

Prosecution of Governmental Figures: An Obstacle in the Path to Peace

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Abstract: Amongst numerous conflicts in the status quo that have devastated economies and resulted in massive human life losses, international criminal law must turn away from the hollow principles of “justice” and “accountability; instead, an alternative of impunity and peace is preferable. This paper challenges the traditional notion that government officials who lead and are responsible for crimes recognized by the International Criminal Court (ICC) should be prosecuted by said committee. It will explore how prosecution hinders the functionality of peace processes and negotiations while analyzing its impact on the incentive for leaders to intensify and prolong conflicts. Lastly, this paper suggests an alternative to impunity through mechanisms such as establishing “Truth and Reconciliation Commissions” and “blanket amnesties” as a more sustainable option to maintain peace. Justice cannot come without consensus, which is a prerequisite to justice.

Keywords: ICC (International Criminal Court), Prosecution, Negotiation, Impunity

1. Introduction

Proponents of prosecuting government figures that were complicit in crimes rally behind several historical examples: Nuremberg, Tokyo, and Yugoslavia [1]. The claim is that such instances of a successful prosecution could bring about peace without sacrificing justice and accountability. Despite this claim, it is necessary to understand that the conflicts humanity faces in the 21st century are vastly divergent from those of the past. We are no longer dealing with powerless leaders that were forced into unconditional surrender in the case of Imperial Japan [2] but with dangerous actors such as Joseph Kony of the Lord's Resistance Army [3] in Uganda. These leaders will not cave to pressure, opting to use their military capabilities as a bargaining chip to intensify and prolong conflict when they perceive the ICC as a threat and foe. Moreover, past indictments have set a “dangerous precedent” for potential criminal charges in the future, deterring governmental leaders from turning themselves in or facing justice head-on [4].

This paper aims to engage with this dilemma, explain why the intervention of the ICC in domestic and international conflicts leads to worsened conflicts, as will be illustrated in case studies of Uganda and Libya, and ultimately prove why states should adopt head-of-state impunity such that senior government officials are not prosecuted by international criminal law in ways that can prolong and worsen conflict by disincentivizing peace negotiations.

2. Pre-Existing International Criminal Law and its Prosecution of Leaders

At the offset, it is essential to establish the current attitude of the ICC towards the prosecution of leaders through its policies and resolutions. Although the Rome Statute, the treaty that established the ICC, does not explicitly state its support of prosecuting heads of state, numerous articles within the treaty and other resolutions convey that international criminal law heavily favors such prosecution. The first and most intuitive of which can be seen in Article 27(2) of the Rome Statute, which states that “Immunities or special procedural rules which may attach to the official capacity of a person shall not bar the Court from exercising its jurisdiction over such a person” [5]. Such a statement in an official treaty illustrates that the ICC condones the prosecution of leaders and does not consider their position of power an essential factor of consideration in the trial. The impact of this is that there is no structural protection for leaders against their crimes and no chance of amnesty per the treaty.

Moreover, the four renowned international crimes that the ICC prosecutes further suggest an inclination to prosecute leaders; articles 6, 7, 8, and 9, which respectively charge genocide, crimes against humanity, war crimes, and crimes of aggression, are actions most capable and applicable to be done by governmental leaders. The applicability of these four crimes toward heads of state was evident in the passing of the United Nations Security Council Resolution 808 [6], which prosecuted Slobodan Milošević, the leader of the former Yugoslavia, for crimes against humanity, war crimes, and genocide. Because the vast majority of ICC prosecutions are upon these four crimes, government officials and leaders are disproportionately charged and prosecuted compared to other individuals.

Through these mechanisms and treaties, it is evident that even though current international criminal law does not directly call for the prosecution of leaders, its intention is relatively clear: to prosecute all heads of state and leaders involved in crimes while ending all instances of impunity.

3. Obstruction of Peace Negotiation

As shown in table 1, ICC intervention and indictments in states such as Uganda, the DRC, and Sudan not only failed to end the conflict there but prolonged many to last over a decade. Through attempting to use justice as a stepping stone to peace, the prosecution of leaders instead delays the transition to peace. Moreover, it prolongs the duration of an armed conflict by eliminating the opportunity for peace negotiation. There are several reasons why the prosecution of heads of state and peace processes can not go hand in hand.

