Introduction

One of the central characters of the protracted controversy between the African Union (AU) and International Criminal Court (ICC), former President of Sudan Omar Al Bashir, found himself ousted from power by popular protests in April 2019 after a three-decade rule. Ten years earlier, he had become the first sitting Head of State (HoS) to be charged by the ICC, precipitating friction between the Court and the AU that persists until today. The AU has criticized the Court for being a 'neo-imperial' institution with an anti-African bias. This dynamic seemingly reached its apex in recent years as three African states issued declarations of intent to withdraw from the Rome Statute of the ICC, as well as the publication of an AU mass 'Withdrawal Strategy' in 2017 (AU 2017). While only Burundi has implemented its withdrawal from the Statute,[1] the fraught relationship between the AU and the ICC has undoubtedly contributed to the academic and public discourse that the Court is in 'crisis.'

This article examines this controversy through the lens of norm contestation, focusing on the AU's contestation of the 'anti-impunity norm,' or the idea that individuals should be held criminally accountable for committing international crimes, namely war crimes, crimes against humanity, and genocide. We argue that the anti-impunity norm should be conceptualized as having a composite structure of distinct normative elements—specifically, three interrelated principles of equality in international politics that comprise the norm's value: first, individual legal equality under international criminal law (ICL); second, the de jure sovereign equality of states under international law; and third, the equality of accountability in international criminal justice. Using these 'equality claims' as an analytical framework to study the AU's response to the ICC cases against African HoS—Omar Al Bashir of Sudan, Uhuru Kenyatta of Kenya, and Laurent Gbagbo of Côte d'Ivoire—we illustrate how the AU's contestation of the anti-impunity norm varies in its value claims despite its unified focus on the issue of sovereign immunity. This demonstrates how the anti-impunity norm inherently entails negotiation between divergent understandings of equality within international politics, highlighting the fundamental difficulties and political contradictions that arise from the very idea of anti-impunity itself.

The article contributes to the literature in three ways. First, it presents a systematic way of taking seriously the normative content of the AU's contestation of the ICC. Existing literature has commonly suggested that the AU's contestation is at least partially motivated by strategic

[1] Beyond Africa, the Philippines is the only other state to have withdrawn from the Rome Statute.

concerns, such as shielding political elites from accountability or gaining advantage in elections. However, even accounting for such strategic aims, it is significant that the AU's contestation generated considerable traction among a wide array of constituencies, underlining how focus on the normative meaning of contestation will lead to a richer understanding. This is particularly pertinent in this current moment, where not only the ICC and the anti-impunity norm, but other, particularly liberal, international institutions and norms are facing virulent pushback. Secondly, by offering a novel conceptualization of the anti-impunity norm, it expands upon existing literature on norm contestation generally, and the anti-impunity norm specifically, that tends to assume a more cohesive and unitary structure of the anti-impunity norm and consequently pits it against other important international norms, such as sovereignty. Presenting the norm as having a composite internal structure allows us to better capture the contradictory nature of norms as inherently contested shared understandings. Thirdly, the article provides a means for future research to analyze the effects of contestation on the anti-impunity norm beyond its resilience or erosion and rather systematically account for a plurality of alternative 'futures' of the norm.

This article proceeds as follows: we first present the anti-impunity norm and the evolution of its the relationship with official immunity. We then provide an overview of literature on norm contestation, focusing on the challenges of conceptualizing contestation of international norms, and then contextualize our analytical orientation regarding the AU-ICC controversy within this literature. We then derive a composite structure of the anti-impunity norm and detail the three 'equality claims' at its core. Using the 'equality claims' as an analytical framework, we provide a descriptive account of the AU's contestation of the anti-impunity norm in the three ICC cases against former President Omar Al Bashir of Sudan, President Uhuru Kenyatta of Kenya, and former President Laurent Gbagbo of Côte d'Ivoire. Finally, the article concludes by drawing theoretical implications for norm contestation and the anti-impunity norm.

The Anti-Impunity Norm

The anti-impunity norm consists of at least three key prescriptive elements, or what 'ought' to be done. First, the norm is not generally applicable to all human rights violations and transgressions under international law, but rather pertains to accountability for a specific set of human rights violations—war crimes, crimes against humanity, and genocide. Second, stemming from the shift from states to individuals as the primary subjects of ICL, these violations must be treated as crimes committed by individuals. Third, the norm prescribes

regularized criminal proceedings as the appropriate mechanism for addressing responsibility for international crimes, corresponding to those found in liberal rule-of-law based domestic societies (Sikkink 2011, 20; Bower 2019, 90).

These prescriptive elements diffused through dramatic institutionalization throughout domestic, regional, and international jurisdictions over the past four decades in what Sikkink has termed the "justice cascade" (2011). In the most visible manifestation of this 'cascade,' 122 states are States Parties to the Rome Statute of the ICC as of June 2020. The core international crimes—war crimes, crimes against humanity, and genocide—are punishable by almost every post-World War II international judicial body, and major elements of ICL have been domesticated into many national criminal codes. While general and targeted amnesties have been regular practice in peace negotiations for decades, contemporary practice makes it difficult for conflict parties to avoid discussions about individual criminal accountability for international crimes.

A key part of the anti-impunity norm is the equal treatment of individuals irrespective of their official roles, or the capacity under international law to hold state officials—including HoS—criminally accountable for international crimes. International law has traditionally provided for immunity from criminal prosecution for state officials, either attached to their office or status or attached to acts performed by officials in the exercise of their functions. Starting in the aftermath of World War I, with the efforts to try former leader of Germany Kaiser Wilhelm II, international law has carved out some exceptions to this very-well established institution of sovereign immunity—a foundation of the international order "predicated on the co-equal sovereignty of states" (Bassiouni 2012, 73).

The arrest of former HoS of Chile, General Augusto Pinochet, in 1998 in London became a watershed moment regarding national proceedings against foreign HoS. The UK House of Lords broke new ground in finding Pinochet did not benefit from immunity for the crime of torture, even when perpetrated in an official capacity, on the basis of the UN Convention Against Torture. Another key decision, this time reaffirming the traditional conception of immunity, came in 2002, when the International Court of Justice found that there was no exception to the immunity from criminal jurisdiction of foreign states for incumbent Ministers of Foreign Affairs and HoS, even when suspected of responsibility for war crimes or crimes against humanity. Drawing a distinction with international tribunals, it also found that incumbent or former Ministers of Foreign Affairs and HoS may be subject to criminal

proceedings before certain international criminal courts, depending on the statutes of those international courts (ICJ 2002, para. 61).

Indeed, drawing on the Charter of the International Military Tribunal of Nuremberg, the statutes of several international tribunals established in the 1990s removed immunity as an exemption from criminal responsibility for certain international crimes, as codified in Article 7(2) of the International Criminal Tribunal for the former Yugoslavia Statute, Article 6(2) of the International Criminal Tribunal for Rwanda Statute, and Article 27(1) of the ICC Rome Statute. The fact that 122 States Parties to the Rome Statute have accepted to remove immunities for officials, including HoS, for certain international crimes indeed marks a significant development in ICL. While the long-held principle that immunities serve as a bar to jurisdiction or as a defense against allegations of international crimes has been gradually eroded, international practice and jurisprudence around accountability nevertheless remain highly contested, with questions revolving around the status of the accused (incumbent vs. former official, HoS vs. other official), differences in proceedings in foreign vs. international courts, and the responsibilities of non-States Parties to cooperate with international courts.

The cases discussed in this article are thus recent episodes in a long history of controversy around determining the limits and exceptions of sovereign immunity before both national and international courts. So far, eight HoS have been the focus of cases in international tribunals, to various degrees charged, tried, acquitted, and sentenced.[2] When the ICC charged sitting President of Sudan Al Bashir with crimes against humanity and war crimes in 2009 and for genocide in 2010, he became the third sitting HoS to be charged by an international tribunal, after Slobodan Milošević of Serbia in 1999 and Charles Taylor of Liberia in 2003. In December 2010, the ICC issued summonses to appear to six high-ranking Kenyan officials, including Uhuru Kenyatta, before he became HoS in March 2013, and the proceedings continued after his election. In addition to raising important legal questions around immunities and states' responsibilities to cooperate with the ICC, these cases prompted significant debate between the AU and the ICC about the normative dimensions of these developments.

