthermore, those responsible for serious crimes and violations using three laws, namely Cambodia's national criminal code (Homicide, torture and Religious Persecution), humanitarian law (crimes against humanity, grave breaches of the Geneva Conventions) and international law (destruction of cultural property during armed conflict according to The Hague Convention and crimes against internationally protected persons according to the Vienna Convention) (Meisenberg & Stegmiller, 2016).

The ECCC implements a parallel structure between Cambodia and the International at every judiciary level, from judicial, prosecution and administration to personnel delegated by the United Nations. While from the Cambodian government appointed by the Cambodian government. However, in the agreement establishing the ECCC, a clause allows the United Nations to withdraw its cooperation from the court if the Cambodian government takes steps to prevent the court from functioning following its provisions. The Cambodian government's

political interference in the investigation, arrest, and prosecution process aggravates the situation (Witte, 2016).

Undoubtedly, some criticism of the ECCC. The first is substantially and contains important lessons, including for future efforts on institutional design. The two sections of the ECCC (international and Cambodian) result in parallel administrative structures, accentuating divisions between national and international personnel and creating unnecessary duplication and costs. While ECCC does not always perform as expected, given the constraints in which it operates, it may work as expected. If the UN's critics are taken aback by the weakness that led to the creation of the ECCC, the UN may have miscalculated both its domestic authority and the reputational cost of engagement (Lamb, 2015).

b. Special Court for Sierra Leone (SCSL)

In the Sierra Leone war, the hybrid court model was also adopting. Many elements, including political and budgetary considerations, must be considered while establishing a special court for Sierra Leone. Due to the government's application to the United Nations in 2002, establish the Special Tribunal for Sierra Leone. The United Nations and the government of Sierra Leone reached an agreement to establish this special court, which included the giving of a legal standing distinct from the existing ad hoc courts. The UN supports the ad hoc model since it is self-contained.

The Special Tribunal for Sierra Leone was the first international tribunal funded by voluntary donations. In 2013, it became the first court to complete its mandate and transition to a residual mechanism. In 2004, the Chamber of Appeals ruled that the enlistment, recruitment and use of child soldiers was a crime during the period covered by the indictment. The Chamber of Appeals also rejected a motion filed on behalf of former Liberian President Charles Taylor challenging his charges on the grounds of sovereign and extra-territorial immunity. The decision paved the way for Taylor's trial before the Special Court (Drumbl, 2018).

If referring to the concept of individual criminal responsibility, then anyone can be presented at trial (Njoki, 2018). Human rights groups, who oppose anybody under 18, have objected to this. The legal process in court still subject accused aged 15-18 years old, but it would conducting independently (Crane, 2008).

Apart from child soldiers, this court also deals with a new crime against humanity, namely forced marriage. During the approximately ten years of armed conflict, thousands of women were kidnapped and forced to become sexual partners over the years. These women were considered the wives of the kidnappers, known as bush wives, forced and with threats of violence to perform all the duties normally expected of a wife such as cooking, cleaning, giving birth and raising the children of the kidnappers (Scharf & Mattler Suzanne, 2005).

The hybrid model follows the jurisdiction of the formation of this court; article 8 paragraph (1) states that the special court and the Sierra Leone national court have concurrent jurisdiction. Then in paragraph (2), the special court can officially ask the national court to suspend its authority under the statutes and rules of procedure and evidence. However, the UN security council has extradition powers and can compel a State to comply with its orders to maintain international peace and security (Fichtelberg, 2015).

The nature of the armed conflicts in Cambodia and Sierra Leone is very different from those in Rwanda and Yugoslavia. In Sierra Leone, there is no division of ethnicity or religion as central to the conflict. Meanwhile, in Cambodia, although the conflict seemed vicious by the Khmer Rouge, most of the victims were ethnic Khmer. Socio-politically, the existence of the mixed court model is to defuse the demands for partiality (Hobbs, 2016).

2) The Role of the United Nations in the Establishment of an International Criminal Court

Of the several international criminal courts established in conflict countries, the United Nations has played a specific and indirect role in forming the model and form of the court. As an organization working in the humanitarian field, of course, the United Nations wants the perpetrators of crimes to punish and victims to get a sense of justice.

The role of the United Nations is very much needed in the establishment of courts to handle international crime cases. Article 41 of the UN charter authorizes the security council to implement its policies (Eliza et al., 2015). The UN prioritized

human rights protection, proportionality and impartiality, and adherence to established norms.

The UN's role in overcoming the peace crisis is to carry out a residual international mechanism for the criminal justice (IRMCT). The UN Security Council established it on December 22 2010, as a follow-up to the jurisdiction, rights, obligations and essential functions of the International Criminal Court for Rwanda (ICTR) and the international criminal tribunal for the former Yugoslavia (ICTY). The mechanisms presented for the two courts are ad hoc, with little structure to enable them to work efficiently.

