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ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Impunity thick and thin: The International Criminal Court in the search for equality

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Abstract

In discussions of impunity, such as the one surrounding the International Criminal Court, the concept of impunity itself has remained relatively unattended. Examining the concept more closely reveals that we use it in both thin and thick senses, the thin relating to a concern about the values of punishment and the criminal law and the thick to a broader notion of equality, of which crimes being punished (equally) is one aspect, but not the totality of the issue. Only a thick version of impunity captures all that makes it a problem we care greatly about. According to this conception, what makes impunity a problem is primarily a failure to ensure equality before the law. This can show up in two ways. First, when a crime is not prosecuted or punished because the offender belongs to a group of people who are beyond the reach of the law. Second, when a crime is not prosecuted or punished because the victim belongs to a group of people deemed less important in the eyes the law. Institutions and courts of law end impunity, first and foremost, by restoring the experience of equality against privilege and brute power. This sets an important challenge to the International Criminal Court, because while the Court may serve many important values, its current institutional formation and its political context seem to undermine its capacity to contribute to end impunity in the thicker sense.

Keywords: equality before the law; impunity; International Criminal Court; rule of law; selectivity

1. Introduction

The International Criminal Court (ICC or the Court), like any other institution of justice, is far from ideal, and many objections to both its legitimacy and its capacity to achieve its goals have been raised over time.[1] Some defend the work of the Court with the claim that, despite its faults, it derives its legitimacy from serving the higher purpose of 'putting an end to impunity'.[2] Others counter that the enforcement of an 'anti-impunity norm' has not dispelled the Court's crisis

[1]See, for example, A. Anghie, 'The evolution of international law: Colonial and postcolonial realities', (2006) 27 *Third World Quarterly* 5, at 739; G. Simpson, *Law, War and Crime* Polity (2007); and generally the works contained in C. Schwöbel (ed.), *Critical approaches to international criminal law: an introduction* (2014). See also M. Langer, 'The Archipelago and the Wheel. The Universal Jurisdiction and the International Criminal Court Regimes', in M. Minow, C. C. True-Frost and A. Whiting (eds.), *The First Global Prosecutor: Promise and Constraints* (2015), at 216.

[2]M. Cherif Bassiouni, 'Searching for peace and achieving justice: The need for accountability', (1996) 59 *Law and Contemporary Problems*, at 9; M. C. Bassiouni, 'Combating Impunity for International Crimes', (2000) 71 *University of Colorado Law Review*, at 409; K. Hessler, 'State Sovereignty as an Obstacle to International Criminal Law', in L. May and Z. Hoskins (eds.), *International Criminal Law and Philosophy* (2010), at 39; D. Luban, 'Fairness to Rightness', *Georgetown Public Law Research Paper No. 1154117*; R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005); W. Lee, 'International Crimes and Universal Jurisdiction', in May and Hoskins, ibid., at 30.

of legitimacy since it has come at the cost of other values such as equality.[3] While it may be too soon to pass judgment on the Court's overall ability to contribute to ending impunity of human rights violations, the possibility of moving forward in a conversation about this capacity partly depends on getting a better sense of what exactly we mean by impunity and why we care so much about ending it.[4]

As Mark Drumbl has argued, there is a striking contrast between the pervasiveness with which the term impunity is used in political and scholarly discourse, and its low levels of theorization.[5] In this article, I join recent efforts to overcome this neglect and I offer some considerations about what we mean by 'impunity', why we care about ending it and how we can best achieve this purpose.[6] In the first two sections I argue that we use this concept in both thin and thick senses, the thin relating to a concern about the values of punishment and the criminal law and the thick to a broader notion of equality, of which crimes being punished (equally) is one aspect but not the totality of the issue. In a thick conception, our concern with impunity is primarily about equality before the law. As a consequence, punishing need not always play a primary role in a court's effort to end this kind of impunity. I will argue that this is the kind of impunity we care most about.

In the third section of the article, I will claim that courts of law end thick impunity, first and foremost, by restoring the experience of equality before the law against privilege and brute power. This sets an important challenge to the ICC. While most may believe that punishing some crimes is better than punishing none, and while the Court may serve important values other than ending impunity,[7] perhaps, due to its current institutional formation and its political context, the Court cannot yet be an institution that contributes to ending impunity in the thicker sense.

2. Thin impunity

It is uncontroversial that impunity points to a problem of a political and legal order having to do with failing to punish or with providing immunity from punishment, but there are at least two different ways to understand why this is a problem. First, impunity may be about failure to promote the values of punishment or failure to pursue the goals that punishment is supposed to advance. I will call this 'thin' impunity. Second, impunity could refer also, and perhaps more importantly, to a problem of political justice, i.e., a lack of equality before the law. I will call this second conception 'thick' impunity.

In thin impunity, unpunished or unprosecuted crime is a problem for a legal and political order because it undermines the values of punishment or the criminal law. For those who believe that punishment is a good in and on itself, unpunished crime can signify a political failure, because we miss out on the intrinsic good that punishment represents. In some versions of retributive justice,

[3]Both equality among individuals and among states. See S. Nouwen, 'Legal Equality on Trial: Sovereigns and Individuals Before the International Criminal Court', (2012) 43 *Netherlands Yearbook of International Law*, at 151.