The Internal Structure of Norms and Contestation

[2] This list features Jean Kambanda of Rwanda, Charles Taylor of Liberia, Slobodan Milošević of Serbia, General Augusto Pinochet of Chile, Omar Al Bashir of Sudan, Muammar Gaddafi of Libya, Hissène Habré of Chad, and Laurent Gbagbo of Côte d'Ivoire.

Like other international norms that scholars, policymakers, and activists widely accept to 'exist,' the anti-impunity norm remains open to continuous debate about its scope of application and alternative interpretations (Winston 2018, 639). Norms are commonly conceptualized in International Relations (IR) theory as "shared understandings" (Checkel 1999, 88) that define what are standards of "appropriate behavior for actors with a given identity" (Finnemore and Sikkink 1998, 891). Norms are understood to have constraining and constitutive qualities (Checkel 1997). They are constraining in the sense that norms prescribe and prohibit behavior by defining the boundaries of "normal" actions in a particular situation (Rhoads 2016, 27-28). Norms constrain behavior not in the form of direct coercion per se, but by generating a sense of obligation—"oughtness"—which not only provide solutions to coordination problems, but also form the language of international politics through which demands are made, actions are justified, responsibility is determined, and the blameworthy or praiseworthy character of an action is determined (Kratochwil 1984, 686).

Simultaneously, scholars such as Wendt (1999) and Wiener (2008, 2014) argue that norms not only determine what is acceptable behavior, but also create categories of actors and determine their identities and corresponding interests (Wiener 2014, 19). In other words, norms generate meaning through the construction of intersubjective understandings of who and what things are. This normative meaning includes the question of what is valued in a particular context, whether they are tangible outcomes such as reduced carbon footprint or more intangible objectives such as accountability (Winston 2018, 640). Material and social facts on their own do not clarify whether the situation at hand requires a justification or modification of behavior. Rather, they must be understood in relation to underlying values of society in order to be evaluated as good or bad (Wendt 1999, 111-2). The process of norm construction—the delineation of what are "appropriate behaviors"—is from this perspective an interaction between the constraining and constitutive functions of norms (Hurrell and MacDonald 2012, 61).

The first generation of norm scholars in IR largely adopted the epistemological and ontological position that assumed the interpretation of norms as relatively static and clear, reading the meaning of norms off a stable constitutive script of a "given" identity (Katzenstein 1996, 5). Earlier literature on the emergence, diffusion, and institutionalization of norms thus focused on explaining the processes through which shared understandings are generated in international politics (Finnemore and Sikkink 1998; Katzenstein 1996; Risse, Ropp, and Sikkink 2013).

Contestation over the meaning of the norm, such as its applicability and scope of implementation, was considered to be part of an earlier stage of the norm "life cycle," as norm evolution culminates in norm internalization by actors and thus "acquire a taken-for-granted quality and are no longer a matter of broad public debate" (Finnemore and Sikkink 1998, 895).

The widespread practice of contestation challenges this assumption of the "taken-for-granted" quality, and fixed meaning, of norms. Norm contestation, both explicit and implicit discursive as well as behavioral forms of contestation in which actors engage in social practices that entail alternative interpretations of norms or prioritize competing norms, has thus been a focal point in Constructivist IR research (Wiener 2014, 1-2; Stimmer and Wisken 2019). Some scholars have suggested that contestation necessarily emerges when general norms are applied to specific situations, as it is not possible for actors to anticipate all contingencies (Wolff and Zimmermann 2016). Variances in how norms are codified and institutionalized may also lead to linguistic ambiguities and overlapping norms that create disputes about implementation (Krook and True 2012; Welsh 2013; Betcy 2017; Klotz 1995). From the perspective that views norm meaning as fixed, high levels of contestation suggests that either the norm is not widely accepted by actors, implying that earlier norm compliance was strategic behavior, or that the norm will degenerate or die as a result of the contestation (Sanders 2018; Panke and Petersohn 2012; Kutz 2014).

However, other scholars highlight a more fundamental issue regarding the conceptualization of norms. As Niemann and Schillinger suggest, a "*contested* norm," represents "almost a contradiction in terms," if it is assumed that norms have fixed meanings (2017, 30). Critical Constructivists, such as Wiener, argue that this seeming paradox implies that while norms may have a single conceptual structure, they bear a dual quality as being simultaneously stable and flexible. Norms are both structuring and socially constructed through interaction in a context, and while they may seem stable over a given period of time, they are by definition flexible (Wiener 2007, 49). Contestedness—rather than the 'taken for granted-ness'—forms the inherent logic of norms which generates its normative quality, resulting in what Wiener terms "meaning-in-use" (ibid, 190). Inherent flexibility of the norm does not suggest that norms have no effect on behavior. The very recognition that the norm exists structures behaviors of actors (Winston 2018, 643). The key theoretical challenge to understanding norm contestation is, thus, to conceptually "theorize with the unfixity" (Niemann and Schillinger 2017, 430) and the dual quality of norms in the practice of contestation.

This range of perspectives is reflected in the literature on HoS immunity and the controversy between the AU and the ICC. Some studies analyze the AU-ICC contestation as a function of self-interest and argue that states such as Kenya used a wide range of strategies to undercut the ICC and deflect accusations of impunity, including politicizing complementarity, regionalizing political opposition, and pairing instances of cooperation and condemnation (Mueller 2014; Helfer and Showalter 2017). More broadly, Chaudoin models compliance with institutions like the ICC as a calculation between pro- and anti-compliance groups' valuations of winning the contest versus the costs they face in trying (2016). Undoubtedly, for certain actors, decision-making was informed by short-term strategic interest. Yet, the fact that the AU's contestation has gained support from actors that would not benefit from non-compliance underlines the need to engage with the normative significance of such contestation.

A different pool of literature on the AU-ICC controversy sheds valuable light on the causes and significances of the dynamics by taking the AU's contestation as a form of normative argument, rather than as 'mere' short-term strategic behavior to protect the self-interest of political elites. In doing so, however, these studies conceptualize the anti-impunity norm as singular and discrete, framing the dynamics as a choice between competing norms. Boehme, for example, analyses South Africa's decision to not comply with the ICC arrest warrant for Al Bashir and argues that the South African executive faced a "loyalty conflict" between two norms – the regional non-cooperation norm and the accountability norm – and chose to comply with the former. This argument conceptualizes the dynamic as a binary choice between norms that are mutually exclusive in their respective meanings: the regional norm of non-cooperation with the ICC, which includes a preference for regional African solutions and "an anti-imperialist world order in which the global South enjoys equal status to the global North," versus the international norm of anti-impunity, which includes cooperating with the arrest warrant for Al Bashir (2017). Similarly, Mills argues that the AU-ICC disagreement should be understood as an illustration of how African states, as they negotiate their "identities and interests," have to navigate the tension that arises between various norms—the "old" norm of absolute state sovereignty versus "new" human rights norms, human rights versus Pan-Africanism, and peace versus justice (2012, 408). The clash is understood to be between discrete norms that create competing demands on states, who must decide how to interpret and weigh competing interests and norms. In their study of the motivations and behaviors of African states that resist the anti-impunity norm and the ICC, Mills and Bloomfield similarly

analyze the anti-impunity norm as the "challenger" norm and sovereignty and sovereign immunity as the "status-quo norms," comprising the 'menu' of competing norms from which states must choose to determine behavior (2018). Bower also traces how the AU has raised concerns for stability, respect for regional institutions, and continuing privilege of formerly imperial powers (2019). García Iommi similarly argues that pro-ICC actors prioritize the anti-impunity norm, which is in tension with fundamental norms that bear greater importance to African states, such as sovereignty, peace, anti-colonialism, and pan-African solidarity (2020).

In broad terms, we share the general analytical orientation of the above studies that take seriously the AU's normative arguments. However, we depart from these studies in theoretical and conceptual terms by framing the dynamics of contestation as disagreement from *amongst* meanings of the anti-impunity norm, rather than as *between* discrete norms. Our starting point is thus from conceptualizing the internal structure of the anti-impunity norm. To do so, we draw on scholars, especially Rhoads (2016) and Winston (2018), who propose different ways in which the internal structure of norms can be disaggregated in order to better capture the dual quality of norms in the practice of contestation. Rhoads, for instance, presents the norm of impartiality in peacekeeping as a "composite norm," or "a complex ideational structure, composed of different sub-norms and normative elements, each of which can change and is open to contestation singly or in combination" (2016, 28). Rhoads disaggregates the composite nature of the impartiality norm into two component parts – one consisting of the procedural dimension governing the *mode* of decision-making, or how decisions are made and actions are taken, and the other consisting of the substantive dimension pertaining to the *basis for* decision-making, or the actor's mandate (2016, 26-39).