3) Permanent International Criminal Court

The establishment of the International Criminal Court is one of the significant contributions to developing international law and international criminal law. Establishing the International Criminal Court aims to end impunity for the perpetrators of the most serious crimes and prevent crimes' recurrence. The ICC's authority is contained in article 5, which is authorized to genocide, crimes against humanity, war crimes and crimes of aggression. This court adheres to three essential principles, namely complementary, the principle of legality applies absolutely, and there is no possibility of deviation as long as the crime is the jurisdiction of this court, and the principle of ne bis in idem (Hiariej, 2009).

The emergence of the ICC sparked polemics from various countries relating to the ICC's jurisdiction over citizens of non-UN member countries. There are two kinds of theories developed, namely delegated universal jurisdiction and delegated territorial jurisdiction (Morris, 2001). At the very least, the concept developed and accommodated by the ICC relates to individual responsibility as perpetrators who must be held accountable for serious crimes (Triyana, 2013).

This Statute reflects some compromises and establishes that the jurisdictional regime of the ICC triggered in three ways. First, the courts may exercise jurisdiction concerning crimes in the statutes if the situation refers to the prosecution by the UN security council acting under UN powers. Second, a State party can carry out the Statute. Third, after independent investigations finish investigating, prosecutors

acting as *Proprio motu* can act on their own initiative (McCormack & Robertson, 1999).

As a last resort court, the ICC expected it would focus on the jurisdiction provisions determined and not wholly politicization of bias, namely by conducting prosecutions independently and impartially. The advantage of the ICC under Article 15 of the Rome Statute, the court can receive information called communications from individuals and organizations regarding crimes that fall within the jurisdiction of the ICC. However, a situation requires investigation, with the critical role of the prosecutor being able to determine whether or not a situation is admissible in court. So, like it or not, this court must consider the political consequences and the consequences of the prosecution's decision.

The weakness of the existence of the Rome Statute is the withdrawal of the State upon the agreed signatories. Based on Article 127 paragraph (1), a state party may resign through written notification to the Secretary-General of the United Nations, with a minimum period of one year. As a result, it means that after one year, the State party can resign. The countries that withdrew from the agreement included Burundi, Gambira, South Africa and the Philippines. The African continent is targetting because 10 of the 11 instances under investigation occur in Africa (European Union, 2018).

4) Implementation of the ICC for Sri Lanka as a Non-Ratifying Country

Even though the international community established an international criminal tribunal based on the 1998 Rome Statute, it consists of five groups: 123 member countries, non-implementing member countries, 139 signatory countries that have not ratified, and 139 signatory countries that have withdrawn their signatures. totalling four countries and countries that are not members and do not sign up are 41 countries, including Indonesia and Sri Lanka.

As a non-ratifying party to the Rome Statute, Sri Lanka faces the difficult task of prosecuting post-conflict crimes perpetrators. During the armed conflict in Sri Lanka, war crimes and crimes against humanity have been perpetrating. First, the government security forces (under President Rajapakse) consist of the Sri Lankan armed forces, the National Police Special Task Force (STF), the civil defence

forces, and several Tamil organizations against Tamil Tigers. They had fought alongside the Sri Lankan government as auxiliary forces during the conflict. Second, there is revolt. Recruiting children for military service to prepare them for deployment (Niland et al., 2014). Hospital shelled, extra judiciary killings, and civilians ordeal.

The Mixed Court is full of political interests, which can see from the practice in Cambodia. With the transfer of internationalization in the enforcement of crimes against humanity in Cambodia, in addition to universal interests, it turns out that many judges serve the interests of political parties. Although in several cases, the establishment of a special court has faced many obstacles, the application of this hybrid court concept accommodates the sovereignty of the State in the enforcement of international human rights (Carrol, 2013).

Although Sri Lanka has not ratified the Rome Statute and refers to the concept of unable unwillingness in international law, the State is obliged to enforce international crimes in its country (Martin, 2019). This principle accommodates the existence of *jus at Bellum* as a form of state responsibility for armed conflicts that have occurred in their country. In line with I Wayan Patriana, that civilized countries must respect other countries even though these countries are experiencing humanitarian conflicts. As a result, according to international law, the international criminal law principles with particular emphasis on four sectors. The first is the independence, sovereignty and equality of states. the two principles of Non-Intervention. The third is peaceful coexistence and peaceful dispute resolution, and the fourth is respect for and protection of human rights (Patriana, 2015).