[4]According to George Fletcher the word comes from the Spanish *impunidad*, which became an important political concept in the 1980's during the government of President Raúl Alfonsín in Argentina. G. P. Fletcher, 'Justice and fairness in the protection of crime victims', (2005) 9 *Lewis & Clark Law Review*, at 556.

[5]M. Drumbl, 'Impunities', in K. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020), at 238.

[6]M. Pensky, 'Two cheers for the impunity norm', (2016) 42 *Philosophy & Social Criticism* 4–5, at 487; 'Impunity: a philosophical analysis', in M. Bergsmo and E. J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (2019), at 241; T. Reeves, 'Impunity and Hope', (2019) 32 *Ratio Juris* 4, at 415. Regarding the idea that it may be too soon to pass judgment on the Court see D. Luban, 'After the honeymoon: reflections on the current state of international criminal justice', (2013) 11 *Journal of International Criminal Justice* 3, at 505.

[7]As I will later argue, bringing equality to bear on the problem of impunity shows that ending impunity and serving the ends of 'punishment' can be distinguished as two separate functions, and we could at least identify a third function of the Court as that of helping to restore peace and security. See, in this sense, F. Jessberger and J. Geneuss, 'The many faces of the International Criminal Court', (2012) 10 *Journal of International Criminal Justice* 5, at 1081.

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for example, this intrinsic good consists in giving offenders what they deserve.[8] For instrumental theories of punishment, the importance of thin impunity is determined by the value we attribute to punishment as a means of achieving external goods such as deterring crimes, rehabilitating offenders, educating our communities, etc.[9] For example, classical defenders of utilitarian theories of punishment such as Beccaria and Bentham worried about unpunished crime because they thought that it was the certainty of punishment rather than its severity that most effectively deterred persons from breaking the law.[10]

A thin understanding of impunity does not need to focus solely on unpunished crime but could also refer, more broadly, to a failure to bring people to answer before a criminal court.[11] In this broader understanding, the concern with impunity is based on the importance we attach to pursuing the values of the criminal law more generally and, for some, these do not need to depend exclusively on punishment but can also potentially be achieved in other ways such as the criminal trial.[12]

Whether we take a broad or narrow approach, a concern with the values of punishment (or the criminal law more generally) delivers a thin conception of impunity because, while it may cover important uses of the term and provide important reasons for being concerned about unpunished or unprosecuted crime, it does not fully explain why we *sometimes* care so much about impunity. In reality, crimes go unpunished all the time.[13] While this might generally undermine the pursuit of the goals of punishment or the criminal law, it only raises concern in certain circumstances.[14]

[8]For example, M. S. Moore, *Placing Blame: A Theory of the Criminal Law* (1997), at 154, 661. In some versions of retribution, lack of punishment is always a problem as communities are understood as owing punishment to the offenders as a way of recognizing their agency and capacity of being responsible subjects. See G. W. F. Hegel, *Elements of the Philosophy of Right* (1991), at 126; M. Tunick, *Hegel's Political Philosophy: Interpreting the Practice of Legal Punishment* (2014); J. G. Murphy, 'Marxism and Retribution', (1973) 2 *Philosophy and Public Affairs*, at 217. In a somewhat different formulation, see also H. Morris, *Persons and punishment*, (1968) 52(4) *The Monist*, at 475–501. George Fletcher has also argued that the state's legitimacy demands that it does not 'tolerate criminality that it has the capacity to punish' or else it becomes complicit in the crime: Fletcher, *supra* note 4, at 555. Other versions of retributive justice claim that desert is not enough to ground a duty to punish, but they would still see intrinsic value in the practice. See in this sense, D. Husak, 'Why Punish the Deserving?', (1992) 26 *Noûs,* at 447; A. Duff, *Punishment, Communication and Community* (2001), at 175.

[9]See, for example, K. Musalo, E. Pellegrin and S. Shawn Roberts, 'Crimes without punishment: Violence against women in Guatemala', (2010) 21 *Hastings Women's Law Journal*, at 161; P. Nadanovsky et al., 'Homicide and impunity: an ecological analysis at state level in Brazil', (2009) 43 *Revista de Saúde Pública*, at 733.

[10]C. Beccaria, *On Crimes and Punishments* (1986); J. Bentham, *Tratados de Legislación Civil y Penal: Obra Extractada de los Manuscritos del señor Jeremias Bentham* (1821). See also R. A. Posner, 'An economic theory of the criminal law', (1985) 85 *Columbia Law Review* 6, at 1193.

[11]Pensky distinguishes between narrow and a broad conception of impunity, where the first is about a failure to punish while the second is about a lack of accountability. See Pensky (2019), *supra* note 6, at 249.

[12]Ibid., at 263. Another dimension of impunity which I do not have the space to analyse here is what Antony Duff has called a pre-legal notion of impunity, where what is at issue is not a failure to punish or to call to account through the criminal law, but rather the more fundamental concern of having a system that does not let moral wrongdoers 'get away' with their wrongs. See A. Duff, *The Realm of Criminal Law* (2018), at 220.