In a similar vein, Winston argues that all international norms are of composite structure and proposes the analytical concept of a "norm cluster" to capture the indeterminacy and dynamism of normative meaning in studying contemporary international norms (2018). To begin, Winston presents a tripartite structure of a norm that can be expressed by the conditional statement: "given this problem, my value dictates this behavior" (ibid, 640).[3] A norm is understood to presuppose a *problem*, or an issue that needs to be addressed by actors in a given context. Second, the norm inherently includes a statement of *values*. The problem is predicated on an evaluation of what is good or bad, and thus carries moral weight over instrumental utility.

[3] Formally, this is expressed as: If [problem], [value] suggests [behavior] (Winston 2018, 641).

A particular behavior or situation is problematized if it is deemed to be negatively affecting the attainment or continuation of something that is being valued by a given society (Winston 2018, 640)—for example, attacks against civilians are only blameworthy behaviors that require correction insofar as the society in question sees the protection of civilians as significant based on its underlying values. These values are thus significant because they define the problems that norms address (ibid). Finally, a norm prescribes particular *behaviors*, or actions that should be taken to address the problem in alignment with, and to realize the enjoyment of, the values (ibid, 640-1). The values that define the problem also limit the range of acceptable behaviors that can be taken to address it. If actors wish to adopt a specific behavior to address the problem at hand, it needs to be justified as an acceptable course of action to other members of its society. Consequently, actors are prone to justify behavior in reference to widely held values. Whether or not the proposed solution to the problem is legitimate will depend at least partially on whether or not the behavior conforms to the referenced values (Payne 2001, 39).

From this, a norm cluster is thus a "looser and less determinate" collection of interrelated specific problems, values, and behaviors that are closely identified (Winston 2018, 647). Norm clusters have boundaries, but they are intersubjectively defined and thus somewhat malleable, open to processes of contestation, innovation, and learning by relevant actors (ibid). Within each cluster, the normative elements of problems, values, and behaviors may be combined in a variety of ways as long as the different combinations ('meaning-in-use') are considered to be legitimate by the wider community (ibid, 647-8). Winston suggests that a wide array of political phenomena associated with a singular norm in conventional Constructivist IR literature is better understood as a "norm cluster" (ibid, 647).[4] The development of the anti-plastic-shopping-bag norm, as elaborated by Clapp and Swanston (2009), serves as an example. Unpacking the value justifications that are made in advancing the prohibition on an international level shows how the norm's internal structure is better understood as a looser "cluster" with different values—such as the preservation of the environment, animal protection based on religious values, protection of property, and fostering of tourism as a means of economic development—leading to a singular behavioral outcome of banning plastic shopping

[4] We strictly follow Winston's conceptualisation of a 'norm cluster,' comprising of three structural normative elements (problem, value, behavior). Other scholars have used similar or identical terminology to denote assemblages of related norms, including 'cluster' and 'bundles.' (Bloomfield and Scott 2016; Lantis and Wunderlich, 2018; Hofmann and Suthanthiraraj, 2019; Staunton and Ralph 2019). As Lantis and Wunderlich point out (2018, 576), these conceptualizations are theoretically distinct from Winston's framework.

bags (Winston 2018, 651-2). Similarly, Rhoads' "composite norm" accommodates the three structural elements of norms presented by Winston: impartiality, or the lack thereof, forms the 'problem' the norm sets out to solve; the "basis" for decision-making regarding appropriate means of impartiality are the 'values' manifested in peacekeeping mission mandates, and the behavioral prescriptions includes the "mode of decision-making" for peacekeepers (Rhoads 2016, 26-39).

Our contention here is that using the analytical concept of a 'norm cluster' better encapsulates the internal indeterminacy of the anti-impunity norm and in turn helps us articulate how the normative meaning of the AU's contestation can vary between cases and across time. More specifically, in the following section, we argue that the anti-impunity norm has a composite structure and is a 'cluster' with multiple values underpinning the recognition of the problem and simultaneously multiple potentially appropriate behavioral outcomes in relation to the question of sovereign immunity. Existing definitions of the anti-impunity norm as the criminal prosecution of individuals for specific forms of violence, as discussed in the previous section, in effect delineates a problem (a perpetrator's enjoyment of not being held accountable, or 'impunity') and one behavioral solution (criminal prosecution of alleged perpetrators). However, we argue that impunity becomes recognized as a problem as a result of multiple values, specifically three distinct but interlocking principles of equality: individual legal equality, sovereign equality of states, and equality of accountability. Furthermore, we suggest that whether the rejection of sovereign immunity is an appropriate behavioral claim depends on the various configurations of such internal value-problem interlinkages. The behavioral claim of sovereign immunity can thus take on a variety of meanings in the process of contestation depending on how the balance is struck between different principles of equality.

The Value Claims of Anti-Impunity: Three Principles of Equality

In order to derive the three principles of equality that form the value claims within the normative elements of the anti-impunity norm, we employ the interpretive methodology of rational reconstruction (Pedersen 2008; Zürn 2018). As first employed by Habermas in the context of empirical social practices (1996), rational reconstruction is a mode of interpretation that aims at making apparent the underlying assumptions that are required for a social practice to function and be accepted as appropriate by its participants (Pedersen 2008, 465). Habermas refers to this as a type of "formal" analysis that identifies the "idealizing assumptions (presuppositions) that participants of a particular social practice need to make" in order for the

practice to be considered "meaningful" based on the criterion of communicative rationality (Patberg 2014, 511; Risse 2000). The underlying logic of interpretation is a counterfactual one, in which the argument is that the practice in question will not be considered justifiable and appropriate if its participants did not hold a set of particular idealizing assumptions (Patberg 2014, 511).[5] Social practices in this context refers not only to the immediate observable actions and behaviors but also international law and norms that provide the structure for action.

For the purposes of examining the anti-impunity norm, therefore, we examined both the principles of ICL through the statutes and judgements of international criminal tribunals, conceptualized as the codified form of the anti-impunity norm, as well as the institutional practices of international prosecutions. While principles of ICL can be derived from various international legal sources, including different international conventions and the statutes of ad hoc tribunals, we focused on the sources most relevant to the ICC. We referred to scholarly literature in legal and political theory to provide additional context, primarily regarding the issue of HoS and official immunity under international law.

From this, we argue that the anti-impunity norm is comprised of three distinct, if intertwined, values claims regarding different principles of equality through which the behavioral prescriptions to address the problem of impunity are evaluated. The first principle that comprises the norm's internal structure is that of *individual legal equality.* Article 21(3) of the Rome Statute states that the application of the Statute must be "consistent with internationally recognized human rights." A key principle of human rights that has been well-established in international law is the equality of individuals before the law (Nouwen 2012, 153).[6] Against this broader context, the anti-impunity norm upholds the "will to impose effective protections

[5] For example, Habermas applies rational reconstruction to demonstrate the nature of the European Union through a thought experimental process of "supranational constitution-making" to interpret the how the Union emerged, considering the idealized assumptions the hypothetical participants of a constitutional convention would need to hold for the EU's practices to be justified (Habermas 2012, 30-31). In the context of legal theory, if the argument is "support for the constitutional right to homosexual relationships," the implicit premises of this argument can be reasonably broken down to "society should be structured to promote human happiness; constitutional protection of consensual relationships between adults will promote human happiness; homosexual relations fall under definitions of consensual relationships; and thus homosexual relations between consenting adults should be protected" (Rappaport 2004, 577).

[6] See, for example: 1976 International Covenant on Civil and Political Rights, Art. 14(1) and 26; 1950 (European) Convention for the Protection of Human Rights and Fundamental Freedoms Art. 14(1) and 6; 1978 American Convention on Human Rights Art. 8; 1982 African Charter on Human and Peoples Rights Art. 3 and 19.

of morally equal individual persons, irrespective of their nationalities" under international law (Pensky 2016, 491). Impunity from this perspective is a normative problem as it violates the presumed legal equality of individuals, as the "person 'enjoying' impunity does so" as a result of the failure to "include her or him in the application of a legal order valid for others under its jurisdiction" (ibid, 488). The very idea of impunity for particular forms of violence as a normatively objectionable circumstance underscores the equal status of individuals under international law as an object of protection and subject of rights. Simultaneously, the anti-impunity norm stipulates the prosecution of individuals for certain forms of violence, highlighting the equal status of individuals under international law in terms of their responsibility and liability for transgressions.