Table 1: Status of Conflicts After ICC Intervention (Kersten 19)

| State (Date of ICC Intervention) | Trigger Type | Primary Focus of ICC Investigation at time of Intervention | Status of Conflict as of June 2014 |
|-------------------------------------|---------------|--|------------------------------------|
| Uganda (2003) | Self-Referral | Ongoing Conflict | Active |
| Democratic Republic of Congo (2004) | Self-Referral | Ongoing Conflict(s) | Active |
| Central African Republic (2004) | Self-Referral | Ongoing Conflict | Active |
| Darfur / Sudan (2005) | UNSC Referral | Ongoing Conflict | Active |

The first is fear; when leaders recognize that the ICC is actively pursuing them for the reason of prosecution for their crimes, they are unwilling to engage with the court because of the potential for arrest. As a result of the prosecutions, they are also unlikely to relinquish any power they currently hold under the fear of international pressure [7]. Moreover, they are similarly unlikely to agree to power-sharing agreements. Power sharing is an effective method to settle disputes, as seen in Northern Ireland and Fiji, by allowing parties with varying perspectives to exercise jurisdiction over

their territories. Such an agreement is impossible with ICC intervention when prosecuted states fear a possible detainment and arrest by the ICC. Lastly, other states without an indicted leader are also unlikely to agree to power-sharing agreements with indicted states for the sake of their legitimacy and reputation. The fear of prosecution damages the ability for negotiations to take place at all since the parties involved cannot move away from conflicting positions into conciliatory stances when there is no middle ground that can be agreed upon.

The second reason for the tension between prosecution and peace is a problematic power asymmetry and distrust of ICC intervention. For example, the indictment from the ICC towards an individual incentive national and lower-level courts to prosecute that individual and creates pressure from the international community toward the said individual. The head of state in that scenario has minimal incentive to negotiate with a party that intends to remove him from power. Instead, they perceive the ICC's indictment as a "bargaining chip" towards a one-sided negotiation that strongmen leaders are unlikely to cave to. More importantly, the significant power asymmetry created amidst an ICC intervention reduces the possibility of negotiation. The prosecution of the ICC portrays one side of the conflict as "good" and the other as "bad." Not only does this diminish the effectiveness of negotiation through the terms that are agreed on, but it also increases the responsibility of the "bad" party [8]. This power dynamic is unlikely to succeed in a negotiation as neither party wants to be at fault for a crisis and to be subject to pay reparations.

Additionally, the "good" side will be stigmatized against negotiations and possibly labeled as "collaborators" or "hypocrites," decreasing the chance of a peaceful solution for both parties (Kersten). Finally, the ICC and individuals associated with the ICC are perceived to be biased and partial mediators in negotiations. A sufficient mediator is described to have "engender trust on the part of the parties, requisite knowledge, and acceptable to both parties." Because the ICC has immense influence, its associated individuals as mediators in negotiations push leaders and parties away from the negotiating table.

The detrimental impact of the ICC on negotiations is evident in the case of the Lords' Resistance Army (LRA) Insurgency. The court hindered a potential peace agreement in 2 primary ways: deterring representation and not catering to the interests of the LRA. First, the prevalence of ICC warrants and indictment orders for Joseph Kony and other senior LRA leaders resulted in a lack of legitimate representation in the negotiation. As McMot Ditra, an observer in the negotiation, claims, Kony believed that if he attended, his life would be at risk [9]. This was problematic as the delegation for the LRA was insufficient and misrepresentative of the ideologies of the high command, creating severe divides on the terms of the Juba Agreement. Evidence suggests that Kony would have attended the negotiation if it was not for the indictments and the ICC. In the past, he attended negotiations in 1994 and 1997 before he was indicted by the court [9]. The second way the ICC contributed to the negotiations' breakdown was its reluctance to remove the indictments of Kony and other LRA officials despite a clear path to peace. Vincent Otti, second in command of the LRA, claimed in 2006 that he would be willing to sign a peace deal with the government under the condition that the indictments from the ICC were withdrawn beforehand [10]. Despite this, ICC negotiators were unwilling to drop the charges and ignored the Uganda Amnesty Act of 2000. As a result, despite some progress throughout the negotiations, no definitive agreement was agreed upon, and the indictment of LRA leaders made the chances of negotiating minuscule at best. As shown in figure 1, the ICC intervention towards those in charge of the LRA created a snowball effect that eventually resulted in the collapse of the negotiation. The recommencement of the conflict between the Ugandan government and the LRA in 2009 can be attributed to the uncharitable nature of the ICC that attempted to prioritize justice, ultimately pushing parties and leaders away from the negotiating table to an intensified armed conflict.