[13]Beyond potential biases, every criminal law system has economic and even technological limitations that would make it impossible to aspire to punish most of the crimes that are committed. Studies suggest that around 40% of crimes might not even be reported, and from those which are reported only a fraction will be investigated, prosecuted and brought to trial. See T. L. Penney, 'Dark Figure of Crime (Problems of Estimation)', in Blackwell (ed.), *The Encyclopedia of Criminology and Criminal Justice* (2014).

[14]Studies show that the public perception of the relation between crime and punishment is more complex, and less punitive, than what the news media often represent. See R. Gargarella, *Castigar al Prójimo* (2016), at 189; J. V. Roberts, 'Public Opinion and Sentencing Policy', in S. Rex and M. Tonry (eds.), *Reform and Punishment* (2012), at 18; G. Johnstone, 'Penal policy making: Elitist, populist or participatory?', (2000) 2 *Punishment & Society*, at 161; J. V. Roberts and R. Hastings, 'Public Opinion and Crime Prevention: A Review of International Trends', in B. G. Welsh and D. P. Farrington (eds.), *The Oxford Handbook of Crime Prevention* (2012), at 490. The public's support for punitive policies may not lie on a punitive instinct but rather it is the way in which the fears and anxieties of contemporary life are channeled by our political institutions. D. Garland, *The Culture of Control* (2001), at 141.

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The fact that we tolerate unpunished or unprosecuted crime might suggest that the issue with impunity, understood as a failure to pursue the goods of punishment or the criminal law, is a matter of degree. In this view, the fact that there is a gap of unpunished or unprosecuted crime will not raise an important problem for a legal order as long as there is a *sufficient* degree of punishment or prosecution for attaining punishment's goals.[15] But since we lack knowledge about the ways in which punishment can pursue any of its stated purposes – let alone the degree of *sufficient* punishment necessary for it to do so – it is hard to believe that focusing on the pursuit of the values of punishment will tell us why sometimes we care so much about impunity.[16] Moreover, it would be perfectly appropriate for someone to be troubled by impunity and, at the same time, be sceptical about the values of punishment or the criminal law. There is nothing wrong, for example, in claiming that the conditions for fair or useful punishment hardly obtain in the United States today, and at the same time argue that there is a very serious problem of impunity regarding the killing of innocent black men.[17] This suggests that the reason we sometimes care so much about impunity may not be directly related to the values we attribute to punishment or the criminal law. In my view, as I will now argue, we care greatly about impunity when it points to a failure in equality before the law.

3. Thick impunity

In thick impunity, the concern is not primarily with the values of punishment but with equality before the law. In this understanding, a gap of unpunished or unprosecuted crime is particularly troubling when, beyond the costs of the lack of punishment itself, the reason that explains the gap points to a serious failure in equality before the law. This failure can show up in two ways. First, there is a problem of thick impunity when a crime is not prosecuted or punished because the offender belongs to a group of people who are above the reach of the law. This is the sense, for example, in which impunity is discussed in the context of white-collar crime. Here, the concern is not with the importance of punishing these crimes as much as with the fact that certain social groups or individuals are rarely prosecuted for the crimes they commit because they have greater power than common offenders.[18] The outrage created by the impunity of white-collar crime can

[15]See, for example, Husak, *supra* note 8, at 447.

[16]Studies on the efficacy of punishment, mostly focused on deterrence and recidivism, show that efficacy is not easy to assess. See, for example, C. Marie, A. N. Doob and F. E. Zimring. 'Proposition 8 and crime rates in California: The case of the disappearing deterrent', (2006) 5 *Criminology & Public Policy* 3, at 417. M. Tonry, 'Learning from the limitations of deterrence research', (2008) 37 *Crime and Justice* 1, at 279; A. Chalfin and J. McCrary, 'Criminal deterrence: A review of the literature', (2017) 55 *Journal of Economic Literature* 1, at 5; R. Apel and D. S. Nagin, 'General deterrence: A review of recent evidence', (2011) 4 *Crime and Public Policy*, at 411.

[17]Most offenders have suffered such levels of social, political, and economic exclusion that punishing them is progressively seen as morally and politically dubious. See S. Buss, 'Justified Wrongdoing', (1997) 31 *Noûs,* at 337; A. Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial', (2010) 23(2) *Ratio*, at 123; S. P. Garvey, 'Injustice, Authority, and the Criminal Law', in A. Sarat (ed.), *The Punitive Imagination* (2015), at 42–81; A. von Hirsch, *Doing Justice: The Choice of Punishments* (1976); R. Lorca, 'Punishing the Poor and the Limits of Legality', *Law, Culture and the Humanities* (2018); T. Shelby, 'Justice, deviance, and the dark ghetto', (2007) 35 *Philosophy & Public Affairs* 2, at 126; M. Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (1996); W. J. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1996); G. Watson, 'Responsibility and the Limits of Evil', in his *Agency and Answerability: Selected Essays* (2004), at 219.