The second principle is that of *sovereign equality of states*. Indeed, the development of ICL is understood as enhancing individual legal equality at the expense of sovereign equality of states from the perspective of legal principle. Sovereign equality of all states, as enshrined in Article 2(1) of the UN Charter, establishes states as juridical equals and therefore provides the basis for the principle of domestic non-intervention. By stipulating that particular transgressions need to be held accountable, the international norm of anti-impunity already constitutes a challenge to the fundamental principle of domestic non-intervention.

Moreover, the dismissal of immunity traditionally granted to state officials, including HoS and diplomats, in the implementation of the anti-impunity norm can be understood as a challenge to the juridical equality of states. Immunity of state officials is a cornerstone concept emanating from the juridical equality of states (Crawford 2012, 448-449). If states were juridical equals, who therefore did not have the right to judge or sanction one another's actions as illegitimate, it followed that officials who were considered to be acting on behalf of the state could not be sanctioned as individuals for acts committed in their official capacity. The idea that all individuals, including political leaders and other forms of state officials, can and should be held accountable for atrocity crimes—particularly if they were committed as a matter of state policy—is therefore a significant counter-development to the claims of sovereign equality of states.

The direction of travel in the institutionalization and codification of the anti-impunity norm suggests a move away from the protection of sovereign equality of states towards greater respect for individual legal equality. According the Nuremberg Principles, which codified the

legal principles underpinning the seminal modern efforts to curb impunity following World War II, "[t]he fact that a person who committed an act which constitutes a crime under international law acted as a HoS or responsible Government official does not relieve him from responsibility under international law" (International Law Commission 1950, Principle III). Subsequent statutes and jurisprudence of international courts almost exclusively sided with this position set out in Nuremberg, that the immunity enjoyed by state leaders and other officials cannot be absolute and is generally only applicable to domestic courts during their tenure in office, thereby allowing prosecution for atrocity crimes and strongly favoring the claims of individual equality over sovereign state equality (Werle 2005, 173).[7] The Rome Statue presents a particularly strong version of this elimination of official immunity as a behavioral prescription of the anti-impunity norm, with Article 27(1) stating that the Statute will "apply equally to all persons without any distinction based on official capacity," and that "HoS or government," or other forms of government representatives or elected officials, will not be exempt from criminal responsibility. Article 27(2) provides that official capacity "shall not bar the Court from exercising its jurisdiction over such a person." The ICC Pre-Trial Chamber further stipulated that under customary international law, HoS immunity does not apply in the case of international crimes prosecuted by international courts (ICC Pre-Trial Chamber 2011, para 18)[8]. From this perspective, the development of ICL seems to build a more vertically integrated legal order, promoting the legal equality of individuals and challenging the principle of sovereign equality.

Beyond the doctrinal debate of whether international law supports the elimination of official immunity, particularly of HoS, in the realization of the anti-impunity norm, Mills and Bloomfield provides a logical and normative argument for why the anti-impunity norm should prioritize individual equality over sovereign equality (2018). Excluding sitting HoS and Government (and other senior officials) not only would provide perverse incentives to continue commit atrocity crimes and stay in office beyond their term to avoid prosecution, but it would also "be nonsensical given they are often responsible for ordering atrocity crimes" (ibid, 107). From this perspective, contesting the rejection of official immunity as part of the anti-impunity norm, or conceptualizing the anti-impunity norm without the rejection of official immunity,

[7] For example, the ICJ noted in the *Arrest Warrant* case "[j]urisdictional immunity may well bar prosecution for a certain period for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (ICJ 2002, para. 60).
[8] For further, see Triffterer and Burchard 2016, 1037-55 and Kreβ and Prost 2016, 2118-46.

would be synonymous to a fundamental threat to the existence of the norm itself. The legal and normative discussion thus far underscores why some of the literature on the AU's contestation of the anti-impunity norm discussed above the contestation dynamic is portrayed as a binary choice between the norms of anti-impunity or sovereignty.

But even as a matter of legal principle, the idea that the anti-impunity norm necessarily prioritizes individual legal equality over sovereign equality is contested. The pursuit of anti-impunity has always consisted of a more ambiguous, and at times self-contradictory, balance between the value claims of individual legal equality and sovereign equality of states. For example, Article 27(2) of the Rome Statute needs to be read in conjunction with Article 98(1), which states that the ICC cannot request a state to act inconsistently with its other obligations under international law with respect to the state or diplomatic immunity of third-party nationals. The connection between these two Articles have been a source of persistent debate, particularly in the context of the official immunity of Omar Al Bashir, a HoS of a non-State Party. In the case of Malawi's refusal to execute the arrest warrant against Al Bashir, the ICC Pre-Trial Chamber found that under customary international law, HoS immunity does not apply in the case of arrest warrants issued by international courts for the alleged commission of international crimes, even regarding non-States Parties (ICC Pre-Trial Chamber I, para. 18). This has been echoed by some legal commentators who argued that other international legal obligations of states are in effect trumped by the claims of individual legal equality of the anti-impunity norm. Thus, as Akande states, "a state party to the Statute would not be acting inconsistently with its obligations under international law by arresting and surrendering Al Bashir to the ICC" (Akande 2009, 342). The ICC Pre-Trial Chamber's decision nevertheless remains controversial amongst legal commentators, with other scholars arguing that "respect for such procedural immunity" remains essential from the perspective of sovereign equality of states (Gaeta and Labuda 2017). As a result, Article 98(1) of the Rome Statute should not be read as creating obligations on States Parties to infringe the sovereign equality of states without the explicit consent of the state in question, and therefore cannot be applicable to non-parties of the Statute (Nouwen 2012, 172). It is perhaps worth noting that, as Nouwen points out in her critique of the ICC Pre-Trial Chamber decision on Malawi's non-cooperation, the precedents of the Nuremberg and Tokyo tribunals as well as the ad hoc tribunals of Rwanda and the former Yugoslavia cited by the Chamber as evidence that the elimination of official immunity under international law has gained customary status—in other words, acceptance as appropriate practice by the international community—are all situations pertaining to former

HoS and state officials. These are thus cases in which the prioritization of individual legal equality in the pursuit of anti-impunity presents a less direct challenge to the maintenance of sovereign equality (Nouwen 2012, 172-3).

The ambiguous relationship between individual legal equality and sovereign equality of states, is present not only in doctrinal debates on the contested status of official immunity under international law, but also exhibited in the structural arrangement of anti-impunity institutions, particularly the ICC. As a court established through a multilateral treaty system, the ICC provides for a privileged position of states as actors within its institutional structure, giving precedence to sovereign equality of states over individual legal equality under particular circumstances (Han 2019, 70-2). In other words, the behavioral prescription of prosecuting all individuals for grave crimes, including state officials, in practice still remains bounded by the basic principle of state consent, derived from the value claim of sovereign equality. Prosecuting individuals for serious human rights violations does not replace the value of sovereign equality but is rather pursued within it.

Furthermore, built as a 'court of last resort,' the Rome Statute gives primacy and precedence to national courts. This principle of complementarity thus only permits the ICC to step in when it can be shown that states are not able or willing to prosecute the same conduct that is of interest to the ICC Prosecutor (Cassese 2011, 342-3). This structure of complementarity was particularly important to African states in the establishment of the ICC. In fact, in the UN General Assembly Sixth Committee discussions preceding the ICC's establishment proposed two different understandings of complementarity—one that emphasized the primacy of the right of states to prosecute crimes within their jurisdiction and another that underscored the right of the Court to step in when states failed to deliver justice (Gissel 2018, 740-1). African states frequently defined complementarity according to the negative conceptualization (ibid), underscoring how both notions of individual and sovereign equality coexist within the framework of the ICC from its inception, and within the meaning of the anti-impunity norm. Furthermore, the ICC's reliance on state cooperation for its everyday functions—such as enforcing arrest warrants, including those issued against state officials (Han 2019, 71) —is yet another way in which the practice of anti-impunity exhibits an uneasy balance between claims of individual legal equality and sovereign state equality.

