

Prosecuting Heads of State: Sovereignty Immunity and the Anti-Impunity Norm

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YUNA HAN, JUL 16 2021

International criminal justice has become a stable fixture in world politics. The permanent International Criminal Court (ICC), established in 2002, now consists of 123 member states covering almost the entire globe. Most national criminal codes have integrated major elements of international criminal law, making core international crimes (namely, genocide, crimes against humanity, and war crimes) punishable. From the peace process and the on-going conflicts in the Middle East, it is difficult to avoid discussions regarding accountability for international crimes in situations of mass violence.

Behind this prominence of international criminal justice as a practice lies the idea that individuals should be held criminally accountable for committing atrocities, sometimes referred to as the 'norm of anti-impunity' (Bower 2019). A key feature of the anti-impunity norm is the idea that all individuals, regardless of their power or official role, should be held accountable if they are responsible for committing the core international crime. The image of powerful political and military leaders on the dock—as it was the case in the post-World War Two International Military Tribunals of Nuremberg and Tokyo—certainly dominates the public's imagination about international criminal justice. State officials, such as the Head of State, have traditionally been provided immunity from criminal prosecution under international law as an extension of the principle of sovereign equality. This 'sovereign immunity' has increasingly been chipped away with the development of international criminal law (ICL), which has removed sovereign immunity as a protection from criminal prosecution for core international crimes. For example, Article 27 (1) of the Rome Statute of the ICC states that the Statute "shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government "[...] shall in no case exempt a person from criminal responsibility under this Statute [...]."

Nevertheless, prosecution of high-ranking state officials, particularly Heads of State, remain deeply controversial in practice. When the ICC charged then-President of Sudan Omar al-Bashir for war crimes and genocide, for example, this precipitated a decade-long crisis between the ICC and African states (Mills, 2012). Sovereignty remains a powerful norm, particularly for weaker states of the international system (Garcia Iommi, 2020), and in practical terms, the ICC remains reliant on state cooperation for its operations, allowing Heads of States and other powerful actors to successfully push back against efforts to hold them accountable for atrocities (Han, 2019). Such opposition to holding Heads of State accountable have been seen as a direct challenge to the legitimacy and strength the norm of anti-impunity (Mills and Bloomfield, 2018; Boehme, 2017; Garcia Iommi, 2020).

But what exactly is the place of sovereign immunity (or its eradication) in the norm of anti-impunity? What significance does it hold in the practice of international criminal justice? The following analytical essay will introduce a theoretical framework to conceptualise the relationship between the anti-impunity norm and sovereign immunity. This draws on a previously published essay, co-authored with Sophie T. Rosenberg (LSE) on the normative significance of the African Union's contestation against the ICC, titled "Claiming Equality: The African Union's Contestation of the Anti-Impunity Norm," appearing in *International Studies Review*.

The Internal Structure of Norms

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Norms are commonly conceptualised in IR theory as shared understandings that define standards of appropriate behaviour—in other words, ideas of what ‘ought’ to be done (Checkel 1999, Finnemore and Sikkink 1998). While earlier generations of Constructivist IR research assumed that the meanings of norms were fixed in their studies of how norms diffuse, become institutionalised, and ultimately become ‘taken for granted’ by actors (Finnemore and Sikkink 1998), increasing focus on the contestation of norms (e.g. Stimmer and Wisken 2019) led to a broader questioning of whether norms can have fixed meanings in the first place (Niemann and Schillinger 2017). Critical constructivists thus argued that norms should be understood as having a dual quality as being simultaneously stable *and* flexible, as they are socially constructed through actors’ interaction in a given context (Wiener, 2008). A norm’s meaning, in other words, is constructed ‘in-use’ (ibid).

To better theoretically capture this duality of norms as both stable and flexible, it is necessary to unpack the internal structure of norms. Winston (2018) proposes a three-part structure of a norm in this vein, which can be expressed in this conditional statement: “given this problem, my value dictates this behaviour.” For example, consider the norm ‘civilians should not be killed during war.’ A simple understanding of norms as dictating what ‘ought’ to be done would only focus on the behaviour: we should not kill civilians. The tripartite structure of norms (referred to Winston as a ‘norm cluster’), on the other hand, is highlighting the fact that the dictum ‘do not kill civilians’ only make sense as an appropriate behaviour *if* we accept that we hold certain values (such as, the sanctity of life) and identify a problem in relation to these values (such as, protecting the sanctity of life in war). Winston argues that these individual normative elements of value, problem, and behaviour may be combined in a variety of ways as long as the different configurations (the “meaning-in-use” emerging from each context) are considered to be legitimate by the wider community (Winston, 2018). The insight here is that there can be multiple values that dictate a single behaviour, and conversely, commitment to a single value claim can result in different behavioural prescriptions.

Unpacking the Anti-Impunity Norm

Applying Winston’s conceptualisation of norms, existing understandings of the anti-impunity norm as the ‘criminal prosecution of individuals for atrocities’ in effect assume a singular behaviour (prosecution of all alleged perpetrators) to a problem (impunity), identified by a unified set of values (universality of human rights). From this perspective, it is quite clear that sovereign immunity needs to be pulled back fully. But looking at the principles of ICL shown in statutes and judgements of international criminal tribunals and their practices, the anti-impunity norm’s internal structure is far more complex. Specifically, the idea that individuals should be held criminally accountable for atrocities is underpinned by different values, producing different sets of behavioural prescriptions.