[18]See E. H. Sutherland, 'White-Collar Criminality', (1940) 5 *American Sociological Review* 1, at 1. On the criminal law's bias against the poor see, for example, I. R. Taylor, P. Walton and J. Young, *The New Criminology* (1973); L. Wacquant, *Punishing the Poor* (2009); L. Wacquant, *Prisons of Poverty* (2009); J. H. Reiman, *The Rich Get Richer and the Poor Get Prison* (1995); R. G. Shelden, *Controlling the Dangerous Classes: A Critical Introduction to the History of Criminal Justice* (2001). See also M. Alexander, *The New Jim Crow* (2012) and B. Western, *Punishment and Inequality in America* (2006).

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only be fully understood when the charge of impunity includes the perception that some groups are beyond the reach of the law.[19]

Second, problems of thick impunity also arise when crimes are not prosecuted or punished because their victims belong to a group of people deemed less important in the eyes of the law. Talk about impunity here entails discrimination through the legal practice of failing to punish or prosecute certain crimes, such that the law in action creates groups of second-class citizens. One example is the racial bias with which self-defence is applied in some jurisdictions;[20] another is the indifference that the law has sometimes shown regarding violence against women, sexual or otherwise.[21] Here, the failure of political equality is not determined by the fact that the offender is *beyond* the reach of the law but rather by the fact that the victim does not count as an equal and has fallen *below* its reach.

We care deeply about thick impunity, because the fact that some individuals are beyond or below the reach of the law upsets both our ideal of legality as well as the experience of living under a rule of law.[22] No matter how contested our ideals of legality and the rule of law may be, a minimal degree of equality before the law is a basic threshold for both.[23] Failures in equality before the law show up in many different areas, and all are deeply problematic from the point of view of honoring basic conditions of the rule of law. Inequality before the *criminal* law, however, is the most concerning because it entails immunity from or lack of protection by an area of the law, which is supposed to contain the most basic expectations regarding our social behaviour. We strongly expect that even the most privileged members of our communities abide by it and that even the most neglected members are protected by it.[24] When this expectation is broken, we face an urgent political problem which is distinct from the problem that a gap of unpunished crime may create in terms of undermining the more specific ends of punishment or the criminal law.

Bringing equality to bear on the issue of impunity helps us understand why we may be sceptical about the values of punishment or the criminal law and still be troubled by thick impunity, because what is at stake here is not (just) the values of criminal law or punishment but the experience of living in a social and political order which is committed to the idea that no one is above or below the reach of the law. Being ruled by law, and not by the power of particular individuals

[19]Social movements like the Occupy Wall Street movement which protested against income inequality, tend to be triggered by cases of corruption and the sense that corporations and certain social groups benefit from a privileged treatment by the government and the law. Our modern conception of legality and the ideal of living under a rule of law requires levels of regularity and impartiality that do not seem to be substantiated in these cases. See, in this sense, J. Shklar, *Legalism* (1986), at 109, 113–18; J. Rawls, *A Theory of Justice* (2005), at 236; J. Waldron, 'The Concept and the Rule of Law', (2008–2009) 43 *Georgia Law Review* 1.

[20]S. P. Garvey, 'Self-Defense and the Mistaken Racist', (2008) *New Criminal Law Review* 1, at 119.

[21]See, for example, C. A. MacKinnon, 'Reflections on sex equality under law', (1991) 100 *Yale Law Journal*, at 1281; S. Estrich, 'Rape', (1986–1985) 95 *Yale Law Journal*, at 1087; K. Musalo, E. Pellegrin and S. S. Roberts, 'Crimes without Punishment: Violence against Women in Guatemala', (2010) 21 *Hastings Women's Law Journal* 161–222. An interesting related debate has also taken place at the global level around the progressive recognition of rape as a war crime. See C. MacKinnon, 'Rape, genocide, and women's human rights', (1994) 17 *Harvard Women's Law Journal* 5; R. Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?, (2002) 13 *European Journal of International Law*, at 697.

[22]Shklar, *supra* note 19, at 108; Rawls, *supra* note 19, at 236–9; Waldron, *supra* note 19.

[23]While equality in the application of the laws may come in different degrees, it grounds the expectation that courts be seen as applying rules with considerable levels of impartiality Shklar, ibid., at 12–13, 108.

[24]In a liberal imagination, criminal law is aimed at regulating behaviours that constitute the most basic normative expectations regarding our public social interactions. See A. Duff, 'Responsibility, Citizenship, and Criminal Law', in A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law* (2013), at 125–48; M. D. Dubber, 'Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law', in A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law* (2013), at 84–106; A. Ristroph, 'Responsibility for the Criminal Law', in A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law* (2013), at 107–23.

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(or groups) is a fundamental political expectation for us today, perhaps the only way to experience ourselves as being free.[25] A thin conception of impunity cannot capture this.