The third concurrent principle of equality that forms the internal structure of the anti-impunity norm is the *equality of accountability,* or the value placed on the impartial application of the anti-impunity norm. The anti-impunity norm's normativity is not only rooted in its claim of individual accountability within the sovereigntist framework, but also in the claim that accountability for atrocity crimes should be applied equally to all individuals. This relates to the principled expectation arising from the norm based on the principle of the rule of law, specifically the idea that a legitimate legal system should show congruence between the norms that are formulated and how they are implemented.[9] As Cryer argues, the legitimacy of the norms of criminal law, including ICL, is undermined when it is understood to be neither general nor applied even-handedly (Cryer 2005, 195).

In the context of the anti-impunity norm, the claim of equality of accountability relates to the potential influence power politics can have on efforts to achieve accountability for atrocity crimes. On the one hand, the equality of accountability can be referred to whether *all* individuals, regardless of their relative power standing in a political community, are indeed held accountable for committing atrocity crimes. Selective prosecution of individuals that are weaker in the domestic political system can exacerbate the power differences between different types of actors - for example between those who can and cannot claim official immunity and between state officials and non-state actors (Han 2019, 75-6). While the Rome Statute does not explicitly require the ICC to take into account these dynamics, some authors have noted that non-state actors are more likely to be pursued by the ICC even when their alleged crimes are arguably "less serious," and non-state actors are more likely to be captured and surrendered in accordance to an arrest warrant even when state actors are accused of broadly comparable crimes (Mégret 2018, 177). This de facto focus on non-state actors by the ICC can be understood as one way in which sovereign equality becomes more valued over individual legal equality, and thus preventing the equal application of the anti-impunity norm between individuals. At least doctrinally, the elimination of HoS immunity can be considered an appropriate behavioral prescription in this context in order to realize the value of equality of accountability in the anti-impunity pursuit.

On the other hand, the claims of equal accountability can be considered in terms of whether the overall pattern of accountability measures are equitably distributed regardless of the power

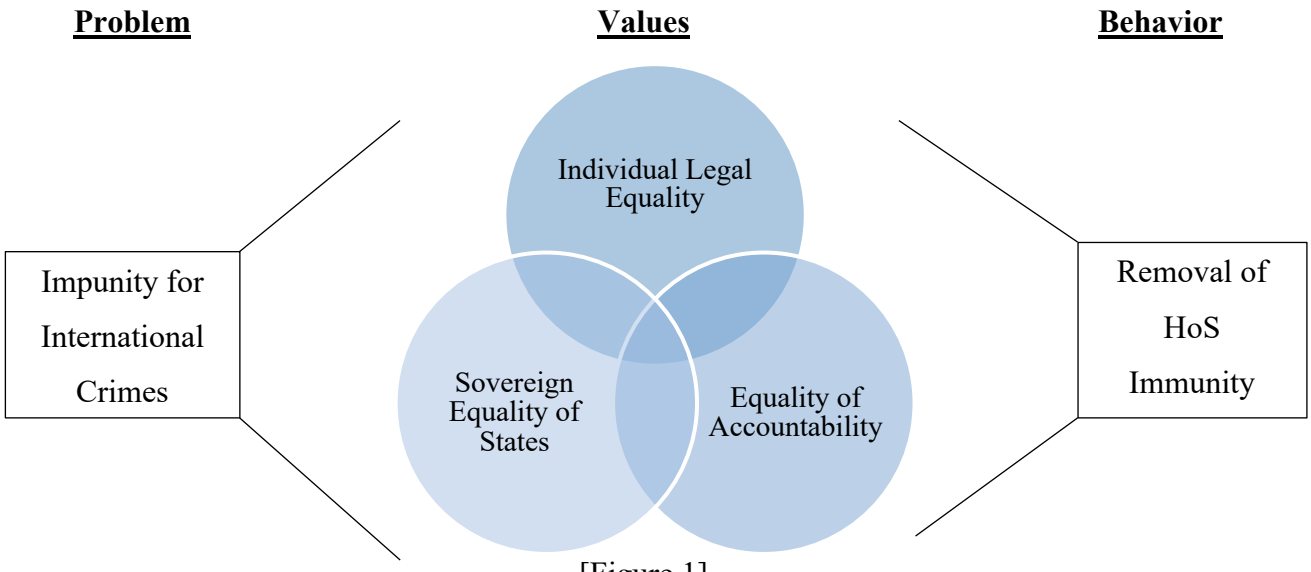
[9] This is derived from Lon Fuller's classic definition of the rule of law (Fuller, 1969).

disparities in the international system. The international legal system remains largely state-centric, with sovereign states holding a privileged position as the primary subjects of international law, despite more recent developments in individual and non-state legal personality (Teitel 2011, 9). Given this prevailing structure of the international system, the standard of even-handedness for *international* criminal prosecutions can be extrapolated on to interstate relations and not only between individuals. This horizontal notion of equality of accountability in international politics is argued to be a significant reason for African states' support for the ICC at its inception, with several African diplomats stating during various UN General Assembly deliberations that the Court should "overcome situations such as […] imbalances of power in the international arena" and that small, weaker states in particular "needed an international criminal court, to the mandatory jurisdiction of which all States, whether small or large, would be subject" (Gissel 2018, 742-3). Prosecution of HoS of relatively weaker states of the international system—such as presidents of African countries—from this perspective could be seen as an affront to claims of equal accountability if similar prosecutions are not pursued for leaders of more powerful countries. Put differently, the de facto power inequalities between states can endanger the equality of accountability if international courts prosecute more cases of atrocity crimes in less powerful states over those committed by individuals from more powerful states.

The uneven application of the anti-impunity norm is at the heart of the critiques of neo-imperialism levied against the ICC, often accused of replicating the unequal power dynamics between former colonial Western powers and formerly colonized African states. While this article focuses on the contestation against the anti-impunity norm through the institutional framework of the ICC, this concern of equality of accountability applies to anti-impunity measures through domestic courts, such as universal jurisdiction cases. For example, referring to Belgium's insistence that Hissene Habré be prosecuted, Schabas raises the question "[w]hy won't Belgium insist that Americans leaders like Rumsfeld and Cheney be extradited to stand trial, as it did with little Senegal? […] Why must impunity be addressed in Senegal […] yet be ignored in Washington?" (Schabas 2013, 551). The question of whether the institutionalization and implementation of the anti-impunity norm could uphold the value of equality of accountability also pertains to how power inequalities between states were reflected in the negotiations of the Rome Statute itself. Although the Rome Statute in principle is a multilateral treaty based on the principle of sovereign equality, more powerful countries with greater economic and political clout dominated the negotiations (Simpson 2004, xiv). Critics have thus

argued that, as Nouwen states, "the pursuit of the fight against impunity has thus far undermined the fight for more equality," (2012, 1) in terms of the equality of accountability.

The anti-impunity norm thus prescribes behaviors to address the problem of impunity that rest upon different value claims, described here as principles of equality. As the above section demonstrated, however, tensions and ambiguities between the different equality claims are far from resolved, and the implementation of the anti-impunity norm involves the constant negotiation and compromise between different claims of equality. Rather than considering these tensions as a result of incomplete realization of the anti-impunity norm, the tripartite conceptualization of the norm's internal structure indicates that different configurations of value claims and behaviors can be considered to be appropriate responses to curb impunity. For example, prescription of the anti-impunity norm can prioritize individual legal equality over the equality of accountability, particularly in terms of the equal implementation of accountability between individuals of different power standing, if prosecutorial strategies pursued a high number of lower-ranking perpetrators rather than focusing on powerful leaders that organized the atrocity crimes. Thus, the three claims of equality should be understood as separate but interrelated. This relationship between the three claims of equality can be visually demonstrated as such:



[Figure 1]

This conceptualization of the anti-impunity norm's value claims as being comprised of three interrelated principles of equality also highlights how contestation of the anti-impunity norm can be understood as an internal contestation *amongst* different meanings-in-use of the norm.

In this sense, the relationships between the three equality claims are not fixed, but rather serve as an analytical framework to consider the focus of contestation, which in turn allows for the description of the variance of the normative meaning of the contestation from the perspective of the value claims comprising the anti-impunity norm.