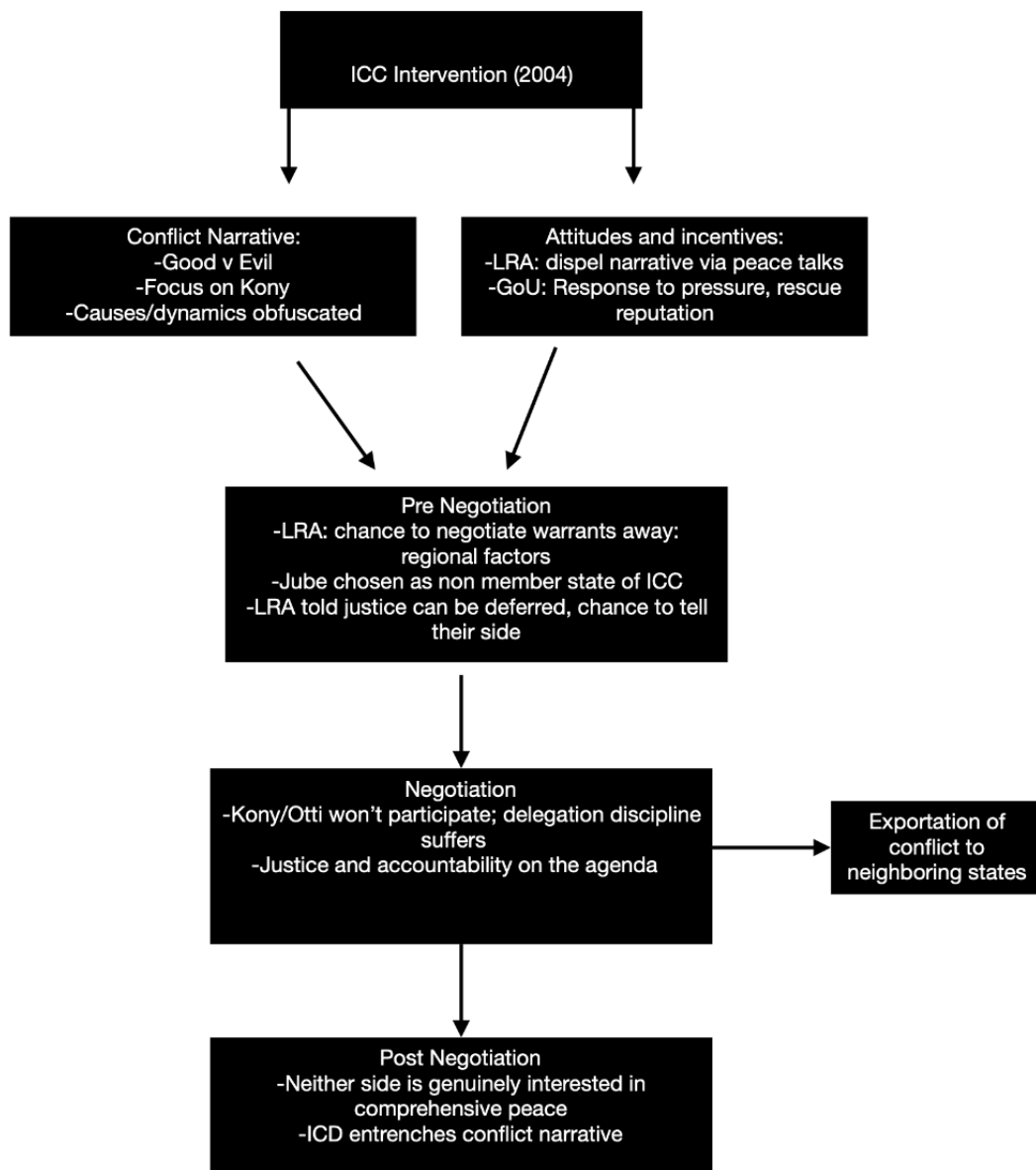


Figure 1: Diagram of ICC Intervention in Uganda (Kersten 220)

4. Intensified and Prolonged Conflict

The correlation in table 2 between the increase of actors indicted by the ICC and the long duration of wars in Uganda, the DRC, and the Central African Republic is no coincidence. This section will explore two independent ways conflicts are intensified due to ICC intervention: the desperation of the accused leader and aggression from opposition parties. Although, as the Truth and Reconciliation Commission in Sierra Leone claimed, "those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict," the desire to immediately hold heads of state and leaders accountable likely comes at the expense of a shortened conflict [7]. This additionally angers leaders such as Kony and motivates them to commit more crimes within and outside their borders. For instance, after learning that the indictments were nonnegotiable, the LRA expanded its operations to the DRC, Central African Republic, and Darfur.

Furthermore, the unconditional indictments of governmental leaders incentives them and their parties to fight for survival, causing a cycle of escalation while stoking the flames of conflict. Importantly, this leads to a worsened and intensified conflict while removing any incentive for leaders and authoritative figures to lay down their weapons when they are bound to face the jurisdiction of the ICC if they do so [11]. Beyond the direct implications of provoking leaders, the prosecution of leaders also incentivizes rebel groups and opposition parties to prolong the conflict. When the ICC indicts an individual in the government, said the government is now perceived as “bad” or “evil,” this creates a blank check for opposition parties to have justification to annihilate the ruling party without the need for negotiation. The imperative harm is this: the prospect of peace is diminished, and opposition parties are never held accountable for their crimes. By incentivizing the accused party and other parties to intensify their military confrontation with its prosecutions, the ICC is directly responsible for the escalation of conflict in many scenarios.

Table 2: Number of Indicted Actors by the ICC in States (Kersten 207)

| State | Referral Type | Government (or Government Affiliated) Actors Indicted | Non-Government / Rebel Actors Indicted |
|-------------------------------------|---------------|---|--|
| Uganda (2003) | Self-Referral | 0 | 5 |
| Democratic Republic of Congo (2004) | Self-Referral | 0 | 5 |
| Central African Republic (2004) | Self-Referral | 0 | 1 |