Bringing equality to bear on the issue of impunity also provides a perspective to assess the role and limits of the criminal law as a means to address it. If a failure in equality before the law is an important part of what triggers thick impunity, it is not clear that the criminal law will always be the best means to address it. Consider an example: The racial disparity in the application of the laws of self-defence in the United States has created a serious problem of impunity over the killing of innocent black men which has mobilized academics, social, and political movements alike.[26] While the issue of impunity here is clearly *triggered* by a failure to punish and prosecute lethal attacks committed against innocent black men, it matters to us greatly *because* this failure shows that the law, instead of applying equally to everyone, has accommodated to the logic of racism, i.e., an ideology and practice where some lives are treated as less important than others.[27] Distinguishing thick and thin senses of impunity allows us to see that while the 'rallying cry' against the impunity of the killing of innocent black men may be a demand for punishment (thin impunity) the real concern that drives the movement is a demand for equality (thick impunity). When we focus on racism as a fundamental part of this problem of impunity, the most appropriate way of addressing it may not be through the criminal law or punishment. Surely, if we value punishment, we will aim to apply self-defence more strictly in these cases and make sure more of these killings are punished. However, it may be equally appropriate to choose alternative ways to address the more demanding problem of racism that is at the background of the gap of impunity here. Some argue, in fact, that addressing the problem of racism requires that we shrink rather than expand the scope of our criminal law institutions.[28]

4. Impunity, courts of law, and the ICC

The lack of sufficient theoretical consideration of the concept of impunity, and our failure to distinguish more precisely its thick and thin versions, has confused the issues surrounding the ways in which courts of law, and particularly the ICC, might best operate to overcome the kind of impunity we care most about. If our concern is with ending thick impunity, courts of law contribute to ending it by applying the criminal law in such a way as to restore or enhance the experience of equality before the law when it is threatened by abuses of power or patterns of discrimination. Courts of law can do this when they have the institutional and political capacity

[25]See Rawls, *supra* note 19, at 239–43. Montesquieu's main reason to defend the importance of separating legislative, judicial, and executive power was precisely to avoid the existence of an agency that was beyond the reach of the law: C. de Montesquieu, *The Spirit of the Laws* (1989), at 156. Indeed, Hobbes's refusal to accept the idea that the sovereign could or should be ruled by the civil law, exposed him to the charge of defending Absolutism. See T. Hobbes, *Leviathan*, (1994), at 213; J. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', (2011) 22 *European Journal of International Law* 2, at 317; J. Waldron, 'Is the rule of law an essentially contested concept (in Florida)?', in J. Waldron, *The Rule of Law and the Separation of Powers* (2017), at 157–8; J. Waldron, 'Why law—Efficacy, freedom, or fidelity?', (1994) 13 *Law and Philosophy* 3, at 259.

[26]Garvey, *supra* note 20; F. Zimring, *When police kill* (2017). Some of the most important social movements connected to this are Critical Resistance, www.criticalresistance.org; Black Lives Matter, www.blacklivesmatter.com/about/; Let Us Breathe Collective, www.letusbreathecollective.com; Transform Harm, www.transformharm.org; Bay Area Transformative Justice Collective, www.batjc.wordpress.com, among others.

[27]According to Ruth Wilson Gilmore, racism is 'the production and exploitation of group-differentiated vulnerability to premature death'. See R. W. Gilmore, 'Golden gulag: Prisons, surplus, crisis, and opposition in globalizing California', (2007) 21 *University of California Press*, at 28.

[28]Contemporary abolitionists argue that to restore the dignity and equality of those who are deemed less important by the law, we need to limit the reach of the punitive power of the state, as the criminal law helps in creating subordination among members of a community and the perception that there are people more dangerous and less important than others. See A. Akbar, 'An abolitionist horizon for police (reform)', (2020) *California Law Review* 108; A. Davis, *Abolition democracy: Beyond empire, prisons, and torture* (2011).

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to adjudicate the criminal law equally with respect to any participant in a legal order, despite political, social or economic inequalities. This is, of course, a matter of degree and it is a task which will hardly ever be performed in an ideal way.

When courts contribute to creating the experience of equality before the law they help to sustain a context of legality as opposed to being ruled by bare power because, while law and power are deeply entangled, they are not the same.[29] Legal institutions must seek to constrain power by embodying the aspiration of applying the laws equally and impartially to all of their subjects.[30] Power and politics have no need to show such aspirations,[31] which is partly why ending impunity is such a relevant task for a legal order to constitute and sustain itself through time. If criminal law has accommodated to power and shows no commitment to equality and impartiality, law risks becoming nothing more than a façade for bare facticity.[32]

Such a connection between ending impunity and creating a context of legality is clearly visible in international criminal law where the fight against impunity has been to a great extent understood, in terms proposed by Paul Kahn, as an effort to replace the language of power with the language of law.[33] The driving force for the creation of the ICC was not just the belief that criminal law could deter international crimes, express condemnation or give offenders what they deserve, but also that setting up a permanent institution such as the ICC would help create a context where human rights are not vulnerable to the whims of power, but protected by legal rules applying equally to all.[34]

Since the ability of the Court to end impunity depends largely on its capacity to address problems of equality before the law, the high levels of selectivity that have so far characterized its workings appear the most concerning obstacle to this function. Legal, structural and political constraints have pushed the Office of the Prosecutor to act in highly selective ways, prosecuting primarily those who Máximo Langer has called low-cost defendants, and sometimes, as Asad Kiyani has powerfully argued, discriminating between groups of offenders on the basis of their identity.[35]

It is important to note again that selectivity need not always be a problem. All systems of criminal justice act selectively because they all have legal, political, economic and even technological constraints that prevent them from investigating and judging all crimes under their jurisdiction.[36] Courts select in ways that do not undermine the experience of being equal before the law when the selection of cases can be seen as based on legal merit and framed by laws that sustain the idea that all legal subjects are equal before the law.