Antonio Cassese claims that there are at least four variables to consider when dealing with international crimes. First, geopolitical concerns and political will support the establishment and financing of courts. Second, it is not necessarily a pure international court. Third, national courts must be at least partially available to rely on national courts to a certain extent, and fourth, affected States, for nationalistic and sovereign reasons, demand involvement in the courts (Cassese, 2010).

There are several reasons for the importance of establishing a hybrid model in the case of management in Sri Lanka. First, Sri Lanka is an independent and

sovereign country (*A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Sri Lanka*, n.d.). Based on the principles that apply in international criminal law, the world's countries must respect the country's independence in determining the court model to punish perpetrators of international crimes. As a result, from the experience of constructing mixed courts, it is inherent because to design according to the specific demands that occurred in Sri Lanka and relevant in comparison to if the perpetrators face before an international criminal court.

The notion of state sovereignty equality is not just about rights but also about the need to respect other countries' rights and to follow international law in good faith. As a result, even though it is essential to have a security council mandate in safeguarding the population or State from atrocities, every State is obligated to enforce and prevent international crimes (Verhoeven, 2011).

In line with the theory of jurisdiction in substance, international crimes under the jurisdiction of the ICC are not subject to universal jurisdiction (Morris, 2001). Violations of Protocol I to the 1948 Geneva Conventions are not subject to universal jurisdiction under customary law. As a result, that the conflict in Sri Lanka cannot face by the ICC.

Optimistic for establishing a mixed court that the Sri Lankan government responds to reports and establishes mechanisms and measures to facilitate the right to know, right to justice, reparations, and guarantees against recurrence. In addition to political reforms that focus on good governance, devolution of power, reform of the security sector, the demilitarization of the Tamil region, and the rule of law, the future transitional justice process will rest on four pillars, namely the truth and reconciliation commission, the reparations process, the office to investigate and resolving omissions, and accountability mechanisms (Van Schaack et al., 2015).

There are several advantages of implementing a hybrid model. Among them is enabling accountability and accountability of judicial participation. Furthermore, depicted from build the foundation on which the State relies after international presence and resources. Meanwhile, the ICC does not contribute anything in return for the success achieved (Carrol, 2013).

Following article 17 paragraph (1) related to the jurisdiction of the ICC, the post-conflict handling in Sri Lanka can be taken over by the ICC if in the course of punishing the perpetrators of international crimes that occurred in Sri Lanka there is omission the State is unable. Here it is seen that the nature of the existence of the ICC is only as a complement to the national legal system, so as long as Sri Lanka is willing and able to process the criminal case, the existence of ICC has no effect on the case of Sri Lanka. Non-State Parties that acknowledge the ICC's jurisdiction in individual matters must also cooperate with the Court under Part 9 of the ICC Statute. 50 Finally, when submitting a situation to the ICC, the Security Council may demand that UN Member States assist with the Court, regardless of whether or not they are parties to the ICC Statute (Cryer et al., 2010).

Furthermore, even if the state is not a party, it must comply with the courts since it recognises the ICC's jurisdiction. This circumstance complies with the ICC laws, section 9. The UN Security Council can immediately request UN member states to collaborate with the ICC, regardless of whether they are States party to the statutes or not, if the ICC exists (Cryer et al., 2010).

Sri Lanka is not a signatory to the Rome Statute. Even though Sri Lanka has not ratified the Rome Statute, the types of crimes committed in the conflict might be classification as war crimes under the 1949 Geneva Conventions and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. In Chapter one, Article 1, the International Law Commission established that the State must be held accountable for international wrongdoing. The Sri Lankan government's actions violated the 1949 Geneva Conventions on Armed Conflict (Commission, 2018).

The Sri Lankan government must pay attention to political developments internationally because voluntary contributions from UN member states characterize a mixed model court. As a result, it means that each country has geopolitical interests as the leading funder. When Sri Lanka applies the Hybrid model, the Sri Lankan government needs to amend the Constitution to change the order of the proportion of judges in the judicial process, namely so that non-citizen judges whom PPB will delegate can work for human rights justice.

CONCLUSION

The United Nations has a responsibility in addressing war crimes and crimes against humanity in various countries. Sri Lanka's situation presents challenges in dealing with war crimes due to its non-ratification of the Rome Statute, which established the International Criminal Court (ICC) as a permanent court. If Sri Lanka fails to hold accountable those responsible for war crimes, the ICC and the international community can intervene based on their jurisdiction, compensating for Sri Lanka's inability. Sri Lanka can propose the formation of an Ad Hoc Tribunal to the United Nations, adopting a judge composition inspired by hybrid models used in Sierra Leone and Cambodia. However, the legality of foreign judges must be clarified beforehand.

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