The African Union's Contestation of the ICC

It is widely accepted by both academic literature and observers that the ICC arrest warrant against President Omar Al Bashir of Sudan was a watershed moment in the relationship between the AU and the ICC, with the crux of the contestation focused on the status of official immunity—particularly regarding sitting HoS. However, as discussed in the previous section, the singular legal principle of official immunity can take on a variety of normative significances in terms of the underlying principles of the anti-impunity norm. Correspondingly, the following section will provide a descriptive account of the AU's contestation in terms of the three claims of equality at the core of the norm. It proceeds by highlighting different nexuses of contestation within the equality framework: first, tensions arising from individual legal equality and the equality of accountability; second, tensions arising from individual legal equality and sovereign equality.

A few comments on methodology are in order. First, to identify variance within the AU's positions, we analyze both discursive and behavioral contestation. In other words, we analyze both contestation through discourse that focuses on arguments about the meaning of a norm and contestation through actions that imply the existence of conflicting understandings of the meaning of a norm (Stimmer and Wisken 2019, 519-20). To analyze the AU's discursive contestation, we drew on a range of primary and secondary sources. We focused mainly on all official declarations made by the AU, especially by the Assembly of the AU and the AU Peace and Security Council, between 2008 (when the ICC Prosecutor applied for an arrest warrant against Al Bashir) and 2017 that directly addressed issues regarding the ICC. Such declarations, drawn from the official AU databases, were twenty-one in total.[10] To complement this focus on AU statements, this article also draws from media coverage between 2008 and 2017, including African and international sources, that included statements issued by the African state officials. The article also draws on secondary sources that trace the evolution of the controversy between the AU and the ICC. We analyzed the AU's discursive engagement, such

[10] See bibliography for full list of documents.

as making public statements, as well behavioral engagement, such as requesting deferral procedures, vis-à-vis these three ICC cases and unpacked the underlying normative postures, tracing how these positions and preferences varied over time and across cases. Doing so enabled us to shed richer light on how the AU approached the question of HoS immunity in different contexts.

Second, for the purposes of this analysis, the AU's position is treated as that of a collective actor. There are, of course, as many distinct views within the AU as there are member states, with these views exhibiting change over time. While treating the AU as a collective actor may indeed obscure the variance among the members, it more importantly accounts for the AU's intention to be seen as a coherent actor. Thus, rather than a limitation, this approach views the AU as it portrays itself – as a regional body that is greater than the sum of its parts. Beyond the scope of this article, future research can understand the normative content of contestation between states and the anti-impunity norm by applying this article's conceptual framework to the views of particular member states. Third, this article focuses on the different positions taken by the AU and, in doing so, keeps the ICC 'constant.' This is a methodological choice that enables focused analysis of the AU's position without commenting on the behavior of the ICC as an institution, including the Prosecutor's approach to the anti-impunity norm. This methodological choice reflects our aim to focus on the underlying norm of anti-impunity itself, rather than the present politics between the AU and the ICC.

Since the Al Bashir arrest warrant, the AU has pushed a strong anti-ICC narrative, arguing that the ICC is a neo-imperial institution with an anti-African bias (Gaeta and Labuda 2017, 141). Under pressure from the public as well as other actors to "do something" about the conflict in Darfur—which many were referring to as a genocide—the UN Security Council (UNSC) referred the situation in Darfur to the ICC in Resolution 1593 (2005) in March 2005, enabling the court to consider a situation of a state that was not party to the Rome Statute (Mills 2012, 414-415). In May 2007, pursuant to this referral, the ICC unveiled two arrest warrants, one of which was for a high-ranking Sudanese state official. In July 2008, the ICC Prosecutor requested that the ICC issue an arrest warrant for Al Bashir, which prompted the AU to call upon the UN Security Council to defer the investigation on the account that the warrant could "seriously undermine the ongoing efforts" to establish peace in Darfur (AU Peace and Security Council 2008, para. 9). The UNSC and the ICC's refusal to take these requests seriously angered the AU, resulting in its declaration of non-cooperation with the ICC's request for states

to assist in the surrender of Al Bashir based on the arrest warrant issued on March 4, 2009 (AU Summit of HoS 2009, para.10). Muammar Gaddafi, serving at the time as the chairperson of the AU, described the ICC as an "attempt by [the West] to re-colonise their former colonies," and a "practice of First World terrorism" (Vilmer 2016, 1321). Jean Ping, the chairperson of the AU Commission echoed this view, deploring the fact that the international community was pursuing the anti-impunity norm only in Africa "as if nothing were happening elsewhere—Iraq, Gaza, Colombia, or in the Caucuses" (ibid). From these statements, it can be gleaned that the accusation of neo-imperialism is, in effect, a demand for equality of accountability, in which the pursuit of anti-impunity is distributed equally and equitably across the international system marked by power imbalances and de facto inequality.

However, the details of the Al Bashir case suggest that the AU's key focus was not only on the claims of equality of accountability, but rather on the intersection between individual legal equality, sovereign state equality, and equality of accountability. In other words, it was not only a problem that anti-impunity efforts were targeting an African person, and an African state, but it was also that an African *HoS* could not enjoy his or her immunity from prosecution, traditionally protected under the sovereign equality of states. The de facto inequality of accountability was pushing the balance of the anti-impunity norm towards a strong interpretation of individual legal equality at the expense of sovereign equality.

The fact that the key issue in the AU's contestation was not necessarily the unequal application of anti-impunity *per se* can be inferred on one level from the fact that even at the height of the AU's contestation of Al Bashir's indictment, it continued to at least rhetorically concede that anti-impunity should be pursued in Darfur. For example, in July 2008, the AU Peace and Security Council then proposed an alternative means through which the anti-impunity norm could be realized, suggesting the formation of a High-Level Panel on Darfur that would submit recommendations on curtailing impunity and promoting reconciliation in Darfur (Naldi and Magliveras 2017, 120). Furthermore, the legal basis for the AU's non-cooperation declaration in 2009 was Article 98 of the Rome Statute which, as discussed in the previous section, raised controversy regarding the perceived abolition of official immunity by the anti-impunity norm. Irrespective of the ICC arrest warrants, the position of the AU has consistently been that as the sitting HoS, Al Bashir should enjoy the immunity from prosecution as a basis of customary international law (Hobbs 2015, 81-87).

The election of Uhuru Kenyatta and William Ruto in 2013 as President and Vice-President of Kenya respectively acted as a further catalyst for the AU's position against the curtailment of official immunity in the pursuit of anti-impunity. The 2007 Kenyan presidential elections saw the country erupt into political violence organized predominantly along ethnic lines. The violence officially came to an end with a power-sharing government between rival parties, with an agreement that stipulated that the post-election violence be investigated by an independent commission of inquiry (Murithi 2015, 78). Yet, the failure of the new government to establish a domestic accountability mechanism to address the post-election violence as stipulated by the commission prompted the ICC Prosecutor to request to open an investigation through his *proprio motu* powers, which was granted in March 2010 (Brown and Sriram 2012, 250).

The AU's position during this period between 2010-2011—nearly contemporaneous to its vociferous attack against the ICC as an neo-imperial institution in the context of the Al Bashir case—was to support the Kenyan government's efforts to contest the balance between the individual legal equality and sovereign state equality by arguing for a Kenyan national process to take precedence over the impending ICC trial. The Kenyan government itself at this stage did not directly contest the validity of the ICC in terms of its claims to equality of accountability. Even though the charged individuals included then-deputy Prime Minister Kenyatta and Minister of Agriculture Ruto, it urged for their full cooperation while the government deliberated the option of a domestic accountability process that would void the on-going ICC process (CICC 2011). The AU broadly reiterated the Kenyan government's position by supporting Kenya's decision in 2011 to file a request with the UNSC to defer the ICC activities in Kenya as a form of a guarantee that domestic proceedings, if pursued, will take precedence over the existing investigations and prosecutions of the ICC (Naldi and Magliveras 2015, 132; UNSC 2011). For instance, it adopted a decision stating that the AU "[s]upports and endorses Kenya's request for a deferral of the ICC investigations and prosecutions in relation to the 2008 post-election violence under Article 16 of the Rome Statute" to "allow for a National Mechanism [sic] to investigate and prosecute the cases [...]" (AU 2011, para. 6).