[29]As Robert Cover argued, we have reason to prefer to be ruled by law, because even if law will deploy important amounts of violence, it is far better than violence without law, R. M. Cover, 'Violence and the Word', (1986) 95 *Yale Law Journal* 1601–29; Cover, 'Foreword: Nomos and narrative', (1983) 97 *Harvard Law Review*, at 4; see also G. Simpson, *Law, War and Crime* (2007).

[30]Shklar, *supra* note 19, at 109; E. P. Thompson, *Whigs and Hunters* (1977), 258–69. Also see in this sense J. Waldron, 'Does Law Promise Justice', (2000) 17 *Georgia State University Law Review*, at 759.

[31]Shklar, ibid., at 111–23.

[32]Regarding the idea that law can be distinguished to bare facticity because of its aspiration to show validity, see J. Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (2015).

[33]P. W. Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', (2000) 1 *Chicago Journal of International Law*, at 1.

[34]D. Luban, 'After the honeymoon: reflections on the current state of international criminal justice', (2013) 11 *Journal of International Criminal Justice*, at 505.

[35]M. Langer, 'The Diplomacy of Universal Jurisdiction', (2011) *American Journal of International Law* 1–49; A. Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity', (2016) 14 *Journal of International Criminal Justice*, at 939.

[36]See *supra* note 13.

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Like any other Court, the ICC's process of selection is determined by a series of constraints which operate at different stages.[37] To begin, there is a selection of which situations are going to be brought to the Court's attention and subjected to a preliminary examination and investigation.[38] From these situations, the Office of the Prosecutor will need to further select and prioritize cases for investigation and prosecution.[39] In order to select among both situations and cases, the Court has an important degree of independence which is regulated by guidelines that enable it to select in ways that does not undermine a commitment against impunity.

In deciding whether to pursue an investigation, the central criterion guiding prosecutorial discretion is gravity,[40] and the Court has made important efforts to specify how to measure this criterion.[41] In practice, however, this process of selection is not only determined by the exercise of the Court's own determinations of merit, but also by limitations of what the Court can actually do. Some of these limitations are internal to the Court, others imposed by other institutions or agents. These internal and external constraints are different in nature. Some are legal, some have to do with financial, human or technological resources, while others are of a political nature, such as those related to feasibility.

Given the complexity of the ways in which selectivity operates in international criminal law, and considering that the process has been widely studied, in what follows I will single out a few legal and political constraints that seem most challenging to the Court's ability to end (thick) impunity.

4.1 Legal selectivity

By legal design, the Court cannot and should not aspire to investigate, prosecute and punish all those cases in which a relevant gap of impunity is created or widened. The Court is limited by the rules that establish its jurisdiction, as well as by the principle of complementarity.[42] While there are aspects of the Court's jurisdiction still up for debate,[43] its legal reach is limited in four ways: by the kinds of crimes it can investigate and judge (jurisdiction *ratione materiae*);[44] by the territory where these crimes are committed (jurisdiction *ratione loci*);[45] by the nationality of offenders (jurisdiction *ratione personae*);[46] and by when the time was committed (jurisdiction *ratione termporis*).[47]

These rules leave important regions of the world out of the Court's legal reach.[48] However, Article 13(b) of the Rome Statute enables the reach of the Court to be broadened by a referral

[37]For a descriptive account over the factors and nature of selectivity in international criminal law see Langer, *supra* note 1; Langer, *supra* note 35, at 1–102.

[38]See Arts. 12, 13(b), 15 of the Rome Statute and Policy Paper on Preliminary Examinations, ICC-OTP, November 2013.

[39]See Policy Paper on Case Selection and Prioritization, ICC-OTP, September 2016.

[40]This decision process entails a jurisdiction assessment, an assessment of admissibility, and an 'interest of justice' assessment, and in these last two, gravity plays an important role. See Smeulers et al., 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance', (2015) 15 *International Criminal Law Review* 5.

[41]Gravity has been understood as being both an issue of quantity and quality, which can be assessed in terms of scale, the nature of crimes, the impact of crimes, and the ways in which they are committed. See Smeulers et al., ibid., at 5–8; H. van der Wilt, 'Selectivity in International Criminal Law: Asymmetrical Enforcement as a Problem for Theories of Punishment', in F. Jessberger and J. Geneuss (eds.), *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law* (2020), at 312.

[42]Ibid. Van der Wilt, at 305–6.

[43]See R. Rastan, 'The jurisdictional scope of situations before the International Criminal Court', (2012) 23 *Criminal Law Forum* 1. Defining its rules of jurisdiction see *Lubanga*, ICC Judgment, ICC-01/04-01/06-772,14 December 2006, paras. 21, 22.

[44]International crimes established in the Rome Statute. See Art. 5 of the Rome Statute.

[45]The territory of a state party. See Arts. 12, 13(b) of the Rome Statute.

[46]See Arts. 12, 26 of the Rome Statute.

[47]After the entry into force of the Rome Statute. See Art. 11 of the Rome Statute.