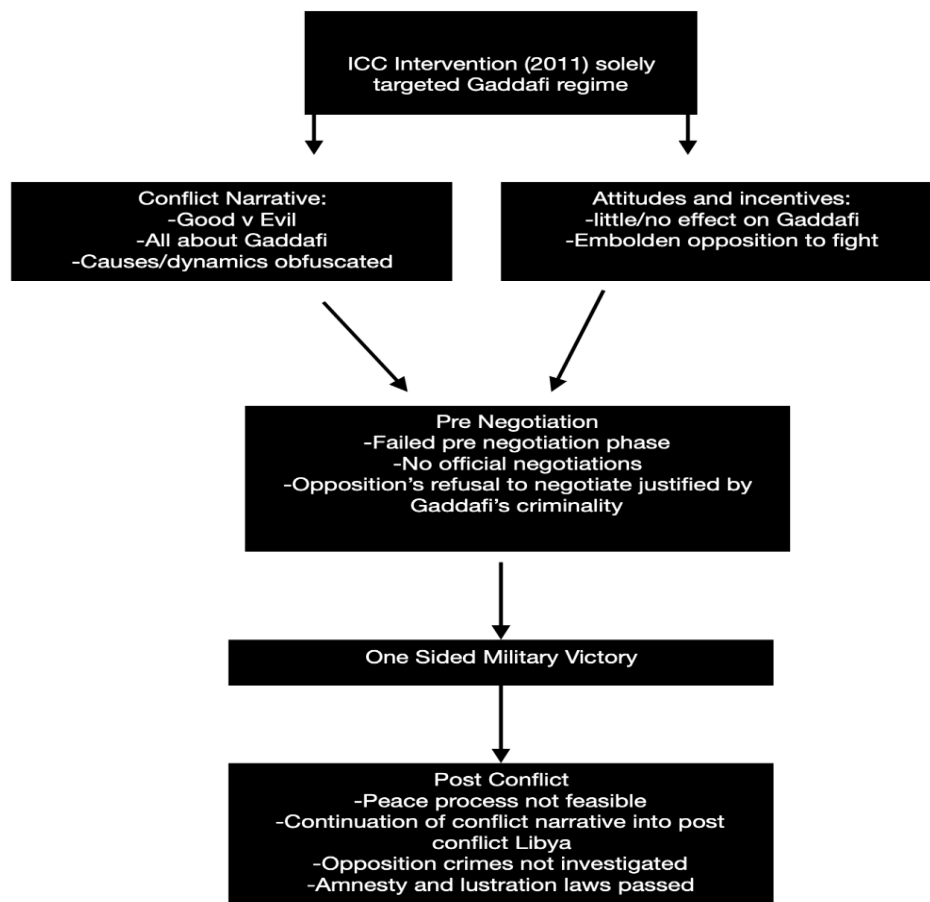


Figure 2: Diagram of ICC Intervention in Libya (Kersten 234)

Such an escalation of the conflict by rebel parties was excellently depicted in the First Libyan Civil War. The ICC indicted Muammar Gaddafi in 2011 under the accusation of committing crimes against humanity, and they found themselves in an armed conflict against “anti-Gaddafi” rebels. Despite the potential for a peaceful settlement, the ICC indictment labeled Gaddafi as “evil” and inspired an unconditional conflict against him. For example, Libya’s National Transitional Council (NTC), a rebel council, completely shuttered negotiations that allowed Gaddafi to hold on to some power. Not only did the indictment ruin the legitimacy of negotiations, but it also created a significant power asymmetry such that power-sharing agreements were unacceptable to the rebels [9]. As shown in figure 2, the ICC motivated opposition parties to prolong and escalate conflict as they were on the “right” side, resulting in instability after the war and a lack of accountability towards these opposition parties. ICC prosecutions of leaders like Gaddafi worsened the nature of war into an escalated nature while taking peace off the table.

5. The Alternative: Impunity

Two alternative forms of impunity can maintain and preserve peace: truth and reconciliation commissions and blanket amnesty. Past truth and reconciliation commissions in places like Sierra Leone and South Africa were highly effective at pursuing an extent of accountability while not invoking the same antagonism as prosecution. Such commissions allow amnesty for crimes “in exchange for the wider truth” [8]. This form of impunity received widespread support as it condemns and expresses regret for past atrocities without directly holding anyone criminally responsible, effectively “reconciling” and providing the “truth.”

When a truth and reconciliation commission is implausible, a blanket amnesty policy is still preferable to prosecution. Although blanket amnesties can strengthen the state's power in Libya in 2012 [9], it is still an effective mechanism for de-escalating war. Recently in 2020, a blanket amnesty was instituted in Sudan, which concluded the conflict with rebel groups; with Sudanese officials calling the rebels “brothers in peace,” Sudan can now focus on its economic development under the pretext of peace [12]. These alternatives of impunity can make up for past wrongdoings while moving forward to sustainable peace effectively.

6. Conclusion

The current state of international criminal law, which actively condones the prosecution of leaders, acts as a deterrence against negotiation while fueling the flames of war. In the name of justice, ICC indictments of government leaders remove the prospect of peace processes and negotiation, instead opting for intensified military confrontation and conflict. Therefore, states must adopt impunity for their governmental leaders for a sustainable and peaceful future when applicable.

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