The election of Kenyatta and Ruto in March 2013, however, shifts the focus of the AU's contestation to the nexus between individual legal equality and equality of accountability. Kenyatta and Ruto, running as part of the new political coalition known as the 'Jubilee Alliance,' explicitly ran on an anti-ICC platform, framing the Court in terms of violating the principle of sovereign state equality. The two candidates had directly cast themselves as both

"victims" of the ICC's neo-imperial reach in Africa, as well as heroic "defenders of Kenya's sovereignty and independence against Western interference" (Lynch 2014, 106). Their victory resulted in a shift in the Kenyan government's position, which argued that given the ICC's inability to realize the anti-impunity norm's claim to equality of accountability, the Court could not demand the primacy of individual legal equality over sovereign state equality. In other words, the focus of the contestation became concentrated on whether high-level state officials *should* be tried by the ICC — particularly given the backdrop of accusations of anti-imperialism. Kenyatta, for example, appeared at the AU summit in Addis Ababa and stated that the "ICC has been reduced into a painfully farcical pantomime" that "stopped being the home of justice the day it became the toy of declining imperial powers" (Latiff 2012). At the same meeting, the AU passed two official declarations urging the UN Security Council to grant a deferral for the ICC proceedings regarding Kenya, particularly against the new Kenyan President, stating that continued ICC proceedings could "undermine the sovereignty, stability, and peace in [Kenya] and other Member States" (AU 2013). Legally, the AU and Kenya's position regarding the prosecution of Kenyatta and Ruto—now the sitting head of a state and his deputy—was different from Sudan's challenge to the ICC. While Al Bashir was the Head of a non-State Party, the fact that Kenya was a State Party to the Rome Statute meant that the AU could not directly claim that the Court had no jurisdiction over Kenyatta and Ruto. While nominally the request was therefore a stay of proceedings whilst Kenyatta and Ruto were in office due to security concerns, the dynamics of the AU-ICC contestation became more clearly focused on the political and normative arguments regarding the balance between individual legal equality and sovereign state equality in the anti-impunity norm.

Kenyan domestic actors became instrumental in focusing the AU's contestation against the ICC to this discussion between individual legal equality and sovereign state equality. In 2013, the Kenyan parliament passed a motion to withdraw from the Rome Statute (Vogt 2013). While President Kenyatta did not act upon the motion itself, this act by the Kenyan parliament was used to galvanize support for a motion for an *en masse* withdrawal from the Rome Statute at the AU Summit meeting in 2013 (Helfer and Showalter 2017, 17; Pizzi 2013). The motion itself failed due to disagreements within the AU's membership, but it was able to arrive at a consensus regarding the reinstatement of official immunity for HoS, recommending that States Parties should "propose relevant amendments to the Rome Statute" (AU 2013). This in turn further generated support for the adoption of the Malabo Protocol in 2014, which established a criminal chamber within the African Court of Justice and Human and Peoples' Rights. Clearly

presented as an alternative forum to implement the anti-impunity norm, the Malabo Protocol "guarantees the immunity for not only sitting HoS but also 'anybody acting or entitled to act in such capacity, or other senior officials based on their functions'" (Vilmer 2016, 1340).

The AU's focus on HoS immunity as a point of contention between individual legal equality and sovereign equality, rather than equality of accountability on its own, is further demonstrated by the AU's lack of response to the ICC's subsequent case against Laurent Gbagbo, former President of Côte d'Ivoire. Following the second round of the presidential elections in November 2010, both incumbent Gbagbo and challenger Alassane Ouattara claimed victory, sparking intense political violence. Gbagbo's claim was based on the Constitutional Council's results, while Ouattara's claim was based on the National Electoral Commission's results that were certified by the UN and recognized by most states. In December 2010, just a few days after the election results, Ouattara requested the ICC to intervene by issuing a confirmation of the Article 12(3) declaration Gbagbo first issued in 2003, thereby accepting the ICC's jurisdiction. After months of negotiations, the UN Security Council adopted Resolution 1975 in March 2011, reaffirming the UN peacekeeping force's mandate to use all necessary measures to protect civilians, including to prevent the use of heavy weaponry against civilians. Supporting the UN, French forces also provided crucial assistance to national security forces to arrest Gbagbo on April 11, 2011, thereby ending the acute political crisis. A few weeks later, on May 3, 2011, Ouattara issued a second re-confirmation of the Article 12(3) declaration. The ICC issued an arrest warrant for Gbagbo in November 2011, after which he was transferred to The Hague. Gbagbo's trial began in January 2016 and he was acquitted by Trial Chamber I in January 2019.

There are several reasons that the situation in Côte d'Ivoire could have prompted challenges against the balance between the anti-impunity norm's claims of equality of accountability, and therefore reiterate the accusations of neo-imperialism. Although the AU formally endorsed Ouattara's victory on December 9, 2010 and temporarily suspended Côte d'Ivoire, the disagreements within the AU made the AU's position towards Ouattara as legitimate victor increasingly more ambivalent over the next few months (Darracq 2011). Simultaneously, some AU leaders started to criticize the role France played in Gbagbo's removal, and therefore the de facto confirmation of Ouattara's victory, as another form of neo-imperial policy, with France unduly manipulating the internal affairs of its former colony. Indeed, the military operation by French forces in April 2011, which was crucial in leading to Gbagbo's arrest, was criticized by

various parties as enforcing regime change through military and judicial intervention. For example, Thabo Mbeki, in an op-ed after Gbagbo's arrest, argued that international interference is preventing the realization of equality of accountability in the pursuit of anti-impunity, asking "[h]ow many blatant abuses of power will Africa and the rest of the developing world experience before the vision of a democratic system of global governance is realized?" (Mbeki 2011).[11] Furthermore, Gbagbo himself was known for his long-held sovereigntist discourse, or *souverainisme*, which presents a strong version of the claim of sovereign state equality, "combin[ing] the legalistic exaltation of state sovereignty" with "a fierce anti-colonial nationalism" (Piccolino 2012, 1). Indeed, the 2002-2010 civil war that preceded the post-electoral crisis was described by Gbagbo and his supporters as the "'second war of independence' against an all-powerful France and its Western and African allies" (ibid). His *souverainisme* has long been particularly targeted at France, accused of enforcing its alleged pro-Ouattara bias through military intervention and assisting his transfer to the ICC. Gbagbo and his many supporters thus portray his arrest and trial as the unsurprising result of overly challenging France for so many years (Rosenberg 2017). This echoes the view advocated by the Sudanese President Al Bashir, who declared that the ICC "is a tool to terrorize countries that the West thinks are disobedient" (Interview 2009).

Nevertheless, there has been little to no public criticism of Gbagbo's transfer or trial nor any reference to Gbagbo in official statements by the AU. There was no mention of the ICC's trial of Gbagbo in any of the AU resolutions on the ICC between 2011 and 2017, during the time the AU's anti-ICC rhetoric gained momentum. Relatedly, there was no statement made following the acquittal of Gbagbo by ICC judges in January 2019. This lack of contestation of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* case suggests the significance of the issue of official immunity in the context of the anti-impunity norm. In other words, if the AU were coherently against the ICC's exacerbating of de facto inequality between states, especially when it is used as part of regime change, the contestation over Gbagbo's arrest and trial would arguably have been stronger. The AU's silence regarding Gbagbo's case at the ICC suggests its grievance is much narrower: when the ICC challenges sovereign immunity for sitting HoS, disrupting the balance between individual equality and sovereign state equality in

[11] Some commentators also argue that communication between the ICC Office of the Prosecutor and the Ouattara administration during the crisis indicates that the eventual ICC arrest warrant was a means for external powers to help extricate Gbagbo from the country, and as such constitutes neo-colonial overreach (Pigeaud 2017).

the implementation of the anti-impunity norm, rather than a singular accusation of the ICC's inability to uphold the underlying principle of equality of accountability within the structure of the anti-impunity norm.

Conclusions: Implications of the 'Equality Claims' Framework

This article examined the AU's contestation of the anti-impunity norm, specifically with regards to the issue of HoS immunity at the ICC. It adopted the tripartite conceptualization of norms into problems, values, and behaviors, and argued that the anti-impunity norm consists of three different values, expressed in terms of distinct but interlocking principles of equality—individual legal equality, sovereign equality of states, and equality of accountability. This conceptualization implied that contestation of the anti-impunity norm should not be seen as contestation between discrete norms, but contestation amongst different iterations of the anti-impunity norm itself. It further argued that the balance between the different principles of equality resulted in different normative significance for the behavioral prescription of sovereign immunity.