[48]Many of the non-state parties such as China, India, the United States, Russia, and Pakistan are some of the biggest and most populous countries in the world. See asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

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from the UN Security Council.[49] From the point of view of ending thick impunity, the Security Council's capacity to trigger the Court's jurisdiction at its discretion has raised concerns.[50] The aspiration of enhancing the experience of equality before the law and creating a context of legality is undermined when the definition of what situations will be investigated can be influenced by agents who are external to the Court such as some of the members of the UN Security Council.[51]

However, this is not the most troublesome aspect of the Security Council's prerogatives over the working of the Court. Legally, the Office of the Prosecutor can decide not to proceed with the investigation of a situation referred by the Security Council and to that extent it retains an important degree of formal independence.[52] And in practice, this possibility has hardly helped broaden the jurisdiction of the Court. Instead, it has mostly served to consolidate the dominance of the interests of the permanent members of the UN Security Council, who have either failed to refer or vetoed the referral of investigations that could endanger their own interests or those of their allies.[53]

More problematic is the Security Council's power to restrict or limit the Court's jurisdiction. As a matter of legal design, according to Article 16 of the Rome Statute, the Security Council can require the prosecutor to defer an investigation for a year, a requirement that can be indefinitely renewed. Additionally, the Court's territorial jurisdiction could be restricted by the legal doctrine of exclusive jurisdiction formulated in the Security Council's referrals of the Darfur and Libya situations.[54] This doctrine could leave the Court powerless to use a claim of territorial jurisdiction to confront the impunity of crimes committed by members of non-party states.[55]

The role of the UN Security Council in shaping the Court's jurisdiction shows that, as a matter of legal design, the selection of situations and cases to investigate and prosecute is not meant to be solely guided by the Court's regulated discretion. Instead, the legal system has a right to select built into it, managed by external agents who represent power rather than law.[56] While in practice this may not be the whole reason why most people who are investigated, accused or convicted by the Court are in fact 'low-cost defendants', it does undermine a basic threshold of legality necessary for the Court to pursue its commitment against impunity.

4.2 Political selectivity

Within the confines of its jurisdiction, partially shaped and constrained by the legal prerogatives and doctrines of the Security Council, the ICC like any other court must prioritize cases in view of its limited resources. As mentioned above, the Rome Statute provides guidelines for this selection

[49]The Security Council can exercise this prerogative, acting under Ch. VII of the United Nations Charter. See Art. 13(2) of the Rome Statute; Van der Wilt, *supra* note 41, at 310–11.

[50]See, for example, D. Bosco, *Rough justice: The International Criminal Court in a world of power politics*. (2013), 39–45, 56–62; D. Kaye, 'The Council and the Court: Improving Security Council Support of the International Criminal Court' (2013), UC Irvine School of Law Research Paper, 2013–127.

[51]Ibid.

[52]See Art. 13(b) and Policy Paper on Preliminary Examinations, ICC-OTP, 2010, para. 2. The Pre-Trial Chamber may object to the decision not to proceed, but it remains a decision of the Court. See J. Trahan, 'The relationship between the International Criminal Court and the UN Security Council: Parameters and best practices', (2013) 24 *Criminal Law Forum*, at 417.

[53]Van der Wilt, *supra* note 41, at 310. In this sense, see also Kiyani, *supra* note 35, at 947.

[54]In UN Security Council Resolutions 1593 (referring the situation in Darfur to the Court) and 1970 (referring the situation in Lybia to the Court), the Security Council claimed that non-party states have exclusive jurisdiction over the acts committed by their officials or personnel when they are acting in operations authorized by the Security Council.

[55]Van der Wilt, *supra* note 41, at 310–11.

[56]See A. Hehir and A. Lang, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect', (2015) 26 *Criminal Law Forum*, at 153. This also suggests that a focus on low-cost defendants is not the result of the Court's bias against them, but of 'the successful attempts of states or their powerful allies to deprive the ICC of jurisdiction', van der Wilt, *supra* note 41, at 311; see also Smeulers et al., *supra* note 40.

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and the Court has made important efforts to develop these.[57] However, political constraints have imposed limitations on the Court's aspiration to act based on merit.

As proposed by Immi Tallgren, political constraints consist of questions of 'feasibility, strategic considerations, risk analysis, diplomatic relations, collateral damage or conflict of interest'.[58] There is nothing wrong *per se* with these limitations: the Court cannot allocate its limited resources to cases which are extremely difficult to investigate, prosecute and judge, or to cases that would undermine its capacity to continue serving its functions. Unfortunately, however, since the Court largely depends on state co-operation to exercise its jurisdiction, questions of feasibility have come at the cost of questions of merit.