Value(s) of the Anti-Impunity Norm

There are three distinct, if intertwined value claims at the heart of the anti-impunity norm we see in practice today. The first can be expressed as the *principle of individual legal equality*, or the idea that individuals have equal rights and responsibilities in the eyes of the law, as enshrined by international human rights (Nouwen, 2012). Impunity becomes a problem from this perspective as it implies that some people are not granted the same degree of protection from international law, while others are able to shirk from their responsibility.

The second value claim is the *principle of sovereign equality of states*. While ICL has been understood as enhancing the principle of individual equality at the expense of sovereign equality (Teitel, 2011), in practice, international criminal justice is a result of a more ambiguous compromise between individual and sovereign equality. The ICC’s jurisdiction does not automatically apply to all individuals, as it may be expected if we were to prioritise the value of individual equality, but only to member *states* who consented to the Statute. The Court is also set up as a ‘court of last resort’ through the principle of complementarity, which stipulates that it can only intervene if a state is unable or unwilling to prosecute, or by the invitation of the state itself (Gissel, 2018). This privileged position of states in the architecture of the ICC (Han, 2019), highlights how individual equality is pursued *within* broader principles of sovereign equality, rather than replacing it.

The third and final value claim is the *principle of equality of accountability*, or the value placed on the impartial application of the anti-impunity norm. A legitimate legal system, including that of international criminal justice, is a

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system in which justice is meted out even-handedly (Cryer, 2005), irrespective of political or social power. Impunity is a problem from the principle of equality of accountability in two ways. First, it can indicate that individuals are being held accountable selectively, particularly if people with less power are being held accountable more regularly. Second, it can indicate that atrocities committed within and by powerful states are not being held accountable for their actions. The negotiation history of the ICC suggests that this second aspect of equality of accountability was particularly important for weaker states of the international system, whose pursuit of anti-impunity was geared towards solving the problem of impunity enjoyed by powerful state actors (Gissel, 2018).

Three Principles of Equality and Sovereign Immunity

The behavioural prescription that sovereign immunity should be removed, thus, need to be evaluated in light of these three principles of equality: between individuals, between sovereigns, and in terms of the general application of ICL. A version of the anti-impunity norm that prioritises individual equality over all other values, for example, may dictate that sovereign immunity need to be removed from practice fully. There is a logical reason to argue for this version of the anti-impunity norm—as Mills and Bloomfield argue, given that it is often state officials that plan and order atrocities, it would be nonsensical to prevent their prosecution (2018). A similar conclusion would be reached if we were to prioritise securing equality of accountability between individuals. Ability to prosecute politically more powerful individuals would help us act on the value of equal justice in this sense.

But in a version of the anti-impunity norm that puts greater emphasis on the value of sovereign equality, sovereign immunity can continue to exist alongside an international norm of anti-impunity without necessarily being a contradiction in terms. Some legal commentators, for example, have argued for respect for sovereign immunity remains essential in the case of arrest warrants for state officials of non-member states of the ICC (Gaeta and Labuda, 2017; Nouwen, 2012).

Furthermore, a version of the anti-impunity norm that prioritises the equality of accountability between states may deprioritise the question of what kind of individual is being held accountable over what country they represent or operate in. In other words, focusing on prosecuting individuals from powerful states could be normatively preferable than concentrating on powerful actors within historically weaker or marginalised states. The question of whether sovereign immunity is preserved or not becomes somewhat less urgent from this version of the anti-impunity norm.

Conclusion and Implications

Where does conceptualising the anti-impunity norm as having a composite structure with different value claims (articulated in terms of the three principles of equality above), problem (impunity), and behaviour (which includes, but is not limited to, the repealing of sovereign immunity) get us? Theoretically, conceptualising the anti-impunity norm in this manner helps us think about plural futures for the norm. Black-boxing the internal structure of the norm, particularly the varied values that intersect at its core, pushes us to think about contestation surrounding particular behavioural prescriptions in overly dichotomous terms. For example, based on the assumption that the anti-impunity norm has a singular, fixed meaning, some scholars have seen contestation of the prosecution of Heads of State (and thus protection of sovereign immunity) as something that fundamentally damages the anti-impunity norm (Mills and Bloomfield, 2018), or strengthens other, competing norms in its place (Boehme, 2017), leading to norm weakening or even norm death (Panke and Petersohn, 2012; Kutz, 2014). But if we were to take seriously the idea that norms are simultaneously stable and flexible, 'taken for granted' yet 'essentially contested', we can better systematically unpack the various "endings" of norm contestation (Stimmer, 2019).

This is not simply a theoretical exercise. A more nuanced and specified understanding of the anti-impunity norm's internal structure, as the 'equality claims framework' in this article presents, can help us better evaluate the normative appropriateness of real-life developments. Despite continued rhetoric of crisis and erosion (Vasilev, 2019), the ICC as an institution is not shuttering its doors anytime soon. Nor is the broader practice of international criminal justice. Rather, we are witnessing changes to the ways in which impunity is addressed, whose crime is being prioritised, and what kind of perpetrators are being targeted. Moving away from the (sole) question of whether the 'big fish' are being caught, participants within international criminal justice is asking, what kind of justice is possible to shore up which

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value claims (Drumbl, 2019). Is impunity a problem because it primarily violates individual legal equality? Or is this particular instance of impunity more egregious because it pertains to a more powerful actor, violating the principle of equality of accountability? The 'equality claims' framework presents us with a way to evaluate and understand these competing versions of justice—many of which remain politically, normatively, and emotionally persuasive in real life politics (Clarke, 2019).

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