This 'equality claims' framework reveals the variance in not only the strategies of AU's contestation but also in the substantive values that are the subject of contestation. Indeed, through the three cases, the article demonstrates how contestation surrounding the ICC's removal of official immunity—understood as part of the behavioral outcome of the problem of impunity—can result from different interpretations of claims to equality. The AU's contestation of the Al Bashir case did not focus solely on the question of equality of accountability (whether criminal justice is dispensed equitably given the unequal distribution of power in the international system), but rather on the intersection of equality of accountability *and* individual legal accountability (all individuals can be held equally responsible under international law) *and* sovereign equality of states (all states are juridically equal under international law). Put differently, the issue was not that the ICC was prosecuting an African, but that an African HoS was not being afforded the same immunity from prosecution that powerful HoS may be afforded, both traditionally but also in practice. The same efforts by the ICC to prosecute a HoS became problematic in the case of Kenya not only because of allegations that the ICC was targeting a HoS of a weaker country, reflecting global power imbalances, but also because of disagreements as to whether or not the prosecution of individuals should be done by a domestic or international court. Furthermore, the two cases demonstrate that the meaning of AU's contestation evolved over time, moving from emphasis

on the balance between individual legal equality and sovereign state equality to the effect that the promotion of individual equality through criminal prosecution, at the expense of prioritizing sovereign equality, can have on exacerbating the de facto inequality between states in the international system. Finally, the AU's focus on the balance between individual legal equality and sovereign equality, rather than equality of accountability on its own, is arguably further demonstrated by the AU's silence in response to the ICC's case against Laurent Gbagbo. While Gbagbo was a former HoS at the time of the ICC arrest warrant against him, the AU's lack of contestation in this case puts into sharper relief the variance in the value claims underpinning AU's contestation, especially given his symbolic stature as an anti-colonial, pan-African leader and the existence of some internal debates within the AU regarding his ousting. In sum, the three cases show that, while the claim to equality of accountability remains highly relevant for the AU in its evaluation of the legitimacy and normative authority of the anti-impunity norm, it is in the narrower context of the balance between individual legal equality and sovereign state equality that the unequal application of accountability becomes a lightening-rod issue of contestation.

The theoretical implications arising from this variation highlights two directions of further research on the anti-impunity norm. The variation of normative meaning of the AU's contestation suggests how contestation of international norms can lead to a diverse array of outcomes. While the literature on norm contestation and change has increased, scholarship generally treats the outcomes of contestation in terms of absolutes and does not systematically unpack the various "endings" of norm contestation (Stimmer 2019, 270-271). Contestation is seen as a damaging process that either weakens the strength or effectiveness of norms (Katzenstein 1996; McKeown 2009; Sanders 2018; Panke and Petersohn 2012; Kutz 2014; Birdsall 2016; Vinjamuri 2018) or leads to replacement by a competing norm (Sandholtz 2019), or is a necessary part of norm application that results in increased resilience (Badescu and Weiss 2010; Welsh 2013; Wiener 2014).

Such dichotomous expectations are echoed in the scholarship on the anti-impunity norm as well, suggesting that the outcomes of the contestation against the prosecution of HoS will either damage or strengthen the norm itself. Mills and Bloomfield, for instance, argue that the AU and African states' strong resistance to the ICC and its cases against Al Bashir and Kenyatta has led to the weakening of the anti-impunity norm itself, implying that the ability to prosecute HoS or state officials constitutes a critical aspect of the anti-impunity norm (2018). Boehme

argues that, by making the non-arrest of an ICC suspect politically acceptable, the AU's contestation has strengthened the non-cooperation norm and weakened the accountability norm (2017). In a similar vein, García Iommi suggests that the ICC and the anti-impunity norm itself face a crisis of legitimacy, in part due to the priority given to alternative fundamental norms of sovereignty, peace, anti-colonialism, and pan-African solidarity (2019, 106). On the other hand, Simmons and Jo present a more optimistic prognosis, arguing that the anti-impunity norm is generally robust based on an assessment of its support from a wide variety of actors, ranging from states, intergovernmental organizations, ordinary publics, rebel groups, and nongovernmental organizations. Highlighting, as do Deitelhoff and Zimmerman (2013; 2019), that the type of contestation matters in assessing its effect on norm robustness, they suggest that the debate over HoS immunity is a disagreement about how to implement the anti-impunity norm and not about the idea that atrocity crimes are legitimate concerns of the international community that should be prosecuted (2019, 31). Drawing on the distinction between 'applicatory' and 'justificatory' contestation, Bower similarly suggests that contestation over HoS immunity is at the level of application and thus does not lead to an 'erosion' of the anti-impunity norm, even if it may have stalled its further expansion (2019).

Conceptualizing the anti-impunity norm as having a composite structure, comprised of a variety of value claims (articulated in terms of principles of equality in this article), problem (impunity), and behaviors (which includes, but is not limited to, the derogation of HoS immunity) that can be contested separately and bundled together in different configurations, moves us beyond this absolute understanding of norm development and contestation and allows us to consider a plurality of alternative 'futures' of the anti-impunity norm. Thinking of plural futures also better captures the inherent difficulties and nuanced 'balancing act' that has always underpinned the anti-impunity norm, as demonstrated by the 'equality claims' framework. For example, contestation between the AU and the ICC on behavioral claim of prosecuting HoS or state officials may result in a form of "norm recognition" (Stimmer 2019, 272), if the AU and the ICC are in agreement with how the underlying value of equality of accountability is reflected in the anti-impunity norm overall. In policy terms, this could be reflected in the ICC's move towards prosecuting more situations pertaining to more powerful states, such as the ICC Prosecutor's current work on the Afghanistan and Palestine situations, whilst perhaps various stakeholders will de-emphasize the prosecution of high-ranking state officials. Serious and systematic consideration of such alternative versions of anti-impunity, particularly at the ICC, is a significant research agenda for both theoretical and policy development. As Arcudi (2019)

argues, the 'Africa problem' of the ICC is in part a result of successive denials of norm modification, spurring a greater debate about the validity of anti-impunity itself.

Conversely, even if actors re-establish agreement on the behavioral outcome of prosecuting HoS—for example, if the AU and African states no longer take concrete action to prevent HoS prosecutions and rhetorically reaffirm the principle that all individuals are equal subjects of ICL, regardless of their official capacity—if the disagreement on the relative importance of various equality claims persists, we can expect to see a form of "norm neglect" (Stimmer 2019, 272). In other words, the anti-impunity norm would continue to 'exist' in its institutionalized form, but perhaps would require additional justifications by actors each time the possibility of an ICC prosecution is raised. It could be hypothesized in this scenario that justifications raised by actors will not take the form of an 'applicatory' contestation, but rather a more far-reaching discussion on what the appropriate balance of different equality claims should be in addressing the problem of impunity.

Is impunity a problem because it primarily violates the principle that individuals are equal in the eyes of the law, including international law? Or is this particular instance of impunity more egregious because it pertains to a more powerful actor, and thus violates the principle of equality of accountability? The 'equality claims' framework helps us understand the competing interpretations of justice—which remain politically, normatively, and emotionally persuasive as Clarke argues (2019). It also helps us imagine plural futures of the anti-impunity norm in further research, which seems particularly pertinent now as liberal international norms generally are facing increased pushback.

Furthermore, the 'equality claims' framework presents one way to systematically evaluate the *normativity* of these plural futures. Constructivist IR literature has questioned the division between the consideration of substantive ethic (i.e. the normativity of a norm) and the study of how norms are implemented, diffused, and contested (Ralph 2018, 177; see also Erskine 2012; Price and Reus-Smit 1998). Ralph, for example, suggests that from the perspective of pragmatist ethics, norms should be taken as a "hypothesis" for Constructivist IR theory to evaluate how well the 'meaning-in-use' of the norm generates actions that ameliorate "lived social problems" (2018, 173). While such evaluation is outside the scope of this article, by separating the underlying values and the behavioral outcome to the problem, the 'equality claims' framework presents a way to consider the normative appropriateness of different

configurations of values and behaviors in relation the problem of impunity. Put more explicitly, considering the AU-ICC contestation using the 'equality claims' framework helps us ask a key question for the future of international criminal justice: what is, and what *should be*, the relationship between HoS immunity and the anti-impunity norm itself?

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