In assessing the feasibility of a case, the Court has not only relied on criteria that would be compatible with a commitment to equality, such as the nature of the conduct investigated, or the quantity and quality of evidence. In needing to obtain the co-operation of states parties, the Court has shown a tendency to prosecute the losing party of a conflict rather than both sides equally, allowing states who co-operate to instrumentalize the work of the Court in order to consolidate power against their internal enemies and secure their own impunity. While this may not be a feature of all of the cases that the Court has selected, it seems to have become a rather common feature of its working.[59]

As Asad Kiyani has argued, this has led the Court to use the group-identity of the person investigated as one of its selection criteria, directly undermining the experience that we are all equal before the law.[60] This kind of selectivity does not show that the Court is biased against some groups of offenders, but rather that the Court is placed in a political context where, in order to exercise its jurisdiction, it has sometimes had to reproduce the power asymmetries internal to the situations it investigates, often taking the form of a 'victor's justice'.[61] This creates the risk that the ICC may not only be unable to point towards power and in this way create the experience of equality that can help close the gap of impunity, but it may even at times 'synergize with repressive political systems', making the gap even greater.[62]

5. Conclusion

I have distinguished two senses in which we refer to impunity, i.e., thin and thick, and I argued that only a thick version of impunity captures all that makes impunity a problem we care deeply about, because it reflects a concern about equality rather than about punishment. As a consequence, ending impunity in this thicker sense is not just about punishing crime (although that may be a necessary condition for it), but also about creating or restoring an experience of being equal before the law. At stake here are not just the values of punishment or criminal responsibility, but the shelter that legality aims to provide against power. Understood in this way, a fight against impunity should not come at the cost of equality either among individuals or among nations. Quite the contrary, it should restore or strengthen it.

[57]See *supra* notes 39, 40. A recent example is decision by the Prosecutor to prioritize its investigations in Afghanistan on crimes allegedly committed by the Islamic State or the Taliban, based on their 'gravity, scale and continuing nature'. Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, 2021, available at www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan.

[58]I. Tallgren, 'The Why Question in International Criminal Punishment – Framing the Landscapes of Asking: A Comment on the Contributions by Frank Neubacher, Sergey Vasiliev and Elies van Sliedregt', in Jessberger and Geneuss, *supra* note 41, at 125.

[59]According to both van der Wilt and Kiyani, this feature of the Court's selectivity has gone beyond the borders of self-referrals. See Van der Wilt, *supra* note 41, at 313; Kiyani, *supra* note 35, at 948, 951. See also *supra* note 57.

[60]Kiyani, ibid., at 948.

[61]Van der Wilt, *supra* note 41, at 313.

[62]Kiyani, *supra* note 35, at 949.

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In the case of the ICC, its current institutional formation and its political context undermine its capacity to contribute to end impunity in the thicker sense. As David Bosco has argued, in order to establish its place in the context of global institutions and politics, the Court has had to accommodate to the politics of power.[63] I have argued here that this accommodation is apparent in both legal and political constraints that have left the Court with very limited space to select its cases in ways that do not undermine its commitment against impunity. While many have claimed that the Court's selectivity undermines its capacity to promote the values of punishment,[64] I have tried to show here how it also endangers the Court's ability to target impunity. To punish some may be better than punishing none. When it comes to ending thick impunity, however, who gets punished and who does not, matters enormously because when this selection aligns with power, impunity is deepened and consolidated.[65]

This need not mean that the ICC is illegitimate or that we should replace it or get rid of it, because ending (thick) impunity is not the only valuable function of the Court.[66] It does, however, say something important about the Court's challenges and about the costs of selectivity. While the Court has made important progress in freeing itself from its limitations to pursue its aims, it is not clear that it will be able, by itself, to achieve the conditions needed to act meaningfully against impunity.[67] Perhaps once we see the centrality of equality before the law as a large part of what constitutes our concern with impunity, it may become necessary to go beyond the criminal law. Other global institutions could contribute more purposively to the Court's commitment to fight against impunity, because the road to equality, accountability and peace must certainly be built by implementing demands that pertain to other domains of global justice such as economic, political and environmental.[68]

[63]Bosco, *supra* note 50, at 20.

[64]See *supra* note 41, at 305; M. Drumbl, *Atrocity, Punishment and International Law* (2007), at 149; I. Tallgren, 'The sensibility and sense of international criminal law', (2002) 13 *European Journal of International Law* 3, at 561; K. Ainley, 'The international criminal court on trial', (2011) 24 *Cambridge Review of International Affairs* 3, at 309; Kiyani, *supra* note 35.

[65]Kiyani, ibid., at 956.

[66]Selectivity could even be a virtue against the worry that international punishment could undermine internal processes of peace or reconciliation, see Langer, *supra* note 35, at 45. See also A. Duursma and T. R. Müller, 'The ICC indictment against Al-Bashir and its repercussions for peacekeeping and humanitarian operations in Darfur', (2019) 40 *Third World Quarterly* 5, at 890. Functions of the Court could also be seen as compatible, as seems to be the view of international criminal law tribunals, see S. Vasiliev, 'Punishment Rationales in International Criminal Jurisprudence: Two Readings of a Non-question', in Jessberger and Geneuss, *supra* note 41, at 79.

[67]Examples of this are the Court's efforts to exercise its territorial jurisdiction over crimes committed by members of non-party states, to attend situations beyond Africa and to clarify prosecutorial criteria for selection. See Van der Wilt, *supra* note 41, at 322.

[68]See, in this sense, F. Neubacher, 'Criminology of International Crimes', in Jessberger and Geneuss, supra note 41, at 44; M. Drumbl 'We're Exhausting Ourselves, Let's Get Busy Instead: A Comment on the Contributions by Jakob v.H. Holtermann, Mota Kremnitzer and Daniela Demko', in ibid., at 212.

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